

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JORGE GEORGE FRATICELLI,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 316 EDA 2012

Appeal from the PCRA Order entered January 3, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0004827-1994

BEFORE: GANTMAN, OLSON and FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J.:

Filed: January 11, 2013

Appellant, Jorge George Fraticelli, appeals from the order, entered January 3, 2012,¹ denying his fourth petition filed under the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

We have previously explained the facts underlying Appellant's convictions for second-degree murder, robbery, criminal conspiracy, and possession of a firearm without a license²:

¹ The January 3, 2012 order from which Appellant filed his notice of appeal is captioned an "opinion." However, the PCRA court's January 3, 2012 filing denied Appellant PCRA relief (based upon the untimeliness of the petition) and was signed by the PCRA court judge. Therefore, like the parties have done in this case, this Court will overlook the improper caption that heads the PCRA court's January 3, 2012 filing and view the document as a signed order denying Appellant PCRA relief.

² 18 Pa.C.S.A. §§ 2502(b), 3701(a)(2), 903(a), and 6106(a), respectively.

*Former Justice assigned to the Superior Court.

On December 12, 1994, Paul Wayland, a [26-year-old] Australian national, arrived in Delaware after a cross-country trip from California to deliver a large quantity of marijuana. Once in Delaware, Wayland contacted Matthew DiMaggio [and the two] met at a local restaurant. Wayland proceeded to DiMaggio's house, where DiMaggio removed most of the packages of marijuana from Wayland's car and made numerous [telephone] calls arranging a meeting at the Sentinel Motel, [in] Birmingham Township, Delaware County, . . . to package and distribute the drugs.

Later that evening, Wayland and DiMaggio drove to the Sentinel Motel, where they met Jeffrey Burger, a [26-year-old man that] DiMaggio had previously used [to distribute drugs]. Before DiMaggio and Wayland had arrived at the motel room, however, Burger telephoned [Claudio] Manzanet, whom he knew from drug dealing, to advise him of the opportunity to steal marijuana from DiMaggio. Burger was also acquainted with Appellant [Indeed, a] few weeks earlier, Burger sold Appellant a gun to give to Manzanet in exchange for \$20.00 and the promise of cocaine.

When DiMaggio and Wayland arrived at the motel, they started to unpack the drugs and discovered that they needed a scale and baggies to properly measure and distribute the marijuana. Burger volunteered to drive to a garage in West Chester where he stored a scale owned by DiMaggio. While at the garage, [Burger] locked his keys in the car and called DiMaggio[. DiMaggio drove to the garage, picked Burger up in his car, and] drove Burger to get a second set of keys. After DiMaggio returned Burger to the garage, [DiMaggio] retrieved the scale, and drove back to the motel. Burger, however, proceeded to Manzanet's apartment, where he met Appellant, Manzanet, and Manzanet's girlfriend, Amy Sortino. While at [Manzanet's] apartment, the three men concocted a scheme to rob the drugs from DiMaggio at the motel room. Appellant was in possession of the gun that he had previously purchased from Burger.

A short time later, the group left Manzanet's apartment; Burger drove his car, followed by Sortino, who was driving

Appellant's car with Appellant and Manzanet as passengers. Appellant was concerned about his identity, so the two cars stopped at a WaWa convenience store where Burger purchased a hat and pantyhose [as a disguise] for Appellant.

The four then proceeded to the Sentinel Motel. [In accordance with the plan,] Burger re-entered the room where DiMaggio and Wayland were weighing [the marijuana]. About ten minutes later[,] there was a rattling at the door of the motel room. Burger looked out [of] the window and saw Appellant wearing the knit cap that [Burger] had just purchased [from the convenience store. Burger also saw] Manzanet in possession of the gun that [Burger] had provided. . . . [Burger] then opened the door[,] looked out[,] and saw [Appellant and Manzanet move] away [from the door]. Burger reconsidered the situation[,] stepped back [into] the [motel] room[,] and shut the door. The banging [on the door] resumed and the door began to open, then two shots were discharged through the door. At this point[,] Wayland jumped into a closet in the motel room and Burger backed away from the door. The door was then kicked open completely[. DiMaggio] fell down to the floor behind [the door, with blood streaming from his face]. Manzanet entered the room with a gun [in hand] and told Burger to give him the bag of marijuana. A third shot was also discharged. . . . [Unfortunately, as the participants later learned, one of the two initial gunshots struck DiMaggio in the left eye].

[After] the assailants departed, . . . Burger, Wayland, and [a mortally wounded, but alive,] DiMaggio quickly mustered their belongings, loaded them into the vehicles[,] and departed the premises. [Since DiMaggio could not see, Wayland drove DiMaggio's truck]. Burger drove his own vehicle.

Wayland drove to a gas station and[, although he telephoned 911, he did not report an emergency. Wayland then left DiMaggio at the gas station, bleeding on the ground, and hitch-hiked] to a nearby restaurant. . . .

[A] gas station attendant [telephoned the police regarding] DiMaggio[.] When the officers arrived at the gas station,

they saw DiMaggio, with a bloodied face, staggering incoherently in circles near his truck. Despite resistance, DiMaggio was transported to the emergency room where it was [] determined that he was blinded by a bullet to his left eye. . . . DiMaggio died [of this wound] nine days later. . . .

[Back at the restaurant on the night of the shooting, police were alerted to Wayland's presence – as Wayland was acting frantically – and officers thus] arrived at the restaurant to question Wayland[. Wayland] initially denied any knowledge of DiMaggio[, but after more questioning, Wayland] admitted [to] his relationship with DiMaggio[] and explained the circumstances surrounding the shooting. . . .

Burger was subsequently connected to the shooting through motel registration and telephone records. Burger, who had been struck in the calf by a bullet during the episode at the motel, did not report the incident to police or seek medical treatment. Ultimately, however, with the assistance of counsel, Burger turned himself into the police and provided detailed statements regarding the Sentinel [Motel] shooting[. Burger's statements implicated] himself and the others in the robbery and homicide. Burger later entered open guilty pleas to [third-degree murder], robbery, and criminal conspiracy. Wayland and Burger both testified for the Commonwealth at trial.

Commonwealth v. Fraticelli, 707 A.2d 548 (Pa. Super. 1997) (unpublished memorandum) at 1-5 (internal quotations, citations, and corrections omitted), *appeal denied*, 725 A.2d 179 (Pa. 1998).

Following Appellant's jury trial, Appellant was found guilty of second-degree murder, robbery, criminal conspiracy, and possession of a firearm without a license. On September 26, 1995, the trial court sentenced Appellant to life in prison for second-degree murder and imposed concurrent

terms of imprisonment for Appellant's criminal conspiracy and firearm convictions.³ N.T. Sentencing, 9/26/95, at 25. We later affirmed Appellant's judgment of sentence and, on July 30, 1998, the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Fraticelli***, 707 A.2d 548 (Pa. Super. 1997) (unpublished memorandum), *appeal denied*, 725 A.2d 179 (Pa. 1998).

Appellant filed his first PCRA petition on July 30, 1999 and, within this petition, Appellant raised a number of ineffective assistance of counsel claims. An evidentiary hearing on Appellant's petition was held on March 7 and 14, 2000. Appellant testified during this evidentiary hearing and admitted that he was involved in the conspiracy to rob the victims of marijuana. Indeed, Appellant testified that: on the night of the murder, after Appellant's work shift ended, Appellant drove to Manzanet's West Chester, Pennsylvania apartment and met with Manzanet and Burger; Appellant agreed with Manzanet and Burger to rob the victims of their marijuana; when Appellant left Manzanet's apartment on the night of the murder, he had "the fully formed intent of robbing the individuals in the [motel] of the marijuana [and Appellant] inten[ded] to rob them by physical menace or force [although] not necessarily [by] using a weapon;" Appellant drove the vehicle to the motel and, prior to arriving at the motel, Appellant

³ For sentencing purposes, Appellant's robbery conviction merged with his second-degree murder conviction. **See** N.T. Sentencing, 9/26/95, at 25.

stopped at a convenience store to purchase “a disguise” because he “wanted something to cover [his] face . . . because [he] didn’t want to go in there and rip these guys off this weed and then them see” his face; after Burger reentered the motel room (in accordance with the robbery plan), Appellant and Manzanet exited their vehicle, walked to the motel room, and prepared to break into the room; on their walk to the motel room, Manzanet produced a gun – which was a gun that Appellant purchased from Burger two weeks prior; upon seeing the weapon, Appellant ran back to the vehicle; while Appellant ran back to the vehicle, he heard gunshots; within minutes, Manzanet ran back to the vehicle with a bag of marijuana; and, when Manzanet reentered the vehicle, Appellant drove himself, Manzanet, and Manzanet’s girlfriend back to West Chester. *Id.* at 78-86 and 106-107.

The PCRA court denied Appellant post-conviction collateral relief on June 30, 2000. We affirmed the PCRA court’s order on May 31, 2001. *Commonwealth v. Fraticelli*, 778 A.2d 1241 (Pa. Super. 2001) (unpublished memorandum).

On November 20, 2001, Appellant, acting *pro se*, filed his second PCRA petition. The PCRA court denied this petition as untimely on March 4, 2002, and Appellant did not file an appeal to this Court. PCRA Court Order, 3/4/02, at 1.

Appellant filed his third PCRA petition on August 5, 2005. Again, the PCRA court dismissed Appellant’s petition as untimely. We affirmed the PCRA court’s order on June 30, 2006 and, on October 18, 2006, our

Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Fraticelli***, 905 A.2d 1042 (Pa. Super. 2006) (unpublished memorandum), *appeal denied*, 909 A.2d 303 (Pa. 2006).

Almost three years later – in April 2009 – Appellant filed the current, *pro se* PCRA petition. As noted, this petition constitutes Appellant's fourth petition for collateral relief under our PCRA. According to this petition, Appellant recently learned that, in 1995, a social worker named Cheryl Hirst-Hodgins had performed a "psychosocial evaluation" on Commonwealth witness Jeffrey Burger. As Appellant pleaded, during Burger's year-1995 sentencing hearing, Ms. Hirst-Hodgins testified as to the results of this evaluation. Specifically, Ms. Hirst-Hodgins testified that "she felt in her professional capacity that Mr. Burger suffered from a [substance-induced] psychotic disorder at the time of the incident." Appellant's Fourth PCRA Petition, 4/8/09, at 3. Appellant claimed that, if the jury had known of this diagnosis, the jury might have questioned Burger's "ability to perceive events and to truthfully relate the facts to which he testified at trial."⁴ Appellant's Brief at 40.

Moreover, Appellant attached Ms. Hirst-Hodgins' October 25, 1995 expert report to his PCRA petition. This expert report was submitted in

⁴ We note that, in 2000, during the evidentiary hearing on Appellant's first PCRA petition, Appellant testified and essentially confirmed Burger's trial testimony.

preparation for Ms. Hirst-Hodgins' November 13, 1995 sentencing hearing testimony and detailed Ms. Hirst-Hodgins' opinion that – at the time of the robbery and murder – Burger was suffering from a substance-induced psychotic disorder. Hirst-Hodgins Report, 10/25/95, at 1 and 2.

Appellant acknowledged that his PCRA petition was manifestly untimely. However, Appellant claimed that he had only recently discovered a physical copy of Ms. Hirst-Hodgins' October 25, 1995 expert report. According to Appellant, since he had only recently discovered the report, Ms. Hirst-Hodgins' expert conclusion – that, at the time of the robbery and murder, Burger suffered from a substance-induced psychotic disorder – constituted a “newly discovered fact” under the PCRA. Further, since Appellant filed the current PCRA petition within 60 days of receiving the expert report, Appellant claimed that his petition satisfied the “after-discovered facts” exception to the PCRA's one-year time-bar. *Id.* at 7a; 42 Pa.C.S.A. § 9545(b)(1)(ii). Appellant also claimed that the Commonwealth failed to disclose Ms. Hirst-Hodgins' expert report in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that his petition thus satisfied the PCRA's “governmental interference” exception. Appellant's Fourth PCRA Petition, 4/8/09, at 7a; 42 Pa.C.S.A. § 9545(b)(1)(i).⁵

⁵ After Appellant filed his current PCRA petition, Appellant retained counsel to aid him in prosecuting the petition. Although counsel did not file an amended PCRA petition, counsel filed a memorandum in support of Appellant's PCRA petition. “Supplemental Memorandum of Law in Support of (Footnote Continued Next Page)

On November 21, 2011, the PCRA court held an evidentiary hearing on Appellant's fourth PCRA petition. Appellant testified during this hearing and specifically admitted that – in 2001 – he received the transcript from Burger's 1995 sentencing hearing. N.T. PCRA Hearing, 11/21/11, at 100. Moreover, Appellant admitted that, during Burger's 1995 sentencing hearing, Ms. Hirst-Hodgins testified as to the substance of her expert report and as to her opinion that – at the time of the robbery and murder – Burger was experiencing a drug-induced psychosis. *Id.* at 100-102.

On January 3, 2012, the PCRA court issued a well-written and well-reasoned opinion, discussing why Appellant's PCRA petition did not satisfy any exception to the PCRA's timeliness requirement. PCRA Court Opinion, 1/3/12, at 1-15. Indeed, based upon the evidence received at the November 21, 2011 hearing, the PCRA court arrived at the factual conclusion that Appellant knew the substance of Ms. Hirst-Hodgins' expert report in 2001 – when, Appellant admitted, Appellant received the transcript from Burger's 1995 sentencing hearing. *Id.* at 7-8.

Appellant filed a timely notice of appeal from the denial of his fourth PCRA petition and now raises the following claims to this Court:

(Footnote Continued) _____

[Appellant's] Petition Filed Under the Post Conviction Relief Act," 10/16/09, at 1. Moreover, counsel represented Appellant at the November 21, 2011 evidentiary hearing.

[1.] Did the PCRA court err in dismissing, as untimely, [Appellant's] PCRA petition filed under 42 Pa.C.S.A. § 9545(b)(1)(i) & (ii)?

[2.] Did a psychosocial report regarding Jeffrey Burger's state of mind at [the] time of [the] incident constitute "newly discovered" and exculpatory evidence, thereby rendering the instant PCRA petition timely filed, where the Commonwealth failed to disclose the report to [Appellant] when received?

Appellant's Brief at 7.

As our Supreme Court has held, we "review an order granting or denying PCRA relief to determine whether the PCRA court's decision is supported by evidence of record and whether its decision is free from legal error." ***Commonwealth v. Liebel***, 825 A.2d 630, 632 (Pa. 2003).

The PCRA contains a jurisdictional time-bar, which is subject to limited statutory exceptions. This time-bar demands that "any PCRA petition, including a second or subsequent petition, [] be filed within one year of the date that the petitioner's judgment of sentence becomes final, unless [the] petitioner pleads [and] proves that one of the [three] exceptions to the timeliness requirement . . . is applicable." ***Commonwealth v. McKeever***, 947 A.2d 782, 785 (Pa. Super. 2008); 42 Pa.C.S.A. § 9545(b). Further, since the time-bar implicates the subject matter jurisdiction of our courts, we are required to first determine the timeliness of a petition before we are able to consider any of the underlying claims. ***Commonwealth v. Yarris***, 731 A.2d 581, 586 (Pa. 1999). Our Supreme Court has explained:

the PCRA timeliness requirements are jurisdictional in nature and, accordingly, a PCRA court is precluded from

considering untimely PCRA petitions. **See, e.g., *Commonwealth v. Murray***, 753 A.2d 201, 203 (Pa. 2000) (stating that “given the fact that the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner”); ***Commonwealth v. Fahy***, 737 A.2d 214, 220 (Pa. 1999) (holding that where a petitioner fails to satisfy the PCRA time requirements, this Court has no jurisdiction to entertain the petition). [The Pennsylvania Supreme Court has] also held that even where the PCRA court does not address the applicability of the PCRA timing mandate, th[e court would] consider the issue *sua sponte*, as it is a threshold question implicating our subject matter jurisdiction and ability to grant the requested relief.

Commonwealth v. Whitney, 817 A.2d 473, 475-476 (Pa. 2003).

In the case at bar, Appellant’s judgment of sentence became final on October 29, 1998 – which was 91 days after the Pennsylvania Supreme Court denied Appellant’s petition for allowance of appeal and Appellant’s time for filing a petition for a writ of certiorari with the United States Supreme Court expired. **See** U.S. Sup. Ct. R. 13 (allowing 90 days to file a petition for writ of certiorari with the United States Supreme Court); 42 Pa.C.S.A. § 9545(b)(3). Appellant then had until October 29, 1999 to file a timely PCRA petition. 42 Pa.C.S.A. § 9545(b). As Appellant did not file his current petition until April 8, 2009, the current petition is manifestly untimely and the burden thus fell upon Appellant to plead and prove that one of the enumerated exceptions to the one-year time-bar applied to his case. **See** 42 Pa.C.S.A. § 9545(b)(1); ***Commonwealth v. Perrin***, 947 A.2d 1284, 1286 (Pa. Super. 2008) (to properly invoke a statutory exception to

the one-year time-bar, the PCRA demands that the petitioner properly plead and prove all required elements of the relied-upon exception).

Appellant claims to invoke the “after-discovered facts” and “governmental interference” exceptions to the time-bar. These statutory exceptions provide:

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence[]

. . .

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S.A. § 9545(b).

Thus, to properly invoke either exception, the petitioner is statutorily required to file his petition “within 60 days of the date the claim could have been presented.” *Id.* As our Supreme Court has explained, to satisfy this “60-day requirement,” a petitioner must “plead and prove that the information on which he relies could not have been obtained earlier, despite

the exercise of due diligence." *Commonwealth v. Stokes*, 959 A.2d 306, 310-311 (Pa. 2008); *Commonwealth v. Breakiron*, 781 A.2d 94, 98 (Pa. 2001). Moreover, because the "60-day requirement" of section 9545(b)(2) is a statutory mandate, the requirement is "strictly enforced." *Commonwealth v. Monaco*, 996 A.2d 1076, 1080 (Pa. Super. 2010).

Appellant's attempt to invoke a statutory exception to the PCRA's one-year time-bar fails under the weight of Appellant's own admissions. Indeed, Appellant's entire, substantive claim for relief is predicated upon Ms. Hirst-Hodgins' expert conclusion that, at the time of the robbery and murder, Commonwealth witness Jeffrey Burger suffered from a substance-induced psychotic disorder. *See* Appellant's Fourth PCRA Petition, 4/8/09, at 3. Appellant claims that he is entitled to a new trial because, if the jury knew of Ms. Hirst-Hodgins' diagnosis, the jury might have questioned Burger's "ability to perceive events and to truthfully relate the facts to which he testified at trial." Appellant's Brief at 40.

Yet, Ms. Hirst-Hodgins rendered her expert opinion in 1995 and, as Appellant has admitted, during Burger's 1995 sentencing hearing, Ms. Hirst-Hodgins testified "that she felt in her professional capacity that Mr. Burger suffered from a [substance-induced] psychotic disorder at the time of the incident." Appellant's Fourth PCRA Petition, 4/8/09, at 3; N.T. PCRA Hearing, 11/21/11, at 100-102. Moreover, during Appellant's November 21, 2011 evidentiary hearing, Appellant freely admitted that he received the

transcript from Burger's 1995 sentencing hearing in September 2001. N.T. PCRA Hearing, 11/21/11, at 100. Therefore, Appellant has admitted that – since September 2001 – he has known of the facts underlying his current claim. Further, although Appellant maintains that his fourth PCRA petition is timely because he only recently received a physical copy of Ms. Hirst-Hodgins' expert report, the record is clear that the substance of the report – or, the underlying "facts" upon which Appellant's collateral claim is based – was set forth in Burger's 1995 sentencing transcript, which Appellant admitted he received and reviewed in 2001.

As Appellant's current petition was filed in April 2009, the petition was not filed "within 60 days of the date the claim could have been presented" and Appellant's attempt to invoke the "after-discovered facts" and "governmental interference" exceptions to the time-bar fails.

Since Appellant's PCRA petition is manifestly untimely and Appellant did not properly "plead and prove" any of the statutory exceptions to the one-year time-bar, our "courts are without jurisdiction to offer [Appellant] any form of relief." ***Commonwealth v. Jackson***, 30 A.3d 516, 523 (Pa. Super. 2011). We thus affirm the PCRA court's order dismissing Appellant's PCRA petition.

Order affirmed.