

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
| Appellee | : | |
| | : | |
| v. | : | |
| | : | |
| ERASTO BARRIOS, | : | |
| | : | |
| Appellant | : | No. 319 EDA 2013 |

Appeal from the PCRA Order January 11, 2013
In the Court of Common Pleas of Chester County
Criminal Division No(s): CP-15-CR-0001622-2007

BEFORE: BOWES, MUNDY, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED SEPTEMBER 16, 2013**

Pro se Appellant, Erasto Barrios, appeals from the order entered in the Chester County Court of Common Pleas dismissing his first Post Conviction Relief Act¹ (“PCRA”) petition as untimely. Appellant contends that his trial counsel was ineffective and the trial court erred by denying his motion for severance and not granting a mistrial. We affirm.

The facts are unnecessary to our disposition. Appellant was sentenced on February 19, 2008, and filed a timely, direct appeal. This Court affirmed, ***Commonwealth v. Barrios***, 1152 EDA 2008 (unpublished

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541-9546.

memorandum) (Pa. Super. Dec. 2, 2009), and our Supreme Court denied Appellant's timely petition for allowance of appeal on May 6, 2010. **Commonwealth v. Barrios**, 992 MAL 2009 (Pa. May 6, 2010).

On July 16, 2012, Appellant filed the instant petition for a writ of *habeas corpus*,² which the PCRA court treated as a PCRA petition because he requested remedies available under the PCRA. **See** 42 Pa.C.S. § 9542; **Commonwealth v. West**, 938 A.2d 1034, 1044 (Pa. 2007) (holding, "that the PCRA subsumes all forms of collateral relief, including *habeas corpus*, to the extent that a remedy is available under such enactment."). On September 11, 2012, the PCRA court appointed counsel for Appellant. Appellant subsequently filed a *pro se* PCRA petition, which the PCRA court docketed on October 12, 2012. On November 8, 2012, counsel filed a petition for leave to withdraw pursuant to **Turner/Finley**,³ which stated he reviewed Appellant's October 12, 2012 *pro se* filing.

The PCRA court issued a Pa.R.Crim.P. 907 notice of intent to dismiss on November 26, 2012. The notice indicated that if Appellant failed to respond, the court would enter an order permitting counsel to withdraw.

² The PCRA court docketed Appellant's petition on July 24, 2012. Because of the prisoner mailbox rule, we deem Appellant's petition filed on the date he deposited it in the mail: July 16, 2012. **See Commonwealth v. Wilson**, 911 A.2d 942, 944 n.2 (Pa. Super. 2006) (discussing prisoner mailbox rule).

³ **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988); **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

Appellant filed a *pro se* response to the Rule 907 notice on December 8, 2012. On January 11, 2013, the PCRA court dismissed Appellant's PCRA petition as time barred. Appellant, *pro se*, filed a timely notice of appeal and a court-ordered Pa.R.A.P. 1925(b) statement.⁴ On February 19, 2013, the PCRA court granted counsel's petition to withdraw.

Appellant raises the following issues on appeal:

Whether the PCRA court erred in dismissing [Appellant's] PCRA petition alleging ineffective assistance of counsel when the evidence indicated that the trial counsel failed to adequately communicate with [Appellant] in pretrial proceedings.

Whether the PCRA court erred in dismissing [Appellant's] PCRA petition alleging ineffective assistance of counsel when the evidence indicated that trail [sic] counsel failed to object, to Pennsylvania State Trooper to testify on behalf of Commonwealth under Expert, [sic] when the Trooper was not qualified.

Whether the trial court erred when it denied Appellant's motion for severance, and permitted Commonwealth, to have a joint trial with Jose Aguiler?

Whether the trial court erred when it failed to grant a mistrial because the Commonwealth failed to reveal a witness Antonio Leon, for exchange for his false testimony?

Whether newly discovered evidence, after the Commonwealth's state witness, Jose Aguiler, testimony involving the Appellant: Jose Aguiler went back to Mexcio

⁴ The *pro se* notice of appeal is valid although counsel was representing Appellant. ***Cf. Commonwealth v. Cooper***, 27 A.3d 994, 1007 (Pa. 2011) (holding defendant's premature *pro se* notice of appeal valid despite being represented by counsel and given unique procedural posture of case).

[sic] to avoid his punishment, and an innocent man man [sic] sent to prison, on Aguiler's false testimony.

Whether trial court erred when it failed to grant a mistrial, because the Commonwealth did not reveal to the defense the following:

(1) The total benefit given Commonwealth's witness in exchange for his testimony.

(2) The Commonwealth had paid for "gas and transportation (NT 12/11/07, page 161)"

(3) The Commonwealth paid for "meals", as well as financially assisting him and his family, relocating out of the area.

(4) The Commonwealth mislead [sic] the jury that Mr. Leon, was in fact a "paid informant", who would sell his sole [sic] to stay out of prison, which he did.

Appellant's Brief at 5-6.

We summarize Appellant's arguments for all his issues. Appellant summarily concludes that he is entitled to a new trial and reinstatement of his appellate rights *nunc pro tunc*. He contends he does not speak English. Appellant maintains that he was improperly removed by the Pennsylvania Department of Corrections to Michigan, which caused him to lose his appeal rights. He insists prejudice was established based on his statement of questions presented.

Before examining the merits of Appellant's claims, our Supreme Court has required this Court to examine whether we have jurisdiction over the underlying PCRA petition. ***See Commonwealth v. Fahy***, 737 A.2d 214, 223 (Pa. 1999). "Our standard of review of a PCRA court's dismissal of a

PCRA petition is limited to examining whether the PCRA court's determination is supported by the evidence of record and free of legal error." **Commonwealth v. Wilson**, 824 A.2d 331, 333 (Pa. Super. 2003) (*en banc*) (citation omitted). A PCRA petition "must normally be filed within one year of the date the judgment becomes final . . . unless one of the exceptions in § 9545(b)(1)(i)-(iii) applies and the petition is filed within 60 days of the date the claim could have been presented." **Commonwealth v. Copenhefer**, 941 A.2d 646, 648 (Pa. 2007) (internal citations and footnote omitted).

The PCRA's timeliness requirements are jurisdictional in nature and must be strictly construed; courts may not address the merits of the issues raised in a petition if it is not timely filed. It is the petitioner's burden to allege and prove that one of the [three] timeliness exceptions applies.

Commonwealth v. Abu-Jamal, 941 A.2d 1263, 1267-68 (Pa. 2008) (internal citations omitted).

The three timeliness exceptions are:

(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; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period

provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1)(i)-(iii).

Instantly, we examine whether the PCRA court erred by holding Appellant's first PCRA petition was untimely. **See** 42 Pa.C.S. § 9545(b)(1), (2); **Abu-Jamal**, 941 A.2d at 1267-68. With respect to his direct appeal, the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal on May 6, 2010. Appellant's judgment of sentence became final on August 4, 2010, ninety days after the Pennsylvania Supreme Court denied *allocatur*.⁵ Thus, Appellant had until August 4, 2011, to file his first PCRA petition. **See Copenhefer**, 941 A.2d at 648.

Appellant filed the instant petition on July 16, 2012, almost one year past the deadline. Thus, this Court must discern whether the PCRA court erred by concluding Appellant did not plead and prove one of the three timeliness exceptions. **See** 42 Pa.C.S. § 9545(b)(1)(i)-(iii); **Copenhefer**, 941 A.2d at 648.

In this case, Appellant has not pleaded and proved any of the timeliness exceptions. **See** 42 Pa.C.S. § 9545(b)(1)(i)-(iii). Accordingly, we agree with the PCRA court's determination that Appellant has not pleaded

⁵ Sup. Ct. R. 13; **see generally** David B. Sweet, Annotation, *Time Requirements Under Supreme Court Rule 13 (and Similar Predecessors) for Petitions for Writ of Certiorari—Supreme Court Cases*, 112 L. Ed. 2d 1278 (2008).

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and proved any of the three timeliness exceptions. **See Abu-Jamal**, 941 A.2d at 1267-68; **Copenhefer**, 941 A.2d at 648. Thus, our courts lack jurisdiction to consider his petition. **See Fahy**, 737 A.2d at 223. Having discerned no error of law, we affirm the order below. **See Wilson**, 824 A.2d at 333.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 9/16/2013