

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

RANDY CLARK WHITACRE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 335 WDA 2013

Appeal from the Order of January 29, 2013,
in the Court of Common Pleas of Indiana County,
Criminal Division at No. CP-32-CR-0000214-2002

BEFORE: LAZARUS, OLSON and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

FILED SEPTEMBER 04, 2013

In this *pro se* appeal, we affirm the order denying Appellant's petition under the Post Conviction Relief Act ("PCRA").

Having been convicted of first-degree murder and related offenses, Appellant was sentenced to imprisonment for life plus an aggregate consecutive period of not less than twenty-four and not more than fifty years. In a published opinion on direct appeal, this Court affirmed his judgment of sentence. ***Commonwealth v. Whitacre***, 878 A.2d 96 (Pa. Super. 2005). The Pennsylvania Supreme Court denied his petition for allowance of appeal on December 29, 2005. ***Commonwealth v. Whitacre***, 892 A.2d 823 (Pa. 2005). It does not appear that Appellant sought a writ of

* Retired Senior Judge assigned to the Superior Court.

certiorari from the United States Supreme Court to review the Pennsylvania Supreme Court's aforesaid ruling.

Appellant later filed his first PCRA petition. The PCRA court appointed counsel. The court held multiple evidentiary hearings and denied relief. On appeal, we affirmed the denial. ***Commonwealth v. Whitacre***, 50 A.3d 237 (Pa. Super. 2012) (unpublished memorandum). The Pennsylvania Supreme Court thereafter denied allowance of appeal. ***Commonwealth v. Whitacre***, 55 A.3d 524 (Pa. 2012).

On or about October 31, 2012, Appellant filed his second PCRA petition.¹ Therein, he raised various claims arguably touching upon issues of prosecutorial misconduct, admission of evidence, sufficiency of the evidence, after-discovered evidence, due process, and ineffectiveness or prior counsel (*i.e.*, trial counsel, direct appeal counsel, first PCRA counsel, and first appellate-PCRA counsel). Proceeding under Pa.R.Crim.P. 907, the PCRA court gave Appellant notice of its intent to dismiss his petition. The court

¹ Being incarcerated at the time he seemingly mailed the petition, Appellant's filing date could arguably have been earlier than October 31, 2012, pursuant to the prisoner mailbox rule. ***See Commonwealth v. Jones***, 700 A.2d 423, 426 (Pa. 1997). However, we see no mailing documents or other evidence in the record that would entitle him to invoke that rule. ***See id.*** (discussing evidence sufficient to invoke prisoner mailbox rule). In any event, however, given the extent of the untimeliness of Appellant's petition—a matter we will discuss *infra*—there is no reason whatsoever to conclude the application of the prisoner mailbox rule—a rule which would likely involve, at most, a few days' difference in the apparent filing date—would have any impact on our ruling.

later dismissed the petition due to the untimeliness thereof. Appellant filed this appeal.

Appellant contends his petition should have been considered timely for a number of reasons. As part of his position, he argues the PCRA court should have held a hearing before issuing a ruling. To some extent, Appellant also addresses the merits of his underlying PCRA claims. For the reasons that follow, we affirm the PCRA court's order denying relief on the basis of untimeliness.

The following legal principles are relevant to our review of this case. A PCRA petition must be filed within one year of when a petitioner's judgment of sentence becomes final unless the petitioner properly pleads and proves at least one of the statutorily enumerated exceptions to the one-year time bar. 42 Pa.C.S.A. § 9545(b)(1), (2). A judgment of sentence becomes final at the end of direct review, including discretionary review in the Pennsylvania Supreme Court and/or the United States Supreme Court, or the expiration of the time for seeking such review. **Id.** § 9545(b)(3). In this vein, we note a petitioner who seeks review in the U.S. Supreme Court has ninety days to do so after the Pennsylvania Supreme Court enters an order denying relief. **Commonwealth v. Monaco**, 996 A.2d 1076, 1081 n.2 (Pa. Super. 2010); SUP.CT.R. 13. Ultimately, if a PCRA petition is untimely, the PCRA court lacks jurisdiction to address its merits. **Commonwealth v. Lignons**, 971 A.2d 1125, 1164 (Pa. 2009).

If a PCRA court determines, based on a review of the PCRA pleadings and the relevant portions of the record, that there are no genuine issues of material fact, that the petitioner is not entitled to relief, and that no purpose would be served by any further proceedings, the court may dismiss the petition without a hearing after providing notice in accordance with Pa.R.Crim.P. 907.

Our standard for reviewing PCRA orders is to determine whether the court's rulings are supported by the record and free of legal error. ***Commonwealth v. Cox***, 983 A.2d 666, 679 (Pa. 2009). It is an appellant's burden to persuade us that the PCRA court erred and that relief is due. ***Commonwealth v. Wrecks***, 931 A.2d 717, 722 (Pa. Super. 2007).

Appellant's judgment of sentence became final in March 2006, after his period for seeking a writ of *certiorari* expired. His instant PCRA petition, having been filed in 2012, was facially late. On this appeal, Appellant seemingly concedes this facial lateness but he claims—though not in a particularly clear fashion—that the PCRA court should have found he was entitled to a time-of-filing exception for one or more reasons.

In this regard, Appellant contends that he is innocent of the subject offenses and that his actual innocence entitles him to an exception from the one-year filing deadline. Similarly, he maintains his actual innocence renders his conviction a miscarriage of justice and that such a miscarriage warrants treating his PCRA petition as having been timely filed. Contrary to

Appellant's position, there is no actual-innocence or miscarriage-of-justice exception in the time-of-filing provisions under the PCRA.

Appellant also argues his convictions resulted from one or more due process violations such that his PCRA petition should not be viewed as late. Standing alone—that is, without being pled as part of one of the enumerated exceptions under 42 Pa.C.S.A. § 9545(b)(1)—an allegation that a due process violation led to a conviction does not itself lead to an exemption from the one-year deadline for filing a PCRA petition.

Additionally, Appellant maintains his petition should be considered timely because he has endured layered ineffectiveness of his trial, direct appeal, first PCRA, and first appellate-PCRA counsel. The existence of layered ineffectiveness does not alone release a petitioner from the obligation to meet the one-year deadline under the PCRA.

Appellant comes closest to presenting one or more time-of-filing exceptions when he asserts he was previously unaware of prosecutorial misconduct and/or abandonment by his appellate-PCRA counsel on his first PCRA petition. Appellant is arguably attempting to fit these assertions into the time-of-filing exceptions for governmental interference and/or previously

unknown facts under 42 Pa.C.S.A. § 9545(b)(1)(i), (ii).² The relevant PCRA subsections are:

(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; or

(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)(1)(ii), (2).

Appellant does not make entirely clear to us what particular acts of alleged prosecutorial misconduct entitle him to a filing-deadline exception. He may be trying to assert that the Commonwealth engaged in some type of misconduct during *voir dire*, did not timely disclose exculpatory statements

² Of these provisions, Appellant cites only 42 Pa.C.S.A. § 9545(b)(1)(ii). However, with respect to his allegation of prosecutorial misconduct, his *pro se* briefs (initial brief and reply brief) can be read as trying to invoke Section 9545(b)(1)(i).

known to police during trial, and/or elicited false trial testimony on one or more topics. In any event, Appellant does not explain how any supposed misconduct interfered with his ability to raise previously any of the underlying, substantive claims he presented in his instant PCRA petition. Additionally, he does not tell us when he came to know of the alleged misconduct and why he could not have ascertained it earlier through due diligence. Along these same lines, Appellant does not demonstrate he presented his instant PCRA claims within sixty days of when he learned either of the alleged governmental interference or of the previously unknown facts arising in connection with prosecutorial misconduct. In short, Appellant has not convinced us any prosecutorial misconduct entitles him to a time-of-filing exception under Section 9545(b)(1)(i) or Section 9545(b)(1)(ii) of the PCRA.

With respect to his contention about his prior appellate-PCRA counsel abandoning him, Appellant essentially maintains counsel pursued fewer than all of the claims Appellant wanted to pursue on the appeal to this Court following the denial of Appellant's first PCRA petition. More particularly, Appellant argues prior appellate-PCRA counsel should have pursued the claim that trial counsel was ineffective for promising the jury certain evidence in his opening statement and then not introducing that evidence at trial. Appellant also may be trying to argue prior appellate-PCRA counsel should have argued one or more additional issues of trial and/or direct appeal counsel's ineffectiveness (*e.g.*, that those counsel failed to raise issues relating to the admission of evidence and/or the sufficiency of the

evidence). Appellant takes the position that he did not know prior appellate-PCRA counsel forwent various issues until sometime after this Court affirmed the denial of Appellant's first PCRA petition.

Appellant's briefs cite law such as ***Commonwealth v. Bennett***, 930 A.2d 1264 (Pa. 2007), dealing with, *inter alia*, complete abandonment by appellate counsel and the possibility that such abandonment, if previously unknown and not ascertainable earlier through due diligence, can, at times, constitute a previously unknown fact for purposes of 42 Pa.C.S.A. § 9545(b)(1)(ii). Appellant does not provide us with any legal authority supporting his position that an appellate-PCRA counsel's decision to forgo one or more appellate issues while pursuing others can provide a basis under Section 9545(b)(1)(ii) for a time-of-filing exception on a subsequent PCRA petition. Thus, Appellant's claim that his prior appellate-PCRA counsel's conduct gives rise to a time-of-filing exception under the PCRA must fail.

In summary, Appellant has not convinced us the PCRA court erred factually or legally in finding his petition was late. Thus, he has not shown the court had jurisdiction over the merits of his PCRA claims. Therefore, he has not given us cause to disturb the court's order. In reaching this result, we recognize Appellant maintains the PCRA court should have held a hearing on his petition before reaching a decision. In this vein, he contends the gravity of his case—*i.e.*, a first-degree murder case—and the alleged merit of his issues make it unfair to dispose of his case without evidentiary PCRA proceedings. As we have already explained, however, the PCRA court lacked

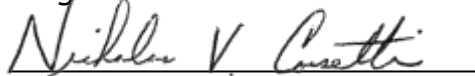
jurisdiction to address the merits of Appellant's issues, regardless of the relative gravity of the underlying charges. As such, Appellant has not shown that there were any genuine issues of material fact, that he was entitled to any relief, or that any purpose would have been served by further PCRA proceedings. He has not convinced us the court erred by not holding a hearing. Finally, given our resolution of the foregoing time/jurisdiction-related matters, we will not address Appellant's arguments about the merits of his underlying PCRA claims.

In light of our preceding analysis, we affirm the PCRA court's order.

Order affirmed.

Judge Olson concurs in the result.

Judgment Entered.

A handwritten signature in black ink, reading "Nicholas V. Casatta", is written over a horizontal line.

Deputy Prothonotary

Date: 9/4/2013