

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOSEPH ALBERT YUTKO,	:	
	:	
Appellant	:	No. 783 MDA 2013

Appeal from the PCRA Order April 8, 2013,  
Court of Common Pleas, Schuylkill County,  
Criminal Division at No. CP-54-CR-0000116-2009

BEFORE: DONOHUE, SHOGAN and MUSMANNNO, JJ.

MEMORANDUM BY DONOHUE, J.:

**FILED DECEMBER 24, 2013**

Appellant, Joseph Albert Yutko (“Yutko”), appeals from the order dated April 8, 2013 dismissing his second petition for relief pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. §§ 9541-46. For the reasons set forth herein, we conclude that Yutko’s PCRA petition was untimely, and we therefore affirm the trial court’s order.

On December 10, 2009, a jury found Yutko guilty of two counts of robbery, 18 Pa.C.S.A. § 3701, and one count of criminal conspiracy, 18 Pa.C.S.A. § 903, in connection with a criminal episode occurring on October 29, 2008 in Shenandoah, Schuylkill County, Pennsylvania. On January 10, 2010, the trial court sentenced Yutko to a sentence of five to ten years of imprisonment to be followed by five years of probation. On December 14,

2010, this Court affirmed the judgment of sentence. Yutko did not seek relief from our Supreme Court.

On February 24, 2011, Yutko filed his first PCRA petition, raising one claim of after-discovered evidence and nine claims of ineffective assistance of counsel. Yutko based his claim of after-discovered evidence on his contention that on the second day of his trial (December 10, 2009), one of the witnesses who offered testimony against him, Shenandoah Police Chief Matthew Nestor ("Nestor"), was indicted in federal court in an unrelated case on charges of conspiracy to falsify police reports and falsification of records in a federal investigation. Nestor was subsequently convicted of these charges in January 2011. In his PCRA petition, Yutko argued that Nestor's indictment and conviction were exculpatory and would have affected the outcome of his (Yutko's) trial. After an evidentiary hearing, by order dated June 3, 2011, the PCRA court dismissed Yutko's PCRA petition.

In a memorandum decision dated October 16, 2012, this Court affirmed the trial court's order. With respect to the after-discovered evidence claim, this Court ruled that Yutko had failed to offer any proof in support of his allegations:

[Yutko's] PCRA petition merely alleged that [Nestor] was indicted and convicted of certain offenses, and that this evidence was exculpatory and would have affected the outcome of trial. There is no documentation of [Nestor's] criminal charges attached to the petition, and [Yutko] presented none

at the PCRA hearing. Accordingly, we agree with the PCRA court that [Yutko] failed to prove his claim.

***Commonwealth v. Yutko***, 1138 MDA 2011 (Pa. Super. October 16, 2012).

On December 14, 2012, Yutko filed a *pro se* second PCRA petition, asserting, *inter alia*, an ineffective assistance of counsel claim against his appointed counsel on his first PCRA petition for failure to provide evidence to support his claim of after-discovered evidence regarding Nestor's indictment and conviction. By order dated January 4, 2013, the PCRA court notified Yutko of its intention to dismiss the petition without an evidentiary hearing. Yutko thereafter filed an amended petition, but on April 8, 2013, the PCRA court dismissed Yutko's petition without an evidentiary hearing. This appeal followed, in which Yutko raises the following two issues for our consideration and determination:

1. Whether the PCRA court erred in its determination when it denied [Yutko's] request for relief under the [PCRA] without an evidentiary hearing, where [Yutko's] prior PCRA counsel did not provide effective assistance by failing to properly plead and prove newly-discovered exculpatory evidence in [Yutko's] first PCRA proceedings.
2. Whether the PCRA court erred in its determination that it did not impose a sentence greater than the lawful maximum.

Yutko's Brief at 4.

Before we may proceed to consider the merits of Yutko's claims, we must first decide whether we have jurisdiction to consider them. The

timeliness requirements of 42 Pa.C.S.A. § 9545(b) are jurisdictional in nature, and the courts lack jurisdiction to grant PCRA relief unless the petitioner can plead and prove that one of the exceptions to the time bar applies. ***Commonwealth v. Pursell***, 561 Pa. 214, 219, 749 A.2d 911, 913-914 (2000). The timeliness requirement in the PCRA is as follows:

**(b) Time for filing petition.-**

(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

(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.

(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.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

42 Pa.C.S.A. § 9545(b).

Yutko's judgment of sentence became final on January 14, 2011, 30 days after this Court affirmed his judgment of sentence. Therefore, a timely second PCRA petition had to be filed by January 14, 2012. Yutko filed his second PCRA petition on December 14, 2012, well beyond the time deadline under the PCRA.

Yutko does not assert that his second PCRA petition satisfies any of the three exceptions under section 9545(b)(1)(i)-(iii). Of the three exceptions, the first and third clearly have no application in this case. With respect to the second exception, sometimes referred to as the "after-discovered evidence exception," it likewise has no application here. The only possible "after-discovered evidence" that could be considered in this instance would be appointed counsel's alleged ineffective assistance of counsel in connection with Yutko's first PCRA petition. Our Supreme Court, however, has repeatedly held that an allegation of PCRA counsel's ineffectiveness may not serve as a newly-discovered "fact" for purposes of 9545(b)(1)(ii). **See, e.g., Commonwealth v. Gamboa-Taylor**, 562 Pa. 70, 80, 753 A.2d 780, 785 (2000); **Commonwealth v. Pursell**, 561 Pa. 214, 223, 749 A.2d 911,

916 (2000); **Commonwealth v. Crews**, 581 Pa. 45, 63-54, 863 A.2d 498, 503 (2004); **Commonwealth v. Johnson**, 580 Pa. 594, 602, 863 A.2d 423, 427-28 (2004); **Commonwealth v. Howard**, 567 Pa. 481, 488, 788 A.2d 351, 355 (2002).

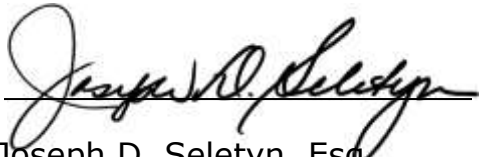
In **Commonwealth v. Bennett**, 593 Pa. 382, 930 A.2d 1264 (2007), our Supreme Court identified an exception to this rule, but only in circumstances in which counsel “abandons his client for purposes of appeal,” and the complete absence of counsel’s assistance “is the functional equivalent of having no counsel at all.” **Id.** at 398, 930 A.2d at 1273. In this case, however, Yutko merely alleges that his appointed PCRA counsel rendered ineffective assistance in connection with his first PCRA petition. He does not allege, or offer to prove, any allegations that would amount to complete abandonment. For example, in his second PCRA petition, Yutko does not allege that appointed counsel failed to file his petition, failed to include any claims for relief in the petition, or failed to appear on his behalf at the evidentiary hearing. As a result, no basis exists here for application of the **Bennett** exception.

In his second issue on appeal, Yutko contends that the trial court imposed an illegal sentence. Although illegal sentence claims may never be waived, they must nevertheless be presented in a timely PCRA petition. **Commonwealth v. Taylor**, 65 A.3d 462, 465 (Pa. Super. 2013) (citing **Commonwealth v. Fehy**, 558 Pa. 313, 737 A.2d 214 (1999)). Because

Yutko's second PCRA petition was not timely filed, this Court has no jurisdiction to review his illegal sentence claim.<sup>1</sup>

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/24/2013

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<sup>1</sup> Even if we had jurisdiction over this claim, we would find no basis for relief. Yutko's robbery convictions were first-degree felonies, punishable by up to 20 years of incarceration. 18 Pa.C.S.A. § 1103(1). Yutko's sentence of 5 to 10 years of incarceration followed by 5 years of probation did not exceed the statutory maximum sentence for a first-degree felony.