

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

ANDRE JACKSON

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 800 MDA 2012

Appeal from the Order Entered March 23, 2012  
In the Court of Common Pleas of Lebanon County  
Criminal Division at No(s): CP-38-CR-0000479-1998

BEFORE: SHOGAN, J., OTT, J., and COLVILLE, J.\*

MEMORANDUM BY OTT, J.:

Filed: February 15, 2013

Andre Jackson appeals *pro se* from the order entered on March 23, 2012, denying his fourth petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq.* After a thorough review of the record, the parties' briefs, and applicable law, we affirm on the basis of the PCRA court's opinion.

The PCRA court aptly summarized the facts and procedural history in its Pa.R.A.P. 1925(a) opinion and we adopt its recitation. **See** PCRA Court Opinion, 3/23/2012, at 1-5. Jackson alleges the PCRA court erred in: (1) dismissing his newly discovered evidence and ineffectiveness claims by finding that these claims do not fall under the time bar exceptions as set

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\* Retired Senior Judge assigned to the Superior Court.

forth in 42 Pa.C.S. § 9545(b)(1)(i-iii);<sup>1</sup> (2) not finding that Jackson is “actually innocent” of all charges beyond a reasonable doubt from the preponderance of the DNA evidence; and (3) finding that defense counsel performed his duty in an effective manner. **See** Jackson’s Brief at 4.

The PCRA court provided a thorough and well-reasoned discussion of its findings. **See** PCRA Court Opinion, *supra*, at 5-7 (explaining that Jackson’s fourth PCRA petition was facially untimely and he did not establish any exception to timeliness requirements based on the following: (1) the receipt of the newspaper article, published on December 17, 1998, did not constitute newly discovered evidence because Jackson was present at the time that defense counsel made the statement<sup>2</sup>, and therefore, this information would have been known to him at that time; (2) since the information contained in the article is available to the public as a matter of public record that is discoverable with the exercise of due diligence, Jackson did not provide any explanation as to why he was unable to discover the article that was published at the time of his sentencing and he did not

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<sup>1</sup> Specifically, Jackson asserted that certain facts were unknown to him until December 6, 2011 when he received an article published in the Patriot News that was mailed to him from the Lebanon Valley College Library regarding his case.

<sup>2</sup> In the December 17, 1998 newspaper article, defense counsel was quoted at Jackson’s sentencing hearing as saying that the fingerprints found at the crime scene did not match Jackson’s fingerprints. **See** Trial Court Opinion, 3/23/2012, at 5.

establish that he was precluded from seeking this newspaper article from the library and any other source at any earlier point in the proceedings; and (3) even if the newspaper article constituted newly discovered evidence, Jackson's challenge would not warrant any relief because his argument relating to sufficiency was waived when he entered his guilty plea and may not be challenged in a PCRA proceeding). We conclude all issues are meritless and adopt the sound reasoning of the PCRA court. Accordingly, we affirm.

Order affirmed.

Colville, J., concurs in the result.

IN THE COURT OF COMMON PLEAS  
OF LEBANON COUNTY, PENNSYLVANIA

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CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :  
v. :  
ANDRE JACKSON :  
No. CP-38-CR-0000479-1998

APPEARANCES:

DAVID J. ARNOLD, JR., ESQUIRE For the Commonwealth  
District Attorney

PRO SE For Defendant

OPINION BY EBY, S.J., MARCH 20, 2012:

Before the Court is Defendant's Response to our Order of January 7, 2012, wherein we expressed our intention of dismissing Defendant's fourth Petition for Post Conviction Collateral Relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq.*, without a hearing and afforded Defendant twenty (20) days to file a Response to the proposed dismissal. On June 26, 1998, a Criminal Information was filed charging Defendant with three (3) counts of Robbery, two (2) counts of Aggravated Assault and one (1) count each of Recklessly Endangering Another Person, Terroristic Threats, Firearms not to be Carried without a License and Possession of a Firearm by a Minor in connection with the robbery of a convenience store and the assault of the cashier with a gun on March 17, 1998.<sup>1</sup> On September 23, 1998, Defendant filed an Omnibus Pretrial Motion to Suppress his post-arrest confession to law enforcement. On October 20, 1998, after hearing, the Court denied Defendant's Omnibus

<sup>1</sup> Defendant was represented by then-Chief Public Defender Charles T. Jones, Jr

Pretrial Motion. On October 27, 1998, Defendant filed a Motion for a Photographic Lineup, which was denied by the Court on the same date.

On October 28, 1998, Defendant entered a negotiated guilty plea to the charges lodged against him.<sup>2</sup> On December 16, 1998, the Court sentenced Defendant consistent with the terms of his guilty plea agreement to five (5) to fifteen (15) years' imprisonment in a state correctional institution. Defendant did not file post sentence motions or a direct appeal to the Pennsylvania Superior Court from the judgment of sentence.

On December 4, 2000, Defendant filed his first Petition for Post Conviction Collateral Relief. Counsel was appointed to represent Defendant.<sup>3</sup> On January 10, 2001, Defendant's Petition was dismissed due to its untimeliness and its failure to state a meritorious claim for relief. Defendant filed an untimely appeal to the Pennsylvania Superior Court from the dismissal of his PCRA Petition, and that appeal was quashed due to its untimeliness on August 9, 2001.

On November 9, 2001, Defendant filed his second PCRA Petition, and we again appointed counsel to represent Defendant.<sup>4</sup> PCRA counsel applied to withdraw from representation of Defendant pursuant to the requirements of *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988), and *Commonwealth v. Finley*, 550 A.2d 213 (Pa.Super. 1988). That application was granted, and Defendant was advised that he could obtain private counsel or proceed on his behalf. After advising Defendant of our intent to dismiss this PCRA Petition without a hearing and affording him the opportunity to respond, we denied relief and dismissed Defendant's second PCRA Petition on March 11, 2002, again due to its untimeliness and failure to state a meritorious claim for relief. Defendant appealed that dismissal to the Pennsylvania Superior

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<sup>2</sup> The executed guilty plea colloquy reflects that Defendant agreed to plead guilty to the charges in exchange for the imposition of an aggregate sentence of five (5) to fifteen (15) years' imprisonment in a state correctional institution

<sup>3</sup> John R. Kelsey, III, Esquire, was appointed to represent Defendant

<sup>4</sup> Timothy T. Engler, Esquire, was appointed to represent Defendant

Court. On November 21, 2002, that appeal was dismissed due to Defendant's failure to prosecute it.

On May 10, 2004, Defendant filed his third PCRA Petition, which was denied on July 1, 2004.<sup>5</sup> Following Defendant's lodging of an appeal, that appeal was dismissed on December 8, 2004 due to Defendant's failure to prosecute it.

It was not until August 10, 2011 that Defendant filed his fourth PCRA Petition.<sup>6</sup> In this Petition, Defendant argued that trial counsel rendered ineffective assistance by failing to investigate in preparation for trial and by coercing Defendant to plead guilty. Defendant submitted that he is entitled to a new trial as a result.

On January 7, 2012, we issued an Order and Opinion regarding the merits of Defendant's most recent PCRA Petition. In our Opinion, we explained that Defendant's PCRA Petition was filed more than eleven (11) years after the permissible time-frame for filing a timely PCRA petition had expired. While Defendant asserted in his Petition that the facts upon which his claims of ineffectiveness were predicated were unknown to him until he received the docket of the case from the Lebanon County Clerk of Courts on July 25, 2011, we found that Defendant knew or should have known before he entered his guilty plea of the actions trial counsel took or failed to take in preparing the case for disposition. Additionally, we noted that Defendant argued that trial counsel failed to tell him of various pieces of evidence and that trial counsel coerced him to plead guilty in earlier PCRA Petitions. Moreover, we found that nothing in the docket

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<sup>5</sup> Pa R.Crim.P. Rule 904(C) provides that the court shall appoint counsel to represent an indigent defendant on a first PCRA petition. Further, Rule 904(D) and (E) provide that the court shall appoint counsel to represent an indigent defendant on a second or subsequent PCRA petition when an evidentiary hearing is required or whenever the interests of justice require it. Since we determined that an evidentiary hearing was not required and the interests of justice did not require it, we did not appoint counsel to represent Defendant on his third PCRA Petition.

<sup>6</sup> As we will explain below, we will not be scheduling an evidentiary hearing regarding Defendant's fourth PCRA Petition. Further, Defendant indicated in both his fourth Petition and his Response that he does not seek the appointment of counsel to represent him. Therefore, we did not appoint counsel to represent Defendant on his current PCRA Petition.

would have alerted Defendant to pursue claims of ineffective assistance based upon a failure to investigate and coercion of Defendant in the plea process. Further, we observed that the docket could have been obtained by Defendant in time for him to pursue his claims of ineffectiveness in a timely-filed PCRA petition. We concluded that Defendant failed to successfully establish that any of the statutory exceptions to the timeliness requirements of the PCRA were applicable that would confer jurisdiction upon this Court to entertain his untimely Petition. Finally, we found that even if we had jurisdiction to entertain the untimely Petition, Defendant's allegations of ineffectiveness were previously litigated and waived, Defendant failed to make a prima facie showing that a miscarriage of justice may have occurred that would enable us to entertain the merits of Defendant's fourth Petition and Defendant's allegations of ineffectiveness substantively were without merit. On these bases, we expressed our intention of dismissing Defendant's Petition without a hearing. Pursuant to Pa.R.Crim.P. Rule 907(1), we afforded Defendant twenty (20) days to file a Response to the proposed dismissal of his PCRA Petition that sufficiently set forth any statutory bases upon which we have jurisdiction to entertain his untimely PCRA Petition and the factual and legal bases upon which he is entitled to PCRA relief in light of the deficiencies noted.

On January 26, 2012, Defendant filed a *pro se* Petition for Post Conviction Collateral Relief, which we consider to be in the nature of a Response to our Order of January 7, 2012.<sup>7</sup> In his Response, Defendant now alleges that the facts upon which his claims of ineffectiveness are

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<sup>7</sup> We do not consider this filing to constitute an Amended or a fifth PCRA petition. First, Defendant specifically indicates in the title of the filing that it is "... Amended in Respon[s]e to Court Order dated 1/7/12..." Further, Rule 907(1) provides that after a Court gives notice of its intention to dismiss a meritless PCRA petition without a hearing, the defendant may respond to the proposed dismissal within twenty (20) days and that the Court thereafter may order the dismissal of the petition, grant leave to file an amended petition or direct that the proceedings continue. In our Order of January 7, 2012, we afforded Defendant leave to file a Response to our proposed dismissal of his Petition that remedied the defects of that Petition. We never afforded Defendant leave to file an amended PCRA petition. Accordingly, we address the filing as a Response to our Order of January 7, 2012 such that Defendant will be afforded no further notice of our intent to dismiss his current PCRA Petition without a hearing.

predicated were unknown to him until December 6, 2011, when he received an article published in the Patriot-News that was mailed to him from the Lebanon Valley College Library regarding his case.<sup>8</sup> Defendant avers that the article reveals that his fingerprints did not match the fingerprints found at the scene of the crimes, which thereby removes him as a possible perpetrator of the crimes and renders the evidence insufficient to support his convictions. It is Defendant's position that he was unable to pursue his claims that trial counsel failed to disclose evidence to him and coerced him into pleading guilty in a timely PCRA petition because he learned that the fingerprints found at the crime scene did not match his fingerprints only when he received the article on December 6, 2011.

As we explained in our Opinion of January 7, 2012, an untimely PCRA petition will be allowed to proceed despite its untimeliness if the defendant pleads and proves that the facts upon which the claim is predicated were unknown to him and could not have been ascertained by the exercise of due diligence. 42 Pa.C.S. § 9545(b)(1). The newspaper article, which Defendant appended to the Response as an exhibit, is dated December 17, 1998 and provides information about Defendant's sentencing that occurred on December 16, 1998. After accounting the sentence Defendant received for the crimes he committed, the article provides:

"According to police records, Jackson, carrying a pistol, entered the store and shoved the muzzle of the pistol into a clerk's body, threatening to shoot her. Jackson then struck the victim with the butt of the weapon.

"Jackson took cigarettes, money and food stamps valued at \$100.

"Chief Public Defender Charles Jones, Jackson's attorney, said fingerprints taken by investigators at the scene were not able to be matched with Jackson's fingerprints.

"Jones, however, agreed with Eby in noting 'that happens a lot.'"

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<sup>8</sup> This article was received by Defendant after he filed the PCRA Petition currently before us.



While Defendant is correct that the article indicates that trial counsel stated that the fingerprints found at the crime scene did not match Defendant's fingerprints, Defendant was present with trial counsel at the time of sentencing when trial counsel made that statement. Therefore, Defendant knew at the time of his sentencing that the fingerprints found at the crime scene did not match his fingerprints. The receipt of a newspaper article on December 6, 2011 that confirmed what Defendant already knew does not constitute newly discovered evidence.

Moreover, even if the newspaper article somehow contained facts or evidence of which Defendant was not aware, the newspaper article was published on December 17, 1998. Information contained in an article appearing in a publication that is available to the public is considered a matter of public record that is discoverable with the exercise of due diligence. *Commonwealth v. Fahy*, 959 A.2d 312, 316 (Pa. 2008). Defendant has not provided any explanation why he was unable to discover an article that was published in a local newspaper at the time of his sentencing on December 16, 1998. Defendant has not established that he was precluded from seeking this newspaper article from Lebanon Valley College or through any other vehicle at any earlier point in the proceedings. With the exercise of due diligence, this article reasonably could have been discovered at the time when it was published in December of 1998. For these reasons, Defendant has failed to establish that his receipt of the newspaper article on December 6, 2011 qualifies as newly discovered evidence that would confer jurisdiction upon us to consider the merits of his otherwise untimely PCRA Petition.

Moreover, even if the receipt of the newspaper article contained new information that could not have been discovered or obtained by Defendant at any earlier point in time, Defendant would not be entitled to any relief. Defendant asserts in his Response that the fact that the fingerprints located did not match his fingerprints renders the evidence insufficient to sustain his

Robbery convictions. Defendant's challenge to the sufficiency of the evidence, an allegation of error that was not included in Defendant's fourth PCRA Petition, relates to evidence that would have been presented against him at trial. As stated above, Defendant pled guilty to the offenses lodged against him under a negotiated plea agreement. In entering his guilty plea, Defendant affirmed under oath that he committed the crimes to which he was pleading guilty, that his criminal conduct fit the legal elements that make up the crimes and that he understood that he was giving up his right to challenge whether the Commonwealth presented enough evidence to establish his guilt beyond a reasonable doubt by pleading guilty. Any issue relating to the sufficiency of the evidence is waived by entry of a guilty plea and is not subject to attack in a PCRA proceeding. *Commonwealth v. Rounsley*, 717 A.2d 537, 539 (Pa.Super. 1998), citing *Commonwealth v. Williams*, 660 A.2d 614, 619 (Pa.Super. 1995). By pleading guilty, Defendant conceded that the Commonwealth's evidence was sufficient to support his convictions, and he cannot attempt to revisit a challenge to the sufficiency of the evidence under the PCRA. *Id.*

Pa.R.Crim.P. Rule 908(A)(2) provides that the Court shall order a hearing when a PCRA petition or the Commonwealth's response raises material issues of fact. We detailed the fatal deficiencies of Defendant's fourth PCRA Petition in our Opinion of January 7, 2012, and we afforded Defendant an opportunity to attempt to remedy those deficiencies. The Response filed by Defendant does not cure these deficiencies, nor does it raise any material issues of fact necessitating a hearing. For the reasons set forth above and in our Opinion of January 7, 2012, we will deny Defendant relief pursuant to the PCRA and will dismiss his fourth PCRA Petition without a hearing.

We will enter an appropriate Order.

ORIGINAL

IN THE COURT OF COMMON PLEAS  
OF LEBANON COUNTY, PENNSYLVANIA

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CRIMINAL DIVISION

COMMONWEALTH OF  
PENNSYLVANIA

No. CP-38-CR-0000479-1998

v.

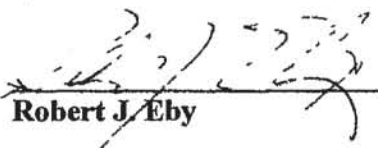
ANDRE JACKSON

ORDER OF COURT

AND NOW, to wit, this 20<sup>th</sup> day of March, 2012, upon careful consideration of Defendant's fourth Petition for Post Conviction Collateral Relief, our Order and Opinion of January 7, 2012, wherein we expressed our intention of dismissing Defendant's Petition without a hearing and afforded Defendant twenty (20) days to file a Response to the proposed dismissal, the Response filed by Defendant, and the record of this case, it is hereby Ordered that the relief sought in Defendant's Petition is respectfully denied. Further, Defendant's Petition is dismissed.


Defendant is advised that he has the right to appeal to the Superior Court of Pennsylvania from the denial of relief and the dismissal of his Petition. An appeal must be filed in writing no later than thirty (30) days from the date of this Order.

BY THE COURT:

 \_\_\_\_\_, S.J.  
Robert J. Eby

RJE/jw

pc: District Attorney (Interoffice Mail)  
Andre Jackson (Certified Mail, Return Receipt Requested, at SCI Huntingdon,  
Inmate No. EE9432, 1100 Pike Street, Huntingdon, PA 16654-1112) #719016135740000097

PURSUANT TO Pa R Crim. P. 114  
All parties are hereby notified  
this date: 3-23-12   
Clerk of Courts, Lebanon, PA