

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ROBERT WILLIAMS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 872 EDA 2013

Appeal from the PCRA Order of February 19, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0802271-2006

BEFORE: GANTMAN, OLSON AND WECHT, JJ.

MEMORANDUM BY OLSON, J.:

FILED DECEMBER 24, 2013

Appellant, Robert Williams, appeals *pro se* from the order entered on February 19, 2013 dismissing as untimely his second petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The PCRA court set forth the relevant facts and procedural history of this case as follows:

On January 31, 2008, following a two-day bench trial before [the trial c]ourt, [Appellant] was found guilty of murder in the third degree, carrying a firearm without a license, carrying a firearm on the public streets of Philadelphia, and possessing an instrument of crime. Sentencing was deferred until March 11, 2008, on which date [Appellant] was sentenced to an aggregate term of not less than 18 years nor more than 40 years['] confinement, to be followed by four years of reporting probation.

On March 23, 2008, [Appellant] filed post-sentence motions, which were denied by [the trial c]ourt on July 21,

2008. [Appellant] filed a timely notice of appeal on August 18, 2008. On September 16, 2009, [this Court] affirmed [Appellant's] judgment[] of sentence. On October 15, 2009, [Appellant] filed a petition for allowance of appeal, which was denied on December 29, 2009. Therefore, [Appellant's] judgment[] of sentence became final 90 days later, on March 28, 2010.

On December 17, 2010, [Appellant] filed a timely *pro se* petition pursuant to the [PCRA]. PCRA counsel was appointed and, after investigation, filed a [letter pursuant to **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*)] on December 16, 2011. On January 5, 2012, after reviewing the pleadings and conducting its own independent review, [the PCRA c]ourt found that [Appellant's] claims lacked merit, and sent him notice of intent, pursuant to Pa.R.Crim.P. 907, to dismiss his petition without a hearing. On February 10, 2012, [the PCRA c]ourt dismissed the PCRA petition consistent with the [Rule] 907 [n]otice. [Appellant] filed a notice of appeal to [this] Court for failure to comply with Pa.R.A.P. 3517.

The instant petition – [Appellant's] second PCRA petition – was filed on September 7, 2012, over a year after [Appellant's] judgment[] of sentence became final. Accordingly, [Appellant] bore the burden to plead and prove that the instant petition satisfied one of the timeliness exceptions of 42 Pa.C.S.A. § 9545(b)(1). After reviewing the pleadings and conducting its own independent review, [the PCRA c]ourt found that [Appellant's] second PCRA petition failed to satisfy one of the timeliness exceptions of § 9545(b)(1), and sent him a [Rule] 907 [n]otice on January 14, 2013, advising [Appellant] that if he had anything with which to supplement his petition, he should provide it. [Appellant] failed to submit any such supplemental information. [The PCRA c]ourt then dismissed the petition on February 19, 2013. On March 4, 2013, [Appellant] filed a notice of appeal [and a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).]

PCRA Court Opinion, 7/11/2013, at 1-2 (footnotes and parentheticals omitted). The PCRA court issued an opinion pursuant to Pa.R.A.P. 1925(a) on July 11, 2013.

On appeal, Appellant presents the following issues for our consideration:

- 1) The PCRA court committed error in dismissing without a hearing [A]ppellant's claims as a patently untimely PCRA, nor allowing any appointed counsel to review/investigate the nunc pro tunc rule exceptions to the jurisdictional timeliness requirement with this appeal, pursuant to § 9545(B)(1), exceptions (i), (ii), and (iii).
- 2) Whether [Appellant's] trial counsel was ineffective in the performance prong by insisting he take a trial by judge and not by jury, as first PCRA counsel was ineffective not to review this issue of the colloquy being knowingly and clear to [A]ppellant.
- 3) Pursuant to Rule 571, it was ineffective of defense counsel not to allow an arraignment by counsel making his own decision to waive [A]ppellant's assignment when [A]ppellant had no understanding of his right to be arraigned.
- 4) [A]ppellant was not advised of his constitutional right and did not waive his right to counsel or his right against self-incrimination. Any statements obtained from him were not knowingly, intelligently, or voluntarily given and were obtained in violation of his federal and state rights.

Appellant's Brief at 5.

While Appellant presents four questions for our review, in his appellate brief, he essentially asserts counsel was ineffective and that his PCRA petition is timely under the governmental interference exception to the PCRA's one-year jurisdictional time bar. *Id.* at 7-8. He claims that he was

not able to file a timely PCRA petition because PCRA counsel failed to provide him with necessary trial transcripts. **Id.** at 13. Moreover, throughout his appellate brief, Appellant stresses that in his first, timely filed PCRA petition he claimed ineffective assistance of trial counsel's failure to provide Appellant discovery before and after trial. **Id.** at 9-10.

We must determine whether we have jurisdiction to hear the appeal pursuant to the PCRA:

[T]he timeliness of a PCRA petition is a jurisdictional requisite. Jurisdictional time limits go to a court's right or competency to adjudicate a controversy. Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition. The PCRA now requires a petition, including a second or subsequent petition, to be filed within one year of the date the underlying judgment becomes final. A judgment is deemed 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 review.

Commonwealth v. Williams, 35 A.3d 44, 52 (Pa. Super. 2011) (citations and quotations omitted).

Here, on December 29, 2009, the Pennsylvania Supreme Court denied further review of this Court's affirmance of Appellant's judgment of sentence. Appellant had 90 days to appeal to the United States Supreme Court, but did not. **See** U.S.Sup.Ct.R. 13. Hence, Appellant's judgment of sentence became final on March 29, 2009. Appellant had one year from that date to file a PCRA petition. Accordingly, Appellant's current PCRA petition

filed on September 7, 2012 is patently untimely and the PCRA court lacked jurisdiction.

“Generally, to obtain merits review of a PCRA petition filed more than one year after a petitioner's sentence became final, the petitioner must allege and prove at least one of the three timeliness exceptions.” **Williams**, 35 A.3d at 52, *citing* 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). The three exceptions to the one-year timing requirement are as follows:

(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.A. § 9545 (b)(i-iii). In addition, Appellant must bring his claim within 60 days of the date it could have first been presented. 42 Pa.C.S.A. § 9545(b)(2).

In his current PCRA petition, Appellant claimed counsel was ineffective and that exculpatory evidence subsequently became available to him that would have changed the outcome of trial. Thus, he initially invoked the after-discovered fact exception under 42 Pa.C.S.A. § 9545(b)(ii). Although

he invoked the after-discovered fact exception in his PCRA petition, Appellant fails to make any cogent argument in his appellate brief addressing this exception. As such, this argument is waived. ***Commonwealth v. Love***, 896 A.2d 1276, 1287 (Pa. Super. 2006), *appeal denied* 940 A.2d 363 (Pa. 2007) (arguments not properly developed in appellate briefs are waived.) Appellant then claimed governmental interference for the first time in his Rule 1925(b) statement. We are constrained to find Appellant's present invocation of the governmental inference exception to the PCRA's timing requirement is also waived for failing to present the claim in his PCRA petition. ***Commonwealth v. Santiago***, 855 A.2d 682, 691 (Pa. 2004) ("[A] claim not raised in a PCRA petition cannot be raised for the first time on appeal.").

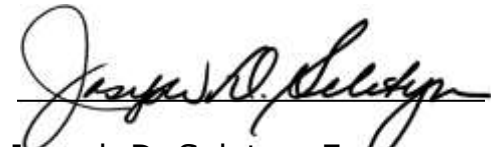
Regardless, Appellant claims that "[d]ue to excessive delay by court-appointed counsel not allowing [A]ppellant to obtain transcripts was government officials interference of [A]ppellant's review[.]" Appellant's Brief at 8. Under the PCRA, "government officials shall not include defense counsel, whether appointed or retained." 42 Pa.C.S.A. § 9545(b)(4). Thus, counsel's alleged withholding of trial transcripts cannot amount to governmental interference. Moreover, "the fact that a petitioner's claims are couched in terms of ineffectiveness will not save an otherwise untimely petition from the application of the time restrictions of the PCRA." ***Commonwealth v. Lesko***, 15 A.3d 345, 367 (Pa. 2011).

Finally, even though Appellant filed a timely first PCRA petition, the PCRA court could not consider the second petition timely when Appellant filed it over one year after his judgment of sentence became final. **See Commonwealth v. Lewis**, 63 A.3d 1274, 1279 (Pa. Super. 2013) (The period for filing a PCRA petition is not subject to the doctrine of equitable tolling); **see also** 42 Pa.C.S.A. § 9545(b)(1) (“Any [PCRA] petition [], including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final.”).

For all of the foregoing reasons, we agree with the PCRA court that jurisdiction was lacking. Appellant’s current PCRA petition was patently untimely, because he filed it over a year after his judgment of sentence became final. Appellant did not plead and prove an exception to the one-year PCRA time bar. Appellant’s claims of ineffective assistance of counsel and equitable tolling cannot save Appellant’s untimely petition.

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