

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ALLEN O'NEIL BALTIMORE,	:	
	:	
Appellant	:	No. 874 WDA 2012

Appeal from the PCRA Order January 17, 2012,
Court of Common Pleas, Allegheny County,
Criminal Division at No. CP-02-CR-0017389-2001

BEFORE: DONOHUE, MUNDY and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: March 5, 2013

Allen O'Neil Baltimore ("Baltimore") appeals from the order of court denying his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

In October 2002, Baltimore was found guilty by a jury of robbery, receiving stolen property and criminal conspiracy.¹ He was sentenced to 25 to 50 years of incarceration. Although Baltimore filed a direct appeal with this Court, it was dismissed for failure to file a docketing statement in accordance with Pa.R.A.P. 3517.

In January 2004, Baltimore filed a PCRA petition seeking the reinstatement of his direct appeal rights. The petition was granted, and upon review, this Court affirmed Baltimore's judgment of sentence. The

¹ 18 Pa.C.S.A. §§ 3701, 3925, 903.

*Retired Senior Judge assigned to the Superior Court.

Pennsylvania Supreme Court denied Baltimore's petition for allowance of appeal on June 6, 2006.

Baltimore filed another PCRA petition on March 29, 2007, which the PCRA court subsequently dismissed. On December 8, 2011, Baltimore filed the PCRA petition at issue in this appeal. The trial court issued notice of its intent to dismiss the petition on December 14, 2011, and Baltimore filed a response thereto. The PCRA court dismissed the petition, finding that it was untimely and that one of the issues raised therein was previously litigated. PCRA Court Opinion, 2/1/12, at 2.

This appeal follows, in which Baltimore presents two issues for our review:

- I. Is [Baltimore] entitled to a [r]emand with instructions regarding his after-discovered evidence, which has never been addressed on its merits in any [c]ourt?
- II. Is [Baltimore] entitled to a [w]rit of [h]abeas [c]orpus, since the [c]itizens has [sic] not risen up against our [g]overnment, and no foreign nation has invaded our homeland of the United States of America?

Appellant's Brief at vii.

We begin by stating our standard of review for appeals challenging a PCRA court's determination:

Our review of a PCRA court's grant or denial of relief is limited to examining whether the court's determination is supported by the evidence and whether it is free of legal error. This Court grants

great deference to the findings of the PCRA court, and we will not disturb those findings merely because the record could support a contrary holding. The findings of a post-conviction court will not be disturbed unless they have no support in the record.

Commonwealth v. Hickman, 799 A.2d 136, 140 (Pa. Super. 2002) (internal citations omitted).

In his first issue, Baltimore argues that he established one of the exceptions to the PCRA's time-bar. Appellant's Brief at x. It is well established that "[t]he PCRA's timeliness requirements are jurisdictional in nature, and a court may not address the merits of the issues raised if the PCRA petition was not timely filed." ***Commonwealth v. Copenhefer***, 596 Pa. 104, 108, 941 A.2d 646, 648-49 (2007). The PCRA provides in relevant part as follows:

(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.

42 Pa.C.S.A. § 9545(b).

Baltimore asserts that he has satisfied the requirements of § 9545(b)(1)(ii) and (2), in that on November 25, 2011, he received an affidavit from a man named James T. Hopkins stating that Mr. Hopkins was an “eyewitness to the factual innocence of [Baltimore].” Appellant’s Brief at x. He further alleges that “this evidence was unknown to [Baltimore], and could not be ascertained by the exercise of due diligence, and was fairly presented within 60[] days of receipt.” *Id.* Accordingly, Baltimore claims, he satisfied an exception to the PCRA’s time bar, and the PCRA court should have held a hearing on this claim.

The affidavit upon which Baltimore bases his claim of after discovered evidence contains only the following factual statements:

I make this [a]ffidavit[] knowingly, willingly and voluntarily in accord with the rules of [c]ourt. I am an eye-witness to the factual innocence of [Baltimore].

I was physically present in the Court of Common Pleas of Pittsburgh County, Pennsylvania when the [j]udge and the [s]tenographer was [sic] missing during the [j]ury selection of his trial. The missing two [g]overnment [o]fficials[] was clearly unfair, because the facts were never recorded during [Baltimore’s] public trial.

PCRA Petition, 12/8/11, at Exhibit 1 (emphasis in the original).

Thus, contrary to Baltimore's assertion in his PCRA petition, the "after discovered evidence" is not testimony asserting Baltimore's innocence, **see** Appellant's Brief at x, but rather proposed testimony from a witness that neither a judge nor stenographer were present during jury selection for Baltimore's trial. While the source of this testimony might be new, its substance is not. Baltimore has always known that a judge and stenographer were not present during jury selection; prior to trial, Baltimore executed a written waiver of his right to have a judge and stenographer present at jury selection. **See Commonwealth v. Baltimore**, 968 A.2d 786 (Pa. Super. 2008) (unpublished memorandum). Accordingly, the facts upon which the claim is predicated were **not** unknown to Baltimore, and so he has failed to establish this exception to the PCRA's time bar.² **See** 42 Pa.C.S.A. § 9545(b)(1)(ii).

Baltimore's second issue challenges the PCRA court's handling of a petition for *habeas corpus* that Baltimore filed on June 20, 2012 while this appeal was pending. Our review here is only of the PCRA court's order

² Furthermore, Baltimore challenged the absence of a judge and stenographer during jury selection in the first PCRA petition he filed after the reinstatement of his direct appeal rights. The PCRA court found that issue to be without merit, and we affirmed that decision. **Baltimore**, 968 A.2d at 786 (unpublished memorandum). Thus, this claim has been previously litigated, and it cannot be the basis for an exception to the PCRA's time bar. **See** 42 Pa.C.S.A. §§ 9543(a)(3), 9544(a)(3). For this reason as well, Baltimore's claim cannot succeed.

dismissing Baltimore's December 8, 2011 PCRA petition. Arguments regarding the PCRA court's handling of Baltimore's June 20, 2012 filing are not properly before us, and so we do not address them.

Order affirmed.