

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

Appellee.

v.

LEWIS WRIGHT

Appellant

No. 1714 EDA 2016

Appeal from the PCRA Order May 4, 2016
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0903461-2003

BEFORE: LAZARUS, J., MOULTON, J., and FORD ELLIOTT, P.J.E.

MEMORANDUM BY MOULTON, J.:

FILED DECEMBER 15, 2017

Lewis Wright appeals *pro se* from the May 4, 2016 order of the Philadelphia County Court of Common Pleas dismissing without a hearing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. We affirm.

The trial court set forth the history of this case as follows:

On August 16, 2005, [Wright] was found guilty after a jury trial, presided over by the Honorable Rose Marie DeFino-Nastasi, of Attempted Murder, 18 Pa.C.S. §§ 901, 2502, as a felony of the first degree; Aggravated Assault, 18 Pa.C.S. § 2702, as a felony of the first degree; Possession with the Intent to Deliver (PWID), 35 Pa.C.S. § 780-113(a)(30), an ungraded felony; Violation of the Uniform Firearms Act (VUFA), 18 Pa.C.S. § 6106, as a felony of the third degree; and Possession of an Instrument of Crime (PIC), 18 Pa.C.S. § 907, as a misdemeanor of the first degree.

Appendix A

On November 3, 2005, [Wright] was sentenced as follows: twenty to forty years for the attempted murder conviction; five to ten years for the PWID conviction; three-and-a-half to seven years for the VUFA § 6106 conviction; two-and-a-half to five years for the PIC conviction; all sentences to run concurrently.

On June 15, 2007, the Superior Court affirmed the judgment of sentence. 434 EDA 2006.

On May 29, 2008, the Supreme Court denied *allocatur*. 370 EAL 2007.

On December 15, 2008, [Wright] filed his first PCRA petition, which was formally dismissed on November 20, 2009. On March 28, 2011, the Superior Court affirmed. 134 EDA 2010. On November 1, 2011, the Supreme Court denied *allocatur*. 336 EAL 2011.

On May 4, 2011, [Wright] filed a second PCRA petition while the appeal of the denial of his first PCRA petition was still pending before the Supreme Court. This court dismissed that petition on September 8, 2011.

On January 8, 2015, [Wright] filed the instant PCRA petition, his third. He filed a supplemental PCRA petition on May 1, 2015, and a second, supplemental PCRA petition and "Motion for Leave to File an Amended PCRA Petition" on December 7, 2015.

In those PCRA petitions, [Wright] claims that he submitted a request to the Pennsylvania State Police in November 2014, seeking the criminal record for Commonwealth witness, Joseph Farley. After receiving this "after-discovered evidence," [Wright] then obtained copies of the criminal docket sheets for Farley's cases under docket numbers CP-51-CR-709201-1999 (35 [P.S.] § 780-113(a)(35), Possession with the Intent to Deliver), CP-51-CR-0807551-2001 (18 Pa.C.S. § 5121, Escape), CP-51-CR-707601-2005 (35 [P.S.] § 780-113(a)(30), PWID), and MC-51-CR-1016551-2002 (18 Pa.C.S. § 5902, Prostitution; 18 Pa.C.S. § 5902, Solicitation).

[Wright] argues that the docket sheets reveal that Farley was awaiting hearings for violations of probation under docket numbers CP-51-CR-709201-1999 and CP-51-CR-

0807551-2001 at the time that Farley testified against [Wright] at trial, and that Farley received favorable treatment from the Commonwealth in exchange for his testimony, which was not exposed to the jury. [Wright] claims that (1) Farley did not testify truthfully regarding his prior convictions or any benefits that he would receive in exchange for his testimony against [Wright]; (2) that trial counsel, Gerald Stein, Esq., was ineffective under **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) for failing to investigate Farley's complete criminal history and exposing this history to the jury; and that (3) the Assistant District Attorney violated **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d. 215 (1963) by concealing evidence of a deal between the Commonwealth and Farley and by knowingly using Farley's false testimony against [Wright].

On January 19, 2016, the Commonwealth filed a Motion to Dismiss.

On March 4, 2016, the court issued a [Pennsylvania Rule of Criminal Procedure] 907 notice. N.T. 03/04/16 at pp. 2-4.

On March 15, 2016, [Wright] filed a timely response to the 907 notice, claiming that the court failed to rule on his December 7, 2015 motion to amend his PCRA petition.

On May 4, 2016, the court indicated on the record that it had received [Wright]'s timely response to the 907 notice and that it had implicitly accepted [Wright]'s supplemental PCRA petitions by acknowledging those findings at the listing on March 4, 2016, and ruling on the claims raised therein. N.T. 05/04/16 at p. 2. The court formally dismissed [Wright]'s PCRA petition that same day.

On May 23, 2016, [Wright] filed the instant appeal to the Superior Court.

Trial Ct. Op., 10/5/16, at 1-3.¹

¹ The underlying facts of this case are set forth in our memorandum affirming Wright's judgment of sentence. **See Commonwealth v. Wright**, No. 434 EDA 2006, unpublished mem. at 1-3 (Pa.Super. filed June 15, 2007).

Wright raises the following issues on appeal:

[1.] Whether the PCRA court abused its discretion by failing to liberally construe Wright's pro se pleadings as required by the Supreme Court precedent of **Haines v. Kerner**[, 404 U.S. 519 (1972).]

[2.] Whether the PCRA court abused its discretion by failing to properly evaluate Wright's claims as required by the Supreme Court precedent of **Kyles v. Whitley**[, 514 U.S. 419 (1995).]

[3.] Whether the PCRA court abused its discretion by misconstruing, misinterpreting, or mischaracterizing either Wright's claims, the record or other evidence presented in support thereof[.]

[4.] Whether the PCRA court abused its discretion by denying Wright a hearing to resolve genuine issues of material fact insofar as it relates to the PCRA court's timeliness assessment and, if so, whether the PCRA court abused its discretion by denying Wright's request for court-appointed counsel and discovery of the prosecutor's files from both Wright and Farley's cases[.]

[5.] Whether the PCRA court abused its discretion by misapplying controlling federal principles to the facts in this case[.]

Wright's Br. at 4 (full capitalization omitted).

Our standard of review from the denial of a PCRA petition "is limited to examining whether the PCRA court's determination is supported by the evidence of record and whether it is free of legal error." **Commonwealth v. Ousley**, 21 A.3d 1238, 1242 (Pa.Super. 2011).

We must first determine whether Wright's PCRA petition is timely. A PCRA petition, "including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final." 42 Pa.C.S. § 9545(b)(1).

A judgment is 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. § 9545(b)(3).

The trial court sentenced Wright on November 3, 2005, he appealed, and this Court affirmed his judgment of sentence on June 15, 2007. Wright petitioned for allowance of appeal, which the Pennsylvania Supreme Court denied on May 29, 2008. Wright did not file a petition for writ of *certiorari* with the United States Supreme Court and, therefore, his judgment of sentence became final on August 27, 2008.² He had one year from that date, or until August 27, 2009, to file a timely PCRA petition. His current petition, filed on January 8, 2015, is therefore facially untimely.

To overcome the time bar, Wright was required to plead and prove one of the following exceptions: (i) unconstitutional interference by government officials; (ii) newly discovered facts that could not have been previously ascertained with due diligence; or (iii) a newly recognized constitutional right that has been held to apply retroactively. **See** 42 Pa.C.S. § 9545(b)(1)(i)-(iii). To invoke one of these exceptions, Wright must have filed his petition within 60 days of the date the claim could have been presented. **See** 42

² Wright had 90 days from the date the Pennsylvania Supreme Court denied his petition for allowance of appeal to file a petition for writ of *certiorari* with the United States Supreme Court. **See** U.S.S.Ct.R. 13.

Pa.C.S. § 9545(b)(2). Wright attempts to invoke the newly-discovered facts and governmental-interference exceptions to the PCRA time bar.

I. Newly-Discovered Facts Exception³

The newly-discovered facts exception "requires a petitioner to demonstrate he did not know the facts upon which he based his petition and could not have learned those facts earlier by the exercise of due diligence." ***Commonwealth v. Brown***, 111 A.3d 171, 176 (Pa.Super.), *app. denied*, 125 A.3d 1197 (Pa. 2015).

Wright claims that he requested Farley's criminal history in November 2014 and learned that Farley had been charged with a second drug trafficking offense and two violations of probation, which were not disclosed at the time Farley testified at Wright's trial. Wright further claims that he learned of "the possibility . . . [of] an undisclosed agreement, offer, or promise made by the District Attorney's Office, to act with leniency in Mr. Farley's open case." Amended PCRA Pet., 12/7/15, at ¶ 32.

The PCRA court found:

Farley's open case and his probationary status were brought out by the Commonwealth on direct[-]examination and the defense on cross-examination. N.T. 08/10/05 at pp. 136-38, 144-48, 160-64, 185-89. Defense counsel attempted to

³ Wright has labeled his claim "after-discovered facts." He appears to be confusing the newly-discovered fact exception to the time bar in section 9545(b)(1)(ii) with a claim of after-discovered-evidence under section 9543(a)(2). ***See Commonwealth v. Burton***, 158 A.3d 618, 628-29 (Pa. 2017) (discussing the correct terminology to be used when referring to the newly discovered fact exception and the after-discovered-evidence claim).

impeach Farley with evidence of his arrest and convictions for prostitution and solicitation, and the court twice sustained the Assistant District Attorney's objection. *Id.* at pp. 186-88. Additionally, Farley testified that he had an open drug case and was in custody at the time of [Wright]'s trial, and that he was not receiving a benefit from the Commonwealth in exchange for his testimony. *Id.* at pp. 136-37, 163-64. . . . Farley's criminal extract and corresponding docket sheets merely restate the same facts [Wright] had known since the time of trial – that Farley had a lengthy criminal history; throughout the pendency of [Wright]'s proceedings, Farley was on probation; and that by the time of [Wright]'s trial, Farley was incarcerated on another open case.

[Wright] has failed to prove that the "facts" upon which he bases his claim could not have been ascertained earlier with due diligence because he was present for his trial and heard those facts as they were testified to by Farley.^[4] Further evidence of [Wright]'s knowledge of Farley's open sentencings is the fact that he argued on direct appeal that Farley's identification of [Wright] as the shooter should be suppressed because Farley's "character and personal circumstances made it probable that he was motivated to give evidence in hopes of receiving consideration from the police."⁵ Since [Wright] has failed to plead and prove both factors under § 9545(b)(1)(ii), the court is without jurisdiction to address the merits of this claim.

⁵ The PCRA requires that, in order for a petitioner to be eligible for relief, his claim cannot have been "previously litigated or waived." 42 Pa.C.S. § 9543(a)(3). The PCRA mandates that an issue is waived if "the petitioner could have raised it but failed to do so . . . in a prior state post-conviction proceeding." 42 Pa.C.S. § 9544(b); *Commonwealth v. Roane*, 142 A.3d 79, 87-88 (Pa.Super. 2016). Therefore, [Wright]'s claims are also waived as

⁴ Further, we note that Farley's criminal history would have been available to counsel prior to trial.

he could have raised them in his first or second PCRA proceedings.

Trial Ct. Op., 10/5/16, at 12-13. We agree.

Wright's claim of an undisclosed agreement also fails. Wright relies on a letter by Farley, dated August 30, 2010, which states in relevant part:

I was the DAs [sic] star witness in an attempted murder on a Phila correctional officer[.] That [sic] why I was given IP instead of state time[.] I put him a way [sic] for a long time[,] without me they had nothing[.] Ive [sic] got proof of that two [sic]. All you have to do is ask for thes [sic] proof and I will give you names and every thing [sic].

Wright's Mem. of Law in Support of Amend. Pet. For Post Conviction Relief, 12/7/15, Ex. E (some capitalization omitted).

This letter, Wright believes, constitutes evidence of the existence of a deal.. We disagree. The August 30, 2010 letter does not establish the existence of an agreement between the Commonwealth and Farley or that Farley offered perjured testimony in Wright's case. Further, regardless of whether the letter constituted a new fact, Wright has failed to prove he was diligent in discovering it, particularly because in Wright's second PCRA petition, filed May 4, 2011, he alleged the existence of a deal. Accordingly, Wright failed to prove he could not have learned of the letter earlier by the exercise of due diligence.⁵ **See Brown**, 111 A.3d at 176 ("A petitioner must

⁵ Even if this letter constituted a new fact that Wright could not have discovered earlier through the exercise of due diligence, his underlying after-discovered-evidence claim fails. To be successful in an after-discovered-

explain why he could not have learned the new fact(s) earlier with the exercise of due diligence.”).

Therefore, Wright’s attempt to invoke the newly-discovered facts exception to the PCRA time bar fails.

II. Governmental-Interference Exception

To succeed in raising the governmental-interference exception to the PCRA time bar, a petitioner must “plead and prove that his ‘failure to raise the claim [or claims] previously was the result of interference by government officials.’” **Commonwealth v. Chester**, 895 A.2d 520, 523 (Pa. 2006) (emphasis in original) (quoting 42 Pa.C.S. §9545(b)(1)(i)).

Wright argues that the Commonwealth violated **Brady v. Maryland**, 373 U.S. 83 (1963), by not disclosing: (1) the underlying facts in Farley’s convictions for prostitution and solicitation; (2) that Farley was awaiting hearings for his violations of probation; or (3) the deal it made with Farley.

evidence claim a petitioner must prove “[t]he evidence: (1) could not have been obtained prior to trial by exercising reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach a witness’s credibility; and (4) would likely result in a different verdict.” **Commonwealth v. Castro**, 93 A.3d 818 (Pa. 2014). Even if the letter constituted evidence, Wright’s claim would be unsuccessful because he would use this evidence solely to impeach Farley’s credibility, and the verdict would not likely change.

Wright's claims do not merit relief. As previously noted, Wright knew at the time of his 2005 trial that Farley had a lengthy criminal history, including convictions for solicitation and prostitution.⁶ **See** Trial Ct. Op., 10/5/16. Regarding the alleged deal between Farley and the Commonwealth, as we explained above, Wright failed to provide any evidence that there was in fact a deal for the Commonwealth to disclose. Wright's attempt to invoke the governmental-interference exception therefore also fails.

To the extent Wright attempts to raise claims of trial counsel ineffectiveness, these claims likewise merit no relief. "[I]t is well-settled that couching a petitioner's claims in terms of ineffectiveness will not save an otherwise untimely filed petition from the application of the time restrictions of the PCRA." **See Commonwealth v. Robinson**, 139 A.3d 178, 186 (Pa.2016).

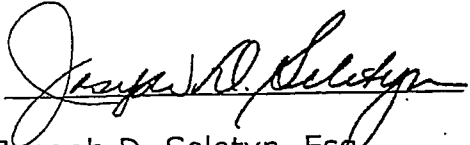
Accordingly, we conclude that the trial court did not err in dismissing as untimely Wright's third PCRA petition.

Order affirmed.

⁶ To the extent Wright claims he only recently learned of the facts underlying Farley's convictions, or that Farley was awaiting violation of probation hearings, Wright has not explained why he could not have discovered this information with the exercise of due diligence.

J-S47024-17

Judgment Entered.

A handwritten signature in cursive script, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/15/17

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0903461-2003

v. : 1714 EDA 2016

LEWIS WRIGHT :

OPINION

FILED

OCT 05 2016

Criminal Appeals Unit
First Judicial District of PA

Rose Marie DeFino-Nastasi, J.

Petitioner appeals from this court's order denying his third Petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq.*

PROCEDURAL HISTORY

On August 16, 2005, Petitioner was found guilty after a jury trial, presided over by the Honorable Rose Marie DeFino-Nastasi, of Attempted Murder, 18 Pa.C.S. §§ 901, 2502, as a felony of the first degree; Aggravated Assault, 18 Pa.C.S. § 2702, as a felony of the first degree; Possession with the Intent to Deliver (PWID), 35 Pa.C.S. § 780-113(a)(30), an ungraded felony; Violation of the Uniform Firearms Act (VUFA), 18 Pa.C.S. § 6106, as a felony of the third degree; and Possession of an Instrument of Crime (PIC), 18 Pa.C.S. § 907, as a misdemeanor of the first degree.

On November 3, 2005, Petitioner was sentenced as follows: twenty to forty years for the attempted murder conviction; five to ten years for the PWID conviction; three-and-a-half to seven years for the VUFA § 6106 conviction; two-and-a-half to five years for the PIC conviction; all sentences to run concurrently.

On June 15, 2007, the Superior Court affirmed the judgment of sentence. 434 EDA 2006.

Appendix B¹

On May 29, 2008, the Supreme Court denied *allocatur*. 370 EAL 2007.

On December 15, 2008, Petitioner filed his first PCRA petition, which was formally dismissed on November 20, 2009. On March 28, 2011, the Superior Court affirmed. 134 EDA 2010. On November 1, 2011, the Supreme Court denied *allocatur*. 336 EAL 2011.

On May 4, 2011, Petitioner filed a second PCRA petition while the appeal of the denial of his first PCRA petition was still pending before the Supreme Court. This court dismissed that petition on September 8, 2011.

On January 8, 2015, Petitioner filed the instant PCRA petition, his third. He filed a supplemental PCRA petition on May 1, 2015, and a second, supplemental PCRA petition and “Motion for Leave to File an Amended PCRA Petition” on December 7, 2015.

In those PCRA petitions, Petitioner claims that he submitted a request to the Pennsylvania State Police in November 2014, seeking the criminal record for Commonwealth witness, Joseph Farley. After receiving this “after-discovered evidence,” Petitioner then obtained copies of the criminal docket sheets for Farley’s cases under docket numbers CP-51-CR-709201-1999 (35 Pa.C.S. § 780-113(a)(35), Possession with the Intent to Deliver), CP-51-CR-0807551-2001 (18 Pa.C.S. § 5121, Escape), CP-51-CR-707601-2005 (35 Pa.C.S. § 780-113(a)(30), PWID), and MC-51-CR-1016551-2002 (18 Pa.C.S. § 5902, Prostitution; 18 Pa.C.S. § 5902, Solicitation).

Petitioner argues that the docket sheets reveal that Farley was awaiting hearings for violations of probation under docket numbers CP-51-CR-709201-1999 and CP-51-CR-0807551-2001 at the time that Farley testified against Petitioner at trial, and that Farley received favorable treatment from the Commonwealth in exchange for his testimony, which was not exposed to the jury. Petitioner claims that (1) Farley did not testify truthfully regarding his prior convictions or

any benefits that he would receive in exchange for his testimony against Petitioner; (2) that trial counsel, Gerald Stein, Esq., was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) for failing to investigate Farley's complete criminal history and exposing this history to the jury; and that (3) the Assistant District Attorney violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) by concealing evidence of a deal between the Commonwealth and Farley and by knowingly using Farley's false testimony against Petitioner.

On January 19, 2016, the Commonwealth filed a Motion to Dismiss.

On March 4, 2016, the court issued a 907 notice. N.T. 03/04/16 at pp. 2-4.

On March 15, 2016, Petitioner filed a timely response to the 907 notice, claiming that the court failed to rule on his December 7, 2015 motion to amend his PCRA petition.

On May 4, 2016, the court indicated on the record that it had received Petitioner's timely response to the 907 notice and that it had implicitly accepted Petitioner's supplemental PCRA petitions by acknowledging those filings at the listing on March 4, 2016, and ruling on the claims raised therein. N.T. 05/04/16 at p. 2. The court formally dismissed Petitioner's PCRA petition that same day.

On May 23, 2016, Petitioner filed the instant appeal to the Superior Court. He thereafter filed a Rule 1925(b) Statement of Matters Complained of on Appeal, claiming that:

1. The PCRA court committed an abuse of discretion when it failed to consider Petitioner's claims "in accordance with the long-standing liberal construction policy of both the state and federal government which applies to pleadings filed by pro se prisoners who are untrained in the law."

2. The PCRA court committed an abuse of discretion when it failed to order an amendment to correct any defects in the PCRA petition pursuant to Pa. R. Crim. P. 905(B), Amendment and Withdrawal of Petition for Post-Conviction Collateral Relief.
3. The PCRA court committed an abuse of discretion to the extent that it failed to allow the Petitioner to timely correct any defects in the PCRA petition under Pa. R. Crim. P. 905(A).
4. The PCRA court committed an abuse of discretion to the extent that it prematurely dismissed Petitioner's PCRA petition without adhering to the mandate in Pa. R. Crim. P. 907(1).
5. The PCRA court committed an abuse of discretion to the extent that it "improperly conducted a merits analysis or otherwise required defendant to establish a meritorious claim under either *Strickland* or *Brady* in order to fall within an exception" to the PCRA jurisdictional time bar.
6. The PCRA court committed an abuse of discretion to the extent that "the court's fact-specific, case-by-case determination improperly imposed a requirement on defendant, who is a *pro se* prisoner, to exercise due diligence in obtaining requested *Brady* material or otherwise required defendant to seek out public disclosure of records from sentencing hearings in other unrelated cases to look for evidence establishing the Commonwealth's suppression of Joseph Farley's complete criminal history and the existence of an undisclosed agreement or a deal based on the assumption that Farley committed perjury, and the prosecutor improperly permitted him to do so."

7. The evidence is insufficient to support the PCRA court's determination that Petitioner's PCRA petition is untimely and/or without merit.
8. The court's 907 notice is inadequate in that it fails to engage in specific fact-finding, detailing the evidence supporting its determination that no exceptions to the jurisdictional time bar apply.
9. The court's Order formally dismissing Petitioner's PCRA petition is inadequate in that it was narrowly drafted in a manner which fails to state whether the scope of its review included the *Brady* and *Strickland* claims filed in petitions on January 8, 2015, May 4, 2015, December 17, 2015, the Commonwealth's Motion to Dismiss filed on January 19, 2016, and Petitioner's response to the 907 notice filed on March 15, 2016.
10. The PCRA court erred in failing to conduct an evidentiary hearing.
11. The PCRA court erred to the extent it denied Petitioner's request under Pa. R. Crim. P. 902(E)(1) for an Order directing discovery of the prosecutor's files from Joseph Farley's trial and Petitioner's request under Pa. R. Crim. P. 904 to be represented by court-appointed counsel.

ANALYSIS

Issue I

Petitioner argues that the PCRA court committed an abuse of discretion when it failed to consider Petitioner's claims "in accordance with the long-standing liberal construction policy of both the state and federal government which applies to pleadings filed by pro se prisoners who are untrained in the law." Although Petitioner fails to state specifically how the PCRA court erred, even a liberal construction of Petitioner's pleadings does not remedy the untimeliness of

his PCRA petition. *Com. v. Eller*, 807 A.2d 838, 845 (Pa. 2002) (citing *Com. v. Lark*, 746 A.2d 585, 590 n. 5 (Pa. 2000) (the PCRA's time restrictions are not subject to equitable tolling)). For the reasons set forth below, the PCRA court properly dismissed Petitioner's third PCRA petition.

Issue II

Petitioner argues that the PCRA court committed an abuse of discretion when it failed to order an amendment to correct any defects in the PCRA petition pursuant to Pa. R. Crim. P. 905(B), which provides:

When a petition for post-conviction collateral relief is defective as originally filed, the judge shall order amendment of the petition, indicate the nature of the defects, and specify the time within which an amended petition shall be filed. If the order directing amendment is not complied with, the petition may be dismissed without a hearing.

Pa. R. Crim. P. 905(B). Rule 905 "is intended to provide petitioners with a legitimate opportunity to present their claims to the PCRA court, in a manner sufficient to avoid dismissal due to a correctable defect in pleading or presentation." *Com. v. Robinson*, 947 A.2d 710, 711 (Pa. 2008).

Petitioner's PCRA petition was dismissed, as discussed below, because it is untimely and without merit. It was not dismissed "due to a correctable defect in pleading or presentation." *Com. v. Lippert*, 85 A.3d 1095, 1098 (Pa. Super.), app. denied, 95 A.3d 277 (Pa. 2014); *See Com. v. Simpson*, 66 A.3d 253, 261 (Pa. 2013). Accordingly, no relief is due.

Issue III

Petitioner argues that the PCRA court committed an abuse of discretion to the extent that it failed to allow the Petitioner to timely correct any defects in the PCRA petition under Pa. R. Crim. P. 905(A), which provides:

The judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.

Pa. R. Crim. P. 905(A).

On January 8, 2015, Petitioner filed the instant PCRA petition, his third. He filed supplemental PCRA petitions on May 1, 2015 and December 7, 2015. The PCRA court implicitly accepted the subsequent filings as amendments to the original filing by acknowledging both of the supplemental petitions on the record and addressing the claims raised therein. N.T. 03/04/16 at pp. 2-4; N.T. 05/04/16 at p. 2; *See Com. v. Roney*, 79 A.3d 595, 616 (Pa. 2013). The court did not dismiss the petition as a result of any material defects in the pleadings. Since the PCRA court did, in fact, accept Petitioner's supplemental petitions, this claim is without merit.

Issues IV & VIII

Petitioner claims that the PCRA court committed an abuse of discretion to the extent that it prematurely dismissed Petitioner's PCRA petition without adhering to the mandate in Pa. R. Crim. P. 907(1). He also claims that the court's 907 notice is inadequate in that it fails to engage in specific fact-finding, detailing the evidence supporting its determination that no exceptions to the jurisdictional time bar apply. Rule 907 provides:

[T]he judge shall promptly review the petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the petition and shall state in

the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 20 days of the date of the notice. The judge thereafter shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings continue.

Pa. R. Crim. P. 907. The purpose of a 907 notice is “to allow a petitioner an opportunity to seek leave to amend his petition and correct any material defects, the ultimate goal being to permit merits review by the PCRA court of potentially arguable claims.” *Com. v. Smith*, 121 A.3d 1049, 1055 (Pa. Super. 2015), app. denied, 136 A.3d 981 (Pa. 2016) (quoting *Com. v. Rykard*, 55 A.3d 1177, 1189 (Pa. Super. 2012), app. denied, 64 A.3d 631 (Pa. 2013)).

The PCRA court issued a 907 notice on March 4, 2016, after determining that Petitioner was not entitled to PCRA relief and that no purpose would be served by any further proceedings. N.T. 03/04/16 at pp. 2-4. The notice indicated that the court intended to dismiss the petition for lack of merit, because it was untimely filed, and no exceptions to the timeliness requirement were applicable. It was not dismissed as a result of any material defect in the pleadings. The court sufficiently stated its reasons for dismissing Petitioner’s petition on the record and in the 907 notice. *See Com. v. Smith*, 121 A.3d 1049, 1055 (Pa. Super. 2015), app. denied, 136 A.3d 981 (Pa. 2016).

Petitioner filed a timely response to the 907 notice on March 15, 2016. In the response, Petitioner claimed that he requested to file an amended petition and that the PCRA court never ruled on his motion. As evidenced by the record, Petitioner filed his supplemental petitions and the PCRA court implicitly accepted them. N.T. 03/04/16 at pp. 2-4. Additionally, after receiving Petitioner’s response to the 907 notice, the court explicitly stated on the record that it had

accepted Petitioner's supplemental petitions. N.T. 05/04/16 at p. 2. Accordingly, Petitioner's argument is meritless.

Issues V¹ & VI²

Petitioner's judgment of sentence became final on August 27, 2008, when the ninety-day period for filing a petition for writ of *certiorari* with the United States Supreme Court expired, making the instant PCRA petition filed January 8, 2015, patently untimely. *See* 42 Pa.C.S. § 9545(b)(3).

The timeliness of a PCRA petition is a jurisdictional requirement. *Com. v. Brown*, 111 A.3d 171, 175 (Pa. Super. 2015) (citing *Com. v. Robinson*, 12 A.3d 477, 479 (Pa. Super. 2011)). A petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment of sentence is final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition is met, and that the claim was raised within 60 days of the date on which it became available. 42 Pa.C.S. § 9545(b)(1)-(2).

If a petition is filed after that one year date, the general rule is that the PCRA court lacks jurisdiction to hear the petition. However, Section 9545(b) provides for three limited circumstances to the general rule in which such a petition may be filed beyond that one-year period:

¹ Petitioner argues that the PCRA court committed an abuse of discretion to the extent that it "improperly conducted a merits analysis or otherwise required defendant to establish a meritorious claim under either *Strickland* or *Brady* in order to fall within an exception" to the PCRA jurisdictional time bar.

² Petitioner argues that the PCRA court committed an abuse of discretion to the extent that "the court's fact-specific, case-by-case determination improperly imposed a requirement on defendant, who is a *pro se* prisoner, to exercise due diligence in obtaining requested *Brady* material or otherwise required defendant to seek out public disclosure of records from sentencing hearings in other unrelated cases to look for evidence establishing the Commonwealth's suppression of Joseph Farley's complete criminal history and the existence of an undisclosed agreement or a deal based on the assumption that Farley committed perjury, and the prosecutor improperly permitted him to do so."

(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.

42 Pa.C.S. § 9545(b)(1)(i)-(iii), (2).

In his PCRA petition, Petitioner asserts that he submitted a request to the Pennsylvania State Police in November 2014 for the criminal record of Commonwealth witness, Joseph Farley. After receiving this “after-discovered evidence,” Petitioner then obtained copies of the criminal docket sheets for Farley’s cases under docket numbers CP-51-CR-709201-1999 (35 Pa.C.S. § 780-113(a)(35), PWID), CP-51-CR-0807551-2001 (18 Pa.C.S. § 5121, Escape), CP-51-CR-707601-2005 (35 Pa.C.S. § 780-113(a)(30), PWID), and MC-51-CR-1016551-2002 (18 Pa.C.S. § 5902, Prostitution; 18 Pa.C.S. § 5902, Solicitation).

Petitioner argues that the docket sheets reveal that Farley was awaiting hearings for violations of probation under docket numbers CP-51-CR-709201-1999 (PWID) (Shreeves-Johns, J.) and CP-51-CR-0807551-2001 (Escape) (Woods-Skipper, J.) at the time that Farley testified against Petitioner at trial on August 10, 2005, which was not exposed to the jury (N.T. 08/10/05 at pp. 136-37); that Farley did not testify truthfully regarding the facts underlying MC-51-CR-1016551-2002 (N.T. 08/10/05 at pp. 136-38, 186-88); and that Farley received favorable treatment from the Commonwealth in exchange for his testimony because his trial under docket number CP-51-CR-707601-2005 was initially scheduled for trial on June 22, 2005, but was rescheduled prior to Petitioner's trial "due to a possible negotiated guilty plea." See Notes of Testimony from Farley's December 21, 2015 Guilty Plea attached hereto as Exhibit A.

Petitioner claims that this "after-discovered evidence" shows that Farley did not testify truthfully regarding his prior convictions and any benefits that he would receive in exchange for his testimony against Petitioner, and that the Assistant District Attorney violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) by failing to turn over evidence of "deals" between the Commonwealth and Farley and by knowingly permitting Farley to testify falsely regarding the facts underlying his convictions for Prostitution and Solicitation.³

A facially untimely PCRA petition attempting to raise a substantive after-discovered evidence claim must first establish jurisdiction by pleading and proving an exception to the PCRA time-bar. 42 Pa.C.S. § 9545(b)(1). Pennsylvania courts have repeatedly referred to § 9545(b)(1)(ii) as the "after-discovered evidence" exception to the one-year jurisdictional time limitation. *Com v. Bennet*, 930 A.2d 1264, 1270 (Pa. 2007) (citing *Com. v. Peterkin*, 722 A.2d

³ Petitioner also claims that trial counsel, Gerald Stein, Esq., was ineffective for failing to investigate Farley's complete criminal history and exposing this history to the jury. It is well-settled that a claim for ineffective assistance of counsel does not save an otherwise untimely petition for review on the merits. *Com. v. Gamboa-Taylor*, 753 A.2d 780, 785 (Pa. 2000). Therefore, the court will not address the merits of this claim.

638, 643 (Pa. 1998)). This shorthand reference was a misnomer, since the plain language of subsection (b)(1)(ii) does not require the petitioner to allege and prove a claim of “after-discovered evidence.”⁴ Rather, the “new facts” exception in § 9545(b)(1)(ii) requires the petitioner to establish that: (1) the facts upon which the claim was predicated were **unknown**; and (2) could not have been ascertained by the exercise of **due diligence**. Thus, the new facts exception at § 9545(b)(1)(ii) does not require any merits analysis of an underlying after-discovered evidence claim; the merits analysis is governed by Section 9543(a)(2)(vi).

Due diligence demands that the petitioner take reasonable steps to protect his own interests. *Com. v. Monaco*, 996 A.2d 1076, 1080 (Pa. Super. 2010) (citing *Com. v. Carr*, 768 A.2d 1164, 1168 (Pa. Super. 2001)). A petitioner must explain why he could not have obtained the new fact(s) earlier with the exercise of due diligence. *Id.* (citing *Com. v. Breakiron*, 781 A.2d 94, 98 (Pa. 2001) (citation omitted)). This rule is strictly enforced. *Id.* In applying the rule to Petitioner’s claim, “the standard is whether the existence of the purported agreement could have been ascertained by the exercise of due diligence[.]” 42 Pa.C.S. § 9545(b)(1)(ii), one year from when Petitioner’s sentence became final on August 27, 2008. *Hawkins*, 953 A.2d at 1255 (citation omitted).

As a prefatory matter, Petitioner’s proffered evidence fails to substantiate his claims. Farley’s open case and his probationary status were brought out by the Commonwealth on direct examination and the defense on cross-examination. N.T. 08/10/05 at pp. 136-38, 144-48, 160-64, 185-89. Defense counsel attempted to impeach Farley with evidence of his arrest and convictions for prostitution and solicitation, and the court twice sustained the Assistant District Attorney’s

⁴ In fact, when the Legislature intended a claim of “after-discovered evidence” to be recognized under the PCRA, it has done so by language closely tracking the after-discovered evidence requirements. *See* 42 Pa.C.S. § 9543(b)(vi) (requiring that the evidence be “exculpatory” and “would have changed the outcome of the trial . . .”).

objection. *Id.* at pp. 186-88. Additionally, Farley testified that he had an open drug case and was in custody at the time of Petitioner's trial, and that he was not receiving a benefit from the Commonwealth in exchange for his testimony. *Id.* at pp. 136-37, 163-64. Farley subsequently entered into a negotiated guilty plea in that case on December 21, 2005. The Notes of Testimony from the guilty plea hearing belie Petitioner's unsubstantiated claim that there was some "secret deal" between the Commonwealth and Farley. *See* Exhibit A. Farley's criminal extract and corresponding docket sheets merely restate the same facts Petitioner had known since the time of trial—that Farley had a lengthy criminal history; throughout the pendency of Petitioner's proceedings, Farley was on probation; and that by the time of Petitioner's trial, Farley was incarcerated on another open case.

Petitioner has failed to prove that the "facts" upon which he bases his claim could not have been ascertained earlier with due diligence because he was present for his trial and heard those facts as they were testified to by Farley. Further evidence of Petitioner's knowledge of Farley's open sentencings is the fact that he argued on direct appeal that Farley's identification of Petitioner as the shooter should be suppressed because Farley's "character and personal circumstances made it probable that he was motivated to give evidence in hopes of receiving consideration from the police."⁵ Since Petitioner has failed to plead and prove both factors under § 9545(b)(1)(ii), the court is without jurisdiction to address the merits of this claim.

⁵ The PCRA requires that, in order for a petitioner to be eligible for relief, his claim cannot have been "previously litigated or waived." 42 Pa.C.S. § 9543(a)(3). The PCRA mandates that an issue is waived if "the petitioner could have raised it but failed to do so . . . in a prior state post-conviction proceeding." 42 Pa.C.S. § 9544(b); *Com. v. Roane*, 142 A.3d 79, 87-88 (Pa. Super. 2016). Therefore, Petitioner's claims are also waived as he could have raised them in his first or second PCRA proceedings.

Issue VII

Petitioner argues that the evidence is insufficient to support the PCRA court's determination that his PCRA petition is untimely and/or without merit. Challenges to the sufficiency of the evidence are not cognizable under the PCRA. 42 Pa.C.S. § 9543(a)(2); *See Com. v. Price*, 876 A.2d 988, 995 (Pa. Super. 2005) (holding that sufficiency claim not cognizable under PCRA without an assertion that counsel on direct appeal was ineffective for failing to assert it); *Com. v. Bell*, 706 A.2d 855, 861 (Pa. Super. 1998) (sufficiency claims not cognizable under PCRA). The court is therefore unable to address the merits of this claim.

Issue IX

Petitioner argues that the court's Order formally dismissing his PCRA petition is inadequate in that it was narrowly drafted in a manner which fails to state whether the scope of its review included the *Brady* and *Strickland* claims filed in petitions on January 8, 2015, May 4, 2015, December 17, 2015, the Commonwealth's Motion to Dismiss filed on January 19, 2016, and Petitioner's response to the 907 notice filed on March 15, 2016. As stated *supra*, the court considered all filings in this matter.

Rule 907 provides:

When the [PCRA] petition is dismissed without a hearing, the judge promptly shall issue an order to that effect and shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the petition and of the time limits within which the appeal must be filed. The order shall be filed and served as provided in Rule 114.

Pa. R. Crim. P. 907(4).

The order dismissing the PCRA petition included a recitation of Petitioner's appellate rights and was properly served on Petitioner via certified mail. Therefore, no relief is due.

Issue X

Petitioner argues that the PCRA court erred in failing to conduct an evidentiary hearing. "There is no absolute right to an evidentiary hearing on a PCRA petition, and if the PCRA court can determine from the record that no genuine issues of material fact exist, then a hearing is not necessary." *Com. v. Springer*, 961 A.2d 1262, 1264 (Pa. Super. 2008) (citation omitted); *Com. v. Garcia*, 23 A.3d 1059, 1066 (Pa. Super. 2011) (PCRA court may decline to hold a hearing if the petitioner's claims are patently frivolous with no support in either the record or other evidence); Pa. R. Crim. P. 907(2). Since Petitioner's PCRA petition is untimely and does not fit within any exceptions to the timeliness requirement, an evidentiary hearing was not warranted.

Issue XI

Petitioner claims that the PCRA court erred to the extent it denied his request under Pa. R. Crim. P. 902(E)(1) for an Order directing discovery of the prosecutor's files from Joseph Farley's trial. Rule 902(E)(1) provides that "no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of exceptional circumstances." Pa. R. Crim. P. 902; *See Com. v. Reid*, 99 A.3d 427, 445 (Pa. 2014) (allegation that petitioner only "believes and alleges" that Commonwealth witness received considerations is insufficient to permit discovery). Since Petitioner failed to show exceptional circumstances to support his discovery request, the PCRA court did not err.

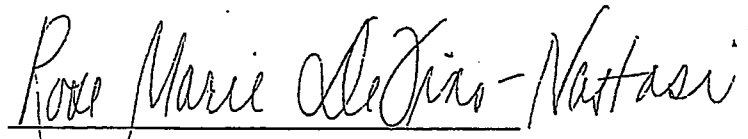
Petitioner also argues that the court erred to the extent that it denied his request under Pa. R. Crim. P. 904 to be represented by court-appointed counsel. The automatic right to counsel in collateral appeals applies only to first PCRA petitions. *Com. v. Kubis*, 808 A.2d 196, 200 (Pa.

Super. 2002) (citing Pa. R. Crim. P. 904(A)). A PCRA petitioner who satisfies the judge of the inability to afford or otherwise procure counsel is entitled to appointment of PCRA counsel under Pa. R. Crim. P. 904(D) for a second or subsequent petition if an evidentiary hearing is required under Pa. R. Crim. P. 908. *See Com. v. Jackson*, 965 A.2d 280, 283 (Pa. Super. 2009). Since no evidentiary hearing was required in this case, Petitioner was not entitled to the appointment of PCRA counsel.

CONCLUSION

Based on the foregoing, the court's denial of the PCRA petition should be affirmed.

By the Court:



Rose Marie DeFino-Nastasi, J.

Commonwealth v. Lewis Wright
CP-51-CR-0903461-2003
Opinion

Proof of Service

I hereby certify that I am this day serving the foregoing Court Order upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa.R.Crim.P. 114:


Petitioner: Lewis Wright, GK 5937
SCI Coal Township
1 Kelley Drive
Coal Township, PA 17866

Type of Service: ☐ Personal ☒ First Class Mail ☐ Other, Please Specify:

District Attorney: Philadelphia District Attorney's Office
PCRA Unit
Widener Bldg.
3 South Penn Square
Philadelphia, PA 19107

Type of Service: ☐ Personal ☐ First Class Mail ☒ Inter-Office

Date: 10/05/2016



Lauren Alfaro, Esq.

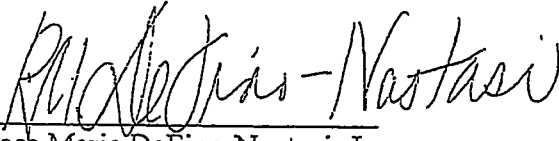
Law Clerk to the Honorable Rose Marie DeFino-Nastasi

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
CRIMINAL TRIAL DIVISION
FORMAL DISMISSAL OF PCRA PETITION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0903461-2003
v. :
LEWIS WRIGHT :
:

AND NOW, this 4th day of May, 2016, this Court having determined that
Petitioner's Post Conviction Relief Act petition is untimely and/or without merit, this
matter is dismissed. 907 Notice previously sent. *In Forma Pauperis* status to continue.
An appeal to the dismissal of Petitioner's petition must be filed in the Superior Court of
Pennsylvania within thirty (30) days from the date of the Formal Dismissal of the PCRA
petition.

BY THE COURT:


Rose Marie DeFino-Nastasi, J.

Received
MAY 4 2016
Office of Judicial Records
Appeals/Post Trial

COMMONWEALTH OF PENNSYLVANIA, : No. 69 EAL 2018

Petition for Allowance of Appeal from the Order of the Superior Court

V.

Petitioner

PER CURIAM

AND NOW, this 10th day of July, 2018, the Petition for Allowance of Appeal is **DENIED**.

A True Copy
As Of 07/10/2018

Attest:
John W. Person Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

Appendix C

**Additional material
from this filing is
available in the
Clerk's Office.**