

Appendix "A"

Opinion 7/6/18

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA | CP-23-CR-6376-2013

V.

Jermone Small

A. Sheldon Kovach, Esquire, for the Commonwealth
Jerome Small, *pro se*

O P I N I O N

Capuzzi, J.

Filed: 7/6/18

This is an appeal from the dismissal of Appellant's fourth Post- Conviction Relief Act (herein PCRA) Petition. For the forthcoming reasons, the dismissal of the Petition should be affirmed on appeal.

Procedural History

On December 5, 2005, Petitioner was sentenced to life without parole for second-degree murder. Additionally, consecutive sentences of 120 to 240 months incarceration for aggravated assault, 16 to 60 months incarceration for firearms not to be carried without a license and 140 to 280 months for criminal conspiracy were imposed.

Petitioner filed a direct appeal challenging the weight of the evidence. On November 16, 2006, the Superior Court affirmed the judgment of sentence. On March 13, 2007, an order was entered in the Pa. Supreme Court denying Petitioner's petition for allowance of appeal. On March 26, 2007, Petitioner filed a timely PCRA Petition. Counsel was appointed and filed a "no merit letter" and application to withdraw. The PCRA court

issued a notice of intent to dismiss and ultimately the PCRA petition was dismissed. Petitioner appealed and the dismissal of the petition as affirmed by the Superior Court on November 10, 2008.

Petitioner filed a second PCRA petition on June 29, 2009. The PCRA court ultimately dismissed the petition for lack of jurisdiction as it was untimely. The Superior Court affirmed the dismissal and the Pa. Supreme Court denied the petition for allowance of appeal on April 4, 2011.¹

On March 24, 2018, Petitioner filed this Petition which this Court was assigned to address. This Court issued a Notice of Intent to Dismiss on May 5, 2018; as the Petition was untimely and Petitioner had failed to plead any prove any exception to the timeliness requirement. A final Order dismissing the Petition was issued on May 23, 2018. Petitioner filed an appeal on June 20, 2018.

Discussion

A PCRA petition must be filed within one year of the date the underlying judgment becomes final. A judgment becomes final for purposes of a PCRA at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and Pennsylvania, or at the expiration of time for seeking review. *42 Pa.C.S. §9545(b)(3), Commonwealth v. Hernandez*, 79 A.3d 649 (Pa. Super. 2013).

Second or subsequent petitions also must be filed within the one year judgment of sentence becomes final. *Commonwealth v. Henkle*, 90 A.3d 16 (Pa. Super. 2014).

¹ As the appeal was pending, Petitioner filed another PCRA petition on April 1, 2010, which was dismissed by the PCRA court.

An exception to the timeliness requirement arises if the petitioner alleges and proves one of the following statutory exceptions:

- (1) failure to raise the claim was result of interference by government officials with the presentation of the claim in violation of the constitution or laws of the Commonwealth or the constitution or laws of the United States;
- (2) facts upon which the claim is predicated were unknown to petitioner and could not have been ascertained by exercise of due diligence; or
- (3) right(s) asserted is a constitutional right that was recognized by the Supreme Court or the Supreme Court of Pennsylvania after the time period provided and has been held by that court to apply retroactively. *42 Pa.C.S. §9545(b)(1)*.

When using one of the exceptions, the petition must be filed within sixty days of the date the claim could have been presented. *42 Pa.C.S. §9545(b)*. The Superior Court has provided, with regard to an after-recognized constitutional right, the sixty day period begins to run upon the date of the underlying judicial decision. *Commonwealth v. Cintora*, 69 A.3d 759 (Pa. Super. 2013).

"Though not technically waivable, a legality of sentence claim may nevertheless be lost should it be raised for the first time in an untimely PCRA petition for which no time-bar exception applies, thus depriving the court of jurisdiction over the claim. *Commonwealth v. Seskey*, 86 A.3d 237 (Pa. Super. 2014) citing *Commonwealth v. Fahy*, 737 A.2d 214, 223, (Pa. 1999) ("although legality of sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA's time limits or one of the exceptions thereto.")

If a petition is determined to be untimely, and no exception has been pled and proven, the petition must be dismissed without a hearing because Pennsylvania courts are without jurisdiction to consider the merits of the petition. *Seskey*, 86 A.3d at 242.

First, Petitioner alleges that he is entitled to a new sentence under Alleyne; however, Alleyne is not applicable on collateral review. Second, Petitioner alleges that the holding in *Montgomery* entitles him to a new sentence, which is inaccurate as Petitioner was not a juvenile, rather he was 28 at the time he committed the murder that carried a life without parole sentence.

Conclusion

For the aforementioned reasons, the dismissal of the Petition should be affirmed on appeal.

BY THE COURT:


John P. Capuzzi, Sr.

Appendix "B"

Memorandum

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF
PENNSYLVANIA,

No. 207 MM 2017

Respondent

v.

JEROME SMALL,

Petitioner

ORDER

PER CURIAM

AND NOW, this 20th day of February, 2018, the Application for Leave to File
Original Process is GRANTED, and the Petition for Writ of Habeas Corpus is DENIED.

A True Copy Elizabeth E. Zisk
As Of 2/20/2018

Attest: *Elizabeth E. Zisk*
Chief Clerk
Supreme Court of Pennsylvania

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

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA

Appellee

v.

JEROME SMALL,

Appellant

No. 1977 EDA 2018

Appeal from the PCRA Order Entered May 23, 2018
in the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0006376-2003

BEFORE: OTT, J., NICHOLS, J. and STRASSBURGER, J.*

MEMORANDUM BY STRASSBURGER, J.:

FILED DECEMBER 28, 2018

Jerome Small (Appellant) appeals from the May 23, 2018 order dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm.

In November 2003, Appellant and his co-defendant, Michelle Henderson, were arrested and charged with various offenses stemming from the murder of Nathaniel Rogers. Rogers was shot and killed after he "returned to his home ... and interrupted two individuals who were apparently burglarizing his home."

Commonwealth v. Small, 915 A.2d 150 (Pa. Super. 2006) (unpublished memorandum) (brackets in original omitted).

Appellant proceeded to trial *pro se* and court-appointed counsel assumed the role of stand-by counsel. Appellant's first trial commenced in July 2005 and ended with a mistrial on the majority of charges. A second trial

*Retired Senior Judge assigned to the Superior Court.

began on October 3, 2005. Prior to Appellant's trial, Henderson pleaded guilty to third-degree murder, criminal conspiracy to commit burglary and possessing an instrument of a crime, and "testified during the Commonwealth's case-in-chief at [Appellant's] trial." Trial Court Opinion, 5/10/2006, at 2. Pertinent to this appeal, at trial, Appellant, *inter alia*, cross-examined

Henderson regarding the plea agreement she entered into with the Commonwealth. In fact, [Appellant] read portions of the agreement into the record and it was marked as a defense exhibit. The agreement provided that the Commonwealth would recommend Henderson's sentencing be postponed until after [Appellant's] trial and that at the time of sentencing, the Commonwealth would inform the court as to her cooperation and role in the investigation but that no further recommendations would be made. Obviously [Appellant] was in possession of the written plea agreement before trial as he used it to cross-examine Henderson in an effort to undermine her credibility.

Trial Court Opinion, 11/4/2009, at 5 (citations omitted).

At the close of testimony, and after deliberation, Appellant was convicted of, *inter alia*, second-degree murder, aggravated assault, and criminal conspiracy.¹ "On December 5, 2005, [Appellant] was sentenced to life without parole for second-degree murder. Additionally, consecutive sentences of 120 to 240 months incarceration for aggravated assault, 16 to 60 months incarceration for firearms not to be carried without a license and

¹ "Henderson was sentenced on October 18, 2005 for third[-]degree murder, criminal conspiracy to commit burglary and possessing and instrument of [a] crime. An aggregate sentence of [84] to 164 months['] incarceration was imposed and the remaining charges were *nolle prosessed*." ***Id.***

140 to 280 months for criminal conspiracy were imposed." PCRA Court Opinion, 7/12/2018, at 1.

On November 16, 2006, this Court affirmed Appellant's judgment of sentence, ***Small***, *supra*, and the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Small***, 919 A.2d 956 (Pa. 2007). Since then, Appellant has filed several PCRA petitions, all of which have resulted in no relief.

Most recently, Appellant filed *pro se* a fifth PCRA petition on March 24, 2018. Therein, Appellant alleged a ***Brady***² violation, contending "[t]he Commonwealth committed [] misconduct when they failed to turn over portions of [Henderson's] plea agreement that the jury should of [sic] heard about to learn of the witness['] motives and biasness [sic]." *Pro Se PCRA Petition*, 3/24/2018, at 4. Specifically, Appellant avers the Commonwealth withheld a pertinent part of the plea deal, that the "more serious charges" would be *nolle prossed* in exchange for Henderson pleading guilty. Appellant's Brief at 10.

On May 5, 2018, the PCRA court filed a notice of intent to dismiss the petition without a hearing pursuant to Pa.R.Crim.P. 907. A final order dismissing Appellant's petition was filed on May 23, 2018.

² ***Brady v. Maryland***, 373 U.S. 83 (1963).

Appellant timely filed a notice of appeal.³ Appellant presents one question to this Court on appeal: "Whether Appellant is entitled to a new trial because the prosecution withheld" the aforementioned information concerning the particulars of Henderson's guilty plea. Appellant's Brief at 4, 10.

Before we can examine the substantive claim Appellant raises on appeal, we must determine whether the filing of his PCRA petition was timely. **See, e.g., Commonwealth v. Lewis**, 63 A.3d 1274, 1280-81 (Pa. Super. 2013) (quoting **Commonwealth v. Chester**, 895 A.2d 520, 522 (Pa. 2006)) ("[I]f a PCRA petition is untimely, neither this Court nor the [PCRA] court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims.").

Generally, 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

³ The PCRA court did not order Appellant to file a statement of errors complained of on appeal; it did file an opinion pursuant to Pa.R.A.P. 1925(a). However, in its opinion, the court does not address the issue before us, but instead addresses a sentencing issue Appellant presented in his fourth PCRA petition. *Pro Se PCRA Petition*, 3/24/2016; *PCRA Court Opinion*, 7/12/2018. Irrespective of this apparent confusion on the part of the PCRA court, in light of our disposition and because this Court may affirm the PCRA court's order on any basis, we need not remand this case for a corrected 1925(a) opinion. **See Commonwealth v. Clouser**, 998 A.2d 656, 661, n.3 (Pa. Super. 2010) ("It is well-settled that this Court may affirm on any basis.").

raised within 60 days of the date on which it became available. 42 Pa.C.S. § 9545(b).

It is clear that Appellant's 2018 petition is facially untimely: his judgment of sentence became final in 2007. However, Appellant alleges his claim is reviewable because the following timeliness exception applies: "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. § 9545(b)(1)(iii). In support of this averment, Appellant alleges that his petition is based upon a change in the law, referencing **Commonwealth v. Burton**, 158 A.3d 618 (Pa. 2017). Appellant's Brief at 9.

At the outset, we note that the issue Appellant presents for our review was raised previously in a prior appeal, a fact Appellant concedes. **See Commonwealth v. Small**, 4 A.3d 670 (Pa. Super. 2010) (unpublished memorandum); Appellant's Brief at 9. In this prior appeal, this Court affirmed the PCRA court's order dismissing Appellant's petition based on the PCRA court's opinion. In its opinion, the PCRA court found, *inter alia*, that Appellant's June 29, 2009 petition was untimely filed and did not meet an exception to the timeliness requirement because the circumstances attendant to Henderson's guilty plea "became a matter of public record on October 18, 2005." Trial Court Opinion, 11/4/2009, at 7.

It is well-settled that previously litigated claims are not cognizable under the PCRA. **Commonwealth v. Spotz**, 18 A.3d 244, 260 (Pa. 2011). However, Appellant avers that our Supreme Court's decision in **Burton**, which held "that the presumption that information which is of public record cannot be deemed "unknown" for purposes of subsection 9545(b)(1)(ii) *does not apply to pro se* prisoner petitioners[,]" presents a new constitutional right which allows this Court to review this claim once again. Appellant's Brief at 8-10; **Burton**, 158 A.3d at 638 (emphasis in original).

Contrary to this position, this Court has held that our Supreme Court's decision in **Burton** did not establish a new constitutional right. **Commonwealth v. Kretchmar**, 189 A.3d 459, 462-64 (Pa. Super. 2018) (holding that **Burton** established neither a new constitutional right nor a watershed rule of criminal procedure). Thus, Appellant cannot use **Burton** "as a jurisdictional hook by which to relitigate his previous" PCRA petition.⁴ ***Id.*** at 466.

⁴ Additionally, any attempt to invoke the newly-discovered facts exception pursuant to Section 9545(b)(1)(ii), is likewise unavailing. **See Kretchmar**, 189 A.3d at 467 ("Appellant's current PCRA petition presents no new documents, no new evidence, and, most critically, no new facts. Accordingly, his claims fail[] to meet the requirements of Section 9545(b)(1)(ii) on its face. The only circumstance that has changed since Appellant's previous PCRA petition is our Supreme Court's issuance of the **Burton** decision. However, judicial decisions do not constitute new 'facts' for purposes of the newly-discovered evidence exception set forth in Section 9545(b)(1)(ii).").

In light of the foregoing, Appellant is not entitled to relief. Accordingly, the PCRA court correctly dismissed Appellant's petition.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/28/18

Appendix "H"

Supreme Court
order

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 58 MAL 2019

Respondent

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

v.

JEROME SMALL,

Petitioner

ORDER

PER CURIAM

AND NOW, this 18th day of June, 2019, the Petition for Allowance of Appeal is
DENIED.

A True Copy Elizabeth E. Zisk
As Of 06/18/2019

Attest:
Elizabeth E. Zisk
Chief Clerk
Supreme Court of Pennsylvania