

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

COLIN D. BORTZ

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 2016 WDA 2012

Appeal from the PCRA Order November 8, 2012  
In the Court of Common Pleas of Westmoreland County  
Criminal Division at No(s): CP-65-CR-0000152-1994

BEFORE: GANTMAN, J., OTT, J., and PLATT, J.\*

MEMORANDUM BY OTT, J.:

**FILED DECEMBER 9, 2013**

Colin D. Bortz appeals, *pro se*, from the order entered in the Court of Common Pleas of Westmoreland County denying him relief, without a hearing, on his petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S. § 9541 *et seq.* The PCRA Court denied Bortz relief on the basis that his petition was untimely and he had failed to demonstrate any of the statutory timeliness exceptions were applicable.

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\* Retired Senior Judge assigned to the Superior Court.

Following a thorough review of Bortz' brief,<sup>1</sup> the certified record, and relevant law, we affirm.<sup>2</sup>

A lengthy jury trial was held in June 1995, and the jury convicted Bortz of two counts of first-degree murder, one count of second-degree murder and one count of arson.<sup>3</sup> An aggregate sentence of three consecutive life terms was imposed. He filed a direct appeal, and a panel of our Court affirmed the judgment of sentence in a memorandum decision, dated February 27, 1997. Our Supreme Court denied allowance of appeal on October 14, 1997. ***See Commonwealth v. Bortz***, 694 A.2d 1116 (Pa. Super. 1997) (unpublished memorandum), *appeal denied*, 701 A.2d 574

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<sup>1</sup> The Commonwealth chose not to file a brief. The Commonwealth did file a motion to quash the appeal, claiming Bortz's brief was materially deficient and untimely. Because the appeal was timely and we are able to discern Bortz's issues and argument in support thereof, we deny that motion.

<sup>2</sup> Our standard of review of the denial of a PCRA petition is limited to examining whether the court's rulings are supported by the evidence of record and free of legal error. This Court treats the findings of the PCRA court with deference if the record supports those findings. It is an appellant's burden to persuade this Court that the PCRA court erred and that relief is due.

***Commonwealth v. Feliciano***, 69 A.3d 1270, 1274-75 (Pa. Super. 2013)

<sup>3</sup> 18 Pa.C.S. §§ 2501, 2502(a)(b), and 3301(a), respectively. The evidence showed Bortz set a fire in the apartment building of one of his girlfriends. The fire killed one of Bortz's girlfriends, her daughter, and another occupant of the apartment building.

(Pa. 1997). Bortz's sentence became final 90 days later when the deadline to file an appeal to the United States Supreme Court expired. **See *Commonwealth v. Frey***, 41 A.3d 605, 610 (Pa. Super. 2012).

On June 12, 2012, more than fourteen years after his sentence became final, Bortz filed the present PCRA petition. Following proper notice pursuant to Pa.R.Crim.P. 907, the PCRA court denied Bortz's petition for the previously stated reasons. Bortz filed a timely statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b).<sup>4</sup>

Because the timeliness issue is jurisdictional in nature, we will address that issue first.

The PCRA time limitations, and exceptions thereto, are set forth in 42 Pa.C.S. 9545(b)(1)(i)-(iii). That section states:

**(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

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<sup>4</sup> The PCRA court's 1925(a) statement refers to the October 24, 2012 order dismissing the petition. That order simply provided two statements that (1) Bortz did not meet the requirements of ***Commonwealth v. Lawson***, 549 A.2d 107 (Pa. 1988) (second or subsequent PCRA petition must provide strong *prima facie* showing of a miscarriage of justice), and (2) the petition was untimely. Although the PCRA court should have provided its reasoning in support of those determinations, we are, nonetheless, able to review the matter.

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.

To invoke one of these exceptions, the petitioner must plead it and satisfy the burden of proof. ***Commonwealth v. Beasley***, 559 Pa. 604, 741 A.2d 1258, 1261-62 (1999). Additionally, any exception must be raised within sixty days of the date that the claim could have been presented. 42 Pa.C.S. § 9545(b)(2). Our Supreme Court “has repeatedly stated that the PCRA timeliness requirements are jurisdictional in nature and, accordingly, a PCRA court cannot hear untimely PCRA petitions.” ***Commonwealth v. Ligon***, 601 Pa. 103, 971 A.2d 1125, 1164 (2009) (citing ***Commonwealth v. Reinzi***, 573 Pa. 503, 827 A.2d 369, 371 (2003)).

***Commonwealth v. Feliciano***, 69 A.3d at 1275.

Because Bortz’s petition was filed more than fourteen years after his sentence became final, the petition is facially untimely. However, Bortz has claimed the after-discovered facts exception is applicable to his petition. **See** 42 Pa.C.S. §9545(b)(ii).

In order to qualify as after-discovered evidence, Bortz must demonstrate “the facts upon which the claim is predicated were unknown to petitioner and could not have been ascertained by due diligence.” 42 Pa.C.S.

§ 9545 (b)(1)(ii).” ***Commonwealth v. Bennett***, 930 A.2d 1264, 1270 (Pa. 2007).

Here, Bortz argues that he has, since his conviction, attempted to obtain certain court documents that Assistant District Attorney Larry Koenig instructed various court employees not to supply to him. Bortz claims he filed the present petition invoking the after-discovered evidence exception within 60 days of when he received documents under the Right to Know Law, 65 P.S. § 67.101, *et seq.* Even accepting these two letters at face value, and that Bortz has presented his claim within 60 days of when the claim could have been presented, 42 Pa.C.S. § 9545(b)(2), Bortz has not satisfied the after-discovered evidence exception.

Bortz has attached a copy of the affidavit of probable cause from the criminal complaint to his PCRA petition. He claims that evidence presented at trial conflicted with information contained in the affidavit. While Bortz indicates he received the document via a “Right to Know” request, Bortz has failed to indicate why he could not obtain this public record prior to his trial. In his appellant’s brief, Bortz claims he had been seeking a copy of the complaint since 1994, but had never been supplied a copy. However, Bortz points to nothing in the certified record to support this bald allegation and our review of the certified record discloses no instance in which the issue was raised before the trial court. We note that the complaint and affidavit of probable cause are part of the court file, which is a public record. **See**

***Commonwealth v. Taylor***, 933 A.2d 1035, 1042 (Pa. Super. 2007) (finding after-discovered evidence exception did not apply where “appellant’s warrant was a matter of public record”). Therefore, no allegation that is based upon information contained in the affidavit of probable cause can be considered to satisfy the after-discovered evidence exception.

Finally, Bortz claims that he is entitled to discharge because the information was signed by Assistant District Attorney Koenig and not District Attorney John J. Driscoll. Pursuant to 42 Pa.C.S. § 8931, the district attorney or a designee, is required to sign all bills of information. Bortz contends that the district attorney did not sign the information and Assistant District Attorney Koenig was not properly designated to sign in his stead; therefore, his prosecution must be declared void because the trial court lacked jurisdiction. Bortz claims he could not prove this allegation regarding Assistant District Koenig until the Commonwealth responded to his Right to Know letter, by providing a copy of Assistant District Attorney Konig’s designation.

Bortz argues he requested production of Koenig’s designation many times prior to his filing the Right to Know letter in March 2012. However, the **fact** that the assistant district attorney who signed the information was **known** to Bortz and his counsel prior to trial. Bortz has not averred that the designation he recently obtained through the Right to Know Law was not available to him or his counsel prior to trial. Bortz now simply provides

documentation of a matter that he and his counsel could have known prior to trial. Accordingly, the after-discovered evidence exception does not apply.<sup>5</sup>

Having carefully reviewed the arguments of Bortz, and having found that none of the PCRA's statutory exceptions render his PCRA petition timely, we affirm the decision of the PCRA court that dismissed the petition without a hearing.

Because the PCRA court's decision is supported by the record and is free of legal error, we affirm.

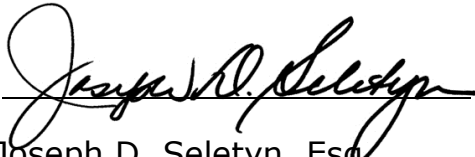
Order affirmed. Commonwealth's motion to quash is denied.

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<sup>5</sup> Accepting for the sake of argument that Bortz exercised due diligence in attempting to obtain the document and could not have obtained it prior to 2012, he would not prevail on the claim. Contrary to his allegation that Assistant District Attorney Koenig was not properly designated to sign a bill of information, the document clearly states that he is so designated. "Lawrence W. Koenig as Assistant District Attorney shall have full authority to act in my stead and to perform all duties of assistant District Attorney under 42 Pa.C.S. § 8931." Appointment and Designation, Bortz Exhibit 9. This designation was executed by District Attorney John J. Driscoll on July 8, 1992 and it fully authorized Koeng to act in the district attorney's stead. Accordingly, Assistant District Attorney Koenig was authorized to sign the information, and the trial court had jurisdiction to try Bortz.

J-S40027-13

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: 12/9/2013