

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	
	:	<b>CR-798-2013</b>
<b>v.</b>	:	
	:	
<b>KENNETH J. JOHNSON,</b>	:	<b>PCRA</b>
<b>Defendant</b>	:	

**OPINION AND ORDER**

On March 21, 2017, Kenneth Johnson (Defendant) filed a Brief in Support of PCRA Nunc Pro Tunc (“Brief”). In his Brief, Defendant makes two assertions: first, that his Post-Conviction Relief Act (PCRA) rights should be reinstated *nunc pro tunc*. Second, the Defendant asserts the grounds upon which his PCRA Petition would be alleged, should his right to petition be reinstated.

In the Brief, Defendant contends that he is entitled to reinstatement of his right to file a PCRA Petition *nunc pro tunc* because the actions of his PCRA counsel denied the Defendant his right to effectively advocate for his collateral relief via the PCRA. Defendant further contends that PCRA counsel was ineffective for failing to investigate and interview an eyewitness, the testimony of whom the Defendant claims would have substantiated his claim of innocence.

**Background & Procedural History**

On June 16, 2015, Defendant was charged with Rape of an Unconscious Person<sup>1</sup>, Sexual Assault<sup>2</sup>, and Indecent Assault<sup>3</sup>. Defendant was represented at trial by Attorney Jeana Ann Longo. On January 28, 2014 the Defendant was found guilty

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<sup>1</sup> 18 Pa.C.S. § 3121(a)(3)

<sup>2</sup> 18 Pa.C.S. § 3124.1

<sup>3</sup> 18 Pa.C.S. § 3126

on all counts by a jury trial. On June 19, 2014, Defendant was sentenced to 81 to 168 months' incarceration for the Rape of an Unconscious Person charge. Order of Sentence, 6/19/2014, at 1. The Court found that the Sexual Assault and Indecent Assault convictions merged for sentencing purposes. *Id.* The Defendant was further sentenced to a 3-year term of probation, to follow his incarceration consecutively. *Id.*

On July 14, 2014, Attorney Longo filed a Notice of Appeal to the Pennsylvania Superior Court on behalf of the Defendant. The Superior Court affirmed the judgement on May 19, 2015. On April 25, 2014, while the Defendant was awaiting the Superior Court's holding, the Defendant retained Attorney Michael C. Morrone for the purpose of eventually preparing a Post-Conviction Relief Act Petition for the Defendant.

The record indicates that on several occasions between the date that Attorney Morrone was retained and July 27, 2016, Attorney Morrone and the Defendant corresponded on numerous occasions via mail. Invoice for Legal Services ("Invoice"), 7/27/2016, at 1. One correspondence from Attorney Morrone to the Defendant, dated January 6, 2015, indicated to the Defendant that as soon as he received a decision from the Superior Court, to "let [Attorney Morrone] know and we can get started on your PCRA." Letter 1 to Defendant ("Letter 1"), 1/6/2015, at 1. The record further indicates additional correspondence occurred between Attorney Morrone and the Defendant's girlfriend, Ashley Harman. Invoice at 1. The Defendant alleges that this correspondence included reassurances by Attorney Morrone that a PCRA Petition would be—and eventually had been—filed on the Defendant's behalf. Affidavit of Kenneth J. Johnson ("Affidavit"), 9/8/2016, at 2.

On July 27, 2016, thirty-nine days after the close of the statutory period during which a PCRA Petition may be filed<sup>4</sup>, Attorney Morrone contacted the Defendant via letter, advising him that his “firm belief” was that “there is nothing new to support the filing of a PCRA,” and that “[t]herefore, I . . . will no longer be representing you regarding a PCRA to the conviction.” Letter 2 to Defendant (“Letter 2”), 7/27/2016, at 1. Attached to the aforementioned letter was the Invoice indicating the dates and durations of numerous contacts that Attorney Morrone had with the Defendant and Ms. Harman between April of 2014 and July of 2016. Invoice at 1.

On December 4, 2016, the Defendant filed his Brief in Support of PCRA Nunc Pro Tunc (“Brief”). This Court filed an Order on December 9, 2016, appointing Attorney Trisha Hoover Jasper as PCRA counsel and ordering Attorney Jasper to file an amended PCRA Petition or a Turner/Finley letter by March 9, 2017. After a conflict was recognized, Attorney Julian Allatt was assigned as PCRA counsel.

## **Discussion**

As stated by the Pennsylvania Superior Court in Commonwealth v. Johnson, 803 A.2d 1291, 1293 (Pa. Super. 2002), “any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition.” Defendant was sentenced on June 19, 2014. Defendant filed a Notice of Appeal to the Pennsylvania Superior Court on July 14, 2014, and the Superior Court affirmed on May 19, 2015. Because the Defendant had a period of thirty (30) days to file a Notice of Appeal with the Pennsylvania Superior Court<sup>5</sup>, his judgment of sentence became final on June 18, 2016. Defendant’s Brief filed December 4, 2016, was therefore filed after the

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<sup>4</sup> 42 Pa.C.S. § 9545(b)

<sup>5</sup> Pa. R.A.P. 903

judgement of sentence became final. As such, and although it was fashioned as a “Brief,” the Defendant’s December 4, 2016 filing effectively functions as the Defendant’s first PCRA Petition, and will hereinafter be referred to as such.

**1) Reinstatement of PCRA Right Nunc Pro Tunc.**

**a. Timeliness of Amended PCRA Petition.**

Under the Post Conviction Relief Act, a defendant has one (1) year after his judgment of sentence becomes final to request Post Conviction Relief unless circumstances exist that prevented the defendant from filing within one year, in which case he must file within sixty (60) days of when his claim could have been presented. 42 Pa.C.S. §§ 9545(b)(1)(i)-(iii). Following the analysis *supra*, the Defendant’s judgment of sentence became final on June 18, 2016. Therefore, the PCRA Petition filed December 4, 2016, is untimely<sup>6</sup>.

**b. Authority to Allow an Untimely-Filed PCRA Petition.**

The PCRA’s statutory language makes clear that although the appropriate time for filing a PCRA is within one (1) year after the judgement of sentence becomes final, there are three explicit exceptions to this rule:

- (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

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<sup>6</sup> 42 Pa.C.S. § 9545(b)(3).

(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. §§ 9545(b)(1)(i)-(iii). The Defendant alleges none of the aforementioned exceptions in his PCRA Petition, instead relying on the doctrine of equitable tolling. PCRA Petition, 12/4/2016, at 2-4.

Defendant's PCRA Petition bolsters his argument in favor of equity by citing Supreme Court of Pennsylvania cases where equity was applied to direct appeals. *Id.* However, as the Pennsylvania Superior Court and the Supreme Court of Pennsylvania have consistently held, "[t]he PCRA's time limitations 'are mandatory and interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits.' The period for filing a PCRA petition 'is not subject to the doctrine of equitable tolling.'" Commonwealth v. Rizvi, 2017 Pa. Super. LEXIS 451 \*5 (*citing* Commonwealth v. Fahy, 737 A.2d 214, 222 (Pa. 1999)). Therefore, this Court does not have the jurisdiction to consider the merits of the Defendant's untimely PCRA Petition.

Alternatively, it could be argued that the Defendant's PCRA Petition meant to allege exception 42 Pa.C.S. § 9545(b)(1)(ii): that the fact that Attorney Morrone had not filed a PCRA Petition on his behalf between the date Attorney Morrone was retained and July 27, 2016 was not known by the Defendant and could not have been ascertained by the exercise of due diligence. However, this exception to the PCRA filing period refers to the facts on which the underlying PCRA claim is predicated—not the facts on which the reinstatement of filing rights *nunc pro tunc* is predicated. In the

present case, the fact on which the underlying PCRA claim is predicated is that his trial counsel, had not reached out to a key eyewitness, Mr. Antonio Connelly.

However, the Defendant himself concedes in his affidavit attached to his PCRA Petition that “[Defendant had] temporarily lost contact with Mr. Connelly around the time of [Defendant’s] trial,” and that “[Attorney Longo] fail[ed] to properly prepare for trial due to the fact that she did not consult with [the Defendant] . . . therefore failing to investigate and interview an eyewitness . . . .” Affidavit at 1. If the Defendant was not aware of the whereabouts of his key eyewitness, and did not discuss this witness with Attorney Longo, the Defendant must have known that Attorney Longo did not meet with the witness, and therefore 42 Pa.C.S. § 9545(b)(1)(ii) may not apply to justify an untimely PCRA filing.

Because the Defendant’s allowable untimeliness argument fails whether interpreted as an equitable tolling argument or a “facts unknown even by the exercise of due diligence” argument, the Defendant’s PCRA Petition must fail on these grounds.

## **2) *Eligibility for Relief Under the PCRA.***

Incarcerated defendants, or those on probation or parole for a crime, are eligible for relief under the PCRA when they have pled and proved by a preponderance of the evidence the following four components:

- 1) Defendant has been convicted of a crime under the laws of PA and is at the time relief is granted currently serving a sentence of imprisonment, probation or parole for the crime.
- 2) Conviction or sentence resulted from one or more of the following
  - i. Violation of the US or PA Constitution that so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

- ii. Ineffective assistance of counsel – same undermining the truth determining process standard as above “undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place”.
  - iii. Plea of guilty induced where inducement caused Defendant to plead guilty when he is innocent.
  - iv. Improper obstruction by government officials of petitioner’s appeal right where a meritorious appealable issue was properly preserved in the Trial Court.
  - v. The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial had it been introduced.
  - vi. Imposition of sentence greater than the lawful maximum.
  - vii. Proceeding in a tribunal without jurisdiction.
- 3) Allegation of the error has not been previously litigated or waived; and
- 4) Failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel<sup>7</sup>.

Here, the Defendant avers, pursuant to 42 Pa.C.S. § 9543(2)(ii) *supra*, that his trial counsel, Attorney Longo, provided assistance of counsel which was so ineffective that the truth-determining process was undermined such that no reliable adjudication of guilt could have taken place. Defendant contends that this ineffectiveness was the result of Attorney Longo’s failure to investigate and interview an eyewitness, the testimony of whom the Defendant claims would have substantiated his claim of innocence.

**3) Ineffective Assistance of Counsel for Failure to Call a Witness.**

The Court’s standard of review when evaluating a claim of ineffective assistance of counsel is unambiguous and has remained relatively unaltered since its promulgation in Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987), in which the

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<sup>7</sup> 42 Pa.C.S. § 9543.

Supreme Court of Pennsylvania adopted the standard of review developed by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The court in Commonwealth v. Sneed, 899 A.2d 1067, 1076 (Pa. 2006) held, in relevant part:

[T]he constitutional ineffectiveness standard requires the defendant to rebut the presumption of professional competence by demonstrating that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different.

Id. (citations omitted). If any of the three prongs necessary to succeed on a claim of ineffective assistance of counsel is not satisfied, the claim must be rejected as a whole. Id. (citing Pierce, 786 A.2d at 221-23). Further, trial counsel is presumed effective, and the burden of proving otherwise is on the defendant. Commonwealth v. Rollins, 738 A.2d 435 (Pa. 1999).

The Supreme Court of Pennsylvania has held that there are five requisite elements that must be proven by the Defendant to show ineffective assistance of counsel. Commonwealth v. Washington, 927 A.2d 586, 599 (Pa. 2007). The Defendant must show that: “(1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.” Id. (citing Commonwealth v. Fletcher, 750 A.2d 261 (Pa. 2000)).

***a. Arguable Merit of the Claim.***

Of the five elements required to show that counsel was ineffective for failing to call a witness, only one is sufficiently proven and corroborated in the record: that (1)



the witness existed. The billing invoice sent from Morrone to the Defendant indicates that the Defendant was charged for “Phone calls to find Antonio Connelly”; “Phone calls to Antonio Connelly (left message)”; and, “Meet with Antonio Connelly.” Invoice at 1.

Regarding the availability of the witness to testify, the Defendant’s own admissions in his Affidavit indicate that Mr. Connelly was unavailable to testify at his trial. ‘Available’ is defined as “present or ready for immediate use.” “Available.” *Merriam-Webster Online Dictionary*. 2017. <http://www.merriam-webster.com> (13 July 2017). In conceding that Mr. Connelly was missing at the time of the trial, Affidavit at 1, Defendant conceded that Mr. Connelly was neither present nor ready for immediate use.

The record does not speak directly to whether trial counsel knew or constructively knew of the existence of the witness, or whether the witness was willing to testify for the defense. The record does reflect that the witness was willing to speak to PCRA counsel, Invoice at 1, which lends to the conclusion that the witness may have been willing to testify at trial for the Defendant. However, for this Court to reach such a conclusion based on the facts alleged by the Defendant would be entirely too speculative. Because the Defendant has not satisfied all five requisite elements to establish the merit of his claim, the claim must fail on this prong.

***b. Prejudice of the Defendant’s Right to a Fair Trial.***

Regarding the fifth requisite element of a claim of ineffective assistance of counsel as it applies to counsel’s failure to call a witness: the Defendant has in no way proven the way in which the failure of his trial counsel to call his key eyewitness

denied him the right to a fair trial. The Supreme Court of Pennsylvania has held that counsel will not be deemed ineffective if the Defendant cannot “show how the uncalled witnesses’ testimony would have been beneficial under the circumstances of the case.” Commonwealth v. Gibson, 951 A.2d 1110, 1134 (Pa. 2008).

In support of his assertion that the uncalled witness would have been beneficial to his case, the Defendant alleges only that “the testimony of this witness would’ve substantiated [his] claim of innocence.” Affidavit at 1. The Defendant’s baseline assertion that testimony from the eyewitness would have substantiated his claim is wholly insufficient to prove that the testimony would, in fact, have affected the verdict. The Defendant carries the burden of demonstrating the requisite elements of an ineffective assistance of counsel claim, Washington, 927 A.2d at 599, and the Defendant in the present case has not sufficiently proven that his key eyewitness’s testimony would have been beneficial to his case. Therefore, the Defendant’s claim of ineffective assistance of counsel must fail on this prong.

***c. Reasonable Basis Designed to Effectuate Client’s Interests.***

Regarding the ‘reasonable basis’ prong, the Supreme Court of Pennsylvania has held that the failure to call a witness “is not *per se* ineffective assistance of counsel, for such a decision implicates matters of trial strategy, and that it is the burden of the Defendant to show that no reasonable basis existed for not calling the witness. Washington, 927 A.2d at 599.

Just as the Defendant carries the burden in displaying that his right to a fair trial was prejudiced, the Defendant also carries the burden of showing that his counsel at trial had no reasonable basis in not calling a particular witness to the stand. While

there is nothing in the record indicating that Defendant's trial counsel did have a reasonable basis for not calling the witness, it is not the burden of trial counsel to show that a reasonable basis existed; rather, it is the burden of the Defendant to prove that no reasonable basis existed. Because the Defendant has failed to meet this burden, the Defendant's claim of ineffective assistance of counsel must also fail on this prong.

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of July, 2017, it is hereby ORDERED and DIRECTED as follows:

Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.

BY THE COURT,

Nancy L. Butts, P.J.

cc: DA  
Julian Allatt, Esq.  
Kenneth J. Johnson [#LR7461]  
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