

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**CHARLES SHAFFER,
Defendant**

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CP-41-CR-1686-2012

PCRA SECOND

OPINION AND ORDER

On March 21, 2017, Charles Shaffer (Defendant) filed a petition for relief under the Post-Conviction Relief Act (PCRA).¹ Counsel was not appointed as this is Defendant's second PCRA petition.

In the petition, Defendant contends that he is entitled to relief because his PCRA Counsel was ineffective for failing to submit hospital reports regarding the Victim, P.F.A. hearing notes, and preliminary hearing notes. He claims that these documents should have been submitted to the Superior Court in his appeal of this Court's denial of the Amended Petition for Post-Conviction Relief filed by April 21, 2015.

Procedural History

Defendant was found guilty after jury trial of Criminal Attempt (rape)²; Criminal Attempt (involuntary deviate sexual intercourse)³; and Indecent Assault⁴. The Sentence of the Court, on November 14, 2013, was to an aggregate term of imprisonment of 10 to 20 years. Defendant did not file post-sentence motions or a direct appeal of his order of sentence as such, his sentence became final on

¹ 42 Pa.C.S. § 9541 *et seq.*

² 18 Pa. C.S, 901(a).

³ 18 Pa. C.S, 901(a).

⁴ 18 Pa.C.S. § 3126(a)(2).

December 13, 2013.

On November 6, 2014, Defendant filed a *pro se* PCRA petition. Attorney James Protasio was appointed by this Court to represent Defendant. Attorney Protasio filed an Amended Petition for Post-Conviction Relief on April 21, 2015. It consisted of a witness certification of what Defendant would have testified to had he been called to testify at trial. The PCRA Court in a two page Opinion and Order filed June 5, 2015, dismissed Defendant's counseled PCRA petition for failure to develop Defendant's Ineffective Assistance of Trial Counsel claim. No evidentiary hearing was held and no twenty-day notice of the Court's intention to dismiss was included. PCRA Counsel and Defendant received a notice of the dismissal and Defendant's appeal rights. Opinion and Order, 6/5/2015, at 2.

PCRA Counsel appealed the denial of relief by the PCRA Court. PCRA Counsel represented Defendant in his appeal to the Superior Court. Appeal Docket Sheet, 1059 MDA 2015. The Superior Court in an unpublished memorandum affirmed the decision of the trial court. Memorandum, No. 1059 MDA 2015, 3/21/2016. In its decision, the Superior Court found that the PCRA Court had not abused its discretion in dismissing Defendant's PCRA Petition without a hearing since *inter alia*

1. The certification does not establish that these convictions would have been admissible at trial. Superior Court Opinion, 3/21/2016, at 6.
2. There is no evidence of records, through expert opinion or otherwise, establishing the relevance of the victim's mental health to the issues at trial. *Id.* at 5.
3. There is no transcript of this PFA hearing, nor any reference to it all outside Shaffer's allegations, in the certified record.

Defendant filed a second Petition for Post-Conviction Relief on March 21, 2017, where he attached further evidence of his ineffective assistance of trial counsel

claim. He now argues that his PCRA Counsel was ineffective for failing to develop the record in order to prove these claims.

There is no formal mechanism in the PCRA for a second round of collateral attack focusing upon the performance of PCRA Counsel. Commonwealth v. Holmes, 79 A.3d 562, 584 (Pa. 2013). Additionally, Petitioner could not appeal the decision of the Superior Court alleging ineffectiveness of PCRA Counsel, because claims of PCRA Counsel ineffectiveness cannot be raised for the first time on appeal. Commonwealth v. Ford, 44 A.3d 1190, 1196 (Pa. Super. 2012) (citing Commonwealth v. Pitts, 981 A.2d 875 (Pa. 2009)). When counsel files a Turner/Finley no-merit letter to the PCRA court, a petitioner must allege any claims of ineffectiveness of PCRA Counsel in a response to the court's notice of intent to dismiss. Id. However, this begs the question as to the correct procedure when PCRA Counsel believes that the Petition has merit but argues unsuccessfully to both the Trial Court and the Superior Court, as is the case at bar. There is no notice of intent to dismiss in this situation where the PCRA Court finds no merit but PCRA Counsel does because as here, the PCRA Counsel represents Petitioner on appeal. Should PCRA Counsel have argued his own ineffectiveness to the Superior Court? Based on the reasoning of Commonwealth v. Jette, 23 A.3d 1032, (Pa. Super. 2011), the Court believes “yes”, as this would have been the a way for Petitioner to pursue an ineffectiveness of PCRA Counsel claim.

It is not appropriate procedurally to file a second Petition for Post-Conviction Relief as serial petitions for post-conviction relief are not favored. See Commonwealth v. Lawson, 549 A.2d 107, 112 (Pa. 1988) (“[A] second or any

subsequent post-conviction request for relief will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred."); see also Commonwealth v. Bond, 819 A.2d 33, 52 (Pa. 2002) ("Permitting a PCRA petitioner to append new claims to the appeal already on review would wrongly subvert the time limitation and serial petition restrictions of the PCRA."). Commonwealth v. Jette, 23 A.3d 1032, 1043 (2011) (holding it was error for Superior Court to remand to PCRA Court for appointment of new counsel). Though the Court appreciates the dilemma Petitioner faces in attempting to bring his claim, it is without jurisdiction to consider his claim:

"[T]he timeliness of a PCRA petition is a jurisdictional requisite." Commonwealth v. Brown, 111 A.3d 171, 175 (Pa. Super. 2015). Any petition under [the PCRA] . . . 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.

42 Pa.C.S. § 9545(b)(1).

Moreover, to qualify under the time bar exception, Petitioner must file within sixty (60) days of when the claim could be presented (*Id.*) and it is the Petitioner's duty

to plead in the petition and prove that one of the exceptions applies. Commonwealth v. Beasley, 741 A.2d 1258, 1261 (Pa. 1999).

Petitioner's Judgement of Sentence became final on December 13, 2013, therefore he had until December 13, 2014, to file a Petition for Post-Conviction Relief. The Instant Petition filed March 21, 2017 is untimely. The PCRA Court is without jurisdiction to consider its merits.

In the current PCRA petition, Petitioner has failed to acknowledge the untimeliness of his request nor do any of his allegations appear to be new in nature or meet the requirements of the time bar exception and as such the Court has no jurisdiction to hear this Petition and must deny it. The evidence Petitioner attached to his second Petition for Post-Conviction Relief 1) A letter from a local attorney from September 1, 2016; 2) an affidavit from Rebekah Beaghley; 3) an affidavit from Tiffany Hartzel; 4) a one page from the hospital record from the date of the incident; and 5) the Superior Court's opinion, do not alert the Court to a *prima facie* showing of a miscarriage of justice.

Conclusion

After conducting an independent review, this Court finds that the Defendant's petition is untimely. In addition, he has not proven an exception to the PCRA time-bar. Therefore, this Court does not have jurisdiction over the petition.

ORDER

AND NOW, this _____ day of June 2017, it hereby ORDERED and DIRECTED as follows:

The Defendant is notified that this Court intends to dismiss the Defendant's PCRA petition because it is untimely. The Court will dismiss the Defendant's petition unless the Defendant files an objection to that dismissal within twenty (20) days of date of this Order.

BY THE COURT,

Nancy L. Butts, P.J.

cc: District Attorney
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