

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

KEVIN R. MILLER
aka KEVIN HILLER,
Defendant

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CP-41-CR-0000151-1996

PCRA

OPINION AND ORDER

On November 13, 2017, Counsel for the Defendant filed a Motion to Withdraw as Counsel pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant has failed to raise any meritorious issues in his PCRA Petition, and his petition should be dismissed.

Background

On September 9, 1996, Defendant entered a plea of guilty to one (1) count of Conspiracy to Possess with Intent to Deliver¹, cocaine, an ungraded felony. Defendant was sentenced on November 14, 1996 by the Honorable William S. Kieser to a period of county incarceration of nine (12) months less one day to twenty-four (24) months less one day. Sentence, 11/14/1996. At the time of sentence the Defendant was given credit for time served from January 8, 1996, and made eligible for immediate parole upon approval of a parole plan. Id.

On July 28, 2017, Defendant filed a "Motion for Post Conviction Collateral Relief" supported by a separately filed "Affidavit of Kevin Hiller [sic]" claiming actual innocence.

¹ 18 Pa.C.S. § 903(a)(1).

The Court appointed counsel in accordance with Pa.R.Crim.P. 904(C),² and scheduled a court conference for November 21, 2017. Appointed counsel filed a Motion to Withdraw as Counsel and a Turner-Finley letter prior to the conference. Defendant sent a letter to the Court objecting to counsel's Motion to Withdraw.

After independent review of the entire record and review of submissions by both Defendant and counsel, the Court finds that there are no genuine issues of material fact and that Defendant is not entitled to post conviction collateral relief, and no purpose would be served by any further proceedings. The Court does not reach Defendant's assertion that his plea was entered under duress and that he is actually innocent of the offense to which he pled guilty as his petition is untimely, meets none of the exceptions to the timeliness requirement, and the Court thus has no jurisdiction to consider it.

Defendant's PCRA Petition is untimely pursuant to 42 Pa.C.S. § 9545(b)

Defendant's PCRA Petition is untimely. Section 9545(b) of the Post Conviction Relief Act requires that a PCRA petition be filed within one (1) year of the date the judgment in a case becomes final, or else meet one of the timeliness exceptions under 42 Pa.C.S. § 9545(b)(1). The exceptions set forth in 42 Pa.C.S. § 9545(b)(1) are as follows:

- (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;

² "when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant's first petition for post-conviction collateral relief."
Pa.R.Crim.P. 904.

- (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.

A PCRA petition raising one of these exceptions “shall be filed within [sixty] days of the date the claim could have been presented” and the petitioner must “affirmatively plead and prove” the exception. Commonwealth v. Taylor, 933 A.2d 1035, 1039 (Pa. Super. 2007).

As such, when a PCRA is not filed within one year of the expiration of direct review, or not eligible for one of the exceptions, or entitled to one of the exceptions, but not filed within [sixty] days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner’s PCRA claims.

Id. at 1039.

Neither (i) or (iii) apply. As to (ii), Defendant would have known that he was actually innocent and pled under duress well within the one-year jurisdictional limit. Defendant was sentenced on November 14, 1996, and took no appeal to the Superior Court of Pennsylvania. Thus, his Judgment of Sentence became final thirty (30) days later on December 16, 1996.³ 42 Pa.C.S. § 9545(b)(3) (“For purposes of this subchapter, a judgment becomes 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.”)

Defendant asserts no exception to the filing timely requirements that would meet any of the exceptions so his petition is baseless. Moreover, it is implausible that

³ Because Defendant asserts his alleged innocence in his petition, the timeliness of that petition relates back to the initial guilty plea and the original sentencing.

Defendant is still serving a two year sentence that was rendered almost twenty-two (22) years ago for which Defendant was immediately paroled. There is nothing in the record to indicate otherwise although mention is made to a warrant being served on Defendant in 2004, it would not have been in relation to the above captioned docket number. Lastly, the Defendant is housed in a Federal Detention Center in Philadelphia. He would not serve a county sentence in a federal facility.

Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pa.R.Crim.P. 907(1), the parties are hereby notified of this Court's intention to deny the Defendant's PCRA Petition. The Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an Order dismissing the Petition.

ORDER

AND NOW, this 1st day of February, 2018, it is hereby ORDERED and DIRECTED as follows:

1. 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.
2. The **Motion to Withdraw as Counsel (Turner/Finley Letter)** filed November 13, 2017, is hereby **GRANTED** and **Donald Martino, Esq.** may withdraw his appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

cc: DA
Donald Martino, Esq.
Kevin Hiller 60998-066
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President Judge Nancy Butts (work file)