

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:
vs.	: NO. 97-10,376; 97-10,377; 97-10,378
	:
RICHARD C. BANEY,	: CRIMINAL ACTION - LAW
	:
Defendant	:

OPINION and ORDER

The matters presently before the Court concern the Post Conviction Relief Act (PCRA) Petition initially filed *pro se* by Defendant July 26, 1999, as a motion seeking *nunc pro tunc* to file post-sentence motions or direct appeal from the judgment of sentence. By Order of Court dated August 26, 1999, we found this filing as being in the nature of a post-conviction relief petition. James R. Protasio, Esquire was assigned to represent Defendant and given the opportunity to file an Amended PCRA Petition. The Amended PCRA Petition was filed February 1, 2000.

The Commonwealth argues that this Court is without jurisdiction to consider the PCRA Petition as it was not timely filed, citing 42 Pa.C.S. §9545(b)(1), which provides that a post conviction petition must be filed within one year of the date the judgment of sentence, becomes final. *See* Commonwealth's Brief in Opposition to Petition for Post Conviction Relief p. 1. Defendant was sentenced January 7, 1998; the sentence was not appealed. Accordingly, the judgment of sentence became final thirty days after Defendant was sentenced. The Commonwealth further argues that Defendant is not entitled to relief in any event as his claim of a conflict of interest involving the District Attorney's office, even if true, does not entitle him to relief.

Both arguments must fail. This is Defendant's first PCRA petition. In *Commonwealth v. Walker*, 721 A.2d 380 (Pa.Super. 1998), the Superior Court considered the action of a trial court which denied a PCRA petition without a hearing and without appointment of counsel, as it found the petition was untimely on its face pursuant to 42 Pa.C.S. §9545(b)(1). The Superior Court determined this was error, stating:

An indigent¹ Appellant is entitled to counsel on his first petition for PCRA relief pursuant to Pa.R.Crim.P. 1504. This provision must be read in conjunction with Pa.R.Crim.P. 1507 which allows a court to summarily dismiss a PCRA petition if it finds that there is no genuine issue of fact entitling Appellant to relief. We have held "[r]ule 1504(a) allows an indigent defendant the opportunity to secure the appointment of counsel to aid him in the completion of his first petition seeking post-conviction collateral relief, *regardless of the merits of his claim.*" *Commonwealth v. Peterson*, 453 Pa.Super. 271, 683 A.2d 908, 911 (Pa.Super. 1996) [emphasis supplied]. Accordingly, the mandates of Rule 1504 must be read consistently with those of Rule 1507 and the court's power to dismiss a first PCRA petition must yield to the Appellant's right to counsel.

This reasoning holds true in spite of the untimely nature of the petition. Appellant should have the benefit of having counsel review his claim to determine whether any of the exceptions delineated in Section 9545(b) of the PCRA act apply. Counsel can then decide to proceed or not based on the merits of Appellant's contentions.

Walker at pp. 381-382.

Accordingly, Defendant is entitled to appointment of counsel to assist him in the filing of his first PCRA petition. In fact, as noted *supra*, an Amended PCRA petition has been filed. The matter is now properly before this Court for a determination as to whether an

¹ In the instant cases, Defendant is indigent. Defendant is currently incarcerated and counsel was appointed to represent him for purposes of his PCRA petition; counsel has been appointed to represent Defendant since the pre-trial stages of these proceedings.

evidentiary hearing is necessary. 42 Pa.C.S. §1507. The Court Scheduling Technician will be directed to schedule argument on this matter.

The Court notes that on February 11, 2000, Defendant filed a *pro se* “Petition for Writ of Mandamus/Motion to Compel.” Although docketed by the Prothonotary as a Motion to Dismiss Counsel, in fact this is not the relief Defendant seeks. Rather, Defendant would have this Court compel defense counsel to comply with the Rules of Professional Conduct. This Court has no such authority. However, if defense counsel has not already done so, he is strongly encouraged to communicate with Defendant without further delay regarding the current status of these proceedings. Counsel should explain to Defendant the developments, which have occurred as a result of the last conference and provide Defendant with a copy of the Amended PCRA petition.

ORDER

AND NOW, this 24th day of February 2000, the Court Scheduling Technician is directed to schedule argument regarding Defendants' Amended PCRA petition. Specifically, counsel shall address whether, in light of the Amended PCRA petition, this Court should schedule an evidentiary hearing or dispose of the motion without hearing pursuant to 42 Pa.C.S. §1507.

Defendant's *pro se* petition, filed February 11, 2000, is HEREBY DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
District Attorney (K. Osokow)
James Protasio, Esquire
Richard C. Baney – DT-1942
P. O. Box 1000; Houtzdale, PA 16698-1000
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)