

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 98-11,453

VS :

DALE BOWER :

OPINION AND ORDER

Before the Court is Defendant's Motion for Post Conviction Collateral Relief filed January 22, 2001. The matter was initially set for a conference on March 16, 2001. At the time of the conference, the Commonwealth argued that the Court could not entertain the petition, since it was not timely filed within one year of the date that the sentence became final.¹ Defense counsel was granted additional time in which to file an amendment to the motion. On April 9, 2001, Defendant's Counsel filed an amended petition. A conference on the amended petition was held May 4, 2001. In the petition, Defendant alleges: that his sentence is illegal because he should not have been sentenced separately for violating two different provisions of the aggravated assault statute.

After reviewing the petition, the Court finds that the Petition still does not allege a basis for relief under the Post Conviction Relief Act, 42 Pa.C.S.A. § 9545(b). Defense Counsel has first argued that the petition should be considered timely, since he raised the issues in his *pro se* Petition to Modify his Sentence filed September 15, 2000, which would be within the one year limit. The Court has reviewed this petition, however, and finds that the issues presented in the present petition had not been previously raised.

¹ This Court's Sentencing Order is dated November 29, 1999.
The Defendant's Petition for Post Conviction Collateral Relief was filed January 22, 2001.

The Act does afford three narrow exceptions to the one-year filing requirement where 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.

Instantly, the Court finds that Defendant's claim does not fall within one of the exceptions. Defendant is alleging his counsel's ineffectiveness in failing to object to separate sentences for two different sections of the aggravated assault statute. Under subsection (i) of the statute, "government officials" does not include defense counsel, whether appointed or retained. 42 Pa.C.S.A. § 9545(b)(4). Since the Defendant has not proven that he falls within an exception to the time for filing requirement, the Court must dismiss his petition.

ORDER

AND NOW, this ____ day of May, 2001 the Court, having no jurisdiction to entertain Defendant's Petition for Post Conviction Collateral Relief, DISMISSES said petition.

By The Court,

Nancy L. Butts, Judge

cc: DA
Edward J. Rymza, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges