

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :  
 :  
 vs. : NO. 83-10,480  
 :  
 ROBERT BLACKWELL, :  
 :  
 Defendant : PCRA DISMISSAL

*Date: December 23, 2003*

**OPINION and ORDER**

Before the Court for determination is the Post Conviction Relief Act (PCRA) Petition of Defendant Robert Blackwell filed May 14, 2001. A conference was held before this Court concerning the Petition on October 6, 2003. Following that conference, this Court issued an Order notifying Defendant of the Court's intention to dismiss the Petition as being untimely filed and for failing to demonstrate that the Petition fell within one of the exceptions to the one-year time limit. The Court permitted Defendant to file a written response within twenty days of receipt of the Order. Defendant has filed no such response.

The Court will dismiss Defendant's PCRA Petition as untimely. A trial court does not have jurisdiction to hear a PCRA petition if the petition was untimely filed. *Commonwealth v. Hutchinson*, 760 A.2d 50, 53 (Pa. Super. 2000). The PCRA requires that any petition, including a second or subsequent one, must be filed within one year of the judgment becoming final. 42 Pa.C.S.A. §9545(b)(3); *Hutchinson*, 760 A.2d at 53. A judgment becomes final "at the conclusion of direct review, including discretionary review to the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S.A. § 9545(b)(3); *Commonwealth v. Abu-*

*Jamal*, 833 A.2d 719, 724 (Pa. 2003). The time limits prescribed by the PCRA will be strictly enforced because of their jurisdictional significance. *Commonwealth v. Vega*, 754 A.2d 714, 718 (Pa. Super. 2000).

The preclusive effect of the one-year time limit can only be overcome if the petitioner pleads and proves that one of the exceptions applies. *Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999); *Commonwealth v. Davis*, 816 A.2d 1129, 1133 (Pa. Super. 2003).

Those exceptions are:

(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.A. §9545(b)(1)(i)-(iii). If the case falls within one of these exceptions, then the petition must be filed within sixty days of the date the claim could have been presented. 42 Pa.C.S.A. §9545(b)(2); *Commonwealth v. Gamboa-Taylor*, 753 A.2d 780 (Pa. 2000).

Defendant was sentenced on October 27, 1983. Defendant appealed his sentence to the Superior Court on November 9, 1983. On November 20, 1984, that appeal was remanded to the trial court for appointment of new appellate counsel since prior appellate counsel had failed to file a brief. New counsel was appointed and the appeal proceeded.

However, on July 15, 1985, the Superior Court dismissed Defendant's appeal without prejudice to his rights under the Post Conviction Hearing Act (PCHA)<sup>1</sup> because of counsel's failure to file a brief.

On May 20, 1986, Defendant filed a PCHA Petition. In a July 13, 1986 order, the Defendant was granted the right to appeal to the Superior Court *nunc pro tunc*. The Superior Court affirmed the sentence and denied the appeal on July 22, 1987. The present PCRA petition was filed on May 14, 2001. It was filed almost sixteen years after the Superior Court initially dismissed Defendant's appeal and almost fourteen years after the Superior Court dismissed the appeal on the merits and affirmed Defendant's sentence. Clearly, the petition is filled after the one-year deadline and Defendant must plead an exception to satisfy the jurisdictional requirements of 42 Pa. C.S.A. §9545.

Defendant has set forth five allegations that he contends entitles him to relief. Defendant has failed to file a response to the Court's October 21, 2003 Order indicating its intent to dismiss the PCRA Petition. As such, the Court will view the allegations made in the Petition as Defendant's argument.

The first allegation is that government officials have interfered with his appeal rights because they have withheld or destroyed evidence in the case. Specifically, the Defendant asserts that the Commonwealth has failed to produce a "parole document" and a piece of paper from the lineup where the victim wrote "none" after viewing the lineup. A *Brady*<sup>2</sup> violation would fall within the government interference exception. *Commonwealth v.*

---

<sup>1</sup> The Post Conviction Hearing Act was the predecessor of the Post Conviction Relief Act.

<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

*Breakiron*, 781 A.2d 94, 98 (Pa. 2001); *Beasley*, 741 A.2d at 1261. If the failure to disclose forms the basis of the governmental interference, then the petition must “identify a specific claim that [the defendant] was unable to discover or develop due to the [government’s] conduct.” *Commonwealth v. Howard*, 788 A.2d 351, 355 (Pa. 2002). If the PCRA petition invokes the governmental interference exception based on a *Brady* violation it still must be filed within sixty days of the date when the claim could have been asserted. *Breakiron*, 781 A.2d at 98; *Beasley*, 741 A.2d at 1262.

Defendant has failed to carry his burden of establishing an exception based on governmental interference because of a *Brady* violation. The gravamen of this exception is that because of the failure to disclose the defendant was unaware of the claim and could not have raised it until it was discovered. That is not the situation here.

Defendant has been aware of these issues prior to his 1983 trial. Issues concerning the missing “parole document” and the lineup were the subjects of various pre-trial and post-trial motions. The fact that the “parole document” was not produced was not only known to Defendant, but also the jury when they were given a missing evidence instruction. The same is true regarding the piece of paper on which the victim wrote “none” after viewing the line up since there was specific testimony brought out at trial regarding this. Not only has Defendant been aware of these claims since before his 1983 trial he has raised these issues in one form or another in prior PCRA and Habeas Corpus petitions. Defendant cannot claim that the Commonwealth’s conduct prevented him from discovering or developing these claims. As such, Defendant has not established the existence of governmental interference in this regard.

The second and third allegations in the PCRA Petition will be addressed together. The second allegation asserts that government officials have tampered with testimony and trial transcripts. The third allegation asserts that Pennsylvania Department of Corrections employees have tampered with his appeals and interfered with his appeal rights. These bald allegations do not establish any one of the exceptions provided for in 42 Pa.C.S.A. §9545(b)(1). The petition must plead specific facts to demonstrate that a defendant's claim meets with the requirements of the time limit exceptions. *See, Breakiron*, 781 A.2d at 98; *Commonwealth v. Carr*, 768 A.2d 1164, 1168 (Pa. Super. 2001). The Petition does not provide specific facts to support these assertions. Therefore, Defendant has failed to establish an exception to the time limit requirement on these theories.

The fourth allegation would appear to be an assertion that Defendant's prior counsel has been ineffective for not pursuing his current PCRA petition. The fourth allegation contained in Defendant's PCRA Petition makes reference to Kyle Rude, Esquire. The Defendant alleges that Attorney Rude sent Defendant a letter on April 2, 2001 informing Defendant that an other attorney had been assigned to Defendant's case and that Attorney Rude was not "properly pursuing [the Defendant's] appeal." Defendant further alleges that his family sent Attorney Rude a copy of a brief Defendant filed in the Superior Court in January 2000. Defendant concluded by stating that the Superior Court did not reach the merits of the brief because it dismissed the appeal because Defendant did not address the issue of interference by government officials with his appeal rights. The Court is unable to discern from the court file how Attorney Rude became Defendant's attorney on this matter.

On October 7, 1997, the Defendant filed a PCRA Petition. Colleen Shedlock, Esquire, from the Lycoming County Public Defender's Office was appointed counsel to represent Defendant on that petition. On December 11, 1997, the Court entered an order provisionally dismissing the Petition on the basis that it was untimely and it did not assert an applicable exception to the one-year limitation. Sometime in early March 1998, Attorney Shedlock advised the Court's law clerk that Defendant had not filed a response to the December 11, 1997 Order and did not intend to do so. Attorney Shedlock requested a final order be entered and such an order was entered on March 19, 1998. On March 31, 1998, Defendant filed a *pro se* document entitled "Motion to Reopen This Case Because of Interference by Government Officials to Deny Petitioner Access to the Court's [sic]," in which he asserted that he filed a response to the Court's proposed dismissal and requested a hearing on the PCRA petition. In a May 6, 1998 Order, the Court determined that Defendant had filed a *pro se* response on December 11, 1997 and vacated the March 19, 1998 Order dismissing the PCRA petition for failure to file a response. The Court then concluded that the response did not raise new issues or amplify issues raised in the PCRA petition that would merit a hearing. The Court then dismissed Defendant's PCRA Petition filed October 7, 1997.

On January 15, 1999, Defendant filed a *pro se* motion entitled "Motion to Re-Open this Case Because of Ineffective Assistance of Counsel, and a Motion for Appointment of Counsel from Outside the Lycoming County Public Defender's Office, and/or the Appointment of Counsel from Outside Lycoming County." On February 17, 1999, this Court entered an

order stating that it viewed the January 15, 1999 motion as a PCRA petition and intended to dismiss it without a hearing. Defendant was given twenty days to file a response to the proposed dismissal. Defendant filed a *pro se* response on March 10, 1999. The Court dismissed the January 15, 1999 PCRA petition in an April 23, 1999 Order. Defendant appealed that order to the Superior Court *pro se*. On January 9, 2001, the Superior Court affirmed the April 23, 1999 Order dismissing Defendant's PCRA petition as untimely. The Superior Court stated in its decision that Defendant needed to plead an exception to the one-year time limit and that "[n]one of the twelve issues sought to be raised by appellant in his brief alleges an error premised on these exceptions." *Commonwealth v. Blackwell*, No. 1076 MDA 1999, slip op. at 5 (Pa. Super. Jan. 9, 2001). Regardless, Attorney Rude's involvement, if any, with the prosecution of the PCRA Petition cannot be grounds for an exception to the one-year time limit.

The ineffectiveness of counsel does not provide an exception to the time limit requirements of 42 Pa.C.S.A. §9545. *Breakiron*, 781 A.2d at 97, *Carr*, 768 A.2d at 1168. Defense counsel, appointed or retained, does not come within the definition of "government official" and his actions cannot be the grounds to support a claim premised on the governmental interference exception. 42 Pa.C.S.A. §9545(b)(4); *Commonwealth v. Yarris*, 731 A.2d 581, 588 (Pa. 1999). Also, a conclusion that prior counsel was ineffective is not a newly discovered fact that would fall within the after-discovered facts exception. *Commonwealth v. Gamboa-Taylor*, 753 A.2d 780, 785 (Pa. 2000). Therefore, any ineffectiveness on counsel's part cannot form the basis of an exception to the time limit requirements.

The fifth allegation made by Defendant in the PCRA Petition is that government officials have interfered with his appeals because government employees removed documents from his cell and placed false documents in the mail so as to prevent him from properly appealing his last PCRA petition to the Superior Court. This allegation does not establish an exception to the time limit requirements. It is a bare assertion made without any factual support in the Petition. Therefore, the Defendant has failed to meet his burden of establishing an exception in this regard.

Accordingly, the PCRA Petition will be dismissed as untimely because Defendant has failed to establish an exception to the one-year time limit.



**ORDER**

It is hereby ORDERED that Defendant Robert Blackwell's Post Conviction Relief Act Petition filed May 14, 2001 is denied.

Defendant shall be notified of this Opinion and Order by certified mail, return receipt requested pursuant to Pa.Crim.R.P. 907(4).

Defendant is advised that he has the right to appeal this Court's denial and dismissal of his Post Conviction Relief Act Petition.

Defendant is further advised that he has thirty days in which to file his appeal.

BY THE COURT,

William S. Kieser, Judge

cc: District Attorney  
Robert W. Blackwell -- #AT-1022  
P. O. Box 200; Camp Hill, PA 17001-0200  
Judges  
Christian Kalas, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)