

**IN THE COURT OF COMMON PLEAS FOR
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH	:	
	:	
v.	:	No: 99-10,765
	:	
RICHARD JAMES RANDALL, JR.	:	
Defendant	:	

OPINION AND ORDER

Before the Court is Defendant's Post-Sentence Motion filed October 28, 2002. This motion reached the Court following a rather extended procedural history, which is summarized as follows: On October 26, 1999, Defendant entered a guilty plea before the Honorable Nancy L. Butts to the charges of Sexual Abuse of Children (photographing a child involved in sexual activity), Sexual Abuse of Children (possessing photographs of a child involved in sexual activity) and Corrupting the Morals of a Minor. Defendant was sentenced on that same date to serve an aggregate period of incarceration of six years and two months to fifteen years. His attorney, William J. Miele, subsequently filed motions requesting that Defendant be granted leave to withdraw his guilty plea or be granted a modification of his sentence. Eventually, following at least one continuance and one extension granted by the Court, Defendant's motions were set to be heard by the Court on March 13, 2000. At that time, the Commonwealth argued that because Defendant's claims raised the issue of ineffectiveness of trial counsel, that new counsel should be appointed. The Court agreed and ordered that a conflicts attorney be assigned to represent Defendant. However, the 120

days allowed by Pa.R.Crim.P. Rule 720(3)(a) for a decision on any post-sentencing motion had already elapsed and although a 30 day extension on Defendant's motion had already been granted, that, too, was about to expire. The rules are explicit under Pa.R.Crim.P. Rule 720(3)(b) that no additional extensions can be granted and that if a post-sentencing motion is not decided within 150 days of sentencing then it is deemed denied by operation of law. Therefore, because the 150 days permitted for disposition of post-sentencing motions was about to expire, the Court dismissed Defendant's motions, indicating that new counsel should raise the same motions in the form of a PCRA petition.

On April 5, 2001, Attorney J. Michael Wiley was appointed to represent the Defendant. No PCRA petition or direct appeal to the Superior Court was ever filed by Mr. Wiley. On October 26, 2001, new conflicts counsel, Attorney Eric Linhardt, was appointed to represent Defendant. Mr. Linhardt filed a "Petition for Post Conviction Relief" on June 18, 2002, requesting that Defendant be granted leave to file post-sentencing motions and a direct appeal nunc pro tunc. Following additional continuances, this motion was heard by the Honorable William S. Kieser on October 10, 2002. Judge Kieser made a finding that it "appears that the petition has merit" and gave the Defendant ten days to file post-sentence motions. Defendant's Post-Sentence Motion was filed on October 28, 2002 and scheduled for hearing on January 29, 2003. On that date, a number of procedural issues were raised by the parties and it was determined that hearing on this matter should be rescheduled for two separate days so that the procedural issues raised by the parties could be litigated on the first day and that time could

be set aside later if needed for testimony and evidence regarding the merits of Defendant's claims.

Argument was held on the procedural issues raised in this case on February 4, 2003. The Commonwealth asserted three issues: first, that the Court of Common Pleas of Lycoming County does not have jurisdiction to address the issues raised by Defendant and did not have jurisdiction on October 10, 2002 when this matter was initially heard because the judgment in this case was final more than one year prior to the date that Defendant's Petition for Post-Conviction Relief was filed. Second, that even if the Court had jurisdiction on October 10, 2002, that the Court should not have granted any relief to Defendant. Third, that if the Court decided to grant relief to Defendant, then the proper relief could not have been to grant him leave to file a post-sentencing motion nunc pro tunc because a post-sentencing motion was in fact timely filed and subsequently denied by the Court in this case.

The first issue raised by the Commonwealth is that the Court of Common Pleas of Lycoming County lacks jurisdiction in this case because Defendant filed his Petition for Post-Conviction Relief more than one year after the judgment in this case became final. The Defendant counters that if the Commonwealth believed that the Court lacked jurisdiction to address this case on October 10, 2002, then it should have raised the jurisdictional issue at that time or, alternatively, have appealed the decision of Judge Kieser on October 10, 2002 on the basis that Judge Kieser lacked jurisdiction. Defendant argues that because the Commonwealth failed to do either of these things, that jurisdictional defect, if

any, is waived. Alternatively, Defendant argues that jurisdiction still exists in the Court of Common Pleas because he has one year from the expiration of the time allowed to file his initial PCRA during which he can file a “layered” PCRA alleging the ineffectiveness of PCRA counsel for failure to file a PCRA petition.

Initially, this Court notes that claims that a court is lacking in jurisdiction can never be waived. Since a question of subject-matter jurisdiction goes to the very power of the court to act, it may be raised at any time during the proceedings, and may not be waived by consent or otherwise. Commonwealth v. Zeigler, 251 Pa. Super. 147, 380 A.2d 420 (1977) citing Commonwealth v. Mangum, 231 Pa.Super. 162, 332 A.2d 467 (1974); Commonwealth ex rel. Paylor v. Cavell, 185 Pa.Super. 176, 138 A.2d 246, cert. den. 358 U.S. 854, 79 S.Ct. 84, 3 L.Ed.2d 88 (1958); Commonwealth v. Gill, 166 Pa.Super. 223, 70 A.2d 700 (1950). However, since an Order was issued on October 10, 2002 by the Honorable William S. Kieser of the Lycoming County Court of Common Pleas, a question arises as to whether Judge Kieser has already addressed the issue of jurisdiction in this case.

Judges of coordinate jurisdiction sitting in the same case should not overrule each others' decisions. See, e.g., Okkerse v. Howe, 521 Pa. 509, 516-517, 556 A.2d 827, 831 (1989). This rule, known as the "coordinate jurisdiction rule," is a rule of sound jurisprudence based on a policy of fostering the finality in an effort to maintain judicial economy and efficiency. Id. See also Golden v. Dion & Rosenau, 410 Pa.Super. 506, 510, 600 A.2d 568, 570 (1991) (once a matter has been decided by a trial judge the decision should remain undisturbed, unless the

order is appealable and an appeal therefrom is successfully prosecuted). This coordinate jurisdiction rule falls squarely within the ambit of a generalized expression of the "law of the case" doctrine. This doctrine refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter. See 21 C.J.S. Courts § 149a; 5 Am.Jur.2d Appeal and Error § 744. Among the related but distinct rules which make up the law of the case doctrine are that: (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court. See Joan Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U.Pa.L.Rev. 595, 602 (1987) (*citing* A. Vestal, Law of the Case Single-Suit Preclusion, 12 Utah L. Rev. 1, 1-4 (1967))

In this case, this Court sits in coordinate jurisdiction with the Honorable William S. Kieser. As already noted, "(j)udges of coordinate jurisdiction sitting in the same case should not overrule each others' decisions." Commonwealth v. Starr, 664 A.2d 1326 at 1331. "Departure . . . is allowed only in exceptional circumstances such as where there has been an intervening change in the

controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed." Starr, 664 A.2d 1326 at 1332. The rule serves "not only to promote the goal of judicial economy" but also: "(1) to protect the settled expectations of the parties; (2) to ensure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end." Id. at 1331. It is manifest that a judge may not lightly overrule the prior decision of another judge of the same court. In some circumstances, however, application of the rule can "thwart the very purpose the rule was intended to serve, *i.e.*, that judicial economy and efficiency be maintained." Salerno v. Philadelphia Newspapers, Inc., 377 Pa.Super. 83, 546 A.2d 1168, 1170 (Pa.Super. 1988). It is important, however, to note that the rule does not apply where two motions differ in kind. In such a case, a second judge is not precluded from granting relief though another judge has denied an earlier motion. Golday v. Trustees of University of Pennsylvania, 544 Pa. 150, 675 A.2d 264, 267 (Pa. 1996).

Here, the parties agreed at the time of the hearing on the procedural issues in this matter that judicial notice could be taken of the proceedings held before Judge Kieser on October 10, 2002. A review of that hearing reveals that there is no discussion of any kind on the record regarding the issue of whether the court has jurisdiction over this matter, nor is this issue addressed in Judge Kieser's Order of that date. This Court can therefore properly review the facts of this case and resolve the issue of whether we retain jurisdiction over this case.

42 Pa.C.S.A. Section 9545 of the Post Conviction Relief Act provides that original jurisdiction over claims brought under the Act shall be in the Court of Common Pleas. In subsection (b), it goes on to provide that “any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final”.

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. 42 Pa.C.S.A. Section 9545(b)(1).

Instantly, the Court finds that Defendant’s claim does not fall within one of the exceptions. This Court denied Defendant’s original post-sentencing motion on March 13, 2000. Defendant’s right to make a direct appeal of his case to the Pennsylvania Superior Court therefore expired thirty days later, on April 12, 2000. This Court appointed Attorney J. Michael Wiley to represent Defendant on April 5, 2000. There was no direct appeal filed on this case between April 5, 2000 and April 12, 2000 and the judgment then became final. Defendant then had one year from that date to file any PCRA petition that he wished to file. No

PCRA petition was filed on or before April 12, 2001, when Defendant's PCRA right would normally have been extinguished. Attorney Eric Linhardt was appointed to represent Defendant on October 26, 2001. Attorney Linhardt filed the a Petition for Post-Conviction Relief on June 18, 2002, approximately eight months after he had been assigned to represent Defendant.

Although he makes no representation in his motion that this case falls within one of the exceptions to the one-year rule, the Court will now address whether Defendant fits within one of the exceptions to the one-year rule provided by 42 Pa.C.S.A. Section 9545 (b)(1) even though one year had already passed from the date that judgment became final. It is the finding of this Court that he does not. Defendant testified essentially that the facts upon which his PCRA claims are predicated were "unknown to the petitioner and could not have been ascertained by the exercise of due diligence". 42 Pa.C.S.A. Section 9545(b)(1)(ii). However, this Court makes an express finding that the Defendant failed to exercise due diligence in determining whether an appeal or a PCRA petition had been filed on his behalf. Defendant testified at the hearing held February 4, 2003 that he believed on March 13, 2000 that an appeal would be taken on his case to the Pennsylvania Superior Court. Defendant, however, made little attempt to determine whether such an appeal had actually been filed. Defendant has testified that he wrote letters to the Mr. Miele at the Lycoming County Public Defender's Office that were not answered and that he wrote to the Lycoming County Office of the Prothonotary for a copy of the docketing transcript in his case, receiving two of three pages of the docketing transcript.

However, he also testified that he did not attempt to correspond with the Superior Court to learn if in fact an appeal had been filed on his behalf. Beyond that, Defendant offered no evidence that he took any steps to pursue his appeal. He did not offer any evidence that he corresponded with the Lycoming County Court of Common Pleas. He did not offer evidence that he corresponded with the Lycoming County Office of the Prothonotary on this issue. He did not offer evidence that he sent anyone to the Prothonotary or to the Lycoming County Office of the Public Defender, which is located in the same building, to explore this issue. Instead, he waited in excess of six months before asking someone to go personally to the Office of the Prothonotary on his behalf and obtain the missing page from his docketing transcript. At that time, the one year period for filing of a PCRA petition had already elapsed. Finally, in March, 2002, the Prothonotary's Office responded to an inquiry from Defendant and notified him that Mr. Linhardt had been appointed to represent him. Approximately three months after that, Defendant's Petition for Post-Conviction Relief was filed.

This Court notes that even if Defendant had exercised due diligence between March 13, 2000, the date that his original post-sentencing motion was denied by the Court, and March 2002, when Defendant indicates that he was informed by the Lycoming County Prothonotary that Mr. Linhardt represents him, that there is no showing that he exercised any due diligence in pursuing his claims between March, 2002 and June 18, 2002, when a Petition for Post-Conviction Relief was filed on his behalf. There was no testimony or any other evidence that showed that Defendant diligently pursued relief during that time.

42 Pa.C.S.A. Section 9545(b)(2) provides that “(a)ny petition invoking an exception provided in paragraph (1) (the exceptions to the one-year rule) shall be filed within 60 days of the date the claim could have been presented.” Defendant was provided with a copy of the order appointing Mr. Linhardt as his counsel on March 5, 2002. The 60 day period for presenting his claim would therefore have expired on May 4, 2002.

Based upon the foregoing, it is the finding of this Court that Defendant failed to file a direct appeal in this case prior to the time that the appeal period had expired. When that appeal period expired, the judgment in Defendant’s case became final. Further, Defendant failed to file a PCRA petition within one year of the date when the judgment in his case became final. It is also the finding of this Court that Defendant’s case does not fall within one of the exceptions to the one year rule found in 42 Pa.C.S.A. Section 9545(b)(1). Accordingly, this Court makes a finding that the Lycoming County Court of Common Pleas no longer possesses jurisdiction in this case as Defendant’s Petition for Post-Conviction Relief is untimely. There is no need to reach the other procedural issues raised in this case and they are specifically not decided.

ORDER

Accordingly, it is ORDERED and DIRECTED that for the reasons set forth above, Defendant's Post-Sentence Motion is DENIED. The Court Scheduling Technician is advised that time set aside for further testimony in this matter on February 20, 2002 is not required.

By the Court,

_____ J.

February 10, 2003

xc: Eric Linhardt, Esq.
District Attorney (KO)
Sheriff
Court Scheduling