

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : **No. 99-10,367**
: **vs.** : **CRIMINAL DIVISION**
: **SEAN FORD,** : **PCRA**
: **Defendant**

O R D E R

AND NOW, this ____ day of May 2004, upon review of the record and pursuant to Rule 907(a) of the Pennsylvania Rules of Criminal Procedure, the Court notifies the Defendant of its intention to dismiss his pro se Post Conviction Relief Act (PCRA) Petition filed on or about January 27, 2004.

The Court intends to deny the PCRA petition for several reasons. First, the petition is untimely. The Pennsylvania Superior Court decided the defendant's direct appeal on or about October 12, 2000. Defense counsel or the defendant had thirty days within which to file a petition for allowance of appeal to the Pennsylvania Supreme Court. Pa.R.App.P. 1113. No such petition was filed. Therefore, the defendant's conviction became final on or about November 11, 2000. Any PCRA petition, including a second or subsequent petition, must be filed within one year of the date his conviction became final, unless the Defendant alleges and proves one of the three limited exceptions. 42 Pa.C.S. §9545(b). The timeliness requirements of the PCRA are jurisdictional in nature. Commonwealth v. Howard, 567 Pa. 481, 485, 788 A.2d 351, 353 (Pa. 2002); Commonwealth v.

Palmer, 814 A.2d 700, 704-05 (Pa.Super. 2002). "[W]hen a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 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."

Commonwealth v. Gamboa-Taylor, 562 Pa. 70, 77, 753 A.2d 780, 783 (Pa. 2000). Clearly, the Defendant's petition was filed more than one year after his conviction became final.

Although the Defendant wishes to assert "newly discovered evidence," he fails to specify what facts to support his claim were unknown to him and could not be ascertained by the exercise of due diligence. He also fails to state in his petition when he allegedly discovered the new facts or evidence. Without such allegations, the petition is untimely and the Court lacks jurisdiction to hold an evidentiary hearing or grant him any relief.

If the "newly discovered evidence" consists of the victim's arrest record, it appears from the exhibits attached to the petition that the Defendant had someone obtain this information from the Prothonotary's Office on August 29, 2003. To be eligible for the after-discovered evidence exception contained in Section 9545(b)(1)(ii) based on printouts dated August 29, 2003 from the Prothonotary's Office of the victim's criminal case numbers, the Defendant would

have had to file his petition on or before October 28, 2003 for it to be considered timely. It was not filed until January 27, 2004.

Second, the Court believes at least some of the issues have been previously litigated or waived. The Defendant asserts ineffective assistance of counsel. He does not specify how or why his counsel was ineffective. Based on his allegations asserting the victim fabricated the charges and his exhibits noting her criminal record, it appears the Defendant is claiming counsel was ineffective for advising him to plead nolo contendere. This is the Defendant's second PCRA petition. In his first PCRA petition, the Defendant asserted his counsel was ineffective for advising him to accept a plea agreement. Therefore, it appears that the Defendant's claim of ineffective assistance of counsel has been previously litigated.

Third, the Court does not believe the Defendant can prove prejudice. To prove prejudice, the Defendant must plead and prove that the outcome of his case likely would have been different. The Court believes this is unlikely given the Defendant's statements, such as the one he made at sentencing that he wished to change his plea from no contest to **guilty** and he wished to apologize to the victim and her children. N.T., December 2, 1999, at p.12.

Fourth, at this point there is no need for an evidentiary hearing because the Defendant has not complied

with Section 9545(d) regarding witness certifications. Not only must the Defendant state the witness's name, but he must also provide the witness's address, date of birth and, most importantly, the substance of the witness's testimony. Although the Defendant lists three potential witnesses in his petition and provides the addresses for two of them, he does not indicate what any of them would say if they were called to testify. Unless or until the Defendant provides this information, the proposed witnesses would not be permitted to testify. 42 Pa.C.S. §9545(d) ("Failure to substantially comply with the requirements of this paragraph **shall render the proposed witness's testimony inadmissible.**").

As no purpose would be served by conducting a conference or hearing, none will be scheduled and the parties are hereby notified of this Court's intention to deny the Petition. 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.

By The Court,

Kenneth D. Brown, P.J.

cc: Kenneth Osokow, Esquire (ADA)
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Work file