

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : **No. 94-10477; 94-10478;**
: **94-10479**
vs. :
:
:
WILSON HARVEY, :
Defendant : **PCRA**

O R D E R

AND NOW, this ____ day of June 2004, upon review of the record and pursuant to Rule 907(a) of the Pennsylvania Rules of Criminal Procedure, it is the finding of this Court that Defendant is not entitled to post conviction collateral relief.

The Court intends to dismiss the defendant's PCRA petition for several reasons. First, it appears that the Defendant's petition is untimely. The Pennsylvania Superior Court denied the Defendant's direct appeal on March 6, 1996. The Defendant had thirty days to file a petition for allowance of appeal with the Pennsylvania Supreme Court. No such petition was filed. Therefore, the Defendant's convictions became final on or about April 5, 1996. The general rule is that all PCRA petitions, including second or subsequent petitions must be filed within one year of the date the judgment becomes final. 42 Pa.C.S.A. §9545(b)(1). The Defendant's judgment of sentence became final on or about April 5, 1996, so his PCRA petition should have been filed on or before April 4, 1997. The Defendant's petition was not filed until May 14, 2003.

There are three exceptions to the general rule:

1) interference by government officials; after-discovered evidence; and 3) constitutional changes. 42 Pa.C.S.A. §9545(b)(1)(i)-(iii); Commonwealth v. Peterkin, 554 Pa. 547, 557, 722 A.2d 638, 643 (Pa. 1998). If a defendant is invoking one of these exceptions, he must file his PCRA petition within 60 days of the date the claim could have been presented. 42 Pa.C.S.A. §9545(b)(2). The Defendant asserts governmental interference and contends: 1) no final order was entered on his previous PCRA petition filed on December 4, 1996; and/or 2) the Court did not appoint counsel for him on his first PCRA petition.¹ For these reasons, the Defendant claims his current PCRA petition should relate back to his timely, uncounseled petition filed in 1996. The Defendant's first contention is without merit because the Court issued a final order on January 14, 1997. The Court would like to treat the current petition as timely because it did not appoint counsel to represent the Defendant on the petition filed in December

¹ The December 1996 PCRA petition is the second petition filed on the docket. The first petition reflected on the docket was filed while the defendant's direct appeal was pending and the Court dismissed it as premature. When the December 1996 petition was filed, the Court mistakenly treated it as a second petition and did not appoint counsel.

1996. Nevertheless, the Court is constrained to find the Defendant's current petition is untimely, because he has not alleged that he filed his current petition within 60 days of discovering the alleged governmental interference.² 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). Thus, this Court lacks jurisdiction to hold an evidentiary hearing or grant relief on the Defendant's petition.

Second, to the extent the Defendant is seeking to have his sentences run concurrent or otherwise modified, the length of his sentence was the subject of his direct appeal. Therefore, these issues are previously litigated.

² The Court notes the Commonwealth asserted the failure to appoint counsel was not governmental interference, but merely error on the part of the Court. Since the Court finds that the defendant did not raise the alleged governmental interference in a timely manner, it did not rule on the issue of whether the failure to appoint counsel would constitute mere error or governmental interference.

Third, the Defendant's assertions that he did not realize he had pled nolo contendere and was sentenced on the firearms charges until he was "staffed" at SCI Waymart are both untimely and belied by the record. The Defendant has been at SCI Waymart since at least February 22, 1995 as is evidenced by the certificate of service on the Defendant's pro se motion for withdrawal of counsel. Therefore, these claims are untimely. Furthermore, both the plea³ and sentencing transcripts show that the Defendant was aware he was convicted and sentenced on the firearms charges. For example, during the plea hearing, the Court asked, "Does this cover carrying a firearm without a license?" Counsel for the Defendant replied in the affirmative. The Defendant was present for this exchange. The Court then asked the Defendant if he carried a firearm and the Defendant replied, "I had a, there was a .22 revolver in my car." The Defendant acknowledged he did not have a license for the firearm and indicated the firearm had been taken during one of the burglaries. N.T., July 5, 1994, at p. 23. The Court discussed the elements of the firearms offenses with the Defendant and he indicated he understood them. N.T., July 5, 1994, at pp. 41-42. The Court also asked the Defendant if he understood that he would be sentenced for

³ The Defendant pled nolo contendere on July 5, 1994 at the same time as his co-defendant Larue Gordner. The plea transcript can be found in Mr. Gordner's case file numbered 94-10,476.

24 burglaries and one attempt, along with the firearm charges and conspiracy. The Defendant replied, "Yes, I do." N.T., July 5, 1994, at p. 35. The Court dictated the Order accepting the Defendant's nolo contendere plea to all the charges, including the firearms charges, in the Defendant's presence. N.T., July 5, 1994, at p.44-45. At the end of the hearing the Court asked the Defendant if he had any questions and he indicated he did not. N.T., July 5, 1994, at 49. The firearms charges were also discussed numerous times in the sentencing transcript. N.T., September 26, 1994, at pp. 2, 7, 20, 21, 30, 32. Based on these facts of record, the Court finds the Defendant's assertions that he did not realize he pled to the firearms charges are without merit.

As no purpose would be served by conducting any further 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)
Nicole Spring, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Wilson Harvey, DE9475
PO Box 256, Waymart PA 18472-0256