IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. 97-10,924; 97-10,970**
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	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
BARRY O. KOCH,	**:**	
Defendant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Order dated September 2, 2003, which denied and/or dismissed the defendant's Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

On or about March 2, 1998, the defendant entered pleas of nolo contendere to indecent assault, criminal attempt indecent exposure, and criminal attempt indecent assault in case number 97-10,924 and to indecent assault, corrupting minors, and endangering the welfare of children in case number 97-10,970. On June 17, 1998, the Court sentenced the defendant pursuant to Pennsylvania's Megan's Law (Megan's Law I). The defendant appealed his sentences to the Pennsylvania Superior Court. The Superior Court found Megan's Law I unconstitutional and remanded the cases for re-sentencing.

On or about November 29, 1999, the Court re-sentenced the defendant. In case number 97-10,924, the Court imposed a sentence of six months to five years for indecent assault, a consecutive three months to five years for criminal attempt indecent assault and a consecutive three months to five years for criminal attempt indecent exposure.

The aggregate sentence imposed in case number 97-10924 was one year to fifteen years incarceration in a state correctional institution. This sentence was also consecutive to the sentence imposed in case number 97-10-970. In number 97-10970, the Court sentenced the defendant to incarceration for six months to five years for indecent assault, a consecutive term of three months to five years for endangering the welfare of children and a consecutive term of three months to five years for corruption of minors.[1] The aggregate sentence under number 97-10,970 was also one year to fifteen years. The aggregate of both case numbers was two years to thirty years and was consecutive to a Clinton County sentence of four years to twenty years, which also arose out of sexual offenses against children.

On December 8, 1999, defense counsel filed a motion to modify sentence in which he asserted the maximum portion of the defendant's sentence was unduly excessive. On December 14, 1999, the Court summarily denied the motion and indicated the lengthy maximum sentence was completely appropriate in light of the defendant's history of sexually abusing children.

There was an error in the sentencing Order in case number 97-10970 and the Court issued an amended Order, which was dated December 7, 2000 and docketed December 11, 2000. See footnote 1of this Opinion. The defendant filed a pro se PCRA petition to both

1 Although the Court announced the sentence for corruption of minors in open court on November 29, 1999, the court reporter inadvertently failed to include this sentence in the sentencing Order. Approximately one year later, the Department of Corrections notified the Court that the aggregate for indecent assault and endangering the welfare of children was nine months to ten years, not one year to fifteen years as stated in the Order. At this point, the Court discovered the court reporter's error and issued an amended sentencing order on or about December 7, 2000.

case numbers on January 22, 2001. The defendant filed a notice of appeal on January 24, 2001 in case number 97-10,970. The Court held a conference on the PCRA petition on April 3, 2001 and issued an Order giving PCRA counsel thirty days to amend and to determine whether the appeal in case number 97-10970 divested the Court of jurisdiction to hear the PCRA petition at least to that case number. On June 25, 2001, the Court entered an Order indicating the PCRA petition was withdrawn by defense counsel pursuant to the defendant's instructions. On November 30, 2001, the Superior Court quashed the defendant's appeal in number 97-10970, because it was not filed within thirty days after entry of the order from which the appeal was taken.

On January 15, 2003, the defendant filed a pro se PCRA petition. On January 31, 2003 Eric Linhardt was appointed as counsel for the defendant. The Court held a conference with counsel on April 1, 2003 and issued an Order (docketed April 11, 2003) giving defense counsel thirty days to file either an amended petition or a Finley letter. On May 1, 2003, Attorney Linhardt filed an application for leave to withdraw his appearance on behalf of the defendant because the PCRA was not filed within one year of the defendant's conviction becoming final and, after research and discussion with the defendant, counsel was unable to plead or prove any exceptions to the one year time limitation.[2] A Finley letter was attached was attached to the application to withdraw as Exhibit 1 and a letter to the defendant was attached as Exhibit 2.

In an Order docketed August 5, 2003, the Court provided notice to the

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2 In fact, the defendant acknowledged to defense counsel that he became aware of the claims raised in his PCRA petition in either 2001 or 2002. See Application for Leave to Withdraw, Exhibit 1, p. 3.

defendant of its intent to dismiss his PCRA petition without an evidentiary hearing primarily because the petition was untimely. In a separate Order issued that same date, the Court granted Attorney Linhardt's application to withdraw. The defendant did not respond to the Court's notice of intent to dismiss his PCRA petition, so the Court entered a final order dismissing the petition on September 2, 2003.

On or about September 26, 2003, the defendant filed a notice of appeal. The Court directed the defendant to file a concise statement of matters complained of on appeal. The purpose of the Order was to determine which issues in the PCRA petition were going to be pursued by the defendant on appeal and/or why the defendant believed his petition was timely. Instead, the defendant asserted new issues regarding ineffective assistance of PCRA counsel. The defendant cannot raise these issues on appeal because they were not raised in the trial court. Therefore, the Court will not address the defendant's "concise statement," but rather will restate its rationale for dismissing the defendant's PCRA petition as untimely.

Section 9545(b) of the Judicial Code, regarding jurisdiction and timeliness of a PCRA petition, states:

> (1) Any petition filed under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
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> (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.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.
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> (3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review.
>
> (4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

42 Pa.C.S.A. §9545(b).

Given the factual history set forth in this Opinion, it is clear that the defendant's current PCRA petition is untimely. The Court sentenced the defendant on or about November 29, 1999. Defense counsel filed a post-sentence motion, which the Court summarily denied on or about December 14, 1999. Defense counsel had thirty days within which to file an appeal, but failed to do so.[3] Therefore, the defendant's judgment of sentence became final on or about January 13, 2000.[4] The defendant did not file his current PCRA petition until January 23, 2003. The defendant attempted to plead the governmental interference exception to the one-year requirement, but the allegations were insufficient. Most of the allegations of 'governmental misconduct' occurred during the defendant's plea and sentencing hearings. These allegations did not affect the defendant's ability to file his

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3 The Court received a copy of a pro se notice of appeal on December 15, 1999 and ordered a concise statement of matters complained of on appeal. The defendant filed a concise statement, but the Court did not issue a 1925(a) Opinion because the appeal was never properly filed. The defendant could not file a pro se appeal, because he was still represented by an assistant public defender. Pa.R.Cr.P. 576(C), which in 1999 was Rule 9022(C). The Court's copy of the notice of appeal inadvertently was docketed and appears on the docket as a motion for reconsideration filed by the defendant.

4 Even assuming for the sake of argument that the defendant's judgment of sentence became final thirty days after the Superior Court quashed his appeal on November 30, 2001, the defendant would have had to file his PCRA petition no later than December 30, 2002.

PCRA in a timely manner. The only allegation of governmental interference that relates to the defendant's ability to file his PCRA petition within one year is his allegation that the Court failed to advise the defendant of the Act's time restrictions. Personal notice, however, is not required, because the Pennsylvania Appellate courts have found an individual receives sufficient notice of the time requirements by virtue of the passage of the 1995 PCRA amendments. Commonwealth v. Hoffman, 780 A.2d 700, 703-04 (Pa.Super. 2001), citing Commonwealth v. Fahy, 558 Pa. 313, 325, 737 A.2d 214, 220 (1999). Since the defendant's petition was not filed in a timely manner, the Court lacked jurisdiction to hold an evidentiary hearing to address his petition on its merits. See Commonwealth v. Howard, 567 Pa. 481, 485, 788 A.2d 351, 353 (2002); Commonwealth v. Palmer, 814 A.2d 700, 705 (Pa. Super. 2002); Commonwealth v. Hoffman, 780 A.2d 700, 702 (Pa.Super. 2001).

DATE: _____ By The Court,

_____
Kenneth D. Brown, P. J.

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