

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

COMMONWEALTH

v.

**WENDELL BROWN,
Defendant**

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No.: 97-10,073; 98-10,551

OPINION AND ORDER

Before the Court is the Defendant's Motion for Post Conviction Collateral Relief filed July 18, 2003. Counsel was initially appointed on July 29, 2003 to aid Defendant in pursuing his Post Conviction petition. Before a hearing was scheduled, original defense counsel withdrew and another conflicts attorney was assigned on December 3, 2003. Assigned counsel, Jay Stillman, Esquire reviewed the file that he could not represent the Defendant, as he had been in the Public Defender's Office at the time the Defendant originally had contact with the office. On March 25, 2004, James Protasio, Esquire was ultimately assigned. At the conference on April 13, 2004, the Commonwealth argued that the Court could not entertain the petition, since it was not timely filed within one year of the date that the sentence became final.¹ Defendant alleges in his petition that: the evidence introduced by the Commonwealth at trial was false as well as the discovery

¹ This Court's Sentencing Order is dated August 25, 1999. Defendant did not file a Motion for Reconsideration of Sentence, therefore the sentence became final on September 24, 1999. The Defendant's First Petition for Post Conviction Collateral Relief was filed September 27, 1999 and denied by this Court as being untimely as his direct appeal right had not yet expired. The instant PCRA petition was filed July 14, 2003.

provided to him did not allow him the opportunity to call or cross examine any witnesses on his own behalf.

After reviewing the petition, the Court finds that the Petition still does not allege a basis for relief under the Post Conviction Relief Act, 42 Pa.C.S.A. § 9545(b). The Act does afford three narrow exceptions to the one-year filing requirement where the where the petitioner alleges and 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. §9545(b)(1).

In the case at hand, none of the Defendant's claims fall within one of the exceptions. All of the Defendant's claims center around the evidence or lack of evidence available to Defendant at the time of trial without even a bare allegation that due diligence could not have revealed the information.

Defendant makes no assertion that his cases are effected by a newly recognized and retroactive constitutional right. Finally, under subsection (i) of the statute, "government officials" does not include defense counsel,

whether appointed or retained. 42 Pa.C.S.A. §9545(b)(4). Since the Defendant has not proven that he falls within an exception to the time for filing requirement, the Court must dismiss his petition.

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. None will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), 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.

ORDER

AND NOW, this ____ day of June, 2004, the Court Defendant and his attorney that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty days of today's date.

By The Court,

Nancy L. Butts, Judge J.

xc: DA (KO)
James Protasio, Esquire
Hon. Nancy L. Butts
Judges
Gary Weber, Esquire
Diane L. Turner, Esquire