

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

COMMONWEALTH	:	
	:	
v.	:	No.: 00-10,464
	:	
LAMAR MORTON,	:	
Defendant	:	

OPINION AND ORDER

Before the Court is Defendant's Petition under the Pennsylvania Post-Conviction Relief Act (PCRA), filed June 17, 2003. The matter was initially set for a conference on August 29, 2003, however no record exists of any proceeding held on that date. Thereafter, Defendant's current counsel, Eric R. Linhardt, filed an Application for Leave to Withdraw Appearance on January 15, 2004, asserting that he had reviewed Defendant's PCRA petition and found no meritorious issues to present to the Court. Mr. Linhardt then requested that he be allowed to withdraw as Defendant's attorney in this case.

The Court begins by finding that the Defendant's PCRA petition is untimely. The Post-Conviction Relief Act provides under 42 Pa.C.S.A. §9745 that a PCRA petition must be filed within one year of the date that a case becomes final. See also Pennsylvania Rules of Criminal Procedure, Rule 901. The above-captioned case became final at the expiration of the appeal period following Defendant's sentencing. Defendant was sentenced in this case on August 17, 2000. His appeal period therefore expired on September 16, 2000. No appeal was filed in his case. The period during which the

Defendant could have properly filed a PCRA petition therefore expired on September 16, 2001. The PCRA Act does, however, provide three narrow exceptions to the one-year filing requirement 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).

Instantly, the Court finds that Defendant's claim does not fall within any of the listed exceptions. Since the Defendant has not proven that he falls within an exception to the time for filing requirement, the Court must dismiss his petition for that reason.

If, however, the Defendant had filed a timely petition for PCRA relief, the Court would still find that no meritorious issues have been raised in his petition. The single issue raised in his PCRA petition is Defendant's claim that a contractual agreement existed between him and the Commonwealth which was breached when the Defendant was not released by the Pennsylvania Board of Probation and Parole on his minimum date.

Defendant's attorney, Mr. Linhardt, has correctly set forth the law on this issue in the Turner¹ letter accompanying his Application for Leave to Withdraw Appearance. As noted there, the decision whether to release an inmate upon the expiration of his minimum sentence rests exclusively with the Pennsylvania State Board of Probation and Parole. The decision to grant parole at any time prior to the expiration of an inmate's maximum sentence "is a matter of grace and mercy shown to a prisoner who has demonstrated to the Parole Board's satisfaction his future ability to function as a law-abiding member of society upon release". Rogers v. Pennsylvania Board of Probation and Parole, 555 Pa. 285, 724 A.2d 319 (1999). It is equally clear that no inmate possesses a legal right to parole. Finnegan v. Pennsylvania Board of Probation and Parole, ____ Pa. ____, 838 A.2d 684 (Pa. 2003). Additionally, the Pennsylvania Supreme Court has held that "parole decisions are not ones which are subject to appellate review by the courts." Rogers, supra. See also Finnegan, supra, citing Pennsylvania Dental Association v. Commonwealth Insurance Department, 512 Pa. 217, 516 A.2d 684 (Pa. 1986) (The Court may not specify how discretion is to be exercised nor require the performance of a particular discretionary act.)

The Court additionally finds that the Defendant was aware at the time that he entered his plea that no so-called contract existed between him and the Commonwealth that he would be released at the expiration of his minimum sentence. After the Court accepted the Defendant's plea of no

¹Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (Pa. 1988). See also Commonwealth v. Finley, 379 Pa.Super. 390, 550 A.2d 213 (Pa.Super. 1988).

contest, sentencing took place immediately, at which time Defendant's trial counsel stated on the record that

Mr. Wiley: (t)he Court is well aware as I am and the Commonwealth as well as my client that currently the probation board is at a (sic) eighty-five percent on the max and under those circumstances we believe that the facts of this case as well as the circumstances of why we're here today would dictate simply a double up of the minimum sentence. We would be looking for something straight in the middle of the standard range, which would be the twenty-four months so we would be requesting that the Court impose a twenty-four to forty-eight month sentence, boot camp eligibility. If the Court desires continued supervision that they do it through consecutive probation as opposed to a long tail on the sentence.

The Court: Sure there's not anything you want to tell me?

The Defendant: No.

Transcript of no-contest plea and sentencing, August 17, 2000, pp. 15 – 16.

The claim which Defendant raises in his PCRA petition is therefore without merit.

Defendant raises no other claims in his PCRA petition. However, in his Turner letter, Mr. Linhardt indicates that in correspondence with the Defendant, a second potential issue has been raised that Defendant's trial counsel was ineffective for recommending that the Defendant enter a guilty plea. Although this claim does not appear in the PCRA petition and no amended petition has been filed, the Court has reviewed the transcript of Defendant's guilty plea hearing, held on August 17, 2000, and makes a finding that the no contest plea entered by the Defendant in this case was

knowing, intelligent and voluntary. There is no indication that the Defendant was coerced or induced in any manner to enter his plea. Both a written and an oral colloquy were conducted in this case. In those colloquies, the Defendant indicated that he understood his rights, that he understood that by pleading guilty he would be giving up many of his rights, and that it was his own decision to do so. See written plea colloquy dated August 17, 2000 and Transcript of no contest plea and sentencing, August 17, 2000. In fact, the Court made clear to the Defendant that he could instead proceed to trial without delay.

The Court: Today is the date that we were to proceed to trial in your case and it's my understanding that instead of doing that you wanted to plead guilty to some charges, is that correct?

The Defendant: Yes.

The Court: You understand that you have an absolute right to go to go to trial, that you don't have to plead guilty?

The Defendant: Yes.

The Court: But this is what you want to do?

The Defendant: Uh-huh.

Transcript of guilty plea, August 17, 2000, p. 2. Additionally, when asked who had made the decision to enter a no-contest plea in the case rather than proceed to trial, the defendant responded that he, Lamar, had made that decision. Id., at p. 12, Written colloquy, p. 5. The Court also finds it significant that the Defendant has numerous prior convictions, resulting in a Prior Record Score of 5. This was not the first time that the Defendant had

been in court facing criminal charges. He was familiar with the criminal justice system in Pennsylvania and the process by which an individual is held to answer to criminal charges brought against him. No evidence exists within the record as to the advice given to the Defendant by his attorney. However, it is clear from the colloquies that the Defendant was aware that it was ultimately his own decision whether or not to enter a plea or proceed to trial. Additionally, there is no evidence to suggest that the Defendant's trial counsel had no reasonable strategic basis for recommending a guilty plea, if in fact that recommendation was made. To the contrary, at the time of the entry of Defendant's no contest plea, his trial attorney told the Court that the Defendant's intention had been to proceed to trial until he found out two days before the entry of the plea that one of his co-Defendant's had changed his statement and would provide very damaging testimony against him at trial which was consistent with the Commonwealth's version of the facts. Id., at p. 15. Additionally, Defendant in asserting a claim of ineffective assistance of counsel bears the burden of showing that he was prejudiced by his attorney's ineffectiveness. See Commonwealth v. Mason, 559 Pa. 500, 741 A.2d 708 (1999). "Trial counsel is presumed to have rendered effective assistance and appellant has the burden of proving otherwise." Commonwealth v. Marshall, 534 Pa. 488, ___ A.2d ___ (Pa. 1993), citing Commonwealth v. March, 528 Pa. 412, 598 A.2d 961 (1991). There is no indication in the record that Defendant would be able to meet this burden. In fact, the available evidence directly contradicts his claim. The Court therefore finds

that even if the Defendant were to raise the issue of ineffective assistance of counsel, that claim would fail.

Based upon the foregoing, the Court finds that no purpose would be served by conducting any further hearing, and therefore 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.

The Court additionally shall grant Mr. Linhardt's Application for Leave to Withdraw Appearance as there are no meritorious issues raised in the Defendant's PCRA petition.

ORDER

AND NOW, this ____ day of April, 2004, the Court GRANTS the Application for Leave to Withdraw Appearance filed by Attorney Linhardt on January 15, 2004 and notifies the Defendant 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)
Eric Linhardt, Esquire
Lamar Morton – EJ8885
State Correctional Institution
RD 10, Box 10
Greensburg, PA 15601
Hon. Nancy L. Butts
Judges
Gary Weber, Esquire
Diane L. Turner, Esquire

Later in the proceeding, the Defendant acknowledges that no plea agreement exists in his case and the Court is free to sentence as it wishes.

The Court: You understand that the standard sentencing guideline range is twenty-one to twenty-seven months and you're not here pleading to any specific agreement.

The Defendant: Yes, I know.

The Court: So there's nothing that you can appeal at least with regard to the sentencing on that I failed to comply with the plea agreement because there's no plea agreement.

The Court: Yes.

Transcript of guilty plea, August 17, 2000, pp. 5 – 6.