IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. 99-10,955**
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	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
JAMAL BENNETT,	**:**	
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 January 7, 2005 and docketed January 12, 2005. The relevant facts follow.

On October 21, 1999, a jury convicted the appellant of simple assault, recklessly endangering, and possession of a controlled substance with the intent to deliver. On December 20, 1999, the Court sentenced the defendant to an aggregate sentence of 4 ½ to 10 years incarceration in a state correctional institution.

The appellant filed a timely appeal. In his appeal, the appellant asserted the trial court erred in admitting a photograph depicting the appellant holding a gun and the evidence was insufficient to support his convictions. In a memorandum decision filed August 2, 2001, the Pennsylvania Superior Court rejected the appellant's assertions and affirmed his convictions.[1]

On August 14, 2002, Attorney Eric Linhardt filed a PCRA petition on the appellant's behalf. The sole issue raised in the petition was that the Court improperly and/or

illegally applied the deadly weapon enhancement on his simple assault and/or recklessly endangering convictions. On November 22, 2002, the Court denied the appellant's PCRA petition. The appellant filed a timely appeal. In a memorandum opinion filed on June 9, 2004, the Pennsylvania Superior Court affirmed this courts' order denying post conviction relief and granted counsel's motion to withdraw because the sole claim raised in the petition was without merit.[2]

On June 17, 2004, the appellant filed a second PCRA petition. In this petition, the appellant again alleges that his sentence was illegal because the court applied the deadly weapon enhancement. He also raises issues asserting: (1) the trial court erred in dismissing his first PCA petition absent his counsel filing a Finley or "no merit" letter, (2) his counsel was ineffective for failing to challenge the legality of the search of his residence, and (3) the photograph depicting him possessing a weapon was inflammatory and prejudicial and therefore inadmissible against him. On November 16, 2004, the court notified the appellant of its intent to dismiss his second PCRA without holding an evidentiary hearing, because the petition was untimely. The appellant filed a response claiming his petition should not be considered untimely because he filed it within 60 days of the Superior Court's decision disposing of his first PCRA petition and he has been and continues to be incarcerated in a restricted housing unit. On January 12, 2005, the Court dismissed his second PCRA petition. The appellant filed a timely appeal.

Unless a petitioner pleads and proves one of the three limited exceptions, a PCRA petition, including second and subsequent petitions, must be filed within one year of

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1 The Superior Court docket number for that appeal was 536 MDA 2000.
2 The Superior Court docket number for this appeal was 2006 MDA 2002.

the date the judgment of sentence becomes final. 42 Pa.C.S.A §9545(b)(1). A judgment becomes final at the expiration of direct review. 42 Pa.C.S.A. §9545(b)(3). The Pennsylvania Superior Court denied the appellant's direct appeal and affirmed his judgment of sentence in a memorandum opinion filed on August 2, 2001. The appellant had thirty days to file a petition for allowance of appeal with the Pennsylvania Supreme Court. To this Court's knowledge, the appellant did not file a timely petition for allowance of appeal. Therefore, the appellant's judgment became final on or about September 2, 2001 and his PCRA petition had to be filed on or before September 1, 2002.

There are three exceptions to the one-year filing requirement: (1) governmental interference; (2) after-discovered evidence; and (3) constitutional changes that have been held to apply retroactively. 42 Pa.C.S.A. §9545(b)(1)(i)-(iii). Even if one of these exceptions applies, the petition will still be considered untimely if the exception is not asserted within sixty days.

In his response to the Court's notice of intent to dismiss, the appellant attempts to invoke either the first or second exception. The appellant first asserts that, since all of his attorneys were appointed by the court, they are state actors who have interfered with the presentation of his claims. The PCRA specifically states, however, that the term government officials "shall not include defense counsel, whether appointed or retained." 42 Pa.C.S.A §9545(b)(4). Therefore, the appellant's assertions are insufficient as a matter of law to satisfy the governmental interference exception.

The appellant also asserts that since he has been incarcerated in a restricted housing unit since September 2002, prison officials have interfered with his ability to present his claims. This argument fails for two reasons. First, the appellant was not placed in

restricted housing until after the expiration of the one-year period for filing a PCRA petition. Second, the record of the appellant's filings in this case belies the appellant's assertions that he was unable to file documents with the court.

The appellant contends that his petition is timely because it was filed within 60 days of the Superior Court's denial of his first PCRA petition. Again, the court cannot agree. The appellant has not pleaded any **facts** that he discovered in the 60 days preceding the filing of his second PCRA petition. Given some of the appellant's vague allegations in his response to the notice of dismissal, the court assumes the defendant wants to argue PCRA counsel was ineffective for failing to raise these issues in his first PCRA petition. Unfortunately, the appellant's allegations relate to trial counsel and appellate counsel. Other than mentioning Mr. Linhardt as one of his court-appointed attorneys, the appellant does not state any factual allegations against Mr. Linhardt and does not properly layer his ineffectiveness claims against trial counsel and appellate counsel. Moreover, even if the appellant had pleaded that PCRA counsel was ineffective for failing to raise the issues the appellant asserts in his second PCRA petition, such an allegation would not legally be sufficient to invoke the after-discovered evidence exception. See Commonwealth v. Gamboa-Taylor, 562 Pa. 70, 80, 753 A.2d 780, 785 (Pa. 2000)("subsequent counsel's review of previous counsel's representation and a conclusion that previous counsel was ineffective is not a newly discovered 'fact' entitling Appellant to the benefit of the exception for after-discovered evidence.").

The time limits of the PCRA are jurisdictional in nature. Commonwealth v. Howard, 567 Pa. 481, 489, 788 A.2d 351, 356 (Pa. 2002); Commonwealth v. Murray, 562 Pa. 1, 5, 753 A.2d 201, 202-03 (Pa. 2000). Since the appellant's PCRA petition was not filed

within one year of his conviction becoming final and appellant did not plead sufficient facts to invoke one of the exceptions, the Court lacked jurisdiction to address the appellant's PCRA claims, and it properly denied the petition without holding an evidentiary hearing.[3]

DATE: _____ By The Court,

_____
Kenneth D. Brown, P. J.

cc: Kenneth Osokow, Esquire (ADA)
Jamal Bennett, #ED-9008
1100 Pike St, Huntingdon, PA 16654
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)

3 Even if the appellant's petition were timely, the Court would have denied it without holding an evidentiary hearing. The appellant's claims regarding the photograph and the weapon enhancement were previously litigated in his direct appeal and first PCRA petition, respectively. His claim that the Court erred in dismissing his first PCRA petition without counsel filing a Finley letter is without merit. There is no requirement that the Court only dismiss a PCRA petition when defense counsel agrees that the petition lacks merit. Moreover, the Pennsylvania Superior Court upheld this Court's decision and found that the appellant's first PCRA petition was clearly without merit. Finally, his claim that the search of the residence was illegal because he did not have the ability to consent to a search of the residence also lacks merit. The appellant admits in his response to the notice of intent to dismiss that he was leasing the house and resided in it. Based on these admissions, it is clear the appellant had both actual authority and apparent authority to consent to the search. See Commonwealth v. Hughes, 575 Pa. 447, 836 A.2d 893 (Pa. 2003); Commonwealth v. Quiles, 422 Pa.Super. 153, 619 A.2d 291 (Pa.Super. 1993); Commonwealth v. Blair, 394 Pa.Super. 207, 575 A.2d 593 (Pa.Super. 1990).