

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

: No. CR-239-2000

: (00-10,239)

:

vs.

: CRIMINAL DIVISION

:

:

RONALD UNGARD,
Defendant

: Post Conviction Relief Act

: (PCRA)

ORDER

AND NOW, this _____ day of March 2005, the Court DENIES the defendant's Post Conviction Relief Act (PCRA) petition.

A jury found the defendant guilty of aggravated assault, a felony of the first degree, and recklessly endangering, a misdemeanor of the second degree. In an order docketed December 11, 2000, the Court sentenced the defendant to incarceration in a state correctional institution for a minimum of 4 years and a maximum of 15 years. Defense counsel filed a motion for judgment of acquittal and for a new trial, which the Court denied in an opinion and order docketed March 6, 2001. Although the defendant desired to appeal his convictions, his attorney failed to file a notice of appeal on his behalf.

On November 29, 2001, the defendant filed a PCRA petition to have his appeal rights reinstated. The Court granted the defendant's PCRA petition and reinstated his appeal rights in an order docketed April 5, 2002. On March 21, 2003, The Pennsylvania Superior Court dismissed the defendant's appeal due to counsel's failure to file a brief.

On August 24, 2004, the defendant filed his current PCRA petition, in which he asserts his sentence was enhanced in violation of Blakely v. Washington, 124 S.Ct. 2531

(June 24, 2004). Since his first PCRA merely reinstated his direct appeal rights, the Court treated his current PCRA petition as a first petition. The Court appointed counsel to represent the defendant. The Court gave counsel several opportunities to amend the PCRA petition. No amendments were filed. The Court scheduled a conference on the petition for February 7, 2005. At the conference, counsel submitted a Turner/Finley letter that stated previous counsel informed the defendant that his appeal was dismissed for failure to file a brief in accordance with the Order of the Superior Court dated March 21, 2003, and indicated the defendant was unable to demonstrate any of the exceptions to the one-year statute of limitations found in the PCRA. On February 14, 2005, the Court gave notice to the defendant of its intent to dismiss his PCRA petition as untimely. The defendant submitted a response to the proposed dismissal on March 11, 2005, but the response did not state any facts to show that his petition was timely.

Any PCRA petition must be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves one of the three limited statutory exceptions. 42 Pa.C.S.A. §9545(b). A judgment becomes final at the conclusion of direct review, including discretionary review in the Pennsylvania Supreme Court, or at the expiration of time for seeking the review. 42 Pa.C.S.A. §9545(b)(3). At the latest, the defendant's conviction became final 30 days after the Superior Court dismissed his appeal, i.e., April 20, 2003. Thus, to be considered timely, the defendant had to file his PCRA petition on or before April 19, 2004. The defendant's petition was not filed until August 24, 2004.

The time limits 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). Since the defendant’s petition was filed approximately 4 months late, the Court lacks jurisdiction to hold an evidentiary hearing or grant the defendant relief.

The defendant asserts his petition falls within the exception for a new constitutional right found at 42 Pa.C.S.A. §9545(b)(1)(iii). The Court cannot agree. Section 9545(b)(1)(iii) states: “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.”

Although the United States Supreme Court decided Blakely after the time period provided by the PCRA, the Blakely decision does not apply retroactively. See Commonwealth v. Moss, 2005 PA Super. 111, 2005 PA Super. LEXIS 412 (March 23, 2005). Therefore, this exception does not apply.¹

The defendant is hereby notified that he has the right to appeal from this order

1 Even if Blakely applied retroactively, the defendant would not be entitled to relief. The Pennsylvania Superior Court has held that Pennsylvania’s sentencing guidelines do not violate the principles enunciated in Blakely, because Pennsylvania has an indeterminate sentencing scheme. Commonwealth v. Bromley, 862 A.2d 598 (Pa. Super. 2004). Moreover, the defendant did not receive an “enhanced” sentence. The standard guideline range for the minimum sentence for aggravated assault was 42-54 months. The Court sentenced the defendant to a minimum of 4 years or 48 months, so his sentence was squarely within the standard range. The maximum sentence for an aggravated assault that is a felony of the first degree is 20 years. The defendant’s maximum sentence was 15 years. Since the defendant’s minimum sentence was within the standard range and his maximum sentence did not exceed the statutory maximum of 20 years, the defendant’s allegation that his

to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, the defendant may lose forever his right to raise these issues.

A copy of this order shall be mailed to the defendant by certified mail, return receipt requested.

By The Court,

Kenneth D. Brown, P.J.

cc: Kenneth Osokow, Esquire (ADA)
William A. Kovalcik, Jr., Esquire
Ronald Ungard, #EM-0862
PO Box 1000, Houtzdale, PA 16698-1000
Work file
Prothonotary
Gary Weber, Esquire (Lycoming Reporter)

sentence was enhanced independently in violation of Blakely is clearly without merit.