

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

**COMMONWEALTH**

v.

**STEPHEN ZELLERS,  
Defendant**

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**No.: 99-10,322  
98-11,197**

**OPINION AND ORDER**

Before the Court is Defendant's Amended Petition under the Pennsylvania Post-Conviction Relief Act (PCRA), filed November 22, 2004. Defendant's current counsel, William A. Kovalcik, Esq., has submitted to the Court a letter of no merit in response to this Petition<sup>1</sup>. Defendant was convicted by a jury of Attempted Robbery, Attempted Robbery of a Motor Vehicle, Attempted Kidnapping, and Possession of an Instrument of Crime. He was sentenced to 11 ½ to 23 years state incarceration on November 1, 1999. The sentence was appealed to the Superior Court and affirmed on February 7, 2001. Defendant filed a PCRA Petition in October 2001, which was denied by the Court on July 1, 2002. Defendant's

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<sup>1</sup> Commonwealth 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).

Amended PCRA Petition claims that he was not informed of the prior Petition's denial and that therefore an exception to the one-year time limitation of the PCRA should apply to this Amended Petition.

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 conclusion of Defendant's appeal on February 7, 2001. One year later, on February 7, 2002, Defendant's time to file a PCRA Petition expired. The PCRA 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).

The Court finds that Defendant's claim does not fall within any of the listed exceptions. The first exception does not apply because Defendant was represented and could only reasonably claim interference by his own counsel. However, the PCRA specifically states that defense counsel is not a government official for purposes of this exception. §9545(b)(4). The Court also notes that, "[T]he

timeliness requirements of the PCRA are mandatory and jurisdictional in nature. Thus, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner." *Commonwealth v. Hoffman*, 2001 Pa.Super 209, 780 A.2d 700, 702 (2001). Since the Defendant has not proven that he falls within an exception to the timing requirement, the Court must dismiss his Petition.

The Court will not grant Defendant's appeal rights nunc pro tunc. The Court's power to allow an appeal nunc pro tunc is severely limited. "[A]ny such allowance must be based on extraordinary conditions and must involve fraud or some breakdown in the court's operation through a default of its officers, whereby the party has been injured." *Rostosky v. Commonwealth of Pa., D.E.R.*, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1972). [T]he mere neglect of counsel cannot justify the granting of an appeal nunc pro tunc." *Id.* at 763. A bare assertion that Defendant did not receive notice of the Court's intention to dismiss his PCRA does not warrant an appeal nunc pro tunc. The Defendant was ordered a copy be sent to him certified mail and he was represented by counsel who had notice and a copy of the Order. Furthermore, Defendant's current counsel has presumably investigated Defendant's assertion and filed the present letter of no merit.

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 Amended 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 February, 2005, the Court hereby notifies the Defendant that it is the intention of the Court to dismiss his Amended PCRA Petition unless he files an objection to that dismissal within twenty days of today's date.

By The Court,

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Nancy L. Butts, Judge

xc: DA (KO)  
William Kovalcik, Esquire  
Stephen Zellers – EB-6892  
State Correctional Institution - Waymart  
PO Box 256, Route 6  
Waymart, PA 18472-0256  
Hon. Nancy L. Butts  
Judges  
Gary Weber, Esquire  
Law Clerk