

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NO. 1066-1994; 1135-2006
 :
 EDWARD J. NICHOLAS, : CRIMINAL ACTION - LAW
 :
 Defendant : PCRA Petition

DATE: June 4, 2007

MEMORANDUM OPINION AND ORDER

This order is entered in relation to a *pro se* Post Conviction Relief Act (PCRA) Petition filed by Defendant Edward J. Nicholas on April 23, 2007. On May 2, 2007, this court issued an order notifying Nicholas of our intention to dismiss the PCRA Petition as untimely and gave Nicholas twenty days to file a response identifying which exception to the one year time limit applied and explaining how that exception applied. On May 14, 2007, Nicholas filed two documents entitled “Challenge of 42 P.A § 5504(b)” and “Motion Pursuant to 28 U.S.C. 2244(d)(1) Statutory Tolling.” The court will treat these two documents as Nicholas’s response to our May 2, 2007 order.

In these two documents, Nicholas asserts that the charges in the above captioned cases have been modified and as a result he was not sentenced in accordance with his plea agreement. Nicholas asserts that he was not aware of this modification until 2007 when he was investigating procedures to expunge his criminal record. Nicholas further asserts that his former counsel was ineffective for failing to notify him of the modification, so that Nicholas could take timely action.

Nicholas’s response does not set forth an exception to the one year time limit. Even if the court were to assume *arguendo* that the charges were modified and Williamson’s counsel failed to

notify him of this, counsel's ineffectiveness does not provide an exception to the time limit requirements of the PCRA. *See*, 42 Pa.C.S.A. § 9545(b)(4); *Commonwealth v. Breakiron*, 781 A.2d 94, 97 (Pa. 2001); *Commonwealth v. Yarris*, 731 A.2d 581, 588 (Pa. 1999); *Commonwealth v. Carr*, 768 A.2d 1164, 1168 (Pa. Super. 2001).

Nicholas's contention that he was unaware of the modification until 2007 is an attempt to assert the after discovered evidence exception. *See*, 42 Pa.C.S.A. § 9545(b)(1)(ii). This exception does not apply because there is no new evidence. The charges and Nicholas's sentence were never modified.

On October 17, 1994, Nicholas pleaded guilty to Count 1, Receiving Stolen Property, 18 Pa.C.S.A. § 3925, in Case 1066-1994 and to Count 1, Burglary, 18 Pa.C.S.A. § 3502(a), in case 1135-1994. The face sheet of the guilty plea colloquy indicates that Nicholas would plead guilty to those two counts, be sentenced to a minimum of thirty-four days as to the Receiving Stolen Property Count, with credit being applied to this sentence, and be sentenced to a minimum of seventeen months on the Burglary Count. On December 15, 1994, Nicholas was sentenced in accordance with the plea agreement. The Honorable Clinton W. Smith sentenced Nicholas to incarceration at the Lycoming County Prison for a minimum of thirty-four days and a maximum of one year on the Receiving Stolen Property Count. Nicholas was given credit for time served and paroled as to that sentence. Judge Smith sentenced Nicholas to incarceration at a state correctional institution for a minimum of seventeen months and a maximum of four years on the Burglary Count. An examination of the docket entries reveals no order modifying the charges or sentence in either case 1066-1994 or 1135-1994. The court has also examined the court files in both cases and could find no such order.

As such, there is no evidence that the charges and sentence were ever modified or deviated from the plea agreement entered on October 17, 1994. In light of this, there is no after discovered evidence and the exception does not apply. Accordingly, the court will enter the following order.

ORDER

Nicholas's PCRA Petition FILED April 23, 2007 is hereby DENIED and DISMISSED.

Nicholas is hereby advised that he has the right to appeal this order to the Superior Court of Pennsylvania. If he chooses to do so, then he must file a written notice of appeal in the Lycoming County Prothonotary's Office within thirty (30) days of this order.

The Lycoming County Prothonotary's Office shall provide notice to Nicholas of this order by certified mail, return receipt requested.

BY THE COURT,

William S. Kieser, Judge

cc: Edward J. Nicholas – EE2437
SCI Albion
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Albion, PA 16475-0002
DA (KO)
Judges
Gary Weber, Esquire (Lycoming Reporter)
Christian J. Kalas, Esquire
Prothonotary