

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-2027-1997  
: (97-12,027)  
vs. :  
:   
: CRIMINAL  
HILTON MINCY, :  
Defendant : PCRA

**ORDER**

AND NOW, this \_\_\_ day of April 2008, upon review of the record and pursuant to Rule 907(a) of the Pennsylvania Rules of Criminal Procedure, the Court gives Defendant notice of its intent to dismiss his Post Conviction Relief Act (PCRA) petition without holding an evidentiary hearing, because it believes the petition is untimely and the issues raised therein either are previously litigated or waived or lack merit.

Generally, any PCRA petition, including second or subsequent petitions, must be filed within one year after Defendant's judgment became final. 42 Pa.C.S. §9545(b)(1). The Pennsylvania Superior Court affirmed Defendant's judgment of sentence on February 27, 2001. No petition for allowance of appeal was filed with the Pennsylvania Supreme Court. Therefore, Defendant's judgment became final on or about March 29, 2001. Defendant's current PCRA petition (his second overall) was filed on February 21, 2007 and a supplemental petition was filed on June 20, 2007.<sup>1</sup> These PCRA petitions should have been filed on or before March 29, 2002.

Defendant tries to avail himself of the exception to the one-year filing

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<sup>1</sup> At Defendant's request, the Court stayed arguments on his PCRA petition while he litigated a petition for habeas corpus relief in the Federal courts.

period contained in 42 Pa.C.S. §9545(b)(1)(ii), which applies when “the facts upon which the claim is predicated were unknown to the petitioner and could not be ascertained by the exercise of due diligence.” The Court does not believe this exception applies to the current claims raised by Defendant. Defendant has not alleged why he could not discover the facts which form the basis of his current claims prior to March 29, 2002. Commonwealth v. Priovolos, 746 A.2d 621, 626 (Pa.Super. 2000)(trial court properly dismissed petition as untimely without holding an evidentiary hearing where appellant made no attempt to explain why the information that formed the basis of his claims could not, with the exercise of due diligence, have been obtained much earlier). In fact, the Court finds Defendant knew or could have discovered both claims well before he filed his current PCRA petition in 2007.

The claims raised in Defendant’s current petition relate to the criminal record and purported deals received by the victim, Albert Johnson, and Mr. Johnson’s statements to Juay Brockenbaugh that the charges could go away if Defendant paid the victim money. From the time of the preliminary hearing, at the latest, Defendant knew the alleged victim was Albert Johnson. Mr. Johnson’s criminal charges and convictions are matters of public record in Lycoming County and Dauphin County. Therefore, these facts were not “unknown” to Defendant. Commonwealth v. Chester, 586 Pa. 468, 473, 895 A.2d 520, 523 (Pa. 2006)(“for purposes of 42 Pa.C.S. §9545(b)(1)(ii) information is not “unknown” to a PCRA petitioner when the information was a matter of public record.”). Defendant has offered no explanation why he could not discover the April 1997 charges from Dauphin County and the June 1997 Lycoming County charges and the convictions that arose

therefrom prior to trial or within one year after his conviction became final.<sup>2</sup> See Priovolos, supra. In fact, Defendant neither alleges that he or his counsel did not know of the convictions<sup>3</sup> nor did he provide a certification from trial counsel to support such an allegation.

Instead, he suspects the victim was a confidential informant because of the deals he received on all his charges (including ones from other jurisdictions that did not arise until well after Defendant's trial) and because the police did not charge Defendant for the drugs found on his person in the hospital or the gun found in the residence. He further contends the Commonwealth violated the Brady rule by failing to disclose: (1) Mr. Johnson's alleged confidential informant status; (2) the fact that he was not charged with drug or gun offenses; and (3) other secret deals, understandings, favors or promises of leniency. As discussed supra, Mr. Johnson's charges and convictions were not "unknown" to Defendant. The Court also does not believe one can infer from the disposition of those charges that Mr. Johnson was a confidential informant.

With respect to the fact Mr. Johnson was not charged with drug or gun offenses, this information was known by trial counsel and utilized during trial. Trial counsel cross-examined Mr. Johnson about whether drugs were found on his person and whether a weapon was found in the residence. N.T., 5/11/1998, at pp. 83-85, 89. Trial counsel also questioned Officer Keith Bowers about suspected drugs found on Mr. Johnson's person (N.T., 5/12/1998, at pp. 62-63) and he asked Agent Stephen Sorage and Trooper Dean Kirkendall about the weapon found in the residence (N.T., 5/12/1998, at pp. 84, 95-97).

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<sup>2</sup> The Court notes the other charges listed in his PCRA petition all arose after his trial occurred in May 1998.

<sup>3</sup> The Court notes the District Attorney's office typically provides defense counsel with a witness' prior record

Defendant also knew about any facts or information Juay Brockenbaugh could provide before March 29, 2002. Juay Brockenbaugh wrote to Defendant informing him of Mr. Johnson's alleged offer to settle things with money on or about November 9, 1997.<sup>4</sup> Moreover, Defendant raised this issue in his first PCRA petition. Therefore, Defendant clearly knew the facts which form the basis of this claim years before he filed his current PCRA petition.

The Court also believes the issues raised in Defendant's current PCRA petition are previously litigated or waived. In his first PCRA petition, Defendant asserted trial counsel was ineffective for failing to adequately impeach the victim's testimony. The Pennsylvania Superior Court rejected these claims. See Superior Court Opinion, January 9, 2004, at 7. Both issues raised in Defendant's current PCRA petition relate to impeachment of the victim; the issues just offer alternate reasons why the jury should not have believed the victim's testimony. One may not re-litigate a finally litigated ground for relief every time a new legal theory is advanced. Commonwealth v. Baker, 371 Pa.Super. 588, 593, 538 A.2d 892, 894 (Pa.Super. 1988)(petitioner barred from pursuing claim that trial counsel was ineffective for failing to object to prosecutor's summation when he asserted such a claim in his first PCRA petition based on different remarks in the summation). In the alternative, Defendant could have discovered the facts that form the basis of these claims and raised them in his first PCRA petition. He did not. Therefore, these claims are waived.

The Court also finds the issues lack merit. With respect to the claim that the victim Albert Johnson was a confidential informant, the facts alleged do not support

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information before trial.

<sup>4</sup> In the letter, Defendant is referred to by his middle name, Karriem. Ms. Brockenbaugh referred to herself as

this conclusion. In his petition, Defendant notes that charges of false reports, disorderly conduct and loitering were filed against Mr. Johnson on or about April 9, 1997 in Dauphin County. However, the petition further states that these charges were resolved through a plea to a lesser charge. Charges of terroristic threats, harassment and disorderly conduct were filed against Mr. Johnson in Lycoming County on July 24, 1997. Defendant pled guilty and was sentenced on these charges on or about February 13, 1998, approximately three months prior to Defendant's trial. The fact that both charges resulted in pleas does not establish that Mr. Johnson was a confidential informant at the time of Defendant's trial.

The fact that Mr. Johnson may have been charged in Cumberland County in May 1999 and Dauphin County in June and September 2004 is irrelevant; the jury was assessing Mr. Johnson's credibility in May 1998.

Defendant also argues that since Mr. Johnson was incarcerated in March and/or April of 1998 but released prior to trial, he was an informant or received some sort of consideration from the District Attorney's office because he was a witness in Defendant's case. This was not the case. The terroristic threats, harassment and disorderly conduct charges were filed to case number 97-11,435.<sup>5</sup> Mr. Johnson pled guilty, and the Court sentenced him to 12 days to 12 months on February 13, 1998.<sup>6</sup> With credit for time served, Defendant already had served his minimum and was immediately eligible for parole. Mr. Johnson was incarcerated in March and April 1998 on probation/parole violations. In

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Kera or Hakerah in the letter and on the return address of the envelope, respectively.

<sup>5</sup> Harassment and disorderly conduct were summary offenses. Mr. Johnson also was charged with intimidation and retaliation against a person who was a witness in a relative's court case. The intimidation and retaliation charges were dismissed as part of the plea agreement entered in February.

<sup>6</sup> The offense gravity score for terrorist threats was 3, and Mr. Johnson had a prior record score of 0. Therefore, the standard guideline range was RS to 1 month.

Lycoming County, the District Attorney's office is not involved in probation or parole violations; instead, they are filed and pursued by the adult probation officers. Mr. Johnson was released from prison in April 1998, because he needed surgery.<sup>7</sup> See Printout from Adult Probation, affixed as Attachment A.

The Court also believes the allegations regarding the victim having drugs or a gun on the date of the incident do not have merit. Whether the victim possessed guns or drugs was not relevant to who shot him. In fact, it may provide a motive for the shooting. Defendant wants to argue the victim had a motive to testify against him or a bias in favor of the Commonwealth because he wasn't charged with possessing the drugs or the gun.<sup>8</sup> These issues, however, were explored at trial and the jury still found Defendant guilty.

Defendant also seems to argue that Mr. Johnson's conviction for terroristic threats would somehow have been admissible. The Court cannot agree. There are limited circumstances where prior convictions are admissible. If the conviction is for a crime of dishonesty, it may be admissible to impeach the witness' testimony. Pa.R.E. 609; Commonwealth v. Randall, 515 Pa. 410, 528 A.2d 1326 (1987). Terroristic threats, harassment and disorderly conduct, however, are not crimes of dishonesty. See Commonwealth v. Jenkins, 362 Pa. Super. 138, 142, 523 A.2d 813, 815 (1987)(harassment is not a crime involving dishonesty); Commonwealth v. Shealey, 324 Pa. Super. 56, 60, 471 A.2d 459, 461 (1984)(assault and harassment are not in the nature of crimen falsi);

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<sup>7</sup> When an inmate needs a medical procedure, the Court typically will release him so he can get the procedure and he or his insurance carrier will be responsible for the cost rather than Lycoming County.

<sup>8</sup> The Court notes Mr. Johnson claimed the gun found in the residence did not belong to him or the relative in whose home the shooting took place, but looked like the weapon one of the perpetrator's was carrying. The caliber of this gun matched the caliber of the shell casings found at the scene, but the police could not get any usable fingerprints off the weapon to definitively determine who possessed the weapon.

Commonwealth v. Grimm, 249 Pa.Super. 441, 447, 378 A.2d 377, 380 (1977)(convictions showing assaultive or disorderly conduct do not involve false statement or dishonesty).<sup>9</sup>

Thus, contrary to Defendant's assertions, he could not use the terroristic threats conviction for impeachment purposes to show the jury Mr. Johnson was 'arrested for a violent crime.

Defendant's claim that his first PCRA counsel was ineffective also is without merit. Defendant raised the claim related to Juay Brockenbaugh in his first PCRA petition. The Court dismissed this claim because no certification was filed that complied with 42 Pa.C.S. §9545(d)(1). In response to the Court's proposed dismissal, counsel indicated that he could not locate Ms. Brockenbaugh to obtain a certification from her. See Counsel's letter to Court, p.1 (a copy of which is attached as Attachment B). In order to prevail on a layered ineffectiveness claim related to failure to call a witness, Defendant would need to plead and provide a witness certification that would show the following with respect to both the trial and the PCRA hearing: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness' testimony was so prejudicial as to have denied the defendant a fair trial. Commonwealth v. Henry, 550 Pa. 346, 379, 706 A.2d 313, 329 (1997). In addition to the letter from PCRA counsel, court records in Ms. Brockenbaugh's criminal file (01-11, 873) show she was not available to testify for the defense at the PCRA hearing on December 10, 2002. A bench warrant was issued on or about July 19, 2002, because Ms. Brockenbaugh absconded from her probation or parole supervision. See Attachment C. Ms. Brockenbaugh

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<sup>9</sup> Although Mr. Johnson was charged with false reports in Dauphin County, which would be a crime of dishonesty, based on Defendant's allegation that this case was resolved through a plea to a lesser charge it

was not picked up on the bench warrant until June 17, 2004. See Sheriff's return (Attachment D).

For the reasons set forth above, the parties are hereby notified of this Court's intention to deny Defendant's Second PCRA 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.

By The Court,

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Kenneth D. Brown, P.J.

cc: Kenneth Osokow, Esquire (ADA)  
David Foster, Esquire  
831 Market Street, P.O. Box 222, Lemoyne PA 17043

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appears Mr. Johnson was not convicted of that charge.