IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-651-2005**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
DARRYL LEE,	:	
Appellant	:	**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 entered March 23, 2009, which dismissed Appellant's Post Conviction Relief Act (PCRA) petition as untimely.

On June 6, 2005, Appellant entered a guilty plea to aggravated assault in this case and robbery in case number CR-1804-2004 (04-11,805). The plea agreement was for a six to twelve year sentence, consisting of one to two years for robbery and five to ten years for aggravated assault.[1] On June 22, 2005, the Court sentenced Appellant in accordance with the plea agreement. No appeal was filed. Therefore, Appellant's judgment of sentence became final on or about July 22, 2005.

On April 26, 2006, Appellant filed a pro se motion for modification of sentence nunc pro tunc in this case and in case 1804-2004. The Court treated this motion as a PCRA petition and appointed counsel to represent Appellant. On July 17, 2006, the Court gave Appellant notice of its intent to deny his PCRA, explaining that the Court could not

1 The written guilty plea colloquy was filed to case number 04-11,804. A copy of the first page of that colloquy, which shows the terms of the plea agreement, is attached to the Order entered July 17, 2006 in this case.

change his sentence based on his age, lack of violent criminal history, and the strides he made while incarcerated. In response to the notice, Appellant filed a pro se response in which he claimed his plea was not knowingly, intelligently, and voluntarily entered because he was told if he did not plead he would face federal prosecution and a far greater sentence of 20 to 32 years. He also asserted he did not have the intent to cause bodily harm to the victim for the aggravated assault charge, because the weapon accidentally discharged. Since Appellant was represented by counsel and counsel had not signed the response, the Court forwarded the response to defense counsel and the prosecutor and gave defense counsel an opportunity to amend Appellant's PCRA petition.

After various continuances and delays, defense counsel filed an amended PCRA petition and provided a notarized statement from Tiffanie Mutchler, a proposed witness who would support Appellant's claim that a statement was made to Appellant that he would face 20 to 32 years in a federal prosecution which induced him to plead guilty. The Court rejected Appellant's arguments on the intent issue he wanted to assert, but granted an evidentiary hearing on the claim that facing federal prosecution improperly induced his plea agreement.

At the time scheduled for the hearing, Appellant indicated he only wanted to overturn the plea agreement in this case; he wanted to keep the one to two year plea agreement for the robbery in 1805-2004. The Court indicated that since the guilty plea took place in one hearing and the agreement was a package deal for a total of 6 to 12 years on both charges, it would vacate the plea in both cases if Appellant proved the agreement was induced by an improper or invalid threat of federal prosecution. After consulting with counsel, Appellant decided to drop his PCRA. The Court conducted a colloquy with

Appellant, determined that Appellant's decision to dismiss his PCRA was made in a knowing, intelligent and voluntary manner, and dismissed the PCRA petition on or about October 9, 2007.

Appellant filed his second PCRA petition on December 8. 2008. In this petition, Appellant attempted to raise three claims: (1) ineffective assistance of counsel; (2) an abuse of discretion of the sentencing guidelines; and a coerced plea agreement. Although Appellant did not provide much, if any, factual detail regarding these claims, he indicated the victim of the aggravated assault would testify she admitted to officials that the crime was accidental and Tiffanie Mutchler would testify to the coerced plea agreement.

After reviewing Appellant's file and the second PCRA petition, the Court gave notice of its intent to dismiss this PCRA petition as untimely due to the fact the petition was filed more than one year after Appellant's judgment of sentence became final or, in the alternative, the issues were waived because Appellant raised them in his first PCRA petition and knowingly and voluntarily chose to dismiss that petition. See Order dated January 20, 2009.

On February 17, 2009, Appellant filed a response to the Court's intent to dismiss his second petition, but the response did not address the timeliness of the petition or the Court's waiver finding. Instead, Appellant attempted to argue the merits of his issues. In an Order docketed March 23, 2009, the Court denied Appellant's petition.

Although the notice of appeal was not docketed in this case until May 13, 2009, it is dated April 9, 2009. From a stamp on the document, it appears Appellant may have sent his appeal notice to the "First Judicial District of PA" on or about April 13, 2009 and then re-sent it to the undersigned, who received it on May 11, 2009.

The only issue in this appeal is whether the Court erred in denying Appellant's second PCRA petition on the basis that it was untimely or the issues were waived. The Court does not believe it erred in this case.

The PCRA states that any petition, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves one of three statutory exceptions. 42 Pa.C.S.A. §9545(b)(1). Any petition alleging one of the exceptions must be filed within 60 days of the date the claim could have been presented. 42 Pa.C.S.A. §9545(b)(2). These time requirements are jurisdictional in nature. ***Commonwealth v. Gamboa-Taylor***, 562 Pa. 70, 77, 753 A.2d 780, 783 (Pa. 2000)("when a PCRA is not filed within one year of the expiration of direct review, or not eligible for one of the 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 not power to address the substantive merits of a petitioner's PCRA claims"); see also ***Commonwealth v. Geer***, 2007 PA Super 326, 936 A.2d 1075, 1077 (Pa. Super. 2007); ***Commonwealth v. Taylor***, 2007 PA Super 282, 933 A.2d 1035, 1038-39 (Pa. Super. 2007).

Appellant's judgment of sentence became final on or about July 22, 2005. His second PCRA petition was filed on December 8, 2008, over three years later. To be considered timely, Appellant had to have filed this PCRA petition on or before July 24, 2006[2] or alleged facts to show one of the three statutory exceptions and the claim arose or Appellant discovered the facts supporting the claim on or after October 8, 2008. Appellant's

2 July 22, 2006 was a Saturday, which would extend the last day for filing a timely PCRA petition to July 24, 2006.

petition was not filed before July 24, 2006 and it did not allege any facts to show governmental interference, an assertion of a retroactive constitutional right recognized by the United State Supreme Court or the Pennsylvania Supreme Court on or after October 8, 2008, or that the facts supporting his claims were not discovered until after October 8, 2008 and could not have been discovered through the exercise of reasonable diligence. In this case, it is clear Appellant knew the facts supporting his claims no later than August 4, 2006, the date he signed his objections in response to the Court's proposed dismissal of his first PCRA petition. Therefore, Appellant's second PCRA is clearly untimely, and the Court did not have jurisdiction to hold an evidentiary hearing or grant any relief to Appellant.

In the alternative, the claims and issues raised in Appellant's second PCRA petition are waived. After Appellant filed his objections to the Court's proposed dismissal of his first PCRA petition, the Court allowed defense counsel to amend Appellant's first petition to raise these claims. At the time scheduled for the hearing, however, Appellant knowingly elected to withdraw his petition. Therefore, these issues are waived. See 42 Pa.C.S.A. 9544(b); ***Commonwealth v. Shaffer***, 390 Pa. Super. 610, 615-16, 569 A.2d 360, 363 (Pa. Super. 1990), *allocatur denied*, 525 Pa. 617, 577 A.2d 889 (Pa. 1990) *citing* ***Commonwealth v. Payton***, 440 Pa. 184, 269 A.2d 667 (1970)("where an issue is raised in a post-conviction petition, but it is not pursued at a hearing, it is deemed waived unless the failure to pursue the issue was not knowing and understanding").

DATE: _____________ By The Court,

____
Kenneth D. Brown, P. J.

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