

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-246-2002 (02-10,246)
:
vs. : CRIMINAL DIVISION
:
:
STEVEN SMITH, : Notice of Intent to Dismiss
Defendant : PCRA as untimely

ORDER

AND NOW, this ___ day of August 2009, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the Court gives Defendant notice that, with respect to Case Number 246-2002, the Court intends to dismiss Defendant's Post Conviction Relief Act (PCRA) petition as untimely.

Defendant was charged with terroristic threats, a misdemeanor of the first degree; simple assault, a misdemeanor of the second degree; recklessly endangering another person, a misdemeanor of the second degree; and harassment, a summary offense. A jury trial was held on October 11, 2002. The jury found Defendant guilty of recklessly endangering another person, but acquitted him of the other charges. The Honorable Clinton W. Smith sentenced Defendant to "undergo incarceration in a State Correctional Institution for an indeterminate period of time, the minimum of which shall be eleven (11) months and the maximum of which shall be two (2) years." Sentencing Order dated 26 November 2002. Judge Smith also gave Defendant credit for time served in the amount of 114 days.

Defendant filed a timely notice of appeal. In his appeal, he raised two issues: (1) the court erred in denying the motion to recuse the district attorney's office; and (2) the court erred in denying the motion for a mistrial based on one or more jurors seeing

Defendant in handcuffs. The Pennsylvania Superior Court rejected these claims and affirmed Defendant's judgment of sentence on October 23, 2003.

Defendant filed his first PCRA petition on July 1, 2004, in which he asserted trial counsel was ineffective for failing to introduce evidence about the victim's alleged prior assaultive behavior and to impeach the victim with various comments the victim purportedly made. The Court denied this petition without holding an evidentiary hearing. On April 17, 2007, the Pennsylvania Superior Court affirmed.

Defendant filed his current PCRA petition on July 24, 2009.

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).

The PCRA states “a judgment becomes final at the conclusion of direct

review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” 42 Pa.C.S.A. §9545(b)(3). The Pennsylvania Superior Court decided Defendant’s direct appeal on October 23, 2003. Defendant had thirty (30) days to file a petition for allowance of appeal to the Pennsylvania Supreme Court. No such petition was filed. Therefore, Defendant’s judgment of sentence became final on November 24, 2003.¹

Defendant’s current PCRA petition was filed July 24, 2009. To be considered timely, it had to have been filed by November 24, 2004 or allege facts to support one of the exceptions contained in section 9545(b)(1)(i)-(iii). Defendant has not pleaded any facts to support any of the exceptions and his petition was not filed by November 24, 2004. Therefore, in case number 246-2002 the petition is untimely and the Court lacks jurisdiction to hold a hearing or grant any relief.²

As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this Court’s intention to deny the Petition. Defendant may respond to this proposed dismissal within twenty (20) days. Any response should address the timeliness of the petition and state any facts Defendant believes would show the petition is timely. If no response is received within that time period, the Court will enter an order dismissing the petition.

By The Court,

Kenneth D. Brown, President Judge

1 Since the thirtieth day fell on a weekend, the last day for filing such a petition would have been Monday, November 24, 2003.

2 Although a single petition was filed to both case number 246-2002 and 1901-2002, the Court is entering separate orders because the cases are in different procedural postures.

cc: Kenneth Osokow, Esquire (ADA)
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Work file