

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-239-2000 (00-10239)  
: vs. : CRIMINAL DIVISION  
: :  
RONALD UNGARD, : Notice of Intent to Dismiss PCRA  
: petition as untimely  
Defendant :

**NOTICE OF INTENT TO DISMISS PCRA**

AND NOW, this \_\_\_\_ day of March 2009, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the Court gives Defendant notice of its intent to dismiss his Post Conviction Relief Act (PCRA) petition as untimely. The relevant facts follow:

On September 27, 2000, a jury found Defendant guilty of aggravated assault and recklessly endangering another person. On December 6, 2000, the Court sentenced Defendant to incarceration in a state correctional institution for 4 to 15 years. Defendant, through his trial counsel W. David Marcello, filed post-sentence motions on December 8, 2000, which the Court denied in an Opinion and Order dated March 23, 2001 and docketed March 26, 2001. No appeal was filed.

On November 29, 2001, Defendant filed a PCRA petition requesting reinstatement of his direct appeal rights. The Court appointed James Cleland of the Public Defender's Office to represent Defendant. On April 5, 2002, the Court granted Defendant's PCRA and reinstated his appeal rights nunc pro tunc. On March 21, 2003, the Pennsylvania Superior Court dismissed Defendant's appeal because counsel failed to file a brief.

On August 24, 2004, Defendant filed a PCRA petition asserting his

sentence was illegal under *Blakely v. Washington*, 124 S.Ct. 2531 (2004). The Court treated this petition as Defendant's first PCRA petition and appointed William Kovalcik to represent Defendant. The Court gave defense counsel several opportunities to amend the PCRA petition and to determine whether previous counsel notified Defendant that his appeal was dismissed for failure to file a brief. No amendments were filed.

On February 7, 2005, the Court held a conference on the PCRA petition. At the conference, defense counsel submitted a *Turner/Finley* letter that stated previous counsel informed Defendant that his appeal was dismissed for failure to file a brief in accordance with the Order of the Superior Court dated March 21, 2003, and indicated Defendant was unable to demonstrate any of the exceptions to the one-year statute of limitations found in the PCRA. On February 14, 2005, the Court gave Defendant notice of its intent to dismiss his PCRA petition as untimely. Defendant submitted a response to the proposed dismissal on March 11, 2005, but the response did not state any facts to show that his petition was timely. On March 28, 2005, the Court entered a final order dismissing Defendant's PCRA petition as untimely.

On April 6, 2005, Defendant filed a pro se notice of appeal, which the Superior Court dismissed on October 25, 2005 for failure to file a brief.

On January 23, 2009, Defendant filed a "Motion to Restore Defendant's Direct Appellate Rights Nunc Pro Tunc." Ever since the case of *Commonwealth v. Lantzy*, 558 Pa. 214, 736 A.2d 564 (Pa. 1999), a defendant may no longer obtain reinstatement of his appellate rights through a nunc pro tunc petition; rather, the sole means of obtaining such relief is through the PCRA. However, when a filing raises issues

with respect to remedies offered under the PCRA, the Court will consider the motion or petition as a PCRA petition. *See Commonwealth v. Lutz*, 788 A.2d 993, 996 n.7 (Pa. Super. 2001); *Commonwealth v. Lusch*, 759 A.2d 6, 8 (Pa. Super. 2000). Therefore, the Court will consider Defendant's Motion to Restore Appellate Rights Nunc Pro Tunc as a petition filed under the PCRA.

Any PCRA petition must be filed within one year the date the judgment becomes final, unless the petition alleges and the petitioner proves one of the three limited statutory exceptions. 42 Pa.C.S.A. §9545(b). A judgment becomes final at the conclusion of direct review, including discretionary review in the Pennsylvania Supreme Court, or at the expiration of time for seeking the review. 42 Pa.C.S.A. §9545(b)(3). Defendant's conviction became final on April 21, 2003. Thus, to be considered timely, Defendant had to file his current petition on or before April 21, 2004. Defendant petition was not filed until January 23, 2009.

The PCRA statute contains three exceptions to the one-year filing requirement:

(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). To avail himself of one of these exceptions, Defendant must allege facts in his petition to show that one of these exceptions apply, including the dates the events occurred, the dates Defendant became aware of the information or event and why

Defendant could not have discovered the information earlier. *See Commonwealth v. Breakiron*, 566 Pa. 323, 330-31, 781 A.2d 94, 98 (Pa. 2001); *Commonwealth v. Yarris*, 57 Pa. 12, 731 A.2d 581, 590 (Pa. 1999).

The time limits of the PCRA are jurisdictional in nature. *Commonwealth v. Howard*, 567 Pa. 481, 485, 788 A.2d 351, 353 (Pa. 2002); *Commonwealth v. Palmer*, 814 A.2d 700, 704-05 (Pa.Super. 2002). “[W]hen a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited 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 no power to address the substantive merits of a petitioner’s PCRA claims.” *Commonwealth v Gamboa-Taylor*, 562 Pa. 70, 77, 753 A.2d 780, 783 (Pa. 2000).

Defendant’s petition was filed more than four years after his judgment became final and it does not allege any **facts** to support any of the exceptions. Therefore, the Court lacks jurisdiction to address the merits of Defendant’s petition.

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. At a minimum, Defendant’s response should set forth the following information: (1) the statutory exception to the one-year filing requirement he believes would apply to his case, if any; (2) the facts to support any such exception; (3) the date Defendant discovered or became aware of the facts he is claiming would support one of the exceptions; and (4) the reasons why Defendant could not have discovered the facts earlier. If no response is received within the 20-day period or

the response does not allege facts, dates and explanations to support one of the exceptions,  
the Court will enter an order dismissing the petition.

By The Court,

---

Kenneth D. Brown, P.J.

cc: Kenneth Osokow, Esquire (ADA)  
Ronald Ungard, #EM-0862  
SCI Houtzdale, PO Box 1000, Houtzdale PA 16698-1000  
Work file  
Gary Weber, Esquire (Lycoming Reporter)