

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **No. 126-1993**
v. :
 : **CRIMINAL DIVISION**
PETER T. BUSH III, :
Defendant : **PCRA**

OPINION AND ORDER

On July 18, 2012, current Counsel for the Defendant filed a Motion to Withdraw as Counsel along with a Motion to Dismiss pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant has failed to timely file his PCRA Petition, and that his petition should be dismissed.

Background

On January 27, 1993, Peter Bush (Defendant) was charged with four (4) counts of Rape by Forcible Compulsion, four (4) counts of Involuntary Deviate Sexual Intercourse, two (2) counts of Criminal Attempt, one (1) count of Aggravated Assault, two (2) counts of Simple Assault, two (2) counts of Kidnapping, one (1) count of Unlawful Restraint, and one (1) count of False Imprisonment. On June 30, 1993, the Defendant entered a Nolo Contendere Plea to four (4) counts of Rape by Forcible Compulsion, two (2) counts of Involuntary Deviate Sexual Intercourse, one (1) count of Criminal Attempt, one (1) count of Aggravated Assault, one (1) count of Kidnapping, one (1) count of Unlawful Restraint and one (1) count of False Imprisonment. On September 7, 1993, the Defendant received an aggregate sentence of twenty (20) years to sixty (60) years in a state correctional institution.

The Defendant filed a Post Sentence Motion on September 9, 1993, which was denied on October 20, 1993. On December 6, 1993, Defendant filed a Notice of Appeal to the Superior

Court of Pennsylvania, which was denied due to counsel's failure to comply with the Rules of Appellate Procedure. Subsequently, the Defendant filed a post Conviction Relief Act (PCRA) Petition, and was granted the right to file an appeal *nunc pro tunc*. The appeal was denied by the Superior Court of Pennsylvania on May 4, 1995.

Defendant filed a PCRA Petition on May 7, 2012. Defendant alleges that the United States Supreme Court decision in Lafler entitles him to relief and allows him to file an untimely PCRA Petition. Lafler v. Cooper, 132 S. Ct. 1376 (U.S. 2012). Donald F. Martino, Esquire, was appointed to represent Defendant on his PCRA Petition. On July 18, 2012, Attorney Martino filed a Motion to Withdraw as Counsel as he determined that the PCRA Petition lacked merit. After an independent review of the record, the Court agrees with Attorney Martino and finds that Defendant fails to raise any meritorious issues in his PCRA Petition.

The Defendant's PCRA Petition is untimely pursuant to 42 Pa.C.S. § 9545(b)

In his Turner-Finley letter, which Attorney Martino attached to his Petition to Withdraw from Representation, Attorney Martino informed the Defendant that his current PCRA Petition is untimely. 42 Pa.C.S. 9545(b) requires that a PCRA petition be filed within one (1) year of the date the judgment in a case becomes final, or else meet one of the timeliness exceptions under 42 Pa.C.S. § 9545(b)(1). The exceptions set forth in 42 Pa.C.S. § 9545(b)(1) are as follows:

- (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.

Here, Defendant filed a second Notice of Appeal with the Superior Court of Pennsylvania on May 2, 1994. The Superior Court denied the appeal on May 4, 1995. Defendant filed his PCRA Petition on May 7, 2012, which is clearly beyond one (1) year of the date the judgment became final. Therefore, the Defendant must fall within one of the exceptions listed in 42 Pa.C.S. § 9545(b)(1) for his PCRA Petition to be deemed timely.

Defendant alleges that he falls within the exception in 42 Pa.C.S. § 9545(b)(1)(iii), which is a retroactive constitutional right recognized by the Supreme Court of the United States or Pennsylvania. Defendant believes that the United States Supreme Court's decision in Lefler asserted a new constitutional right. In Lefler, the Supreme Court stated that “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.* that the defendant would have accepted the plea and the prosecution would not have withheld it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact was imposed.” Lefler, 132 S. Ct. at 1385. This holding, however, has been recognized by Pennsylvania Courts for many years. See Commonwealth ex rel. Dadario v. Goldberg, 773 A.2d 126 (Pa. 2000) (finding that ineffective assistance of counsel claims in connection with plea offers is a valid PCRA claim); Commonwealth v. Martinez, 777 A.2d 1121 (Pa. Super. 2001) (“Counsel has a duty . . . to explain the advantages and disadvantages of the offer.”); Commonwealth v. Boyd, 688 A.2d 1172 (Pa. 1997); Commonwealth v. Korb, 617 A.2d 715 (Pa. Super. 1992).

Moreover, the facts and law in Lefler do not apply in this case. In Lefler, the Defendant was advised not to take a plea offer and instead go to trial based of an attorney's incorrect understanding of the law. See Lefler, 132 S. Ct. at 1383. As a result, the Defendant received a

sentence that was nearly three times the length the of plea offer. Here, the Defendant was advised to take an open plea agreement, which he did accept. The Defendant contends that his attorney's advice to take a plea agreement was ineffective and that he, in fact, wanted to go to trial. Defendant is basically arguing that his guilty plea was not tendered knowingly, voluntarily, and intelligently. Commonwealth v. Yager, 685 A.2d 1000, 1004 (Pa. Super. 1996). This argument does not fall within any of the timeliness exceptions in 42 Pa.C.S. § 9545. Defendant does not contend nor have evidence that he falls within any other exception, therefore his PCRA Petition is untimely.

Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of this Court's intention to deny the Defendant's PCRA Petition. The 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.

ORDER

AND NOW, this day of August, 2012, it is hereby ORDERED and DIRECTED
as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for leave to withdraw appearance filed July 18, 2012, is hereby GRANTED and Donald F. Martino, Esq. may withdraw his appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

xc: DA
Donald F. Martino, Esq.
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