

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-467-2009; CR-485-2009
:
vs. : CRIMINAL DIVISION
:
: Notice of Intent to Dismiss PCRA
KEITH HOLMES, :
Defendant :

OPINION AND ORDER

This matter came before the Court on Defendant’s Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

At case number 467-2009, Defendant was charged with conspiracy, possession with intent to deliver a controlled substance (PWID), possession of a controlled substance, possession of a small amount of marijuana, possession of drug paraphernalia and two summary traffic offenses. At case number 485-2009, Defendant was charged with PWID, delivery of a controlled substance and criminal use of a communication facility. On January 19, 2010, Defendant pleaded guilty to conspiracy and PWID at case 467-2009 and PWID and criminal use of a communication facility at case 485-2009. On that same date, the Court imposed an aggregate sentence of 4 to 8 years incarceration in a state correctional facility.¹

On or about September 12, 2011, Defendant filed a pro se PCRA petition, in which he claimed he was denied his right to effective counsel under the United States and Pennsylvania constitutions because his counsel advised him to enter guilty pleas without

¹ This sentence consisted of 3 to 6 years incarceration for PWID at case 467-2009 and a consecutive 1 to 2 years incarceration for PWID at case 485-2009. The Court imposed concurrent sentences for conspiracy and criminal use of a communication facility.

filing any pre-trial motions and failed to file an appeal despite Defendant requesting him to do so by mail three days after the guilty pleas were entered. Defendant contends counsel should have filed a motion to suppress all evidence due to it being obtained through the warrantless interception and disclosure of telephone conversations in violation of the Wiretapping and Electronic Surveillance Control Act.

The Court appointed counsel to represent Defendant, instructed counsel to file an amended PCRA petition or a Turner/Finley letter, and scheduled a conference with defense counsel and the Commonwealth. Neither an amendment nor a Turner/Finley letter was filed by appointed counsel.

At the conference, the Commonwealth noted that the PCRA petition appeared to be untimely. The Court tended to agree with the Commonwealth, but wanted an opportunity to conduct a thorough review of the record.

Since the conference, Defendant has written to the Court and the Court Administrator complaining that he has not had any communication from or contact with his court-appointed counsel.

The Court will discuss both the timeliness requirements of the PCRA and appointed counsel's duties.

DISCUSSION

Any PCRA petition, including second or subsequent petitions, must be filed within one year of the date the judgment of sentence becomes final, unless the petitioner pleads and proves one of the three limited statutory exceptions. 42 Pa.C.S.A. §9545(b)(1). 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).

Defendant entered his guilty pleas and was sentenced on January 19, 2010. No post-sentence motions or appeals were filed. Therefore, Defendant’s judgment of sentence became final on or about February 19, 2010. Although Defendant’s PCRA petition was docketed on September 12, 2011, the cover letter to the Prothonotary is dated August 31, 2011; therefore the petition could be considered “filed” as early as August 31, 2011 under the prisoner mailbox rule if it was presented to prison authorities on that date for mailing. Commonwealth v. Little, 716 A.2d 1287 (Pa. Super. 1998). Nevertheless, it still was filed more than a year from the date his conviction became final, making the PCRA petition appear untimely on its face.

The PCRA statute, however, 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 plead facts in his petition to show that one of these exceptions applies.

The timeliness exception set forth in Section 9545(b)(1)(ii) requires a petitioner to demonstrate he did not know the facts upon which he based his petition and could not have learned those facts earlier by the exercise of due diligence. Due diligence demands that the petitioner take

reasonable steps to protect his own interests. A petitioner must explain why he could not have obtained the new fact(s) earlier with the exercise of due diligence. This rule is strictly enforced.

Commonwealth v. Monaco, 996 A.2d 1076, 1080 (Pa. Super. 2010). A defendant must specifically plead 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).

“[A]n indigent petitioner, whose first PCRA petition appears untimely, is entitled to the assistance of counsel in order to determine whether any of the exceptions to the one-year time limitation apply.” Commonwealth v. Smith, 572 Pa. 572, 818 A.2d 494, 500-501 (2003); see also Pa.R.Cr.P. 904(C). As the Smith Court explained:

Without legal counsel, an indigent first-time PCRA petitioner would not know of the necessity of demonstrating the existence of an exception to the time-bar. The standard PCRA petition form that is extensively used by inmates... does not reference the PCRA's time limitation mandate. However, even if the petitioner was aware of the need to prove an exception to the time-bar, appointed counsel would be more

able to investigate underlying facts and explore whether such facts are sufficient to prove that one of the exceptions to the one-year time limitation applies.

Id. at 501.

Rule 904 does not contemplate the mere naming of an attorney, but “envisions that counsel so appointed will have the opportunity and in fact discharge the responsibilities required by his representation.” Commonwealth v. Hampton, 718 A.2d 1250, 1254 (Pa. Super. 1998), quoting Commonwealth v. Fiero, 462 Pa. 409, 413, 341 A.2d 448, 450 (1975). When appointed counsel fails to amend a pro se petition, fails to file a Turner/Finley letter or fails otherwise to participate meaningfully, the proceedings for all practical purposes are considered uncounselled and in violation of the representation requirement. Hampton, 718 A.2d at 1253.

Unless the Court is provided with facts that would show one of the statutory exceptions, it cannot address the merits of Defendant’s petition and it would be required to dismiss the petition as untimely. The Court recognizes, however, that given the apparent lack of communication between Defendant and his appointed counsel, Defendant may not have been aware of the timeliness requirements of the PCRA.

Accordingly, the following order is entered:

ORDER

AND NOW, this ___ day of February 2012, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, it is ORDERED and DIRECTED as follows:

1. The Court will give Defendant thirty (30) days within which to

respond to this proposed dismissal by writing a letter to counsel and providing him with any facts or information related to the three statutory exceptions. At a minimum, Defendant should inform counsel when he discovered that his prior attorney failed to file an appeal; when he discovered that his prior attorney failed to file any pre-trial motions including the motion to suppress he is now contending counsel should have filed; the efforts Defendant took to determine whether his prior attorney had filed an appeal; the efforts Defendant took to determine whether pre-trial motions had been filed; and an explanation of why he could not have discovered these alleged failures earlier. If Defendant has a copy of the letter he sent to counsel requesting the appeal, he should send a copy to his attorney so he can attach it to any amended PCRA petition. See Pa.R.Cr.P. 902 (D). Similarly, if there are any documents that would show the efforts Defendant made to inquire about the status of his requested appeal or that would show any other facts in support of the grounds for relief, Defendant should send a copy to his attorney for the purpose of attaching them to any amended PCRA petition.

2. Defense counsel shall file either an amended PCRA petition or a Turner/Finley letter on or before April 3, 2012. If counsel fails to file an amended PCRA petition or a Turner/Finley letter by this date, the Court will issue a rule to show cause why defense counsel should not be held in contempt of court.

3. The Court will review any amended PCRA petition or Turner/Finley letter to see if there are facts to support any of the statutory exceptions to the one-year filing period. If there are not, the Court will dismiss Defendant's PCRA petition as being untimely without holding an evidentiary hearing.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Todd Leta, Esquire
Keith Holmes, JK1327/1427221
Green Rock Correctional Center, PO Box 1000, Chatham VA 24531
Work file
Gary Weber, Esquire (Lycoming Reporter)