

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. 892-2004
	:	CRIMINAL DIVISION
ROBERT E. JOHNSON, III	:	
Defendant	:	PCRA

OPINION AND ORDER

On October 19, 2011, the Defendant filed a *Pro Se* Post Conviction Relief Act (PCRA) Petition, which appears to be the Defendant's fourth PCRA Petition to date. As this is the Defendant's fourth Petition, he is not entitled to the appointment of counsel and none shall be appointed. See Commonwealth v. Vega, 754 A.2d 714 (Pa. Super. 2000).

On October 11, 2004, the Defendant pled nolo contendere to counts 1 Criminal Attempt, Homicide, a felony of the first degree, and count 9 Possession of Instrument of Crime, a misdemeanor of the first degree, and was subsequently sentenced on October 25, 2004 to state prison for twelve and one half to twenty-eight years. No appeal was filed from this sentence; therefore, the Defendant's sentence became final in November of 2005.

The Defendant filed his first PCRA on September 21, 2005, which the Honorable Kenneth D. Brown dismissed on June 26, 2006, as the Petition raised no genuine issues of material fact.¹ The Superior Court affirmed the dismissal of the Petition in a memorandum dated July 10, 2007. The Defendant's second PCRA Petition was dismissed by Judge Brown on February 20, 2008 and the Superior Court affirmed the dismissal on March 6, 2009. The Defendant's third petition was dismissed by Judge Brown on October 16, 2009: the Superior

¹ Judge Brown retired from active judicial service on December 31, 2009.

Court quashed the Defendant's appeal there from on June 29, 2010, citing as its reason the inadequacy of the Defendant's brief and non-compliance with the Rules of Appellate Procedure.

Pursuant to 42 Pa.C.S. §9545(b)(1), a PCRA Petition must be filed within one year of the date the judgment becomes final, or fall into one of the enumerated exceptions. Therefore, in order for the Defendant's Petition to be timely, he would have had to file this Petition by November of 2006, or in the alternative, one of the exceptions under 42 Pa.C.S. §9545(b)(1) must apply to the facts of the Defendant's case. 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.

Although the Defendant raises the issue of the legality of his sentence, which is always subject to review under the PCRA, such issues must first meet the timeliness requirements of the PCRA before they are considered. See Vega at 719. (See also Commonwealth v. Fahy, 737 A.2d 214, 223 (Pa. 1999). The Defendant also attempts to raise the exception under Pa.C.S. §9545(b)(1)(ii), relating to his allegation of ineffective assistance of counsel William J. Miele, Esquire, as he states that he received an affidavit from a Mrs. Corine Talor stating that Attorney Miele was a co-worker of the victim, which he submitted within sixty (60) days of receipt

thereof. However, the Court believes that the Defendant could have raised this issue previously by the exercise of due diligence. The Court notes that the Defendant's extensive procedural history demonstrates an abundance of opportunity to plead and prove any genuine issues of material fact. Therefore, the Court finds that the Defendant's Petition is untimely and the Court is without jurisdiction to decide this matter.

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, as the Court finds that no purpose would be served by conducting any further hearing, none will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of the Court's intention to deny the 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 12th day of January, 2012, the Defendant is notified that it is the intention of the Court to dismiss the Defendant's PCRA petition unless he files an objection to that dismissal within twenty days (20) of today's date. This decision will be served on the Defendant as set forth in Pa.R.Crim.P. 907(1).

By the Court,

Nancy L. Butts, President Judge

xc: DA
Robert E. Johnson, III
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