

Pennsylvania Board of Probation and Parole. The Defendant filed an appeal of his judgment to the Superior Court of Pennsylvania, which affirmed this Court on June 9, 1998.

On June 16, 2012, the Defendant filed his first PCRA Petition. The Defendant alleges that a police officer involved in his case, Thomas H. Ungard, Jr. (Ungard), was subsequently convicted of Tampering with Public Records and Obstruction of Justice and that this officer fabricated evidence in his case. The Defendant attached to his Petition a print out of an online article about Ungard, which was dated October 13, 2011 and printed on April 13, 2012. The Defendant did not make any specific allegations on what evidence Ungard allegedly fabricated in his case. On October 22, 2012, PCRA counsel, Kirsten A. Gardner, Esq., filed a Petition to Withdraw and a Turner/Finley letter in accordance with Commonwealth v. Turner, 544 A.2d 927 (1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa.Super.1988). Attorney Gardner argued in the Amended Petition that Ungard was not involved in the case and that the evidence on charges against Ungard do not count as after discovered evidence. After an independent review of the record, the Court agrees with Attorneys Gardner that Defendant failed to raise any meritorious issues in his PCRA Petition.

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

Defendant's 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.

A PCRA petition raising one of these exceptions “shall be filed within [sixty] days of the date the claim could have been presented.” 42 Pa.C.S. § 9545(b)(2). A petitioner must “affirmatively plead and prove” the exception. Commonwealth v. Taylor, 933 A.2d 1035, 1039 (Pa. Super. 2007).

As such, 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 [sixty] 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.

Id. at 1039.

Here, Defendant’s direct appeal to the Superior Court was decided on June 9, 1998, and no appeal was filed to the Supreme Court. Thus, his judgment of sentence became final thirty (30) days later on July 9, 1998, the expiration of the time for filing a direct appeal to the Supreme Court of Pennsylvania. 42 Pa.C.S. § 9545(b)(3); Pa.R.A.P. 903. Defendant filed his PCRA Petition on June 6, 2012, which is 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 and for this Court to address the merits of the PCRA Petition.

The Defendant’s PCRA Petition has not specifically alleged any of the exceptions in 42 Pa.C.S. § 9545(b)(1). Based on the Petition, however, the Defendant is raising an issue dealing

with factual developments that have occurred since his trial and therefore this Court will address 42 Pa.C.S. § 9545(b)(1)(ii). “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.” Commonwealth v. Monaco, 996 A.2d 1076, 1080 (Pa. Super. 2010). The Defendant is to explain why he could not have obtained the new facts earlier with the exercise of due diligence. Id.

Here, the Defendant has not explained why it took almost one (1) year to file his PCRA Petition after Ungard was found guilty. The Petition attached a newspaper article that is dated October 13, 2011, approximately seven (7) months before the Defendant filed the PCRA Petition. In addition, Ungard was found guilty in July of 2011, which is almost a year before the PCRA Petition was filed. Based upon the length of time and the lack of explanation for the delay, this Court finds that the Defendant’s efforts do not show due diligence in raising this issue in the form of a PCRA Petition.

In addition, as stated by Attorney Gardner in her Turner/Finley letter, new evidence regarding the filing of criminal charges against a police officer does not meet the after discovered evidence test.

To obtain relief based on after-discovered evidence, [an] appellant must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted.

Commonwealth v. Foreman, 55 A.3d 532, 537 (Pa. Super. 2012). In Foreman, the Superior Court determined that evidence of a detective’s criminal charges would be “used solely to impeach the credibility of [the detective] and would not likely result in a different verdict if a new trial were granted.” Id. As Ungard did not even testify in the Defendant’s trial and had

limited involvement in the case, the evidence of Ungard's conviction has little bearing on this case that took place fourteen (14) years ago.

Whether there is a basis to the Defendant's allegation of fabricated evidence

The Defendant alleges that Ungard fabricated evidence that resulted in his conviction. The Defendant, however, does not state exactly what evidence was fabricated or even how Ungard participated in his case. At the non-jury trial the following individuals testified: Lieutenant Stephen Sorage (Sorage) of the Williamsport Bureau of Police, Corporal Michael Foust (Foust) of the Williamsport Bureau of Police, Joseph Daniel Pinkerton, Paul Eck, and Officer Leonard Dincher (Dincher) of the Williamsport Bureau of Police. Dincher testified that during the execution of the search warrant on the Defendant's apartment, he and Ungard were perimeter security and were to apprehend any individuals that tried to flee the apartment. N.T., September 16-17, 1996, p 105. Sorage, Foust, and Dincher testified to the search of the apartment and what evidence was found, which was used to prosecute the Defendant.⁷ There is no indication that Ungard ever entered or came into contact with any evidence in the apartment. Therefore, the Court finds that the Defendant's allegation of fabricated evidence is without merit.

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

⁷ Sorage testified that he created the inventory list and that the evidence was secured. N.T., September 16-17, 1996, p. 21-22.

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 January, 2013, 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 October 15, 2012, is hereby GRANTED and Kirsten Gardner, Esq. may withdraw her appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

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