

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA,</b>	:	
	:	<b>No. 630-2008; 1863-2008;</b>
<b>v.</b>	:	<b>1882-2008; 2096-2008;</b>
	:	<b>430-2009; 829-2009</b>
	:	
	:	<b>CRIMINAL DIVISION</b>
<b>COLIN BEST,</b>	:	
<b>Defendant</b>	:	<b>PCRA</b>

**OPINION AND ORDER**

On April 16, 2009, Colin Best (Defendant) pled guilty to two counts of Burglary, felonies of the first degree;<sup>1</sup> one count of Theft by Deception, a felony of the third degree;<sup>2</sup> one count of Corruption of Minors, a misdemeanor of the first degree;<sup>3</sup> and one count of Loitering and Prowling, a misdemeanor of the third degree.<sup>4</sup> The Defendant pled guilty in exchange for a negotiated plea agreement of an aggregate sentence of forty-three (43) to eighty-six (86) months with a ten (10) year period of probation and that the sentences of his two 2009 cases would run concurrent with each other. On June 2, 2009, the Honorable Kenneth D. Brown sentenced the Defendant to an aggregate sentence of forty-three (43) to eighty-six (86) months followed by a ten (10) year period of supervision.<sup>5</sup> On June 29, 2009, the Defendant pled guilty to one count of Receiving stolen Property, a felony of the third degree and one count of Burglary, a felony of the second degree. The Defendant received a sentence of one (1) to four (4) years, which ran concurrent to his sentence of June 2, 2009.

On September 28, 2009, the Defendant filed his first *pro se* Post Conviction Relief Act (PCRA) Petition. The Defendant alleged that his trial counsel was ineffective for the following

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<sup>1</sup> 18 Pa.C.S. § 3502(a).

<sup>2</sup> 18 Pa.C.S. § 3922.

<sup>3</sup> 18 Pa.C.S. § 6301(a)(1).

<sup>4</sup> 18 Pa.C.S. § 5506.

<sup>5</sup> Judge Brown retired from active service on December 31, 2008.

reasons: 1) failing to request a Preliminary Hearing on several of the above captioned cases; 2) allowing illegal evidence in the burglary cases; 3) failing to file a Motion to Suppress; 4) failing to file a Petition for Habeas Corpus; 5) failing to obtain discovery relating to the charges; 6) forcing the Defendant to plead guilty by threatening that he might be found a Sexually Violent Offender and may lose custody of his child; 7) failing to request a withdrawal of his guilty plea; 8) failing to object to sentences being in the aggravated range and outside the guidelines without justification; 9) failing to object to the sentence because it was different than the plea agreement; 10) failing to object to the restitution ordered; and 11) failing to file a direct appeal to the Superior Court of Pennsylvania. Donald Martino, Esquire was appointed to represent the Defendant on the PCRA Petition.

On December 20, 2010, Attorney Martino filed a Motion to Withdraw as Counsel in accordance with Commonwealth v. Turner, 544 A.2d 927 (1988) and Commonwealth v. Finley, 376 Pa. Super. 390 (1988). On March 4, 2011, this Court issued an Opinion and Order proposing the dismissal of the PCRA Petition. After reviewing the Defendant's response to the proposed dismissal, this Court dismissed the PCRA Petition on March 29, 2011. The Defendant appealed to the Superior Court of Pennsylvania, who affirmed this Court on February 7, 2012. The Supreme Court of Pennsylvania denied allocatur on November 8, 2012.

On January 23, 2013, the Defendant filed his second *pro se* PCRA Petition. The Defendant alleges two issues: 1) whether the guilty plea of the Defendant was unlawfully induced when the trial court, prosecutor, and trial counsel failed to order a competency hearing prior to the acceptance of the plea agreement and 2) whether the failure of trial counsel to prepare a defense or challenge the sufficiency of the evidence prior to the acceptance of the plea agreement amounted to a constructive denial of counsel. As this is the Defendant's second

PCRA Petition he is not entitled to court appointed counsel unless the Court finds that an evidentiary hearing is required. Pa.R.Crim.P. 904(D). The Defendant subsequently filed an Application For Correction of Court Documents, which the Court stated in an Order that it would address the issue in his PCRA Petition. The Court has assessed the Defendant's current PCRA Petition and has found that it is untimely and that the issues have been waived.

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

Defendant's second 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, the Defendant was sentenced on June 2, 2009 and June 29, 2009 and did not file a Notice of Appeal to the Superior Court. Thus, his judgment of sentence became final thirty (30) days later on July 29, 2009. Defendant filed his second PCRA Petition on January 23, 2013, 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 and for this Court to address the merits of the PCRA Petition.

The Defendant argues that he is entitled to an exception to an untimely PCRA Petition due to governmental interference. 42 Pa.C.S. § 9545(b)(1)(i). In the Defendant's Petition he states that "his guilty plea was unlawfully induced when the trial court, prosecutor, and defense counsel failed to conduct minimal investigation into his competency even though it was a significant factor . . . ." This allegation, however, does not account for the failure to raise the claim in a timely manner. The Defendant filed a prior timely PCRA Petition and thus was not interfered by government officials at that time.

Similarly, the claims that the Defendant raises in his second PCRA Petition could have been raised in his first PCRA Petition and are therefore waived. As directed by 42 Pa.C.S.A. § 9544(b), an issue is waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state post-conviction proceeding." In addition, the Defendant constructively challenged the trial counsel's failure to prepare a defense

in his last PCRA and therefore should be precluded from raising it again.<sup>6</sup> 42 Pa.C.S. § 9543(3) (stating that an issue cannot be raised in a PCRA Petition if it has been previously litigated).

As the Court finds there are no meritorious issues with Defendant's PCRA Petition, it intends to dismiss the Petition unless the Defendant files an objection within twenty (20) days. "[A] PCRA petitioner is not entitled to an evidentiary hearing as a matter of right, but only where the petition presents genuine issues of material fact. . . . A PCRA court's decision denying a claim without a hearing may only be reversed upon a finding of an abuse of discretion."

Commonwealth v. McLaurin, 45 A.3d 1131, 1135-1136 (Pa. Super. 2012) (citations omitted).

Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the Defendant is hereby notified of this Court's intention to deny the Defendant's PCRA Petition. In addition, as the PCRA Petition is untimely, the Court will also deny the Defendant's Application For Correction of Court Documents unless the Defendant raises a genuine and timely issue in his objection.

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<sup>6</sup> The Defendant alleges in his first PCRA Petition: a) failing to request a Preliminary Hearing on several of the above captioned cases; b) failing to file a Motion to Suppress; c) failing to file a Petition for Habeas Corpus; and d) failing to obtain discovery relating to the charges.

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of March, 2013, the Defendant is notified that it is the intention of the Court to dismiss the Defendant's PCRA petition because it does not raise a genuine issue concerning any material fact. The Court will dismiss Defendant's claim unless Defendant files an objection to that dismissal within twenty days (20) of today's date.

By the Court,

Nancy L. Butts, President Judge

xc: Ken Osokow, Esq.  
Colin Best #JC-3464  
P.O. Box 945  
Marienville, PA 16239