

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

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	
	:	
<b>v.</b>	:	<b>No. 1704-CR-2007</b>
	:	<b>CRIMINAL DIVISION</b>
<b>HAROLD F. MCGRAW,</b>	:	
<b>Defendant</b>	:	<b>PCRA</b>

**OPINION AND ORDER**

On August 6, 2013, Counsel for the Defendant filed a Petition to Withdraw from Representation of Post-Conviction Collateral Relief 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 raise any meritorious issues in his PCRA Petition, and his petition should be dismissed.

***Background***

On June 3, 2008, the Defendant pled guilty before this Court to Driving Under the Influence, Driving Under Suspension, and Habitual Offender. On December 11, 2008, at the request of the Defendant, this Court granted the Defendant's Motion to Withdraw his Guilty Plea. On April 29, 2009, a jury found Harold McGraw (Defendant) guilty of count 1 Driving Under the Influence of Alcohol, a misdemeanor of the first degree.<sup>1</sup> In addition, the Honorable William Kieser found the Defendant guilty of Driving Under Suspension,<sup>2</sup> Driving Without a License,<sup>3</sup> Driving Unregistered Vehicle,<sup>4</sup> Carless Driving,<sup>5</sup> and Habitual Offender.<sup>6</sup> On June 15,

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<sup>1</sup> 75 Pa.C.S. § 3802(a)(1).  
<sup>2</sup> 75 Pa.C.S. § 1513(B)(1).  
<sup>3</sup> 75 Pa.C.S. § 1501(a).  
<sup>4</sup> 75 Pa.C.S. § 1301(a).  
<sup>5</sup> 75 Pa.C.S. § 3714.

2009, Judge Kieser sentenced the Defendant on count 1 to eighteen (18) months to five (5) years, on count 8 to six (6) months to two (2) years, and on count 2 to ninety (90) days. Each of the sentences was to run consecutive to the other. The Defendant did not file a direct appeal to the Superior Court of Pennsylvania.

The Defendant filed a *pro se* PCRA Petition on June 11, 2013. The Defendant alleges that a testifying officer and the assistant District Attorney lied during trial and said that the Defendant refused to submit blood to have his blood alcohol content (BAC) determined. In addition, the Defendant states that his trial attorney told him he would file an appeal within ten (10) days after the trial. Don Martino, Esquire was appointed to represent the Defendant for the PCRA Petition. On August 6, 2013, Attorney Martino filed a Petition to Withdraw from Representation of PCRA and a Memorandum Pursuant to Turner/Finley. After an independent review of the record and an additional PCRA conference, the Court agrees with Attorney Martino that Defendant's PCRA Petition is untimely with no applicable exceptions and that he also failed to raise any meritorious issues.

***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

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<sup>6</sup> 75 Pa.C.S. § 6503.1.

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 was sentenced on June 15, 2009 and he did not file any subsequent appeals. Thus, his judgment of sentence became final thirty (30) days later on July 15, 2009, the expiration of the time for filing a direct appeal to the Superior Court. 42 Pa.C.S. § 9545(b)(3). Defendant filed his PCRA Petition on June 11, 2013, 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 did not state a specific reason for the delay in filing his PCRA Petition. Further, the Court is unaware of any exception that would warrant the delay based on the facts placed in the PCRA Petition. The Defendant was aware of the alleged false statements at trial and the lack of an appeal for at least sixty (60) days prior to filing this PCRA Petition. Without a

justification or an argument that one of the timeliness exceptions under 42 Pa.C.S. § 9545(b)(1) should be applied, this Court must find that the 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 October, 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 August 6, 2013, is hereby GRANTED and Don Martino, Esq. may withdraw his appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

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