

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	No. CR-92-10,850
v.	:	
	:	CRIMINAL DIVISION
DAVID DANIEL McHENRY, II,	:	
Defendant	:	PCRA

OPINION AND ORDER

On May 19, 1993, following a jury trial, David Daniel McHenry, II (Defendant) was found guilty of Criminal Attempt (Homicide),¹ Rape,² Involuntary Deviate Sexual Intercourse,³ Aggravated Assault (attempt/cause serious bodily injury),⁴ Aggravated Assault (attempt/cause injury with deadly weapon),⁵ Indecent Assault,⁶ Kidnapping,⁷ Unlawful Restraints,⁸ and Possessing Instrument of Crime.⁹ On October 4, 1993, the Defendant was sentenced by the Honorable Thomas C. Raup to an aggregate sentence of twenty-seven (27) to fifty-four (54) years incarceration in a State Correctional Institution.¹⁰ The Defendant appealed his sentence to the Superior Court of Pennsylvania. The Defendant alleged within his appeal that his trial counsel was ineffective for failing to file a motion for change of venue, motion for a line-up, motion to suppress and for failing to make proper objections. The Defendant's conviction was upheld on November 2, 1994 by the Superior Court.

The Defendant filed a Motion for Violation of Due Process of Identification, Motion for Appointment of Counsel, Writ of Habeas Corpus for Falsely [sic] Imprisonment on Victim's

¹ 18 Pa.C.S. § 901.

² 18 Pa.C.S. § 3121.

³ 18 Pa.C.S. § 3123.

⁴ 18 Pa.C.S. § 2702(a)(1).

⁵ 18 Pa.C.S. § 2702(a)(4).

⁶ 18 Pa.C.S. § 3126(1).

⁷ 18 Pa.C.S. § 2901(a)(3).

⁸ 18 Pa.C.S. § 2902(1).

⁹ 18 Pa.C.S. § 907(A).

¹⁰ Judge Raup retired from active service in December 1995.

Non-Identification and another Motion for Appointment of Counsel, which the Honorable Clinton W. Smith treated as a PCRA Petition on February 5, 1996. Judge Smith denied the PCRA Petition on November 12, 1996.¹¹ The Superior Court affirmed the decision on January 27, 1997.

On August 2, 2006, George E. Lepley, Jr., Esq. filed a PCRA Petition on behalf of the Defendant. The Defendant requested the Court to authorize DNA testing to be performed by an independent laboratory. On December 4, 2006, this Court proposed the dismissal of the Defendant's PCRA Petition as the Court received letters by the Pennsylvania State Police, the Lycoming County Office of the District Attorney, and Roni L. Kreisher (Court Reporter) stating that the evidence the Defendant sought to have tested had been destroyed. On June 13, 2007, the Court directed defense counsel to either file an amended PCRA Petition or a Turner-Finley letter by September 11, 2007. After receiving no response, this Court dismissed the Defendant's PCRA Petition on March 14, 2008.

On April 10, 2013, the Defendant filed *pro se* his third PCRA Petition. The Defendant alleged that his Due Process rights were violated because the DNA evidence in his case had been destroyed. As this is the Defendant's third 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 Court has reviewed the Defendant's current PCRA Petition and has found that it is untimely and that the issue raised is without merit.

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

Defendant's third 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

¹¹ Judge Smith retired from active service on December 31, 2003.

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 October 4, 1993 and the Superior Court of Pennsylvania affirmed his sentence on November 2, 1994. Thus, his judgment of sentence became final thirty (30) days later on December 2, 1994. Defendant filed his third PCRA Petition on April 10, 2013, which is clearly beyond one (1) year of the date the judgment became final. Therefore, the Defendant’s claim 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 could argue that the facts upon which the claim is predicated were unknown to him; specifically that he did not know the DNA evidence had been destroyed. The timeliness exception under 42 Pa.C.S. § 9545(b)(1)(ii), however, must be raised within sixty (60) days of the date the claim could have been presented. Here, the Court issued an order stating that the DNA evidence that the defendant wanted tested had been destroyed on December 4, 2006. That PCRA Petition was dismissed on March 14, 2008. The Defendant raised this issue after having knowledge of the destroyed DNA for five (5) years. Therefore, the Defendant did not file this PCRA Petition within sixty (60) days of when it could have been presented and it is untimely.

Further, the record shows that the Defendant's issue is without merit. When DNA evidence is destroyed, a court is to determine whether it had been destroyed in bad faith. See Commonwealth v. Brison, 618 A.2d 420 (Pa. Super 1992) (finding that the judgment of sentence must be reinstated if there is no hint of bad faith in the Commonwealth's failure to preserve evidence). In Moss, a hair sample taken from the scene of an alleged rape was destroyed by police five (5) years after the defendant's trial. Commonwealth v. Moss, 689 A.2d 259 (Pa. Super. 1997). Besides testimony taken from the police department on their destruction of evidence procedures, the Superior Court found that destroying evidence five (5) years after trial and three (3) years after the direct appeal was sufficient to show no bad faith on the part of the police.

In this case, at the request of Pennsylvania State Police, this Court issued an Order Approving Destruction/Disposition of Evidence on April 10, 2001. The evidence was destroyed

nearly eight (8) years after the Defendant was found guilty at his jury trial. In addition, the evidence was destroyed five (5) years after the Superior Court issued their opinion affirming his sentence. Lastly, based on Defendant's second PCRA Petition, the DNA evidence has been previously tested and the results were inconclusive. Without any evidence of bad faith, the Defendant's issue is without merit.

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.

ORDER

AND NOW, this _____ day of May, 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

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