

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 : **APPEAL**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE

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. 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.

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).

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 Non-Identification and another Motion for Appointment of Counsel, which then President Judge Clinton W. Smith treated as a PCRA Petition on February 5, 1996. Judge Smith denied the PCRA Petition on November 12, 1996. 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 his third and current Post Conviction Relief Act (PCRA) Petition. The Defendant alleged that his Due Process rights were violated because the DNA evidence in his case had been destroyed. On May 31, 2013, the Court proposed the dismissal of the PCRA Petition and gave the Defendant twenty (20) days to file an objection. The Court found that the Defendant's PCRA Petition was untimely and that the issue raised in the Petition was without merit. On June 18, 2013, the Court dismissed the PCRA Petition over the Defendant's objection that the Petition was timely.

On July 15, 2013, the Defendant filed a Notice of Appeal with the Superior Court of Pennsylvania. In accordance with Pa.R.A.P. 1925(b), the Court directed the Defendant to file a concise statement of the matters complained of on appeal. On August 14, 2013, the Defendant filed a concise statement and alleged four (4) issues: 1) the Defendant's PCRA Petition was timely; 2) the evidence in the Defendant's case was improperly destroyed; 3) PCRA counsel on Defendant's second PCRA Petition was ineffective; 4) the Defendant's Due Process rights were violated when evidence against him was destroyed.

The Court finds that any issues raised for the first time in the Defendant's concise statement are waived. Further, for purposes of this Opinion, the Court will rely on its Opinion dated May 31, 2013, which found that the Defendant's PCRA Petition was untimely and lacked merit.

DATE: _____

By the Court,

Nancy L. Butts, President Judge

xc: DA
David McHenry #BV-7463
SCI Rockview
Box A
Bellefonte, PA 16823-0820