

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	No. CR-157-2009
v.	:	
	:	CRIMINAL DIVISION
DARSEAN MOSLEY,	:	
Defendant	:	PCRA

OPINION AND ORDER

On March 2, 2009, the Defendant pled guilty to counts 1 and 2, Robbery, both felonies of the first degree. On the same day, the Defendant was sentenced to state prison for a minimum of forty (40) months, with a consecutive ten (10) year period of supervision under the Pennsylvania Board of Probation and Parole. A timely Post Conviction relief Act (PCRA) Petition was filed November 5, 2009 and the Court appointed as Counsel Donald F. Martino, Esquire. In an Opinion and Order dated January 3, 2011, the Court granted Attorney Martino leave to withdraw. The Court also notified the Defendant of its intention to dismiss the Petition within twenty (20) days.

On December 14, 2011, Defendant filed a Second PCRA Petition, for which the Court did not appoint Counsel.¹ At that time, the Court became aware that an Order dismissing the first Petition had not yet been filed, and subsequently issued the Order dismissing the first PCRA Petition on December 22, 2011. Following a review of the second PCRA Petition, the Court determined that it was without jurisdiction to decide the matter as it was on appeal and on December 23, 2011, notified the Defendant of its intention to dismiss the Petition within twenty (20) days. The Defendant filed a Notice of Appeal on January 13, 2012 and on January 30, 2012, this Court directed the Defendant, in accordance with Pa.R.A.P. No. 1925(b), to file within thirty (30) days a concise statement of matters complained of on appeal. On January 31, 2012,

¹ Pa.R.Crim.P. 904(D).

the Court issued an Order dismissing the second PCRA Petition. The Defendant's concise statement dealt with issues raised in both his first PCRA and his second PCRA. On February 12, 2012, the Court received an additional Notice of Appeal for Defendant's second PCRA. The issues stated were the same as those stated in the first Notice of Appeal for the first PCRA. On December 21, 2012, the Superior Court of Pennsylvania affirmed this Court's denial of the Defendant's PCRA Petition. On January 2, 2013, the Defendant filed an Application for Reconsideration with the Superior Court, which was denied on March 1, 2013.

On March 18, 2013, the Defendant filed his third *pro se* PCRA Petition. The Defendant alleges that his sentence was illegal and that he should have been sentenced for theft by Unlawful Taking rather than Robbery. 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 issues have been waived.

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 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 March 2, 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 April 2, 2009. Defendant filed his third PCRA Petition on March 18, 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 did not argue that his PCRA Petition was timely. After a review of the Defendant’s PCRA Petition, the Court is unable to ascertain any reason why this Petition would fall within one of the timeliness exceptions. Therefore, the Court finds that this PCRA Petition and its issues raised are untimely.

Similarly, the claims that the Defendant raises in his third PCRA Petition could have been raised in his previous Petitions 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.” The issues that the Defendant raises in this PCRA Petition would have been known to him after his sentencing in March of 2009.

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.

ORDER

AND NOW, this _____ day of April, 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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