

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	CR-790-2007
	:	
v.	:	OTN: K 548134-6
	:	
JIMMIE ROGER FIELDS.	:	PCRA PETITION

OPINION AND ORDER

Before the Court is a Petition for Post-Conviction Relief filed by Defendant on March 1, 2013, pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541-9546. In this petition, Defendant alleges that his counsel was ineffective by failing to timely file a direct appeal to the Superior Court. In fact, Defendant's counsel did fail to timely file a direct appeal to the Superior Court. However, this March 1, 2013 petition is the third petition filed in Defendant's matter and the second petition that would be litigated if scheduled for an evidentiary hearing. For the reasons provided below, the Court deems the instant petition as untimely and the issues as waived.

I. Factual and Procedural Background

Non-Jury Trial and Sentencing

On May 1, 2007, Defendant was charged with three (3) counts of involuntary deviate sexual intercourse, each a felony of the first degree, two (2) counts of aggravated indecent assault, each a felony of the second degree, two (2) counts of indecent assault, each a misdemeanor in the first degree, and one (1) count of endangering the welfare of a child, a felony of the third degree. A non-jury trial was held on November 30, 2007, and the Court found Defendant guilty of all of the above-mentioned charges. Attorney Anthony Miele represented Defendant during trial. On May 14, 2008, Attorney Matthew Zeigler entered his appearance on behalf of Defendant. On June 18, 2008, the Court found Defendant to be a Sexually Violent

Predator, in accordance with the Pennsylvania Megan's Law Statute; also on that date, the Court sentenced Defendant to an aggregate period of incarceration in a state correctional institution, the minimum of which should be twenty (20) years and the maximum of which should be forty (40) years. Defendant filed post-sentence motions on July 7, 2008; the Court denied these motions on September 4, 2008. No direct appeal was filed with the Superior Court.

First PCRA Petition – April 13, 2009

On April 13, 2009, Defendant filed a *pro se* Petition for Post-Conviction Relief. On April 21, 2009, Attorney Ryan Gardner was appointed to represent Defendant in his PCRA petition. On October 7, 2009, following an initial PCRA conference, Attorney Gardner was instructed to file an amended PCRA petition on or before November 7, 2009.

On November 18, 2009, Attorney Gardner filed an Amended PCRA Petition. This amended petition included witness certifications for Attorney Anthony Miele, Attorney Matthew Zeigler, Leslie Liddic, Randall Smith, and Luis A. Cruz. On December 7, 2009, the Court directed Attorney Gardner to provide additional witness information; specifically, the Court requested information as to when witness information was communicated to Attorney Miele and how Attorney Miele's failure to produce witness information prejudiced Defendant. The Court directed Attorney Gardner to request a hearing based upon this information on or before January 7, 2010. Attorney Gardner made no further filings.

On September 15, 2010, the Court appointed Attorney Donald Martino to represent Defendant. On October 15, 2010, Attorney Martino petitioned the Court for an evidentiary hearing on Defendant's Amended PCRA Petition, pursuant to the Court's December 7, 2009 Order. The Court scheduled the hearing for January 10, 2011; at the time of the hearing, the Commonwealth objected, alleging that it was prejudiced due to the death of trial counsel

Attorney Miele. Directly following the hearing, the Court issued an Order, granting Defendant leave to file a second amended PCRA petition, with appropriate witness certifications, within thirty (30) days.

Second PCRA Petition – January 31, 2011

On January 31, 2011, Defendant filed a Second Amended PCRA Petition. Defendant's second amended petition requested a new trial based upon the ineffectiveness of trial counsel Attorney Miele. In his second amended petition, Defendant alleged that Attorney Miele was ineffective in three (3) respects: 1) for failing to properly call witnesses, 2) for failing to call a fact witness, and 3) for failing to call character witnesses.

On May 17, 2011, the Court held an evidentiary hearing regarding Defendant's second amended petition. On July 12, 2011, the Court denied Defendant's second PCRA petition. Defendant filed a Notice of Appeal to the Superior Court on July 18, 2011.

By Memorandum Opinion filed March 23, 2012, our Superior Court affirmed the Court's denial of Defendant's Second Amended PCRA Petition. *See Commonwealth v. Fields*, 1262 MDA 2011. In that opinion, the Superior Court addressed Defendant's three ineffectiveness claims and found that each of them lacked merit due to Defendant's failure to establish the prejudice prong of the ineffectiveness test.¹

On April 9, 2013, Defendant filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. On August 13, 2012, the Supreme Court denied allocatur.

¹ In order to succeed on a claim for ineffective assistance of counsel, Defendant must overcome the presumption of counsel effectiveness by proving the following three factors, that: (1) Defendant's underlying claim has arguable merit, (2) trial counsel had not reasonable basis for her action or inaction, and (3) the performance of trial counsel prejudiced Defendant. *Commonwealth v. Chimel*, 1111, 1127 (Pa. 2011) (referencing *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (Pa. 1987)). *See also Commonwealth v. Sampson*, 900 A.2d 887, 890 (Pa. Super. Ct. 2006), *appeal denied*, 907 A.2d 1102 (Pa. 2006) (citing *Commonwealth v. Lynch*, 820 A.2d 728, 733 (Pa. Super. 2003)).

Third PCRA Petition – March 1, 2013

On March 1, 2013, Defendant filed a *pro se* PCRA Petition; this petition is currently before the Court. Unless the Court finds that an evidentiary hearing is required, Defendant is not entitled to court-appointed counsel for the purpose of pursuing this petition. *See* Pa.R.Crim.P. 904(D). Thus, initially, the Court must decide if the issues raised in the instant petition warrant an evidentiary hearing. Presently, Defendant alleges that he was denied ineffective assistance of counsel in one (1) respect: by his counsel's failure to file a direct appeal to the Superior Court.

After careful review of Defendant's March 1, 2013 PCRA petition, the Court finds that the petition is untimely and that Defendant has waived the instant ineffectiveness issue; based upon these findings, the Court will not schedule an evidentiary hearing in this matter.

II. Time for Filing PCRA Petitions

42 Pa. C.S. § 9545(b)(1) requires that all petitions filed pursuant to the Post Conviction Relief Act be filed within *one (1) year* of the date that Defendant's judgment becomes final; this one-year requirement includes second and/or subsequent PCRA petition(s). In this instance, the Court's denial of Defendant's post-sentence motions occurred on September 4, 2008. Defendant's sentence became final thirty (30) days after this denial because Defendant did not seek appellate review. *See* 42 Pa. C.S. §9545(b)(3). Defendant filed the instant petition on March 1, 2013, well beyond the one-year filing requirement. Therefore, on its face, the petition appears to be untimely.

However, the PCRA statute provides for three (3) exceptions to the timeliness requirement. *See* 42 Pa. C.S. § 9545(b)(1). These exceptions include:

- (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.

42 Pa. C.S. § 9545(b)(1)(i)-(iii). Yet, even these exceptions to the timeliness requirement have a timeliness element; any PCRA petition raising one of these timeliness exceptions should be “filed within 60 days of the date the claim could have been presented.” 42 Pa. C.S. § 9545(b)(2). If a PCRA petitioner attempts to file an untimely PCRA petition, it is the burden of the petitioner to plead and prove one of the exceptions to the one-year timeliness requirement. *Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999); *Commonwealth v. Taylor*, 933 A.2d 1035, 1039 (Pa. Super. Ct. 2007). If a PCRA petition is found to be untimely, “[u]nder the plain language of Section 9545 [of the Post Conviction Relief Act], the substance of [petitioner’s] PCRA petition must yield to its untimeliness.” *Taylor*, 933 A.2d at 1043.

In this instance, Defendant failed to affirmatively plead one of the PCRA timeliness exceptions. *See Taylor*, 993 A.2d at 1039. In addition to failing to affirmatively plead one of the timeliness exceptions, Defendant did not provide any genuine issue of material fact regarding the timeliness of his PCRA petition. Therefore, his March 1, 2013 petition should be dismissed pursuant to 42 Pa. C.S. § 9545(b).

III. Previous PCRA Proceeding and Waiver

In addition to the instant petition being untimely, the Court finds that the ineffectiveness issue raised in the instant petition could have been raised in his Second Amended PCRA Petition, filed January 31, 2011. Pursuant to 42 Pa. C.S. § 9544(b), if a PCRA petitioner could have raised an issue during a prior post-conviction proceeding and failed to do so that issue is deemed waived. *Id.*

In this instance, Defendant raised three (3) ineffectiveness issues in his Second Amended PCRA Petition, filed January 31, 2011. Ultimately, this Court denied this petition. His court-appointed PCRA counsel timely filed an appeal of this denial with our Superior Court. By memorandum opinion filed March 23, 2012, our Superior Court affirmed this Court's denial. Again, Defendant's court-appointed PCRA counsel timely filed a petition for allowance of appeal with the Supreme Court of Pennsylvania. On August 13, 2012, our Supreme Court denied allocatur.

As Defendant's petition now stands, the Court finds that Defendant's instant ineffectiveness claim could have been raised in his second amended PCRA proceeding. When his second amended petition was filed, Defendant was aware that Attorney Zeigler did not file a direct appeal of his sentence to our Superior Court. Thus, this issue could have been raised by Defendant in that petition. Therefore, based upon the procedural background of Defendant's matter, the Court finds Defendant waived his instant ineffectiveness claim.

IV. Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's March 1, 2013 PCRA Petition. As the Court finds that no purpose would be served by conducting any further evidentiary hearing regarding this matter, a hearing will not be scheduled.

Pa.R.Crim.P. 909(B)(2); *See Commonwealth v. Walker*, 36 A.3d 1, 17 (Pa. 2011) (holding that a PCRA petitioner is not entitled to an evidentiary hearing as a matter of right, but only when the PCRA petition presents genuine issues of material facts). *See also Commonwealth v. McLaurin*, 45 A.3d 1131, 1135-36 (Pa. Super. Ct. 2012).

Pursuant to Pennsylvania Rules of Criminal Procedure 907(1), the parties are hereby notified of the Court's intention to deny the 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 March 1, 2013 petition.

ORDER

AND NOW, this 14th day of March, 2013, Defendant is hereby notified that it is the Court's intention to dismiss his March 1, 2013 PCRA Petition, unless he files an objection to that dismissal ***within twenty days (20) of today's date***. This Opinion and Order will be served on Defendant as set forth in Pa.R.Crim.P. 907(1).

BY THE COURT,

Date

Richard A. Gray, Judge

cc: DA
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Gary L. Weber, Esq. – Lycoming County Reporter