

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1213-2009;  
vs. : CR-1713-2009  
 :  
 :  
 : Notice of Intent to Dismiss PCRA  
DAVID L. KILGUS, :  
Defendant :

**OPINION AND ORDER**

On July 12, 2010, under Information No. CR-1213-2009, Defendant David Kilgus pled guilty to Count 1, statutory sexual assault, a felony of the second degree; Count 2, involuntary deviate sexual intercourse, a felony of the first degree; and Count 3, aggravated indecent assault, a felony of the second degree. Under Information No. CR-1713-2009, Kilgus pled guilty to Count 1, statutory sexual assault, a felony of the second degree; Count 2, involuntary deviate sexual intercourse, a felony of the first degree; Count 4, statutory sexual assault, a felony of the second degree; Count 5, statutory sexual assault, a felony of the second degree; Count 6, statutory sexual assault, a felony of the second degree; and Count 9, endangering the welfare of children, a felony of the second degree. As well, under Information CR-1713-2009, Kilgus pled no contest to Count 8, sexual exploitation of children, a felony of the second degree.

During Kilgus' guilty plea hearing, he admitted that between January of 2007 and September of 2009, he engaged in sexual intercourse with a female who was less than 16 years of age on five different occasions and engaged in deviate sexual intercourse with the same individual on at least two different occasions. Kilgus admitted that during the time period he was four or more years older than the victim. Kilgus also admitted to digital

penetration of the female on at least one occasion during the same time period. Kilgus admitted that the victim was the biological child of his girlfriend. At the time, both the mother and victim were living with Kilgus at his house. Among other things, Kilgus admitted that he had a duty of support for the victim.

With respect to the sexual exploitation of children charge, Kilgus did not contest that the Commonwealth could present evidence that on June 14, 2009, he directed the victim to have sexual intercourse with a man who was 26 years old while the victim was 16 years old.

On December 22, 2010, Kilgus was sentenced. Under Information No. 1213-2009 with respect to Count 2, involuntary deviate sexual intercourse, Kilgus was sentenced to undergo incarceration in a state correctional institution for an indeterminate term, the minimum of which was 10 years and the maximum of which was 20 years. With respect to Count 2, statutory sexual assault, Kilgus was sentenced to a concurrent term of imprisonment of 1 to 2 years. With respect to Count 3, aggravated indecent assault, Kilgus was sentenced to a concurrent imprisonment term of 2 to 4 years.

Under Information No. 1713-2009 with respect to Count 2, involuntary deviate sexual intercourse, Kilgus was sentenced to a concurrent term of imprisonment, the minimum of which was 10 years and the maximum of which was 20 years. With respect to Counts 1, 4, 5, and 6, all statutory sexual assaults, Kilgus was sentenced to a term of 3 years of probation on each offense, said sentences to run consecutive to each other and consecutive to the 10 to 20 year sentence. The sentence with respect to Count 8, sexual exploitation of

children, was that Kilgus be placed on probation for a period of 2 years to run consecutive to the previous sentences imposed. The sentence of the Court with respect to Count 9, endangering the welfare of children, was a concurrent sentence of 2 years' probation.

The aggregate sentence at the above Informations was a period of incarceration, the minimum of which was 10 years and the maximum of which was 20 years, to be followed by an additional term of 10 years' probation.

On July 16, 2011, Kilgus filed a pro se motion for writ of habeas corpus, which the court treated as a petition under the Post Conviction Relief Act (PCRA) because Kilgus alleged ineffectiveness of counsel. After numerous continuances and appointments of new counsel, the court dismissed the petition.

Kilgus appealed. The Superior Court affirmed the court's dismissal of the petition in a memorandum decision on May 7, 2013. On June 21, 2013, counsel filed an application for reargument nunc pro tunc before the Superior Court, which was denied on July 11, 2013. See 1632 MDA 2012.

On August 1, 2014, Kilgus filed a petition for allowance of appeal, claiming he had been abandoned by counsel. On October 1, 2014, the Pennsylvania Supreme Court denied this petition because hybrid representation is not permitted, but it directed the Prothonotary to forward the filing to counsel. See 118 MM 2014. On November 26, 2014, counsel requested leave to file a petition for allowance of appeal nunc pro tunc, which was denied on January 6, 2015. See 184 MM 2014.

On February 27, 2015, Kilgus filed another PCRA petition. In this petition Kilgus seeks reinstatement of his appeal rights nunc pro tunc. Specifically, he wants the court

to grant him the opportunity to file a petition for allowance of appeal nunc pro tunc with the Pennsylvania Supreme Court. The court finds that it lacks jurisdiction to grant Kilgus the relief he requests.

Section 9545(b) of the Judicial Code, which contains the time limits for filing a PCRA petition, states:

(b) Time for filing petition

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(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.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(4) For purposes of this subchapter, “government officials” shall not include defense counsel, whether appointed or retained.

42 Pa.C.S.A. §9545(b).

The time limits of the PCRA are jurisdictional in nature. *Commonwealth v. Howard*, 567 Pa. 481, 485, 788 A.2d 351, 353 (Pa. 2002); *Commonwealth v. Palmer*, 814 A.2d 700, 704-05 (Pa.Super. 2002). “[A]ny petition filed outside of the one-year jurisdictional time bar is unreviewable unless it meets certain listed exceptions and is filed

within sixty days of the date the claim first could have been presented.” *Commonwealth v. Lesko*, 609 Pa. 128, 15 A.3d 345, 361 (2011). To avail himself of one of the statutory exceptions, a petitioner must allege facts in his petition to show that one of these exceptions apply, including the dates the events occurred, the dates he became aware of the information or event, and why he could not have discovered the information earlier. *See Commonwealth v. Breakiron*, 566 Pa. 323, 330-31, 781 A.2d 94, 98 (Pa. 2001); *Commonwealth v. Yarris*, 57 Pa. 12, 731 A.2d 581, 590 (Pa. 1999). “[W]hen a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 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.” *Commonwealth v Gamboa-Taylor*, 562 Pa. 70, 77, 753 A.2d 780, 783 (Pa. 2000).

For PCRA purposes, “a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” 42 Pa.C.S. §9545(b)(3).

The court sentenced Kilgus on December 10, 2010. Neither post sentence motions nor a direct appeal were filed. Therefore, Kilgus’ judgment of sentence became final on or about January 10, 2011. To be considered timely, Kilgus’ petition had to be filed on or before January 10, 2012 or allege facts to support one of the statutory exceptions and be filed within 60 days of the date the claim could have first been brought. Not only does Kilgus’ petition fail to allege facts to support one of the statutory exceptions, but letters from

his counsel contained in Exhibit 5 of his petition conclusively show that Kilgus did not file his petition within 60 days of the date the claim could have first been brought.

After the Superior Court denied the request for reargument nunc pro tunc, counsel wrote a letter dated September 26, 2013 to Kilgus in which counsel advised Kilgus that his only option was to file a PCRA alleging counsel's ineffectiveness. On October 24, 2013, counsel again told Kilgus it was in his best interest "to file a second pro se PCRA petition claiming ineffective assistance of counsel in that your request to file an appeal was not honored by myself." Despite these letters, counsel did not promptly file a second PCRA petition. Instead, approximately 10 months later, he filed a petition for allowance of appeal with the Pennsylvania Supreme Court. Kilgus did not file this, his second, PCRA petition until over a year after counsel advised him to do so. Therefore, Kilgus' second petition is patently untimely and this court lacks jurisdiction to grant him any relief.

Even if Kilgus' petition were timely, the court does not believe it would have jurisdiction to grant him the requested relief when the Pennsylvania Supreme Court has already denied both his pro se petition for allowance of appeal and counsel's request for leave to file a petition for allowance of appeal nunc pro tunc.

### **ORDER**

AND NOW, this \_\_\_ day of January 2016, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court finds that Kilgus' second PCRA petition is patently untimely; therefore, the court lacks jurisdiction to grant any relief to him.

As no purpose would be served by conducting any further hearing, none will

be scheduled and the parties are hereby notified of the court's intention to dismiss the petition. Kilgus 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.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
David L. Kilgus, JV 9535  
SCI Greene, 175 Progress Drive, Waynesburg PA 15370  
Work File  
Gary Weber, Esquire (Lycoming Reporter)