

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, : **CR-1017-2018**
: **CRIMINAL DIVISION**
v. : **Notice of Intent to Dismiss PCRA**
: **Without an Evidentiary Hearing**
NIARE LAMAR BROWN, :
Petitioner :

ORDER

By way of background, on June 11, 2018, police filed a criminal complaint against Petitioner charging him with Burglary, Criminal Trespass, Resisting Arrest, Theft by Unlawful Taking, and Receiving Stolen Property. The court arraigned Petitioner on July 23, 2018. Petitioner entered a not guilty plea, and his case was placed on the September 11, 2018 pre-trial list and the September 25, 2018 call of the list. For several trial terms, Petitioner’s case was not reached. The Deputy Court Administrator scheduled Petitioner’s case for jury selection on May 1, 2019, and a trial on May 16, 2019. Trial counsel, however, was ill on the day of jury selection. Since trial counsel could not select a jury on that date, the trial was not held on May 16th. Thus, the case was placed on the next call of the list, with jury selection scheduled for the next trial term beginning on August 13, 2019.

On August 12, 2019, Petitioner filed a motion to dismiss pursuant to Rule 600. Following a hearing and argument held on August 28, 2019, the Court denied Petitioner’s motion to dismiss by an Opinion and Order entered on September 25, 2019. Following a nonjury, case-stated trial held on September 27, 2019, the Court found Petitioner guilty of all charges. On December 5, 2019, the Court sentenced Petitioner to thirty-six (36) to seventy-two (72) months’ incarceration in a state correctional institution. On December 17, 2019, Petitioner filed a notice of appeal. The sole issue asserted on appeal was that the Court erred in denying his motion to dismiss pursuant to Rule 600. The Superior Court rejected Petitioner’s arguments and affirmed his judgment of

sentence on May 29, 2020. Petitioner filed a timely Petition for Allowance of Appeal, which the Pennsylvania Supreme Court denied on December 30, 2020. On May 10, 2021, Petitioner filed a *pro se* Post Conviction Relief Act (PCRA) petition. The Court appointed counsel to represent Petitioner and directed PCRA counsel to file either an amended PCRA petition or a *Turner/Finley*¹ no-merit letter. PCRA counsel subsequently filed a motion to withdraw which also contained a no-merit letter.

After an independent review of the record, this Court agrees with PCRA counsel that, although Petitioner's PCRA is timely, he is not entitled to relief as a matter of law. In his PCRA petition, Petitioner asserts that his speedy trial rights were violated because neither the Commonwealth nor the Court followed proper procedures for determining his Rule 600 claim. He claims that only one day—the day counsel was ill—was excludable and that the Commonwealth never proved that it acted with due diligence. To be eligible for relief, Petitioner must plead and prove that the allegation of error has not been previously litigated or waived. 42 Pa.C.S.A. § 9543(a)(3). An issue has been previously litigated if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue or the issue has been raised and decided in a proceeding collaterally attacking the conviction or sentence. 42 Pa.C.S.A. § 9544(a).

In this case, Petitioner's issue has been previously litigated. The highest court in which the Petitioner had review as a matter of right was the Pennsylvania Superior Court. Appeal to the Pennsylvania Supreme Court is by allowance or permission only; it is not a matter of right. The Pennsylvania Superior Court ruled on the merits of Petitioner's Rule 600 claims. On appeal, Petitioner asserted that the trial court abused its discretion in denying his Rule 600 motions to

¹ Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988); Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988)(en banc).

dismiss when the Commonwealth failed to bring him to trial within 365 days of the complaint and failed to prove it acted with due diligence in the face of avoidable delay. The Court rejected Petitioner's arguments and found that the record and the law supported the trial court's rationale. In other words, the Commonwealth acted with due diligence, Petitioner's trial was not held within 365 days due to the illness of defense counsel, and the trial court was both factually and legally correct when it denied Petitioner's Rule 600 motion to dismiss. Since the Superior Court ruled on the merits of Petitioner's Rule 600 claims, he is barred from re-litigating his Rule 600 claims in a PCRA petition. To the extent that Petitioner asserts that trial counsel was ineffective for failing to object to the Commonwealth and the court's use of "improper procedures", Petitioner's claim lacks merit and is belied by the record. The Court held an evidentiary hearing on Petitioner's Rule 600 motion. The record showed that the Commonwealth was ready for trial and that trial counsel's illness on the day of jury selection was the sole reason that Petitioner's trial was not held within 365 days of the complaint.

Finally, Petitioner asserts that his attorney was ineffective as he was denied the right to a speedy trial pursuant to Barker v. Wingo, 407 U.S. 514 (1972). A petitioner claiming ineffectiveness of counsel must establish (1) that the [petitioner's] claim has arguable merit, (2) counsel had no reasonable basis for their action, and (3) that petitioner was prejudiced by the alleged ineffectiveness. *See Commonwealth v. Sneed*, 899 A.2d 1067 (Pa. 2006). In Barker, the Supreme Court created a "balancing test in which the conduct of both the prosecution and defense are weighed." *Id.* at 530, as cited in Commonwealth v. DeBlase, 635 A.2d 1091, 1094 (Pa. Super. 1994). Factors to be reviewed by the court are: length of delay, reason for the delay, defendant's assertion of his right and prejudice to the defendant. DeBlase, 635 A.2d at 1094. "The length of the delay is...a triggering mechanism." *Id.* In Judge Lovecchio's Rule 600 opinion, he found that the delay in the Petitioner's case was "entirely beyond the

Commonwealth's control." Trial Court Opinion 9/25/2019, at 4. He also found that the Commonwealth was prepared to go to trial and due to the illness of trial counsel, Petitioner's trial was not held within its adjusted Rule 600 date. Id. Therefore, the delay, even though it may have prejudiced the Petitioner, was a result of his own attorney's illness. Petitioner is unable to assert a delay attributable to the Commonwealth that was designed to or actually interfered with Petitioner's defense. He also failed to assert his rights under Barker when he litigated his Rule 600 motion before Judge Lovecchio. Since Petitioner has failed to prove both the prejudice prong of the ineffective assistance of counsel and Barker standards, the Court agrees with PCRA counsel and finds that he is ineligible for relief and the petition is without merit.

ORDER

AND NOW, this 17th day of December 2021, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, no purpose would be served by conducting an evidentiary hearing. The Court notifies the parties of its intent to dismiss the petition without holding an evidentiary hearing. Petitioner may respond to this proposed dismissal with twenty (20) days. If no response is received within that time, the Court will enter an order dismissing the petition.

By the Court,

Nancy L. Butts, President Judge

cc: DA
Trisha Jasper, Esq.
Petitioner—304 Arch Street, Williamsport PA 17701