

G. Weber

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CP-41CR-0001226-2014
	:
vs.	: CRIMINAL DIVISION
	:
	: Notice of Intent to Dismiss
DAVID CHARLES BEAN,	: 2 nd PCRA Petition
Defendant	:

OPINION AND ORDER

Before the court is Petitioner’s second Post Conviction Relief Act (PCRA) petition in connection with case 1226-2014. Following a jury trial held on September 12, 2016 and September 13, 2016, Petitioner was convicted of, among other offenses, rape, involuntary deviate sexual intercourse and aggravated indecent assault. Ultimately, he was sentenced to an aggregate period of state incarceration, the minimum of which was 18 years and the maximum of which was 36 years.

Petitioner appealed. The Pennsylvania Superior Court affirmed his judgment of sentence but vacated his sexually violent predator designation on July 31, 2018, and the Pennsylvania Supreme Court denied his petition for allowance of appeal on January 31, 2019.

On June 25, 2019, Petitioner filed his first pro se petition for relief under the PCRA, which was dismissed without holding an evidentiary hearing on June 2, 2020. Petitioner appealed. The Pennsylvania Superior Court affirmed the dismissal on June 22, 2021, and the Pennsylvania Supreme Court denied Petitioner’s petition of allowance of appeal with respect to his first PCRA petition on December 7, 2021.

Petitioner filed a second PCRA petition on or about April 28, 2022.

After a review of the record in this matter, the court finds that it lacks

jurisdiction to hold an evidentiary hearing or grant any relief, because the petition is untimely and any claims presented therein are previously litigated or waived.

Section 9545(b)(1) 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.

42 Pa. C.S.A. §9545(b)(1)(emphasis added). For PCRA purposes, “a judgment becomes final at the conclusion of direct review...or at the expiration of time for seeking the review.”

Petitioner’s judgment became final on or about May 1, 2019, 90 days after the Pennsylvania Supreme Court denied his petition for allowance of appeal in his direct appeal. To be considered timely, his current PCRA petition had to be filed on or about May 1, 2020, or he had to plead facts to satisfy one of the exceptions. Instead, his petition was filed nearly two years late.

Petitioner attempts to assert the exceptions for interference by government officials and newly discovered facts, but he does not assert sufficient facts to invoke these exceptions. For example, Petitioner does not allege who the government officials are who

interfered with the presentation of his current PCRA claims or how they kept him from filing his current PCRA petition in a timely manner. Petitioner does complain about his prior attorneys; however, the term “government official” does not include defense counsel, whether appointed or retained. 42 Pa. C.S.A. §9545(b)(4). He also claims that there was prosecutorial misconduct and coaching of witnesses but those would seem to be underlying substantive claims that could have been asserted at trial, on appeal or in his first PCRA petition and not allegations that any government official interfered with his ability to assert these claims previously.

With respect to his newly discovered facts, Petitioner does not allege when he discovered that the DA/state police allegedly withheld L.K.’s phone records and numerous other calls than were presented in court, what those phone records could or would show, or how those records could or would affect the outcome of his case. Rather, it appears that Petitioner is on a fishing expedition, because he is also requesting in his petition that the District Attorney produce state police logs of all phone calls made in the case and all of L.K.’s phone logs and texts.

The time limits of the PCRA are jurisdictional in nature. *Commonwealth v. Howard*, 567 Pa. 481, 485, 788 A.2d 351, 353 (2002); *Commonwealth v. Palmer*, 814 A.2d 700, 704-05 (Pa.Super. 2002). When 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 one year 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. 42 Pa. C.S.A. §9545(b); see also *Commonwealth v Gamboa-*

Taylor, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000). Therefore, the court lacks jurisdiction to hold an evidentiary hearing or grant Petitioner relief.

Even if his second petition had been timely filed, Petitioner still would not be entitled to relief. In addition to proving the timeliness of his petition, a PCRA petitioner must show that his claims were not previously litigated or waived. 42 Pa. C.S.A. §9543(a)(3). An issue is previously litigated if the highest appellate court in which the petitioner could have review as a matter of right has ruled on the merits of the issue or it has been raised and decided in a prior PCRA petition. 42 Pa. C.S.A. §9544(a)(2), (3). An issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state postconviction proceeding. 42 Pa.C.S.A. §9544(b).

Petitioner asserts two main claims in his petition: (1) the charges against the two alleged victims (L.K. and J.D.) should have been severed because there was no accusation of any sex crime, physical or video, against J.D.; and (2) no drug/alcohol expert testified to the case of how their drug abuse affected their behaviors.

The severance issue was asserted before trial and the trial court rejected it. It was contained in the concise statement of errors complained of on appeal but does not appear to have been pursued further on direct appeal. A claim that trial counsel was ineffective for failing to appeal the denial of severance was asserted in Petitioner's first counseled PCRA petition. Again, the trial court rejected it. Therefore, this issue is previously litigated because it has been raised and decided in Petitioner's first PCRA petition.

Moreover, contrary to Petitioner's claims, there were similar charges of obscene and other sexual performances and invasion of privacy involving both L.K. and J.D. which

justified the charges against both victims being tried together.

The court also notes that Petitioner asserts that he asked both appeal counsel and his first PCRA counsel to assert both issues but they failed to do so. In his pro se first PCRA petition, however, Petitioner did not assert any issues regarding severance or failure to call drug/alcohol expert witnesses.

Where a claim is made of counsel's ineffectiveness for failing to call witnesses, including expert witnesses, it is the petitioner's burden to show that the witness existed and was available; counsel was aware of, or had a duty to know of the witness; the witness was willing and able to appear; and the proposed testimony was necessary in order to avoid prejudice to the petitioner. *Commonwealth v. Chmiel*, 30 A.3d 1111, 1143 (Pa. 2011). Petitioner has not identified any expert witness who was willing and available to testify for him at the time of his trial in the manner he suggests.

Accordingly, the court enters the following order.

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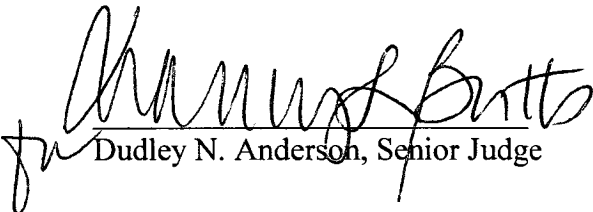
DAVID CHARLES BEAN,
Defendant

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: **2nd PCRA Petition**
:

ORDER

AND NOW, this 24th day of November 2022, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court notifies the parties of its intention to deny Petitioner's (second) PCRA petition without holding an evidentiary hearing for the reasons set forth above. 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 petition.

By The Court,


Dudley N. Anderson, Senior Judge

cc: District Attorney
David Bean, #QN6623
SCI Benner Township, 301 Institution Drive, Bellefonte PA 16823
Honorable Dudley N. Anderson
Gary Weber, Esquire (Lycoming Reporter)