

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 99-10,171

VS :

SHAWN P. MCCRACKEN :

OPINION AND ORDER

Before the Court are Defendant's Petitions for Post Conviction Collateral Relief filed January 31, 2001, and March 12, 2001. The matter was initially set for a conference on May 4, 2001. At the time of the conference, the Commonwealth argued that the Court could not entertain the petition, since it was not timely filed within one year of the date that the sentence became final, as is required under 42 Pa.C.S.A. § 9545(b).<sup>1</sup> Defense counsel was granted additional time in which to file an amendment to the petition, and to articulate why Defendant's claims should fall within an exception to the one year filing requirement. On July 11, 2001, Defendant's Counsel filed an amended petition. A conference on the amended petition was held August 6, 2001. In the petition, Defendant alleges that his counsel failed to provide effective assistance of counsel, that so undermined the truth determining process that no reliable adjudication of guilt could have taken place. Defendant asserts four arguments in support of his claim. Defendant asserts that his trial counsel was ineffective for failing to appeal the denial of the sentence modification, for failing to investigate mitigating circumstances, for failing explain the need for a pre-sentence investigation, and for telling the Defendant that the plea could not include any maximum penalties.

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<sup>1</sup> This Court's Sentencing Order is dated July 8, 1999. Defendant filed a Motion for Reconsideration of Sentence on July 13, 1999, which was denied by this Court on July 15, 1999. The Defendant's Petitions for Post Conviction Collateral Relief were filed January 31, 2001 and March 12, 2001.

After reviewing the petition, the Court finds that the petition still does not allege a basis for relief under the Post Conviction Relief Act, 42 Pa.C.S.A. § 9545(b). The Act does afford three narrow exceptions to the one-year filing requirement *where 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.

#### ***Exception for Interference by Government Officials***

Initially, the Court finds that Defendant's claims of his counsel's ineffectiveness do not fall within the first exception, see 42 Pa.C.S.A. § 9545(b)(4)(i) ("government officials" does not include defense counsel, whether appointed or retained.) Therefore, [Section 9545\(b\)\(1\)\(i\)](#) does not operate to save Defendant's claims of ineffective assistance of counsel from the bar of untimeliness.

#### ***Exception for After Discovered Evidence***

After reviewing Defendant's claims under the second exception, the Court finds it is not applicable either, as Defendant has not shown that his claims were unknown and could not have been ascertained by due diligence. See [Commonwealth v. Carr, 768 A.2d 1164](#), (Super.2001)(Trial counsel's failure to file a direct appeal was discoverable

with due diligence during petitioner's one-year period to file a timely Post Conviction Relief Act (PCRA) petition, which began to run upon expiration of petitioner's time to file a direct appeal, and thus, after-discovered evidence exception to PCRA timeliness requirements did not apply, considering that a phone call to petitioner's attorney or the clerk of courts would have readily revealed that no appeal had been filed.) See also [Commonwealth v. Pursell, 561 Pa. 1214, 749 A.2d 91](#), (2000), reargument denied, reconsideration denied (The exception to the one-year filing period for instances when facts are unknown to the petitioner does not apply where the petitioner merely alleges that more competent counsel would have presented other claims based on a better evaluation of the facts available to him at the time of trial.)

***Exception for Newly Recognized Constitutional Rights***

Defendant makes no assertion that his claims are a constitutional right recognized by the Supreme Court after the time period provided in the section, and held to be applied retroactively. The third exception is therefore not applicable in this case.

***Conclusion***

Since the Defendant has not proven that he falls within an exception to the time for filing requirement, the Court finds the petition untimely, and the Court therefore lacks jurisdiction to address the claims contained therein. [Commonwealth v. Camps, 772 A.2d 70](#), (Pa. Super. 2001)

ORDER

AND NOW, this \_\_\_\_ day of November, 2001 the Court, having no jurisdiction to entertain Defendant's Petition for Post Conviction Collateral Relief, DISMISSES said petition.

By The Court,

Nancy L. Butts, Judge

cc: DA

Gregory A. Stapp, Esquire  
Honorable Nancy L. Butts  
Law Clerk  
Gary Weber, Esquire  
Judges