

COMMONWEALTH OF PENNSYLVANIA vs. WILLIAM  
M. BURKHOLDER, Defendant, C.P. Franklin County  
Branch, Criminal Action, No. 172 of 1991

*Commonwealth V. Burkholder*

*Post Conviction Relief Act - Motion for Recusal*

1. Under the Post Conviction Relief Act (PCRA), an issue is waived if the petitioner did not raise it before trial, at trial, on appeal, in a habeas corpus proceeding, or other proceeding.

2. For those petitioners whose judgment became final before January 16, 1996, a petition is timely if filed no later than one year after January 16, 1996.

3. A motion for recusal should only be granted when a judge harbors any doubt about his or her ability to preside impartially over a matter.

4. Recusal is necessary if the judge, as prosecutor, actually prosecuted the case at any stage or prosecuted the defendant on previous criminal offenses.

5. If the judge happened to be the district attorney at the time and had no direct involvement in the earlier prosecution, recusal is not necessary.

*John F. Nelson, District Attorney, Counsel for the Commonwealth*

*William M. Burkholder, pro se, for the Defendant*

OPINION AND ORDER

WALKER, P. J., October 4, 1999:

**Factual Background**

Petitioner, William Burkholder, was sentenced to 11 - 25 years for rape and aggravated assault on May 22, 1991. The sentence was the result of a plea agreement with the Franklin County District Attorney's office in which the petitioner agreed to enter a plea of *nolo contendere* in exchange for a *nolle prosequi* of other offenses committed by the petitioner. The sentence imposed was outside the sentencing guidelines, and the court gave several sound reasons on record for the

deviation. The court noted on record that the defendant's lack of remorse coupled with the ignoble crime were major factors in the decision. The court denied a motion for modification of sentence, and the Superior Court affirmed this court's decision on February 6, 1992.

Petitioner's first *pro se* PCRA was filed in 1994 and denied without a hearing. The order was not appealed. After a second PCRA petition was then filed *pro se* in 1996, counsel was appointed and a hearing was held in 1997. The petition was denied and the petitioner then appealed to the Superior Court. The Superior Court affirmed the judgment on February 23, 1999.

**Discussion**

The instant petition is a motion for recusal, which suggests that this court was not able to preside impartially over his sentencing. It is not clear what petitioner is doing. It appears, giving the petitioner the benefit of the doubt, that the instant matter is a third PCRA petition. It should be denied for the foregoing reasons:

1. **Waiver**

Classically, the proper time for a motion for recusal is at or prior to trial. Here, there was a *nolo contendere* plea and subsequent sentencing. While the issue could have been properly addressed upon the petitioner's appeal, it was not raised. Additionally, the issue was not raised by the petitioner in his first PCRA petition. Section 9544(b) of the Act states that an issue is waived if the petitioner did not raise it before trial, at trial, on appeal, in a habeas corpus proceeding or other proceeding. This petitioner had ample time to present this issue earlier, and has now waived the opportunity.

2. **Filing Deadlines**

The 1995 amendments to the PCRA declare untimely all petitions filed more than one year after the judgment becomes final. For those petitioners whose judgment became final before January 16, 1996, a petition is timely if filed no later than one year after January 16, 1996. In addition, a second and subsequent PCRA petitions are subject to the same filing deadlines. *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa. Super 1997). Petitioner's judgment became final on March 5, 1992, after his time for seeking review by the Supreme Court expired. As such, he must have filed this PCRA within one year of January 16, 1996. He did not, so it is untimely and must be dismissed.

### **3. Merits of Petition**

A motion for recusal should only be granted when a judge harbors any doubt about his or her ability to preside impartially over a matter. *Code of Judicial Conduct*, Canon 3(C)(1); *Commonwealth v. Boyle*, 498 Pa. 486, 447 A.2d 250 (1982). Petitioner Burkholder sets forth the following argument to support his motion for recusal:

1. This court sentenced petitioner in 1991, with inherent prejudice because petitioner was prosecuted in 1982 by the sentencing judge. Even without a motion by petitioner's counsel, this judge should have recused himself *sua sponte*.

If a judge was a prosecutor at the time of the incident, recusal is necessary if the judge actually prosecuted the case at any stage. *Commonwealth v. Young*, 439 Pa. 498, 269 A.2d 18 (1970). *Recusal is also required where the judge has prosecuted the defendant on previous criminal offenses.* *Commonwealth v. Darush*, 501 Pa. 15, 459 A.2d 727 (1983). However, if the judge happened to be the district attorney at the time and had no direct involvement in the earlier prosecution, recusal is not necessary. *See Commonwealth v. Jones*, 541 Pa. 351, 663 A.2d 142 (1995) (Justice Castille

refuses to recuse himself from appeals from Philadelphia County unless he had direct contact with case during his tenure as district attorney).

In examining the petitioner's file, there is a record of a simple assault and resisting arrest in 1982. In that case, this judge was the district attorney of Franklin County and also necessarily had a role in filing the information and other proceedings. Ultimately, the petitioner was given a total of \$235 in fines to pay for violating fishing regulations. The petitioner was also placed in Accelerated Rehabilitative Disposition (ARD) for simple assault and resisting arrest. After the petitioner completed the program successfully, the charges were dismissed.

However, in the instant matter it is critical that this court only accepted a *nolo contendere* plea and sentenced petitioner. While the court exceeded the guidelines in sentencing, the petitioner was apprised of the reasons as required. The court played no role of fact-finder and did not ultimately determine if the petitioner was guilty or not guilty. The petitioner did not file a motion for recusal upon knowledge of the judge, nor did he accept this court's offer to have another judge sentence him. The petitioner was given an opportunity to address the court as well, but denied it. The court rendered a sentence in accord with the pre-sentence report. Additionally, many of the above issues were directly and indirectly addressed by the Superior Court in its 1992 memorandum.

The petitioner was informed that the sentence deviated from the guidelines because of the crime, the age of the victim, the result of the crime, the lack of remorse and the psychiatric determination that the petitioner was unlikely to be rehabilitated. The court noted that the petitioner had threatened the victim with a knife after the offense to "keep her quiet." It was also made aware to the petitioner that the sentence was

aggravated by his role as parent to the victim. This was a position of trust and comfort that was taken advantage of by petitioner.

Wherefore, the court dismisses the petitioner's petition for recusal and the PCRA petition.

### ORDER OF COURT

October 4, 1999, having considered defendant's PCRA petition and the defendant's petition for recusal, this court enters the following findings and order:

1. Petitioner was sentenced on May 22, 1991 on a plea of *nolo contendere* for rape and aggravated assault. The sentence was appealed, and on February 6, 1992 the Superior Court affirmed the judgment of sentence.

2. The 1995 amendments to the Post Conviction Relief Act (PCRA) require that a petition for post conviction collateral relief be filed within one year of the date the judgment becomes final. The amendments apply to first or subsequent petitions filed after January 16, 1996.

3. For petitioners whose judgment has become final on or before January 16, 1996, a petition is deemed to be timely under the PCRA when the petition is filed within one year of that date.

4. Petitioner William H. Burkholder's judgment became final before January 16, 1996.

5. Because petitioner has filed his PCRA petition more than one year after January 16, 1996, it is untimely.

6. It does not appear to this court that any of the statutory exceptions to the one-year period apply, pursuant to 42 Pa.C.S.A. §9545(b)(1)(I)-(iii).

7. Because the motion for post conviction collateral relief is untimely, no purpose would be served by any further proceedings.

8. As required by Pa.R.Crim.P. 1507(a), this court hereby gives notice to petitioner of its intention to dismiss petitioner's motion for post-conviction collateral relief. Petitioner may respond to this proposed dismissal within twenty (20) days of the date of this notice.

9. Defendant's petition for recusal filed July 19, 1999 is hereby denied.