

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
:
v. :
:
:
GILES W. WITHERSPOON :
:
Appellant : No. 1860 EDA 2019

Appeal from the Order Entered May 30, 2019
In the Court of Common Pleas of Delaware County Criminal Division at
No(s): CP-23-CR-0000086-2000

BEFORE: SHOGAN, J., McCAFFERY, J., and COLINS, J.*

CONCURRING MEMORANDUM BY SHOGAN, J.: **FILED JUNE 30, 2020**

I concur in the result reached by the Majority wherein it concluded Appellant is entitled to no relief because the February 14, 2019 petition should have been considered an untimely post-sentence motion. I write separately to note that under certain circumstances, an untimely post-sentence motion may be considered a petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. ***Commonwealth v. Evans***, 866 A.2d 442, 443-444 (Pa. Super. 2005).

In ***Evans***, this Court explained that regardless of the title of the document filed, convicted petitioners seeking post-conviction relief must be

* Retired Senior Judge assigned to the Superior Court.

afforded the assistance of counsel in filing a first PCRA petition. **Evans**, 866 A.2d at 444. This construct protects an indigent petitioner's right to file a counseled first PCRA petition. **Id.**; **Commonwealth v. Guthrie**, 749 A.2d 502, 504 (Pa. Super. 2000).

The holding from **Evans**, however, provides no benefit to Appellant in the instant case. Herein, Appellant had the benefit of counsel in pursuing his first PCRA petition.¹ Therefore, Appellant exercised his right to, and received the benefit of, a counseled PCRA petition. Accordingly, **Evans** is inapplicable, and there is no basis upon which to deem Appellant's untimely post-sentence motion a PCRA petition.

Judge McCaffery joins. Judge Colins joins.

¹ The record reveals the PCRA court appointed counsel to represent Appellant throughout the pursuit of his first PCRA petition. Order, 6/22/05; Order, 5/19/08; Order, 7/28/08.

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