

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :  
 :  
 vs. : No. CR-437-2016  
 :  
 TYREE GREEN, : Notice of Intent to Dismiss PCRA Petition  
 Defendant : Without Holding an Evidentiary Hearing  
 : and Order Granting Counsel's Motion to  
 : Withdraw

**OPINION AND ORDER**

This matter came before the court on the Post Conviction Relief Act (PCRA) petition filed by Defendant, Tyree Green (hereinafter "Green"). The relevant facts follow.

Green was charged with two counts of firearms not to be carried without a license, two counts of receiving stolen property, two counts of firearm ownership-duty of other persons, and one count of persons not to possess a firearm.

On October 14, 2016, Green entered a guilty plea to firearms not to be carried without a license, a felony of the third degree, in exchange for a minimum sentence of three years' state incarceration with credit for time served, and the remaining charges as well as the charges in case 944-2015 would be dismissed. On that same date, the court sentenced Green to incarceration in a State Correctional Institution (SCI) for a minimum of three years and a maximum of six years.

On April 12, 2017, Green filed his pro se PCRA petition, in which he asserted that (1) the court excessively sentenced him to each charge in the highest range; (2) he was unjustly penalized for his prior record score without the court setting forth specific reasoning on the record, and (3) his sentence was excessive because it exceeded the terms of his plea

agreement when his sentence should have been 36 to 48 months.

As this was Green's first PCRA petition and it appeared that he was indigent, the court appointed counsel to represent Green and gave counsel an opportunity to file either an amended PCRA petition or a "no merit" letter pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988)(en banc).

PCRA counsel obtained the transcript of Green's guilty plea and sentencing, and then filed a motion to withdraw as counsel which included a "no merit" letter as an exhibit thereto.

After an independent review of the record in this case, the court concludes that Green's petition lacks merit.

The first issue raised by Green is his claim that his sentence was excessive. An excessive sentence claim is a challenge to the discretionary aspects of the sentence. *Commonwealth v. Ahmad*, 961 A.2d 884, 886 (Pa. Super. 2008).

This claim is waived because Green failed to assert it in a post-sentence motion or on appeal. 42 Pa. C.S.A. § 9544 (b) ("An issue is waived if the petitioner could have raised it but failed to do so before trial, at trial during unitary review, on appeal or in a prior state post-conviction proceeding.").

Even if Green had not waived this claim, it clearly lacks merit. The Commonwealth and Green negotiated a plea agreement for a minimum sentence of three years' incarceration in a state correctional institution. With Green's prior record score of a 4

and the offense gravity score of a 9, the standard guideline range for Green's minimum sentence was 36 to 48 months. Three years (or 36 months) was the lowest minimum sentence permitted under the standard range of the advisory sentencing guidelines. Pursuant to the plea agreement, the court sentenced Green to a minimum of three years and a maximum of six years.

Despite Green's assertions to the contrary, the guidelines do not apply to the maximum sentence. See 204 Pa. Code §303.9(e)(all numbers and sentence recommendations suggest months of minimum confinement). In fact, with a minimum sentence of three years, the court was required to impose a maximum sentence of at least six years. 42 Pa. C. S. §9756(b)(1) ("The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed.").

Furthermore, "[An individual] who pleads guilty and receives a negotiated sentence may not then seek discretionary review of that sentence." *Commonwealth v. O'Malley*, 957 A.2d 1265, 1267 (Pa. 2008); see also *Commonwealth v. Reid*, 117 A.3d 777, 785 (Pa. Super. 2015). ("This claim raises a challenge to the discretionary aspects of Appellant's negotiated sentence, and is unreviewable. The trial court imposed the sentence Appellant negotiated with the Commonwealth. Appellant may not now seek discretionary review of that negotiated sentence.")

Accordingly, Green's first claim fails.

Green's second issue is that he "was unjustly penalized for his prior record without giving specific reasoning." This claim, as well, is clearly without merit.

The sentencing court must consider the advisory sentencing guidelines. To do so, the court must determine the offense gravity score and calculate the defendant's prior record score. Green's prior record score was determined to be a 4. (Transcript, October 14, 2016, at 3). Although Green waived the preparation of a pre-sentence report (Transcript, at 17-18), his prior record score was correctly calculated and stipulated as a 4 based on his 2010 conviction for resisting arrest, a misdemeanor of the second degree, and his 2011 conviction for robbery, a felony of the first degree. (Transcript, at 17; Green's written guilty plea colloquy attached to the October 14, 2016 guilty plea and sentencing order).

Green's final issue is that he was sentenced in violation of the terms of his plea agreement. This issue begs logic and is undoubtedly without merit.

Green asserts that he should have "received a 36 to 48 month sentence" because the "basic sentencing matrix sentencing guidelines is 36-48 months I received 3-6 years." Green misstates his plea agreement. As the court specifically noted, "your plea agreement is for a three-year period of state incarceration, the maximum is up to me, it could be up to seven, but it has to be at least six." (Transcript, at 3). The court asked Green if he understood this and he indicated "yes". (Transcript, p. 3). The court followed up with, "so the best case scenario that you end up with is a three to six year period of state incarceration in accordance with your plea agreement." (Transcript, at 4). Again, the court asked Green if he understood such to which he replied "yes." (Transcript, p. 4).

The court notes that Green had a duty to answer those questions truthfully, and the court could rely on Green's answers in rendering its sentence. *Commonwealth v.*

*Cortino*, 563 A.2d 1259, 1262 (Pa. Super. 1989).

What is even more outlandish regarding Green's claim is that the entire argument by counsel during Green's sentencing before the court focused on whether the maximum should be seven or six years. (Transcript, at 23-24).

As discussed previously in this Opinion, the court was required by law to impose a maximum sentence of at least six years. 42 Pa. C.S.A. § 9756 (b) (1). The court informed Green of this fact prior to sentencing him.

For the foregoing reasons, Green's claims that his sentence was excessive, exceeded the guidelines, or was in violation of his plea agreement lack merit. Accordingly, the following order is entered.

### **ORDER**

**AND NOW**, this 20<sup>th</sup> day of July 2017, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court finds that Green's PCRA petition clearly lacks merit.

The parties are hereby notified of this court's intention to dismiss Green's PCRA petition without holding an evidentiary hearing. Green 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.

The court GRANTS counsel's motion to withdraw. Green may represent himself or hire private counsel to represent him.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
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Work File