

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1825-2010
vs. :
: CRIMINAL DIVISION
:
:
BRIAN M. HORN, :
Defendant :

OPINION AND ORDER

This matter came before the court on Defendant’s Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

Petitioner Brian Horn (hereinafter “Horn”) was charged with nine counts of unlawful contact with a minor related to obscene and other sexual materials and performances¹ and one count of criminal use of communication facility.² Each of these offenses was graded as a felony of the third degree.

On January 21, 2011, Horn entered an open plea to four counts of unlawful contact with a minor and one count of criminal use of a communication facility before the Honorable Joy Reynolds McCoy.

On July 13, 2011, Judge McCoy sentenced Horn to undergo six (6) to twelve (12) months’ incarceration in a state correctional institution on each count of unlawful contact with a minor, to be followed by five (5) years of probation for criminal use of a communication facility. The aggregate sentence imposed was two (2) to four (4) years’ incarceration in a state correctional institution followed by five (5) years of probation supervision. Judge McCoy

¹ 18 Pa. C.S. A. §6318(a)(4).

² 18 Pa. C.S.A. 7512(a).

awarded Horn credit for time served from November 23, 2010 through July 12, 2011. Horn filed a post-sentence motion seeking reconsideration of his sentence, which Judge McCoy summarily denied on July 26, 2011. No appeal was filed.

On June 15, 2012, Horn filed his first PCRA petition, in which he asserted that he entered his plea agreement with the understanding that the sentence would not be less than three (3) months nor more than six (6) months; therefore, his guilty plea was not voluntary, knowingly or intelligently entered. He also alleged that his counsel was ineffective in that he guided him not to file a direct appeal as it would be a waste of resources, and the sentence imposed, while within the guidelines, was excessive and harsh. Judge McCoy dismissed this PCRA petition without holding an evidentiary hearing, which the Superior Court affirmed in a memorandum decision filed on September 25, 2013.

On October 15, 2015, Horn made a counseled admission that he violated the conditions of his special probation by accessing the internet on a daily basis, by seeking sexually explicit information and/or materials, by not being honest in his treatment and by failing to comply with the directives of board agents. The court revoked Horn's probation and re-sentenced Horn to one (1) to five (5) years' incarceration in a state correctional institution. The court awarded Horn credit for time served from October 9, 2015 to October 14, 2015.

On October 17, 2016, Horn filed his current (second) PCRA petition. Horn alleged that "in the guilty plea entered on 10/1/15" he was "sentenced by the judge in a prior domestic family case" and the judge should have recused himself. He sought withdrawal of the guilty plea and a trial by a jury.

As it was unclear whether Horn was challenging his original plea or his counseled

admission to the probation violation, the court appointed counsel to represent Horn and gave counsel an opportunity to file an amended PCRA petition or a no merit letter. Counsel obtained a transcript of Horn's probation violation hearing, reviewed the transcript and Horn's file, and filed a motion to withdraw that included a no merit letter.

In her no merit letter, counsel clarified that Horn was alleging Judge McCoy should have recused herself from presiding over his guilty plea and sentencing hearing when she presided over his bitter custody dispute earlier that year. Horn also indicated that when the court revoked his probation, it did not give him credit for time served on probation. Horn was seeking a lesser sentence.

To the extent that Horn attempts to challenge Judge McCoy's failure to recuse herself, the court lacks jurisdiction to address this claim because his PCRA petition is untimely.

Any PCRA petition, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final or the petitioner must plead and prove one of the three statutory exceptions. 42 Pa. C. S. A. §9545(b)(1); *Commonwealth v. Mitchell*, 141 A.3d 1277, 1284 (Pa. 2016); *Commonwealth v. Gamboa-Taylor*, 753 A.2d 780, 783 (Pa. 2000). Horn's underlying conviction became final thirty days after Judge McCoy denied his post-sentence motion, i.e., on August 25, 2011. Horn did not file his PCRA petition until more than 4 years later and he did not plead any facts to support any of the statutory exceptions. Therefore, Horn's claims related to Judge McCoy's failure to recuse are patently untimely.

Furthermore, Horn waived this issue by failing to file a motion requesting Judge McCoy to recuse herself prior to his guilty plea or sentencing hearing. *Commonwealth v. Edmiston*, 634 A.2d 1078, 1088 (Pa. 1993); *Commonwealth v. Johnson*, 719 A.2d 778, 790 (Pa.

Super. 1998)

Horn also waived this issue by failing to assert it in his first PCRA petition. 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”).

Horn’s assertion that he was entitled to credit for time served on probation lacks merit. Although the court must give “due consideration” to the time the defendant spent serving probation, the court is not required to credit the defendant with any time spent on probation. *Commonwealth v. Infante*, 63 A.3d 358, 367 (Pa. Super. 2013)(citing *Commonwealth v. Crump*, 995 A.2d 1280, 1284 (Pa. Super. 2010), *appeal denied*, 13 A.3d 475 (Pa. 2010)).

Horn began serving his sentence of probation on November 23, 2014. By early October 2015, Horn was violating his probation on a daily basis by accessing the internet and seeking sexually explicit materials. Horn’s underlying crimes related to Horn using a computer to send webcam transmissions of his exposed penis and of him masturbating to individuals whom he believed were 13 year old females but whom, in actuality, were agents of the Attorney General’s office. Horn had served only about ten and one half (10½) months of his five years of probation, and he was violating the conditions of his supervision on a daily or almost daily basis.

Horn was on probation for criminal use of a communication facility, a felony of the third degree. The statutory maximum for a felony of the third degree is seven (7) years. 18 Pa. C. S. A. §1103(3). The court’s sentence of one (1) to five (5) years’ incarceration was two (2) years less than the statutory maximum.

If Horn or his counsel had requested time served on probation, the court would

not have changed its sentence. It either would have denied the request for credit or it would have increased Horn's sentence by ten and one-half (10½) months to account for the credit but still require Horn to serve the same amount of time in state incarceration.

Horn's sentence is not illegal because the court was not required to give him credit for time spent on probation, and his maximum sentence was not more than seven (7) years.

Horn's counsel at the probation violation hearing was not ineffective for failing to request credit, because Horn was not prejudiced by counsel's failure. Even if counsel had requested credit, the court would not have changed Horn's sentence of state incarceration.

The court imposed a sentence less than the sentence being sought by his probation officer. The court considered the nature of Horn's offenses and his violations. The court was concerned that Horn was heading down a slippery slope and was going to re-offend, particularly in light of Horn's admission that his sex offender treatment had not really addressed his "deviant thoughts." The court found that it needed to incarcerate Horn due to the concerns about re-offense. Moreover, at the time the court imposed its sentence, Horn indicated that he thought it was fair. N.T., 10/15/2015, at 11.

The court also considered Horn's medical issues. Horn's medical issues, however, were not preventing him from accessing inappropriate materials on the internet. Furthermore, the Lycoming County Prison was not equipped to address Horn's medical issues. The court specifically recommended that Horn be housed at Laurel Highlands due to his medical issues. Unfortunately, the Department of Corrections chose to house Horn at SCI-Mahanoy.

For the foregoing reasons, the court will grant counsel's motion to withdraw and it will notify Horn of its intent to dismiss his PCRA petition without holding an evidentiary

hearing.

ORDER

AND NOW, this ____ day of June 2017, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court find that no purpose would be served by conducting any further hearing. Therefore, none will be scheduled and the parties are hereby notified of the court's intention to dismiss Horn's PCRA petition. Horn 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. Horn is notified that he may represent himself or hire private counsel to represent him, but the court will not appoint new counsel to represent him.

By The Court,

Marc F. Lovecchio, Judge

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