

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-889-2015
:
vs. : CRIMINAL DIVISION
:
:
CLAYTON POLICASTRO : Notice of Intent to Dismiss PCRA
Defendant : Without an Evidentiary Hearing

OPINION AND ORDER

This matter came before the court on Defendant's Petition for Credit for Time Spent in Custody, which the court treated as a Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

On May 15, 2015, the Pennsylvania State Police filed a criminal complaint against Defendant Clayton Policastro, charging him with theft by unlawful taking, a felony of the third degree; receiving stolen property, a felony of the third degree; and theft by deception, a misdemeanor of the first degree, for taking over \$5,000 worth of brass fittings and copper wire from New Way Drilling and selling them to Staimans Recycling Corp. for \$1,500. Defendant was incarcerated on May 15, 2015, but released on \$50,000 signature bail on May 27, 2015.

On January 5, 2016, Defendant pled guilty to theft by unlawful taking, a felony of the third degree. Pursuant to the parties' negotiated plea agreement, the court sentenced Defendant to undergo incarceration in a state correctional institution for a minimum of one year and a maximum of 30 months. The court awarded Defendant credit for time served from May 15, 2015 to May 27, 2015.

On October 14, 2016, Defendant filed his petition for credit, which the court

treated as a PCRA. In his petition, Defendant sought credit for the time he spent incarcerated at SCI Coal Township from April 8, 2016 to September 23, 2016. The court appointed counsel to represent Defendant and directed PCRA counsel to file either an amended PCRA petition on Defendant's behalf 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 filed a petition to withdraw from representation which included a *Turner/Finley* no merit letter.

After review of the record and PCRA counsel's no merit letter, the court finds that Defendant's PCRA petition lacks merit and that he is not entitled to the requested credit as a matter of law.

Credit for time served is governed by Section 9760 of the Judicial Code, which states:

After reviewing the information submitted under section 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:

(1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

(2) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody under a prior sentence if he is later re-prosecuted and resentenced for the same offense or for another offense based on the same act or acts. This shall include credit in accordance with paragraph (1) of this section for all time spent in custody as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same act or acts.

(3) If the defendant is serving multiple sentences, and if one of the sentences is set aside as the result of direct or collateral attack, credit against the maximum and any minimum term of the remaining sentences shall be given for all time served in relation to the sentence set aside since

the commission of the offenses on which the sentences were based.

(4) If the defendant is arrested on one charge and later prosecuted on another charge growing out of an act or acts that occurred prior to his arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former charge that has not been credited against another sentence.

42 Pa. C. S. §9760. The only paragraph that has any applicability to this case is paragraph (1). The court awarded Defendant credit for time served for the time he spent in the Lycoming County Prison prior to his guilty plea and sentencing, i.e., May 15 to May 27, 2015. There was no appeal in this case.

Defendant seeks credit for April 8, 2016 to September 23, 2016. It is readily apparent from the exhibits attached to his petition, however, that Defendant was not serving this sentence during that time frame, but rather a state “parole hit” or “back time” on a prior case as a result of his conviction in this case. As a result of his state parole case, his sentence in this case was interrupted from April 8, 2016 (his custody return date) to September 23, 2016.

What Defendant is really seeking is duplicate credit for the time he spent serving as a convicted parole violator. Defendant is not entitled to such credit.

Pursuant to 61 Pa. C.S. §6138 (a)(1) and (5)(i), once the Board rendered a decision on Defendant’s parole case, Defendant was required to serve his parole sentence before his new sentence in this case. Section 6138 (a)(1) and (5)(i) state:

(a) Convicted violators.

(1) A parolee under the jurisdiction of the board released from a correctional facility who, during the period of parole or while delinquent on parole, commits a crime punishable by imprisonment, for which the parolee is convicted or found guilty by a judge or jury or to which the parolee pleads guilty or nolo contendere at any time thereafter in a court

of record, may at the discretion of the board be recommitted as a parole violator.

* * *

(5) If a new sentence is imposed on the parolee, the service of the balance of the term originally imposed by a Pennsylvania court shall precede the commencement of the new term imposed in the following cases:

(i) If a person is paroled from a State correctional institution and the new sentence imposed on the person is to be served in the State correctional institution.

As a matter of law, Defendant's parole sentence and his sentence in this case had to be served consecutively. *Commonwealth v. Dorian*, 468 A.2d 1091 (Pa. 1983);

Commonwealth v. Zuber, 353 A.2d 441 (Pa. 1976); *Kerak v. Pa. Bd. of Prob. & Parole*, 153 A.3d 1134 (Pa. Commw. 2016); *Commonwealth v. Ward*, 489 A.2d 809, 811 (Pa. Super. 1985).

Furthermore, since this time satisfied Defendant's parole hit, he was not entitled to duplicate credit in this case. The prohibition on duplicate credit was explained in *Commonwealth v. Ellsworth*, wherein the Superior Court stated

This Court has held that a defendant is not entitled to 'receiv[e] credit against more than one sentence for the same time served.' *Commonwealth v. Merigris*, 452 Pa. Super. 78, 681 A.2d 194, 195 (Pa. Super. 1996). We have acknowledged that such 'double credit' is prohibited both by the statutory language of Section 9760 and by the principle that a defendant be given credit only for 'time spent in custody . . . for a particular offense.' *Commonwealth v. Hollawell*, 413 Pa. Super. 42, 604 A.2d 723, 725 (Pa. Super. 1992).

97 A.3d 1255, 1257 (Pa. Super. 2014).

As Defendant's petition lacks merit in that he is not entitled as a matter of law to the credit he is seeking, the following order is entered.

ORDER

AND NOW, this 1st day of August 2017, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, as no purpose would be served by conducting an evidentiary hearing in this case, none will be scheduled and the parties are hereby notified of this court's intention to deny the Defendant's Petition. Defendant 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 PCRA counsel's petition to withdraw. Defendant may represent himself or hire private counsel, but the court will not appoint new counsel to represent Defendant.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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