

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
Plaintiff	:	
	:	
v.	:	NO. 86-10,602
	:	
HERBERT MELVIN,	:	
Defendant	:	

**OPINION and ORDER**

The defendant, Herbert Melvin, has filed a PCRA petition requesting this court to resentence him and impose a sentence mandating that he be paroled after serving his minimum term. The information in the petition clearly shows that there are no genuine issues of material fact and relief is not warranted. Therefore, we dismiss the petition without a hearing. Pa.R.Crim.P. 1507(a).

**Factual Background**

On 6 May 1987 this court sentenced Mr. Melvin to imprisonment for an “indeterminate period of time, the minimum of which shall be fifty-eight (58) months and the maximum of which shall be ten (10) years.” On 8 May 1987 the order was modified to a minimum of fifty-nine months and a maximum of ten years. Mr. Melvin appealed his conviction and sentence, and the Superior Court affirmed both on 19 September 1987. When Mr. Melvin was not released on parole after serving his minimum he filed this PCRA petition, complaining that his sentence was illegal because it was indefinite. This court appointed counsel, who filed an amended petition on 3 December 1999.

## DISCUSSION

### A. Ineffectiveness of Counsel

Mr. Melvin claims his counsel was ineffective for failing to inform him he might serve more than his minimum sentence. We begin by addressing the question of timeliness. Under 42 Pa.C.S.A. § 9545(b), a PCRA petition must be filed within one year of the date the judgment becomes final, unless an exception applies. Because Mr. Melvin's judgment became final prior to the effective date of the 1995 PCRA amendments, his petition will be deemed timely if filed within one year of the effective date of Act, which was January 16, 1996. *See* Section 3(1) of the Act of Nov. 17, 1995 (Spec. Sess. No. 1) P.L. 1118, No. 32. Mr. Melvin's PCRA petition was filed on 11 February 1999.

Mr. Melvin claims he falls under the exception set forth in § 9543(b)(ii): “[T]he facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence.” Mr. Melvin argues that he was not aware he would not be released upon serving his minimum until his minimum term actually expired.

Even assuming the petition is timely, Mr. Melvin's claim must be rejected. To prevail on an ineffectiveness claim Mr. Melvin must show that his underlying contention possesses arguable merit, that the course chosen by counsel had no reasonable basis designed to serve Mr. Melvin's interests, and that counsel's conduct prejudiced him. Com. v. Mendoza, 730 A.2d 503, 505 (Pa. Super. 1999). Mr. Melvin's ineffectiveness argument is totally without merit because even if counsel had told him he would be

released after serving his minimum, Mr. Melvin suffered no prejudice from the inaccurate statement. In the case of a guilty plea, such information might have influenced a decision whether or not to accept a plea agreement. Mr. Melvin, however, was convicted after a jury trial. He had no choice but to accept his sentence.

The only possible adverse consequence Mr. Melvin might have suffered by receiving such inaccurate information from his attorney is failing to file a direct appeal of his sentence. He has suffered no such prejudice, however, because we are allowing him to raise that issue now, and we will address it on its merits.

**B. Indefinite Sentence**

Mr. Melvin argues that his sentence is illegal because it is not for a “definite period of time,” as required by 42 Pa.C.S.A. § 9721(e). The “indefinite sentence” complaint appears to be the latest rage among PCRA petitioners since the Pennsylvania Board of Probation and Parole has begun taking a harder line on granting parole. Popular as it may be, however, this argument is meritless because sentences designating a minimum and a maximum are clearly not illegal.

Although it is true that this court used the term “indefinite period of time” in our sentencing order, the type of sentence we imposed is not the type prohibited by 42 Pa.C.S.A. § 9721(e). The type of “indefinite” sentence prohibited by this statute is the sentence typically pronounced in the past, which prescribed a minimum, usually one year for serious crimes, and no maximum, with the Prison Board having complete discretion as

when to release the prisoner once a year had passed.<sup>1</sup> The sentence imposed on Mr. Melvin, by contrast, specifies both a minimum and a maximum term. It is therefore a definite sentence, which makes him eligible for parole once he serves his minimum term.

The type of sentence Mr. Melvin received is not only legal, it is mandated by law. 42 Pa.C.S.A. § 9756. Our current sentencing scheme reflects the legislature's judgment that the best method of sentencing criminals is a mixture of judicial determination, based on the crime and the defendant, combined with discretion of the Pennsylvania Board of Probation and Parole, based on experience with the prisoner while incarcerated. Unlike the indeterminate sentences of the past, this scheme limits the Board's discretion as to the ultimate release date.

We also reject Mr. Melvin's contention that his sentence does not allow for parole. On the contrary, our sentence made him eligible for parole after serving his minimum. What Mr. Melvin does not seem to understand, however, is that although he has the right *to be considered* for parole after his minimum, he has no automatic right to parole. Otherwise, designating a maximum period of incarceration would be meaningless.

Apparently, the Board of Probation and Parole has deemed Mr. Melvin unfit for parole. That decision is well within its prerogative, and it is not this court's concern. We imposed sentence on Mr. Melvin; his parole fate is out of our hands.

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<sup>1</sup> Lawrence M. Friedman, *Crime and Punishment in American History* (1993), p. 159.

**ORDER**

AND NOW, this \_\_\_\_\_ day of December, 1999, for the reasons stated in the above opinion, the amended PCRA petition filed by Herbert Melvin on 11 February 1999 is dismissed.

BY THE COURT,

Date:

Clinton W. Smith, P.J.

cc: Dana Stuchell Jacques, Esq., Law Clerk  
Hon. Clinton W. Smith.  
James Protasio, Esq.  
District Attorney–K.O.  
Gary Weber, Esq., Lycoming Reporter