

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 88-10,041; 89-10857  
:   
vs. : CRIMINAL DIVISION  
:   
:   
BRIAN PHILLIPS, :   
Defendant : PCRA

OPINION AND ORDER

This matter came before the Court on the defendant's "Motion for Correction of Illegal Sentence," which the Court treated as a Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

Case Number 88-10,041

On July 13, 1998, after a non-jury trial, the Honorable Clinton W. Smith found the defendant guilty of simple assault, criminal attempt - kidnapping, criminal attempt - false imprisonment, and the summary offense of criminal mischief. On November 22, 1998, Judge Smith sentenced the defendant to incarceration in the county prison for a minimum of 11 months and a maximum of 23 months, as well as a consecutive 2-year period of probation, and terminated his bail. The defendant filed an appeal and a motion for bail pending appeal. Judge Smith granted the bail motion. The defendant posted bail and was released from prison on or about February 1, 1989.

On June 13, 1989, the defendant filed a praecipe to withdraw bail, because he was incarcerated on other charges and wanted to finish his sentence since he was already in

jail.

The Pennsylvania Superior Court affirmed the defendant's convictions in a decision filed October 2, 1989. The defendant filed a petition for allowance of appeal. The Pennsylvania Supreme Court denied his petition on March 20, 1990.

No further action was taken in this case until the defendant filed his Motion for the Immediate Correction of Illegal Sentence on June 8, 2004.

**Case number 89-10,857**

On May 14, 1989, the police arrested the defendant and charged him with aggravated assault, indecent assault, criminal attempt - rape, terroristic threats, criminal attempt - homicide, and rape. A jury found the defendant guilty of all the charges except terroristic threats. On December 20, 1989, Judge Smith sentenced the defendant to an aggregate term of incarceration in a state correctional institution with a minimum of 10 ½ years and a maximum of 21 years. The defendant appealed his convictions.

On June 7, 1991, the defendant filed a petition seeking credit for time served from May 14, 1989 through December 24, 1990. Judge Smith denied this petition in his Order docketed on July 9, 1991, because the time was served under case number 88-10,041.

The defendant filed his first PCRA petition on or about April 21, 1992. Judge Smith dismissed the petition in an Order docketed on July 13, 1992. The defendant appealed.

The Pennsylvania Superior Court affirmed Judge Smith's decision in a memorandum opinion filed April 20, 1993.

The defendant filed a petition requesting DNA testing on March 9, 1994. Judge Smith dismissed this petition on March 16, 1994. The defendant appealed. The Pennsylvania Superior Court dismissed this appeal on July 18, 1994 for failure to file a brief.

On January 11, 1995, the defendant filed his second PCRA petition, which again raised issues regarding the lack of a DNA test. In an Order dated January 20, 1995, Judge Smith denied this PCRA petition. The defendant appealed. The Pennsylvania Superior Court affirmed Judge Smith's order in a memorandum decision filed August 17, 1995.

On June 8, 2004, the defendant filed his Motion for the Immediate Correction of Illegal Sentence in which he asserts he is entitled to credit for time served from May 14, 1989 to December 21, 1990.

The Court treated this motion as a PCRA petition. See Commonwealth v. Beck, 848 A.2d 987, 989 (Pa.Super. 2004) (a challenge to the failure to award credit involves an issue of the legality of a sentenced and is cognizable under the PCRA; therefore, the court must analyze the petition pursuant to the dictates and limitations imposed by that statute). Since this petition would be the defendant's first PCRA in case number 88-10,041, the Court appointed counsel for the defendant. In the order appointing counsel, the Court noted the petition appeared to be untimely and would need to be amended to assert

one of the exceptions to the one-year filing requirement contained in 42 Pa.C.S. §9545(b)(1). The Court gave counsel 45 days to file an amended PCRA petition.

The Court held a conference on August 30, 2004. At the conference, which was not transcribed, counsel indicated she had communicated with her client and he told her that the reason he did not file his petition earlier was because he did not realize he did not receive the credit he is now seeking until he was denied parole.

### **DISCUSSION**

Any petition filed under the PCRA, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final or within one year of the effective date of the 1995 amendments if the conviction became final before that date. 42 Pa.C.S.A. §9545(b)(1); Commonwealth v. Barrett, 761 A.2d 145, 147 (Pa.Super. 2000). The defendant's conviction under both case numbers became final before the effective date of the 1995 amendments.<sup>1</sup> The 1995 amendments were passed on November 17, 1995 and became effective 60 days later. Therefore, in order to satisfy the timeliness requirements, barring the application of any of the

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1 The Pennsylvania Supreme Court denied the defendant's petition for allowance of appeal in case number 88-10041 on March 20, 1990. The defendant had 90 days to seek a writ of certiorari from the United States Supreme Court. Therefore, the defendant's convictions in case number 88-10041 became final on or about June 19, 1990. See 42 Pa.C.S.A. §9545(b)(3).

In case number 89-10857, the Pennsylvania Superior Court issued its decision on the defendant's direct appeal on December 3, 1991. A timely petition for allowance of appeal was not filed, but the defendant did file a petition for allowance of appeal nunc pro tunc. The Court believes the Pennsylvania Supreme Court denied this petition on or about March 15, 1992. Therefore, the defendant's convictions became final in case number 89-10857

exceptions enumerated in Section 9545(b)(1), the defendant needed to file his petition by January 16, 1997. Barrett, supra at \_\_\_, 761 A.2d at 147. The defendant's petition was not filed until June 8, 2004.

The timeliness requirements of the PCRA are jurisdictional in nature. Commonwealth v. Howard, 567 Pa. 481, 485, 788 A.2d 351, 353 (Pa. 2002); Commonwealth v. Palmer, 814 A.2d 700, 704-05 (Pa.Super. 2002). "[W]hen a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have

been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." Commonwealth v. Gamboa-Taylor, 562 Pa. 70, 77, 753 A.2d 780, 783 (Pa. 2000).

In his motion, the defendant makes a statement that his submission was made "within the 60 days that such legal information was discovered." Defense counsel also mentioned at oral argument that the defendant claimed he did not realize he did not receive the credit in question until he was denied parole. Such assertions, however, are insufficient to invoke the exception contained in section 9545(b)(1)(ii). In order to properly invoke this exception, the defendant must plead in his petition the date on which he learned of the factual evidence giving rise to his claim and explain why the information at issue could not, with the exercise of due diligence, have been obtained earlier. See Commonwealth v. Breakiron, 5656 Pa. 3232, 330-331, 781 A.2d 94, 98 (Pa. 2001); Commonwealth v. Yarris, 557 Pa. 12, 731 A.2d 581, 590 (Pa. 1999); Commonwealth v. Vega, 754 A.3d 714, 718 (Pa.Super. 2000). Moreover, the defendant's assertions are belied by the fact that he filed a petition seeking this same credit on June 7, 1991.

In conclusion, since the timeliness requirements are jurisdictional in nature, the Court finds that it lacks jurisdiction to address the merits of the defendant's petition.

**ORDER**

AND NOW, this \_\_\_ day of September 2004, as no purpose would be served by conducting a hearing in this case, none will be scheduled and the parties are hereby notified of this Court's intention to deny the petition pursuant to Rule 907(a) of the Pennsylvania Rules of Criminal Procedure. 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.

By The Court,

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Kenneth D. Brown, P.J.

cc: Kenneth Osokow, Esquire (ADA)  
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