

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NO. 1696-96
 :
 STEVEN C. EVICCI, : CRIMINAL ACTION - LAW
 :
 Defendant :
 : PCRA Petition Dismissal

DATE: July 17, 2006

OPINION and ORDER

This Opinion and Order is in response to a Post Conviction Relief Act (hereafter “PCRA”) Petition Defendant Steven C. Evicci mailed to this court. On June 15, 2006, this court entered an Opinion and Order indicating its intent to dismiss the Petition as untimely. The court gave Evicci twenty days to file a response to the proposed dismissal and set forth why any of the exceptions set forth in 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii) apply so as to overcome the one year time limit.¹ On July 12, 2006, this court received via mail Evicci’s response dated July 9, 2006.²

In the response, Evicci re-asserts that his attorney at the February 1, 2000 re-sentencing hearing was ineffective for failing to challenge the increased minimum sentence he received. As stated in the June 15, 2006 Opinion and Order, counsel’s ineffectiveness does not provide an exception to the one year time limit. *See, Commonwealth v. Breakiron*, 781 A.2d 94, 98 (Pa. 2001); *Commonwealth v. Carr*, 768 A.2d 1164, 1168 (Pa. Super. 2001). Also, Evicci’s assertion

1 Any PCRA petition, including a second or subsequent petition, must be filed within one year of the date the judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1); *Commonwealth v. Lambert*, 884 A.2d 848, 851 (Pa. 2005), *cert denied*, 126 S. Ct. 1431 (U.S. 2006); *Commonwealth v. Hutchinson*, 760 A.2d 50, 53 (Pa. Super. 2000).

2 The court will direct that the response is filed of record.

that re-sentencing counsel was ineffective would not fall within the newly discovered evidence exception of 42 Pa.C.S.A. § 9545(b)(1)(ii). *See, Commonwealth v. Gamboa-Taylor*, 753 A.2d 780, 785 (Pa. 2000).

Evicci also asserts in his response that the increase in his minimum sentence was unknown to him and that once he learned of it he brought it to the court's attention.³ Evicci's increased minimum sentence cannot be considered newly discovered evidence. In order for a defendant to establish the newly discovered evidence exception, he must plead and prove that "the facts upon which [his] claim is predicated were *unknown* to [him] and could not have been ascertained by the exercise of due diligence." *Commonwealth v. Chester*, 895 A.2d 520, 523 (Pa. 2006) (quoting 42 Pa.C.S.A. § 9545(b)(1)(ii)). (emphasis in original) (change in original). Evicci was present on March 3, 1998 when he was originally sentenced and received an aggregate minimum sentence of eleven years. Evicci was also present at the February 1, 2000 re-sentencing hearing when he received an aggregate minimum sentence of twelve years and eight months. Thus, Evicci knew what his aggregate minimum sentence was both at the March 3, 1998 original sentencing hearing and at the February 1, 2000 re-sentencing hearing. Based upon this information, Evicci could have compared the two sentences and determined that he had received an increased minimum sentence at the February 1, 2000 sentencing hearing. As such, Evicci cannot assert that the aggregate minimum sentence of the February 1, 2000 sentencing hearing was unknown to him nor can he

³ Evicci had mailed a letter to this court dated January 4, 2006 asserting that his minimum sentence as set forth in a sentence status report dated March 2, 2000 was incorrect and the result of a clerical error. In an order dated January 19, 2006, this court set forth why the minimum sentence of twelve years, eight months indicated in the sentence status report was correct and not a clerical error.

assert that the increase in his aggregate minimum sentence was unknown to him. Therefore, Evicci's increased aggregate minimum sentence is not newly discovered evidence.

Accordingly, Evicci's response to this court's June 15, 2006 Opinion and Order fails to set forth any exceptions to the one year time limit. Therefore, Evicci's PCRA petition filed of record July 12, 2006 will be dismissed as untimely.

ORDER

It is hereby ORDERED that the Post Conviction Relief Act Petition of Defendant Steven C. Evicci filed of record July 12, 2006 is DENIED and DISMISSED.

Defendant Steven C. Evicci is hereby advised that he has the right to appeal the denial and dismissal of his Post Conviction Relief Act Petition. Defendant Steven C. Evicci is further advised that in order to do so he must file a notice of appeal with the Lycoming County Prothonotary's Office, not this court, within thirty (30) days otherwise the denial will become final.

The court hereby directs the Lycoming County Prothonotary's Office to file and docket Defendant Steven C. Evicci's response dated July 9, 2006 to this court's June 15, 2006 Opinion and Order.

Per Pennsylvania Rules of Criminal Procedure Rule 908(E), the court further directs the Lycoming County Prothonotary's Office to provide notice of this order and accompanying opinion to Defendant Steven C. Evicci by certified mail, return receipt requested.

BY THE COURT,

William S. Kieser, Judge

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