IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-2027-1997**
	:	**(97-12027)**
vs.	**:**	
	:	**Intent to dismiss 4th PCRA petition that**
HILTON MINCY,	**:**	**defendant captioned as a "Petition for writ of**
Defendant	**:**	**habeas corpus"**

OPINION AND ORDER

This matter came before the Court on a "Petition for Writ of Habeas Corpus" filed by the defendant on or about December 28, 2009.[1] In his petition, the defendant raised three claims: (1) he was illegally convicted of two inchoate offenses; (2) three separate counts of aggravated assault were submitted to the jury when only one count was charged; and (3) the Court illegally removed credit for time served from his sentencing order.

The Post Conviction Relief Act (PCRA) states, in relevant part:

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[1] For the benefit of the defendant and the Appellate Courts, the Court will give a brief background of this case and explanation for the delay in addressing the defendant's current motion. The Honorable Kenneth D. Brown presided over the defendant's case. In 2008, Judge Brown denied the defendant's second PCRA petition and his private counsel filed an appeal on his behalf. While this appeal was pending before the Appellate courts, the defendant, pro se, filed a third PCRA petition, which Judge Brown denied based on a lack of jurisdiction due to the pending appeal of his second PCRA. In June 2009, the Superior Court affirmed the Court's dismissal of the defendant's second PCRA, and the defendant's counsel filed a petition for allowance of appeal to the Pennsylvania Supreme Court. Apparently, the defendant did not realize his attorney was further appealing his second PCRA, and the defendant filed a pro se "petition for writ of habeas corpus" that raised claims for relief cognizable under the PCRA. Judge Brown treated the habeas petition as a PCRA petition and again dismissed it without prejudice to the defendant to file his claims once the appeals process for his previous PCRA was complete. Unhappy that Judge Brown treated his habeas corpus petition as a PCRA, the defendant filed an appeal to the Pennsylvania Superior Court while the petition for allowance of appeal relating to his second PCRA was still pending before the Pennsylvania Supreme Court. Judge Brown retired at the end of 2009, and President Judge Nancy Butts assigned herself any post-conviction petitions or motions filed in cases handled by Judge Brown.

Although the Supreme Court denied his petition for allowance of appeal on or about December 9, 2009 and the Superior Court quashed his appeal on or about December 16, 2009, the record in this case was not remanded or remitted back to Lycoming County until June 24, 2010. By the time the record was returned, the defendant was complaining that President Judge Butts should not be handling his case because he had sued her in the past. Despite the fact that the suit had been dismissed against Judge Butts before the defendant even filed his habeas corpus petition, Judge Butts administratively transferred the case to the undersigned on or about August 10, 2010.

> This subchapter provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief. The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis.

42 Pa.C.S.A. §9542. Therefore, if the claims raised by the defendant are cognizable under the PCRA, habeas corpus is not available and the court must treat the petition as a PCRA petition. See Commonwealth v. Peterkin, 722 A.2d 638 (Pa. 1998)(a writ of habeas corpus continues to exist only in cases where there is no remedy under the PCRA; even if the claims are time-barred, habeas corpus is not available if the claims are cognizable under the PCRA).

The defendant's claim that he was improperly convicted of two inchoate offenses in violation of 18 Pa.C.S.A. §906 is a claim cognizable under the PCRA, because it challenges his underlying convictions. Since this issue was not raised in his direct appeal or in his previous PCRA petition, it likely would need to be raised as an ineffective assistance of counsel claim. Similarly, the defendant's claim that three separate counts of aggravated assault were submitted to the jury when only one was charged, would be cognizable under the PCRA petition as a due process claim or ineffective assistance of counsel claim challenging his underlying aggravated assault convictions. Finally, the defendant's claim regarding credit for time served is cognizable under the PCRA because it involves the legality of sentence. See Commonwealth v. Beck, 848 A.2d 987 (Pa. Super. 2004). Since the defendant's claims are cognizable under the PCRA, habeas corpus relief is not available and the Court must treat his petition as a PCRA petition.

The defendant, however, cannot obtain relief because this

PCRA petition is untimely. Any PCRA petition, including a second or subsequent petition, must be filed within one year of the date the defendant's judgment of sentence became final unless the petition alleges one of the three statutory exceptions. 42 Pa.C.S.A §9545(b).

The time limits 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).

On September 28, 1998, the Court sentenced the defendant to 17 to 40 years incarceration in a state correctional institution for attempted homicide. The defendant's other convictions merged for sentencing purposes. The Pennsylvania Superior Court affirmed the defendant's judgment of sentence in a memorandum opinion filed February 27, 2001. The defendant had thirty days within which to file a petition of allowance of appeal to the Pennsylvania Supreme Court. No such petition was filed. Therefore, the defendant's judgment of sentence became final on or about March 29, 2001. See 42 Pa.C.S.A. §9545(b)(3)("a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review").

To be considered timely, the defendant had to file his petition on or before March 28, 2002, or allege one of the statutory exceptions. The petition was not filed until December 28, 2009 and it does not allege any of the statutory exceptions. Therefore, the petition is untimely, and the Court lacks jurisdiction to address the petition on the merits or grant any relief.

Assuming for the sake of argument that the Court could address the merits of the defendant's petition, he still would not be entitled to relief, because the defendant's allegation are either factually or legally incorrect.

The defendant first asserts that he was improperly convicted of two inchoate offenses in violation of 18 Pa.C.S.A. §906. Section 906 states: "A person may not be convicted of more than one of the inchoate crimes of criminal attempt, criminal solicitation or criminal conspiracy for conduct **designed to commit or to culminate in the commission of the same crime**." 18 Pa.C.S.A. §906 (emphasis added).

The defendant originally was only charged with criminal attempt homicide. The Commonwealth filed a motion to amend the Information to add a count of conspiracy. Recognizing the limits of section 906, the Court granted the Commonwealth's motion, but noted that the intended crime or crimes would be all the counts of the Information other than count 1, criminal attempt homicide. See Order dated February 19, 1998, which was docketed March 5, 1998. Thus, the criminal attempt charge was designed to commit or culminate in the commission of a homicide and the criminal conspiracy charge was designed to commit or culminate in the commission of aggravated assault, recklessly endangering another person

and simple assault charges filed against the defendant. Since the criminal attempt and the criminal conspiracy charges were not designed to commit or culminate in the commission of the same crimes, section 906 was not violated in this case. Commonwealth v. Davis, 704 A.2d 650, 653-654 (Pa.Super. 1997). Furthermore, section 906 prohibits multiple sentences for inchoates designed to commit the same crime; it does not prohibit the jury from rendering a verdict on multiple inchoate crimes. Davis, supra. ("§906 does not allow a defendant to be sentenced for both conspiracy to commit a specific crime and attempt to commit that same crime").

The defendant's second claim is that three counts of aggravated assault were submitted to the jury when he was only charged with one count of aggravated assault. This claim is not accurate. The defendant was charged with two counts of aggravated assault, which encompassed three theories of culpability that each had a different offense gravity score for sentencing purposes.

In count 4 of the Information, the Commonwealth charged the defendant with aggravated assault for attempting to cause or intentionally, knowingly or recklessly causing serious bodily injury to Albert Johnson in violation of 18 Pa.C.S.A. §2702(a)(1). In count 5 of the Information, the Commonwealth charged the defendant with aggravated assault for attempting or causing bodily injury with a deadly weapon in violation of 18 Pa.C.S.A. §2702(a)(4).

An aggravated assault that causes serious bodily injury to the victim is assigned an offense gravity score of 11. If serious bodily injury was attempted but not

caused, the offense gravity score would be a 10. When a defendant attempts to cause or causes bodily injury with a deadly weapon, the offense gravity score is 8. The Court separated the two theories contained within count 4 of the Information on the verdict slip, so the Court would know what offense gravity score to apply to the defendant's convictions in the event he was found not guilty of attempted homicide but guilty of one or more the aggravated assault charges.

The defendant also would not be entitled to relief on this claim because he did not suffer any prejudice. Although the defendant was found guilty of the aggravated assault charges, the Court did not sentence him on any of those counts. The Court only sentenced the defendant on his attempted homicide conviction and found the other offenses merged for sentencing purposes.

The defendant's final assertion is that the Court unlawfully deprived him of 90 days credit for time served when it amended its sentencing order more than 30 days after sentence had been imposed. In the original sentencing order dated September 28, 1998, the Court gave the defendant 90 days credit for time served. In February 1999, the Court issued an amended order removing the credit for time served because the defendant received the same 90 days credit on a sentence from Carbon County.

Although the general rule is that a court may not amend an order more than 30 days after it is issued, this rule is subject to exceptions for patent errors and illegalities. See Commonwealth v. Holmes, 593 Pa. 601, 933 A.2d 57 (Pa. 2007); Commonwealth v. Klein, 566 Pa. 396, 781 A.2d 1133 (Pa. 2001). A defendant is not entitled to duplicate credit.

When one county gives a defendant credit for time served, another county cannot award that same credit as time spent in pre-trial custody. See Bright v. Pa. Bd. of Prob. & Parole, 831 A.2d 775 (Pa.Commw. 2003); Brown v. Dep't. of Corr., 686 A.2d 919 (Pa.Commw. 1996). Since it was the original sentencing order giving credit for time served that was illegal due to the defendant already receiving credit for that time on his Carbon County sentence, the Court had the authority under Holmes and Klein to remove the credit to correct that patent error or illegality.

As no purpose would be served by conducting any further proceedings, none will be scheduled and the parties are hereby notified of this Court's intention to dismiss the Petition.

O R D E R

AND NOW, this ___ day of September 2010, for the reasons set forth in the foregoing Opinion, the Court treats the defendant's "petition for writ of habeas corpus" filed on December 28, 2009 as a PCRA petition. Since the petition was not timely filed and the defendant would not be entitled to relief as a matter of law, the Court gives the defendant notice of its intention to dismiss his petition without holding an evidentiary hearing or any other proceedings. The 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.

In light of the Court's ruling on the defendant's "petition for writ of habeas corpus," the Court also notifies the defendant that it intends to dismiss any other

related motion, including his motion for judgment on the pleadings.

By The Court,

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Marc F. Lovecchio, Judge

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