

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 1536-2007
	:	CRIMINAL DIVISION
KHOURI MCKENZIE	:	APPEAL
Defendant	:	

**OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE**

The Defendant appeals the Order entered by this Court on November 18, 2010, which dismissed the Defendant's Post Conviction Relief Act (PCRA) Petition. The Defendant filed a Notice of Appeal on December 6, 2010, and on December 9, 2010, this Court directed the Defendant, in accordance with Pa.R.A.P. No. 1925(b), to file within thirty days a concise statement of matters complained of on appeal. The Court received the Defendant's concise statement of matters complained of on appeal on December 27, 2010.

The Defendant raises several issues on appeal, including: 1) the Court erred in finding that pursuant to 42 Pa.C.S. 9545(b)(1)(ii) and (iii) the Defendant's PCRA claims were untimely; 2) the trial court erred in determining that the Defendant's PCRA claims under 42 Pa.C.S. 9545(b)(1)(ii) and (iii) lacked merit; 3) the trial court erred in concluding the Defendant's pending immigration removal from the United States was not an integral part of the April 8, 2008 criminal penalty phase the trial court imposed on this non-citizen Defendant who pled no contest to violating a controlled substance law; and 4) the trial court erred in finding that pursuant to 42 Pa.C.S. 9543(a)(1)(i) the Defendant was ineligible for PCRA relief because his detention in the custody of the Department of Homeland Security could not be construed as

proof by a preponderance of the evidence that the Defendant was currently serving a sentence of imprisonment.

Background

Khoury L. McKenzie (Defendant) is not a citizen of the United States, but a native of Jamaica and a citizen of Jamaica. The Defendant was admitted to the United States in Philadelphia on or about February 26, 1990, as an IR-2, which is a type of Visa that gained him entry into the United States, and his status was adjusted to that of lawful permanent resident on February 26, 1990 under Section 201-B, which means that the Defendant is a resident alien. As a resident alien, the Defendant is to carry a resident alien card, or a green card. On February 14, 2008, the Defendant entered his plea in this case and was sentenced on April 8, 2008 to two counts of Delivery of a Controlled Substance (cocaine). The Defendant did not appeal his plea or sentence. On June 9, 2010, the Defendant received a notice of custody determination from the Department of Homeland Security. The notice informed the Defendant that on April 8, 2008, he was convicted in the Court of Common Pleas of Lycoming County in Williamsport, Pennsylvania for manufacturing, delivering, possessing with the intent to manufacture or deliver cocaine, in violation of Title 35, Section 780-113, Subsection 830 of the Pennsylvania Crimes Code, for which his sentence of three to fifteen months confinement was imposed. The notice informed the Defendant that as a result of the convictions in Lycoming County, he was subject to removal proceedings pursuant to the authority contained in section 237(a)(2)(A)(iii) of the Immigration and Nationality Act. Pending a final determination by the immigration judge, the Defendant was detained in the custody of the Department of Homeland Security. The notice further stated that the Defendant was previously placed into removal proceedings on September

18, 2003. However, for reasons which are unclear to the Court, those removal proceedings were subsequently terminated on January 5, 2004.

On August 31, 2010, the Defendant filed a PCRA Petition alleging that the Defendant's February 14, 2008 plea was not entered into knowingly, voluntarily, or intelligently. The Defendant contends in his PCRA Petition that at the time of his plea, he did not concede to or agree with the facts indicating his involvement in the delivery of a controlled substance and that he was coerced to enter into the plea. The Defendant also contends that he was never informed that a guilty plea to a drug trafficking offense could lead to his deportation, and that counsel was ineffective for failing to inform him of the possible deportation consequences of his plea.

Before the Court can consider the merits of a PCRA Petition, the Court must have jurisdiction to decide the petition. In this case, the Court lacks jurisdiction to consider the Defendant's PCRA Petition under both 42 Pa.C.S. §9545(b)(1)(ii) and (iii) and 42 Pa.C.S. §9543(a)(1)(i). As this Court does not have jurisdiction to consider the underlying merits of the Defendant's Petition, the Court's opinion is limited to the issues raised on appeal concerning jurisdiction.

The Court erred in finding that pursuant to 42 Pa.C.S. §9545(b)(1)(ii) and (iii) the Defendant's PCRA claims were untimely

The Defendant contends that the Court erred when it found that pursuant to 42 Pa.C.S. §9545(b)(1)(ii) and (iii) the Defendant's PCRA claims were untimely. Pursuant to 42 Pa.C.S. §9545(b)(1), a PCRA Petition must be filed within one year of the date the judgment becomes final, or fall into one of the enumerated exceptions. The Defendant was sentenced in April of 2008 and he did not appeal his plea or sentence; therefore, his judgment became final in May of 2008. Under the statute pertaining to the PCRA, the Defendant had until May of 2009 to file his

PCRA Petition. The Defendant did not file his PCRA Petition until August 31, 2010. Therefore, in order for the Defendant's Petition to be timely, one of the exceptions under 42 Pa.C.S.

§9545(b)(1) must apply to the facts of the Defendant's case.

The Defendant alleges that both 42 Pa.C.S. §9545(b)(1)(ii) and (iii) apply to the facts of his case. 42 Pa.C.S. §9545(b)(1)(ii) and (iii) provide that any petition filed under the PCRA, including a second or subsequent petition, shall be filed within one year of the date the petition becomes final, unless the petitioner alleges and proves that: ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. 42 Pa.C.S. §9545(b)(2) provides that any petition invoking an exception under 42 Pa.C.S. §9545(b)(1)(i)-(iii) must be filed within 60 days of the date the claim could have been made.

At the time of the hearing on the Defendant's PCRA Petition held before the Honorable Nancy L. Butts on November 18, 2010, the Court determined that neither 42 Pa.C.S. §9545(b)(1)(ii) nor (iii) apply to the Defendant's case as it relates to either the issue that he did not knowingly, voluntarily or intelligently enter his plea, or the issue as it relates to whether or not he was advised of the possible deportation consequences of his plea. As to 42 Pa.C.S. §9545(b)(1)(ii) and the issue that his plea was not knowingly, voluntarily or intelligently entered, the Court stated at the November 18, 2010 hearing:

THE COURT: The Court agrees with the Commonwealth that if the issue is that the defendant was coerced to enter his plea, that his plea would have been entered in... 2008, and that he would have been sentenced in April of 2008, and therefore, the defendant would have had presumably more than sufficient time while he was still serving his sentence, actually the period of confinement or

while he was on supervision with the Pennsylvania Board of Probation and Parole, to file a PCRA petition to challenge the ineffectiveness of counsel, the involuntariness of his guilty plea, and so therefore the Court would find that that particular issue would not qualify under the two sections previously stated to justify jurisdiction on the part of this Court to entertain consideration of his petition.

N.T. 39. As 42 Pa.C.S. §9545(b)(1)(ii) relates to whether or not the Defendant was advised of the effect that a plea of guilty to Delivery of Controlled Substance would have on his alien status, the Court found:

THE COURT: [T]he fact that in Section Number 5 you were placed into removal proceedings on September 18th of 2003 and subsequently removal proceedings were terminated on January 5th of 2004, lead the Court to believe that the defendant was aware of the fact that he was not a naturalized citizen of the United States, that there were some consequences to illegal activity that could befall him should he find himself, quote, unquote, “in trouble with the law.”

N.T. 43. Notwithstanding the above statements, the Court gave the Defendant the benefit of the doubt that perhaps he was ignorant of the fact that certain unlawful behaviors could lead to his deportation. The Court reiterated the fact that on June 9, 2010 the Defendant received a notice of custody determination from the Department of Homeland Security. The notice informed the Defendant that as a result of the convictions in Lycoming County, he was subject to removal proceedings pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 9, Code of Federal Regulations. Furthermore, the Defendant contacted his current attorney around the 11th or 13th of June, 2010, and apprised her of his situation. Despite these facts, the Defendant’s PCRA Petition was not filed until August 31, 2010. Therefore, more than the 60 days allowed to file any petition invoking an exception under 42 Pa.C.S. §9545(b)(1) had elapsed. The Court finds that the Defendant’s laggard action in

filing the PCRA Petition after the 60 day time period divested the Court of the jurisdiction to hear the underlying issues of the Petition.

As to 42 Pa.C.S. §9545(b)(1)(iii) the Defendant relies on Padilla v. Kentucky, 130 S.Ct. 1473 (2010), which held that the Defendant's right to effective assistance of counsel includes advice regarding immigration consequences of pleas. However, even if the Court were to find that the decision in Padilla applies to the Defendant's case under 42 Pa.C.S. §9545(b)(1)(iii), the decision on this case is dated March 31, 2010. The Defendant's PCRA Petition still had to be filed within 60 days of the date the claim could have been made. As stated above, the Defendant's Petition was filed on August 31, 2010. The Petition was filed well after the 60 days from the date of the Padilla decision, and after 60 days of the date the Defendant received the notice on June 9, 2010 from the Department of Homeland Security. Therefore, this Court is divested of jurisdiction to hear the underlying merit of the Petition.

The Court erred in finding that pursuant to 42 Pa.C.S. 9543(a)(1)(i) the Defendant was ineligible for P.C.R.A. relief

The Defendant alleges that the Court erred in finding that pursuant to 42 Pa.C.S. 9543(a)(1)(i) the Defendant was ineligible for PCRA relief. 42 Pa.C.S. 9543(a)(1)(i) provides that

(a) To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime

The Defendant states that as a result of his conviction for Delivery of a Controlled Substance, he received the notice from the Department of Homeland Security and was taken into custody and

detained. The Defendant alleges that his detention with Homeland Security qualifies as “currently serving a sentence of imprisonment, probation or parole for the crime” of Delivery of a Controlled Substance under 42 Pa.C.S. 9543(a)(1)(i). The Court finds that the Defendant’s detention with Homeland Security is not directly related to the sentence imposed by this Court in 2008. By way of its April 8, 2008 Sentencing Order, this Court had no control over the Department of Homeland Security’s detention of the Defendant. Furthermore, the notice the Defendant received on June 9, 2010 stated that the Defendant was subject to removal pursuant to “Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act...” It is clear that the Defendant’s detention with Homeland Security does not fall under 42 Pa.C.S. 9543(a)(1)(i); therefore, the Defendant is ineligible for PCRA relief.

Conclusion

While the Court is aware of and sympathetic to the severity of the consequences facing the Defendant, the Court is not at liberty to ignore the unambiguous statutory language and consider a PCRA Petition when it is clearly divested of jurisdiction to do so. As none of the Defendant's contentions have merit, it is respectfully suggested that this Court's Order of November 18, 2010 be affirmed.

DATE: _____

By the Court,

Nancy L. Butts, President Judge

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