

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 v. : **No. 268-2007**
 :
 ANTHONY KEELS, : **CRIMINAL DIVISION**
 : **APPEAL**
 Defendant :

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

Anthony Keels (Defendant) was sentenced on August 6, 2007 to five (5) years intermediate punishment (IP) with the first ten (10) months to be spent at Lycoming County Prison. Defendant did not report to the Lycoming County Prison when directed and evaded his sentence for several years. On December 5, 2010, Defendant was apprehended in the City of Philadelphia during a traffic stop. On December 17, 2010, after a hearing on the bench warrant issued for the Defendant's failure to comply with the Sentencing Order of August 6, 2007, the bench warrant was made absolute and the Court found beyond a reasonable doubt that the Defendant violated the terms of IP when he failed to surrender at the Prison. The Court revoked the Defendant's sentence of IP and the Defendant was re-sentenced on Count Three (3), Possession with the Intent to Deliver a Controlled Substance (cocaine), an ungraded felony, to state incarceration for two (2) to five (5) years.

On August 29, 2011, the Defendant filed a Post Conviction Relief Act (PCRA) Petition from the December 17, 2010 Order of this Court. As this was the Defendant's first PCRA Petition, he was appointed counsel; however, following a Grazier hearing on November 3, 2011, the Defendant chose to precede *pro-se*.¹ Following a video-conference on the PCRA Petition on February 6, 2012, the Court reviewed the merits of the Petition and determined that a hearing on the issues raised was not warranted.

¹ Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998).

In an Opinion and Order dated April 4, 2012, this Court notified the Defendant of its intentions to dismiss his PCRA unless he filed objection within twenty (20) days. On April 18, 2012, the Defendant improperly filed a Notice of Intent to Appeal the April 4, 2012 Order and Opinion. Subsequently, the Court dismissed the Defendant's PCRA petition on April 26, 2012. On the same day, the Court ordered the Defendant to file a concise statement of the matters complained of on appeal in accordance with Pa.R.A.P. 1925(b). On May 2, 2012, the Superior Court of Pennsylvania directed the Defendant to show cause within ten (10) days why his appeal should not be quashed. On May 10, 2012, the show-cause order was discharged and the case was assigned to the merits panel.

The Defendant raises twelve issues on appeal: (1) Denial of Post-Sentence Motions was caused by the failure of Defendant's counsel; (2) Court improperly used discretion to sentence Defendant; (3) the Court erred in prohibiting Defendant to withdraw his guilty plea and to pursue the PCRA action; (4) the Court erred when the Commonwealth never showed cause as to why the action should not be granted; (5) the Court abused its discretion, in the sentence imposed, as the Defendant claims evidence seized was tainted; (6) the Court abused their discretion because no plea colloquy was done when Defendant originally pled guilty; (7) illegal sentence because the Commonwealth would be unable to obtain a conviction due to exculpatory documents and inadequate evidence; (8) guilty plea was unlawfully induced; (9) the Court and the Commonwealth did not have the proper prior record score; (10) a clear manifest of injustice; (11) ineffective assistance of counsel in the plea and re-sentencing of Defendant; and (12) conflict as to Judge.

Discussion

In general, Defendant is raising many issues for the first time in his Concise Statement of Matters Complained of on Appeal. The Court believes that this is the same as the Defendant

amending his PCRA Petition after the Court has decided the issues, which is not allowed. The Court, however, will address all the issues raised.

Untimely PCRA Petition under 42 Pa.C.S.A. § 9545(b)(1)

A PCRA petition must be filed within one (1) year of the date a judgment becomes final.

42 Pa.C.S.A. § 9545(b)(1) sets forth narrow exceptions:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(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.

A PCRA Court cannot hear untimely PCRA petitions. Commonwealth v. Robinson, 837 A.2d 1157 (Pa. 2003). “[T]he PCRA confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar in addition to those exceptions expressly delineated in the Act.” Id. (citing Commonwealth v. Eller, 807 A.2d 838, 845 (Pa. 2002)).

In Robinson, the Pennsylvania Supreme Court considered whether the language of the PCRA permits a court to innovate a non-textual exception to the PCRA’s time-bar. See id. In that case, the defendant argued that his second PCRA was merely an extension of his previous petition, which was timely filed. See id. The Supreme Court stated that because the defendant’s time-bar exception was neither in the language of the statute nor in the Supreme Court’s decisional law that it was not a valid exception to the PCRA time-bar. See id.

Here, Defendant is arguing that he is entitled to a non-textual timeliness exception because he had been evading his sentence for several years. This is not one of the exceptions set forth in 42 Pa.C.S.A. § 9545(b)(1). Further, this Court is unable to find any decisional law

allowing such an exception. Therefore, the Court will rely on its Opinion and Order dated April 4, 2012, which determined that all issues the Defendant raised resulting from his guilty plea and original sentencing were untimely. Defendant's untimely issues would include: insufficient amount of evidence to convict; inability to withdraw his guilty plea; there was no guilty plea colloquy; the guilty plea was unlawfully induced; allegations of tainted evidence; denial of post-sentence motions; and ineffectiveness of counsel during the guilty plea.

Ineffective assistance of counsel in the re-sentence of Defendant

For purposes of this Opinion, the Court will rely on its Opinion and Order of April 4, 2012, which determined that Defendant did not receive ineffective assistance of counsel at his re-sentencing.

Illegal sentence and conflict as to Judge

For purposes of this Opinion, the Court will rely on its Opinion and Order of April 4, 2012, which determined that there was no conflict with regards to one judge presiding over sentencing and several years later another judge presiding over a bench warrant and re-sentencing.

Improper prior record score

Defendant contends that the Court improperly used a prior record score of four (4). Defendant had two prior convictions of Possession with Intent to Deliver. 35 P.S. § 780-113(a)(30) grades Possession with Intent to Deliver as an ungraded felony. Under the category “[Other] Felony Drugs,” Defendant would have received two (2) points for each conviction for Possession with Intent to Deliver. Therefore, Defendant's prior record score of a four (4) was correct and the Defendant's issue lacks merit. Moreover, Defendant and his counsel did not

object to the Court using a prior record score of four (4) during sentencing and therefore the issue has been waived.

Challenge of discretionary aspects of sentence imposed

Defendant contends that the Court improperly used discretion in sentencing. The Court finds that the issue lacks merit because the Court did not sentence the Defendant outside the sentencing guidelines. Pennsylvania's maximum sentence for Possession with Intent to Deliver, an ungraded felony, is ten (10) years and a \$100,000 fine. Here, the offense has an OGS of seven (7) because the Defendant had 2.7 grams of cocaine on him. The Defendant had a Prior Record Score of four (4) at the time of sentencing giving him a standard range of 18-24 BC. Therefore, Defendant's sentence of two (2) to five (5) years is consistent with the sentencing guideline range.

Illegal sentence because of exculpatory documents

Defendant contends that his sentence is illegal because he is in possession of exculpatory documents. Defendant has never claimed to have had exculpatory documents until he alleged their existence in his Concise Statement of Matters Complained of on Appeal. The Court is unaware of any exculpatory documents that the Defendant may or may not have. Further, the Court does not know when Defendant may have found such exculpatory documents to assess whether his claim is timely. Appellant "does not . . . have the right to amend his PCRA petition after the lower court has already denied it." Commonwealth v. Jones, 815 A.2d 598, 604 (Pa. 2002). Therefore, the Court finds that Defendant's issue has no merit.

Further, the entry of a plea of guilty "usually constitutes a waiver of all defects and defenses except those concerning the jurisdiction of the court, legality of sentence, and validity of plea." Commonwealth v. Coles, 530 A.2d 453, 457 (Pa.Super.1987); Commonwealth v.

Moyer, 444 A.2d 101 (1982); Commonwealth v. Casner, 461 A.2d 324 (1983). In this case the Defendant pled guilty to the offenses of Possession with Intent to Deliver. The Defendant is not raising an issue of jurisdiction of the court, legality of sentence, or validity of plea. Therefore, the Defendant has waived the issue of whether there are exculpatory documents.

Illegal sentence because evidence would show that the Commonwealth would have been unable to convict

Defendant alleges that the Commonwealth would not have had enough evidence to convict him and therefore his sentence, which is based off of a guilty plea, is illegal. The Court believes this issue has no merit for three reasons: (1) untimely; (2) waived by his guilty plea; and (3) improper PCRA claim. First, the Court believes this issue is untimely because it deals with Defendant's guilty plea. Defendant was sentenced based on his guilty plea on August 6, 2007 and his PCRA petition was filed August 29, 2011.

Further, by pleading guilty, Defendant conceded that there was sufficient evidence to support the charge. As stated above, the entry of a plea of guilty "usually constitutes a waiver of all defects and defenses except those concerning the jurisdiction of the court, legality of sentence, and validity of plea." Commonwealth v. Coles, 530 A.2d 453, 457 (Pa.Super.1987); Commonwealth v. Moyer, 444 A.2d 101 (1982); Commonwealth v. Casner, 461 A.2d 324 (1983). Here, Defendant has waived the right to challenge the sufficiency of the evidence of his conviction.

Finally, the Court finds that this issue cannot to be raised in a PCRA. "To be eligible for relief under the PCRA, an appellant must prove by a preponderance of the evidence that the conviction or sentence he is collaterally attaching resulted from one of seven specifically enumerated circumstances." Commonwealth v. Jones, 815 A.2d 598, 604 (Pa. 2002) (citing 42 Pa.C.S. § 9543(a)(2)).

- (i) A violation of the Constitution of Pennsylvania or laws of this Commonwealth or the Constitution of the United States which, in the circumstances of the particular case, so undermine the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermine the truth- determining process that no reliable adjudication of guilt or innocence could have taken place.
- (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty and the petitioner is innocent.
- (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
- (v) Deleted.
- (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
- (vii) The imposition of a sentence greater than the lawful maximum.
- (viii) A proceeding in a tribunal without jurisdiction.

42 Pa.C.S. § 9543(a)(2). Here, Defendant tries to claim an illegal sentence. Defendant's actual claim, however, is whether there is a sufficient amount of evidence for the Commonwealth to obtain a conviction, which is not listed in 42 Pa.C.S. § 9543(a)(2). This does not appear to be a valid PCRA claim; therefore the Defendant is improperly raising this issue under the PCRA.

Evidence seized was tainted/Denial of post-sentence motions

Defendant contends that evidence seized was tainted and that he was denied post-sentence motions. This is the first time the Defendant has raised these two issues. As repeatedly discussed, the entry of a plea of guilty waives all issues except those concerning the jurisdiction of the court, legality of sentence, and validity of plea.

In this case the Defendant pled guilty to the offenses of Possession with Intent to Deliver. The Defendant is not raising an issue of jurisdiction of the court, legality of sentence, or validity

of plea. Therefore, the Defendant has waived both the issues of whether evidence seized was tainted and whether he was denied post-sentence motions. Finally, these motions are untimely as they deal with Defendant's original sentence as already discussed.

The Court erred when the Commonwealth never showed cause as to why the action should not be granted

The Defendant believes that the Court erred because the Commonwealth did not show cause as to why the PCRA should not be granted. Pa.R.C.P. 906 states that:

An answer to a petition for post-conviction collateral relief is not required unless ordered by the judge. When the judge has not ordered any answer, the attorney for the Commonwealth may elect to answer, but the failure to file one shall not constitute an admission of the well-pleaded facts alleged in the petition.

Further, Pa.R.C.P. 907 states that there may be a disposition without a hearing if the judge reviews the petition, an answer by the Commonwealth (if there is one), and other matters of record relating to the defendant's claims.

Here, the Court followed the Rules of Criminal Procedure and independently reviewed the Defendant's petition. In addition, on February 6, 2012, the Court had a conference on Defendant's PCRA petition, where the Commonwealth discussed the merits of Defendant's PCRA. The Commonwealth believed that Defendant's petition was untimely and did not have any merit. Both the Court and the Commonwealth complied with the Rules of Criminal Procedure and therefore the Court finds that the Defendant's issue is without merit.

Conclusion

As none of the Defendant's contentions appear to have merit, it is respectfully suggested that the Defendant's sentence be affirmed

DATE: _____

By the Court,

Nancy L. Butts, President Judge

xc: DA
Anthony Keels #JW-4168
SCI Retreat
660 St. Rt. 11
Hunlock, PA 18621-3136
Gary L. Weber (LLA)