

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :

vs. :

SHALAMAR BROWN, : **No. CR-389-3006; CR-593-2006**

Defendant : **CR-634-2006; CR-671-2006**

: **CR-697-2006**

: **Notice of Intent to Dismiss/Deny PCRA Petition**

OPINION AND ORDER

This matter came before the court on Defendant’s “Petition for Writ of Mandamus,” which the court treated as Post Conviction Relief Act (PCRA) petition,¹ as well as Defendant’s pro se “Petition to Amend PCRA Petition.” The relevant facts follow.

Between December 12, 2005 and March 16, 2006, Defendant scammed numerous individuals out of hundreds of dollars. Generally, the scam involved Defendant offering to pay the victim for a ride.² Once the victim agreed to provide the ride, Defendant would claim that he only had \$100 bills and he needed the victim to get change. The victim would go to an ATM machine, withdraw hundreds of dollars in twenty dollar bills, and provide the money to Defendant expecting to receive payment for the ride and the return of his money in \$100 bills. Although Defendant claimed that the money was at the residence where the victim was going to drop him off, when they reached the destination Defendant left the victim’s vehicle and never returned with any payment.

The victims contacted the police and Defendant was charged with theft and related offenses in the above-captioned cases.

¹ See *Commonwealth v. Jackson*, 30 A.3d 516, 521 (Pa. Super. 2011)(any petition filed after a defendant’s judgment of sentence becomes final will be treated as a PCRA petition).

² In CR-671-2006, the scam involved pressuring the victims to sell marijuana for him. Although the victims

On July 5, 2006, Defendant entered guilty pleas to the following charges: theft by deception, a misdemeanor of the first degree under CR-389-2006; theft by deception, a misdemeanor of the second degree under CR-592-2006; theft by deception, a misdemeanor of the second degree under CR-634-2006; criminal trespass, a felony of the third degree, and theft by unlawful taking, a misdemeanor of the first degree under CR-671-2006; and theft by deception, a misdemeanor of the first degree under CR-697-2006. In each case, the court imposed a consecutive one-year period of supervision under the Intermediate Punishment Program for an aggregate period of five years of supervision.

Defendant violated the conditions of his supervision. On September 20, 2006, the court removed Defendant from the Intermediate Punishment Program, revoked his supervision and re-sentenced him to an aggregate term of 2 to 6 years of incarceration in a state correctional institution followed by a ten-year period of probation.

While Defendant was still on parole and before he started serving his consecutive ten years of probation, Defendant committed new theft offenses in 2010 utilizing the same methods as he did in his 2006 cases. Defendant's guilty pleas to the 2010 theft offenses resulted in a probation violation proceeding. On September 28, 2011, the court revoked Defendant's probation and sentenced him to an aggregate sentence of 2-6 years of incarceration in a state correctional institution consecutive to the 2010 cases. Defendant filed a motion for reconsideration of this sentence, which was summarily denied.

On July 20, 2012, Defendant filed his pro se Petition for Writ of Mandamus.

repeatedly refused, Defendant threatened the victims and demanded that they pay him hundreds of dollars for the drugs he had packaged or his uncle would be very upset and there would be trouble.

The court treated this petition as a PCRA petition, appointed counsel for Defendant and gave counsel an opportunity to file either an amended PCRA petition or a “no merit” letter pursuant to Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa.Super. 1988).

On October 16, 2012, Defendant filed a pro se petition to amend his PCRA petition. After several extensions, appointed counsel, on March 1, 2013, filed a motion to withdraw and an accompanying no merit letter that reviewed the claims Defendant raised in both of Defendant’s pro se filings.

Defendant asserted the following issues in his pro se petitions: (1) the court imposed an illegal sentence in violation of the Double Jeopardy clause when it sentenced Defendant to multiple punishments for the same crime(s); (2) the court erred when it sentenced Defendant to 2-6 years for violating his probation when the period of probation had not yet commenced; and (3) counsel was ineffective for failing to properly investigate the charges, failing to adequately prepare for trial, failing to obtain an expert to prepare a social history, failing to obtain an investigator to interview witnesses, and failing to file an appeal of Defendant’s sentence. After a review of the record in this case, the court finds that Defendant’s ineffectiveness claims are untimely and his remaining claims lack merit.

A PCRA petition must be filed within one year of the date the judgment becomes final unless the petitioner pleads and proves one of the three statutory exceptions. 42 Pa.C.S.A. §9545(b)(1). The time for seeking PCRA relief following the revocation of probation and imposition of a new sentence runs for one year from the conclusion of direct

review of the new sentencing order, but only with respect to the validity of the revocation proceedings and the legality of the new sentence; it does not restart the time period available for collateral review of the underlying conviction. Commonwealth v. Anderson, 788 A.2d 1019, 1021-1022 (Pa. Super. 2001); see also Commonwealth v. Fowler, 930 A.2d 586, 592 (Pa. Super. 2007); Commonwealth v. Cappello, 823 A.2d 936, 940 (Pa. Super. 2003).

The time limits of the PCRA are jurisdictional in nature. “[A]ny petition filed outside of the one-year jurisdictional time bar is unreviewable unless it meets certain listed exceptions and is filed within sixty days of the date the claim first could have been presented.” Commonwealth v. Lesko, 609 Pa. 128, 15 A.3d 345, 361 (2011).

Defendant pled guilty and was sentenced on July 5, 2006. No appeal was taken from this sentence. Therefore, his original judgment of sentence became final on or about August 4, 2006 and any PCRA claims related to Defendant’s underlying convictions and original sentence had to be filed by August 6, 2007 to be considered timely.³

Defendant did not file his petition until July 20, 2012. He also did not plead facts in his petition that would support any of the statutory exceptions. Therefore, Defendant’s ineffective assistance of counsel claims are patently untimely and the court lacks jurisdiction to address them.

The only issues that relate to Defendant’s new sentence are his claims that the court imposed an illegal sentence in violation of the Double Jeopardy clause when it imposed

³ Since August 4, 2007 fell on a Saturday, any petition filed by Monday, August 6, 2007 would be considered timely filed.

multiple punishments for the same crime and the court erred in revoking his probation and sentencing him to two to six years of incarceration in a state correctional institution when his ten-year period of probation had not yet commenced. Both of these claims lack merit.

Defendant entered guilty pleas to multiple theft offenses and one count of criminal trespass. Although all but one of the theft offenses involved violations of the same section of the Crimes Code, Defendant committed separate offenses involving separate victims on separate dates as set forth in the following chart:

<u>Case number</u>	<u>Offense /Date of offense</u>	<u>Victim(s)</u>
CR- 389-2006	Theft by Deception; 1/16/06	Christopher Mitchell
CR-592-2006	Theft by Deception; 3/16/6	Thomas Barefoot
CR-634-2006	Theft by Deception; 2/20/06	Jonathan Cicero
CR-671-2006	Criminal Trespass and Theft By Unlawful Taking; 1/31/06 to 2/3/06	Michael Yesvetz and Christopher Lee
CR-697-2006	Theft by Deception; 12/12/05	Justin Bloom

Clearly, Defendant did not receive multiple punishments for a single crime. Therefore, this issue is frivolous.

Defendant's final claim that the court could not revoke his probation because his term of probation had not yet commenced is similarly without merit. The fact that Defendant's probation had not commenced did not prevent the court from revoking its prior order. Commonwealth v. Ware, 737 A.2d 251, 253-54 (Pa. Super. 1999); Commonwealth v. Wendowski, 420 A.2d 628 (Pa. Super. 1980). As the Superior Court aptly noted in Ware,

If, at any time before the defendant has completed the maximum period of probation, *or before he has begun service of his probation*, he should commit offenses of such nature as to demonstrate to the court that he is unworthy of probation and that the granting of the same would not be in subservience to the ends of justice and the best interests of the public, or the defendant, the court could revoke or change the order of probation. A defendant on probation has no contract with the court. He is still a person convicted of crime, and the expressed intent of the Court to have him under probation beginning at a future time does not "change his position from the possession of a privilege to the enjoyment of a right.

Further, this court has previously agreed that a term of probation:

may and should be construed for revocation purposes as including the term beginning at the time probation is granted. Otherwise, having been granted probation a defendant could commit criminal acts with impunity - as far as revocation of probation is concerned - until he commenced actual service of the probationary period.

Ware, supra (emphasis original; citations omitted).

By committing the same type of offenses in 2010 and utilizing the same modus operandi, Defendant amply demonstrated that he was unworthy of probation and that incarceration was the only way to protect the public, especially the unsuspecting, good-hearted college students who typically fell prey to Defendant's ploys.

Based on the foregoing, the court finds that there are no genuine issues concerning any material fact and Defendant is not entitled relief as a matter of law. Therefore, it will grant court-appointed counsel's motion to withdraw.

Accordingly, the following order is entered:

ORDER

AND NOW, this ____ day of July 2013, the court gives the parties notice of its intent to dismiss Defendant's PCRA petitions without holding an evidentiary hearing. The court gives Defendant twenty (20) days within which to respond to this proposed dismissal. If no response is filed, the Court will enter an order dismissing Defendant's petitions. If Defendant files a response, the Court will review it to see if it alleges any facts or circumstances that would show that any of the issues have merit or would require an evidentiary hearing.

The court also grants counsel's petition to withdraw. Defendant is advised that he may represent himself or hire private counsel to represent him, but the court will not appoint counsel to represent him.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Julian Allatt, Esquire
Shalamar Brown, GU 9540
SCI Somerset, 1600 Walters Mill Rd, Somerset PA 15510
Gary Weber, Esquire (Lycoming Reporter)
Work file