IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**: No. CR- 903-2005**
	:
vs.	**: CRIMINAL DIVISION**
	:
	: Notice of Intent to Dismiss PCRA and
ADAM DELANEY,	**: Order Granting Counsel's Motion to**
Defendant	**: Withdraw**

OPINION AND ORDER

This matter came before the court on Defendant's motion for reconsideration of sentence nunc pro tunc, which the court treated as a post conviction relief act (PCRA) petition pursuant to Commonwealth v. Johnson, 803 A.2d 1291, 1293 (Pa. Super. 2002), which states that any petition filed after a defendant's judgment of sentence becomes final, is treated as a PCRA petition. The relevant facts follow.

In CR-844-2004, Defendant was charged with escape, a felony of the third degree. On March 21, 2005, Defendant entered an open plea to this charge. He failed to appear for sentencing and a bench warrant was issued for his arrest. Defendant was apprehended and, on June 14, 2005, he was sentenced to 24 months to 7 years of incarceration in a state correctional institution.

In CR-903-2005, Defendant was charged with escape, a misdemeanor of the second degree, and flight to avoid apprehension, also a misdemeanor of the second degree. On September 23, 2005, Defendant pled guilty to escape and was sentenced to 2 years of probation consecutive to the sentence Defendant was already serving (under 844-2004).

Defendant was released from incarceration at or near the expiration of his minimum sentence under 844-2004. Although Defendant had a very poor supervision

history, which included numerous hot urines, written warnings and administrative sanctions, no action was taken to revoke Defendant's probation until he was arrested and charged with firearm offenses, possession of a small amount of marijuana, and possession of drug paraphernalia at CR-105-2012.

On January 28, 2013, Defendant pled guilty to carrying a firearm without a license, a misdemeanor of the first degree, and was sentenced to 1 to 2 years of incarceration in a state correctional institution (CR-105-2012).

Defendant's new criminal conviction led to a probation violation hearing in case 903-2005 on February 7, 2013. In light of Defendant's plethora of written warnings, administrative sanctions and continuing to use drugs despite multiple treatment opportunities, the court violated Defendant's probation and re-sentenced him to serve 1 to 2 years of incarceration in a state correctional institution consecutive to the sentence for his new criminal conviction in CR-105-2012.

On March 19, 2013, the Pennsylvania Board of Probation and Parole ("the Board') held a parole violation hearing with respect to Defendant's sentence under CR-844-2004. The Board revoked all of Defendant's street time of 4 years, 11 months and 22 days as a technical parole violator and recommitted him as a convicted parole violator to serve 18 months.

On or about May 2, 2013, Defendant wrote to his public defender, asking him to file a motion for reconsideration of sentence. His attorney thought the motion was frivolous, so he filed a motion to withdraw from representation, which was scheduled for a hearing on July 17, 2013. Defendant also filed a pro se motion for reconsideration of

sentence nunc pro tunc.

On July 18, 2013, the court treated Defendant's motion for reconsideration as a PCRA petition and appointed conflict counsel to represent him. The court gave counsel the opportunity to either amend Defendant's pro se petition or file a "no merit" letter pursuant to Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988) and Commonwealth v. Finley, 379 Pa. Super. 390, 550 A.2d 213 (1988).

Counsel obtained a transcript of Defendant's probation revocation hearing. After reviewing the record, including the transcript and Defendant's motion, counsel filed a motion to withdraw, which contained a "no merit" letter attached as an exhibit. Defendant filed an objection to counsel's no merit letter.

The basis for Defendant's reconsideration request is that probation officials indicated to the court that it was unlikely that all of his street time would be revoked at his parole violation hearing. Defendant submits that if the court had been aware that all of his street time was going to be revoked and he would receive 18 months as a convicted parole violator, the court would have imposed a lesser sentence for his probation violation.

After reviewing all the facts and circumstances of Defendant's case, the court concludes, even if it had known that the Board was going to take all of his street time, it would not have given Defendant a lesser sentence. The court acknowledges that Ms. Yohn stated that she had never seen that happen and Defendant's parole officer, Mr. Girardi stated "The state, a lot of times will take most of his street time, maybe half. The Board's kind of been very lenient, so they might not take anything. It's hard to say." Transcript, pp. 5, 6. However, during the course of this discussion, the court, Defendant's attorney and Ms. Yohn

all agreed that the Board could take all of Defendant's street time. Transcript, p. 5.

There also was a discussion about how much time Defendant would be required to serve in prison. Both the court and Ms. Yohn estimated that Defendant would have to serve a year. Defense counsel advised Defendant that he would have to serve somewhere between 6 and 18 months. Transcript, p.5.

The statements concerning the sentence Defendant could receive on his parole violation were not the determinative factor in the sentence imposed by the court. Rather, the determinative factor was Defendant's incredibly poor supervision history, despite numerous opportunities for drug treatment and increasing sanctions other than incarceration.

Defendant was referred to outpatient counseling twice and an inpatient treatment facility once. Despite these opportunities to address his drug problem, for a period of close to three years Defendant had a positive urine almost every time he went in to see Mr. Girardi.[1] Transcript, p. 18. The court also stated:

> I'll be honest with you Mr. Delaney, I don't know if you're really accepting a whole lot of responsibility for this. The reality is that you made a conscious choice while you were under supervision to not do what you were supposed to do. I don't hesitate – well I probably do hesitate in saying this. I've had my go rounds with Mr. Girardi as a criminal defense attorney, and I did it for 25 years, and maybe—maybe it was he personally didn't like my clients, but I never had a client get this many breaks from him as I've seen – this is an incredible amount of written warnings, an incredible amount of – of, you know, placement, an incredible amount of -- non-punitive sanctions attempting to address you to do the right thing.

Transcript, p. 19. When Defendant attempted to minimize the written warnings by asserting that he was given multiple warnings for the same transgression, the court said, "Okay. Forget the written warnings. I have 10 or 11 positive urines. I've got 1 – 1 inpatient treatment

facility, and 3 outpatient."

The court then revoked Defendant's probation and re-sentenced him to 1 to 2 years of state incarceration. In doing so, the court stated in its order:

> The Court finds that despite escalating consequences, despite inpatient treatment, despite three (3) outpatient treatments, despite administrative sanctions, and despite a plethora of written warnings, the defendant failed to comply with his obligation not to use controlled substances. The Court has a great concern that the defendant's failure to adjust his behaviors ultimately led to criminal misconduct.
>
> The Court finds that incarceration is not only appropriate, but required under the circumstances. Accordingly, defendant's probation shall be revoked and the defendant shall be resentenced at this time.

Order dated February 7, 2013.

The court's final comment to defendant was as follows: "I wish I could help you, Mr. Delaney, but I just don't – I just don't buy it. I mean it's years and years of not doing what you're supposed to do, and now you have to be responsible." Transcript, p. 21.

It is clear to the court that, even if it had known that the Board would revoke all of Defendant' s street time, it would have imposed a maximum sentence in this case based on Defendant's terrible supervision history, and the fact that he was minimizing his conduct and failing to take responsibility for his actions. It was readily apparent to the court that Defendant was not amenable to supervision and the only way to way to change Defendant's behavior was to incarcerate him.

O R D E R

AND NOW, this ___ day of February 2014, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are

[1] The statements on page 18, lines 22 through 25, are the court's, not defense counsel's.

hereby notified of this Court's intention to dismiss Defendant's petition without holding an evidentiary hearing. 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.

Since the court has found that Defendant's petition lacks merit, the court grants counsel's motion to withdraw from representation. Defendant is advised that he may represent himself or hire private counsel, but the court will not appoint counsel to represent him further in this matter.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Donald F. Martino, Esquire
Adam Delaney, GG 9009
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Work file