

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 : No. CR-42-2008; CR-44-2008
 vs. : CR-46-2008
 :
 :
 JOEL T. KENDALL, : Opinion and Order Giving the Parties Notice
 Defendant : of the Court's Intent to Grant in Part
 : Defendant's PCRA petition Without Holding
 : an Evidentiary Hearing

OPINION AND ORDER

This matter came before the court on Defendant's letter, in which he complained that the Department of Corrections was running all of his sentences consecutive and none of his sentences were aggregated "as was part of his plea agreement" and he requested credit for time served for approximately 806 days that he already spent incarcerated on these cases. Pursuant to Commonwealth v. Beck, 848 A.2d 987, 989 (Pa. Super. 2004) and Commonwealth v. Johnson, 803 A.2d 1291 (Pa. Super. 2002), the court treated Defendant's letter as a Post Conviction Relief Act (PCRA) petition. Since this was Defendant's first PCRA petition, the court appointed counsel to represent Defendant and gave counsel an opportunity to file either an amended PCRA petition or a "no merit" letter in accordance with Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988).

After corresponding with Defendant, counsel filed a motion to withdraw, which included a Turner/Finley "no merit" letter. In his correspondence, Defendant apparently asserted claims that his prior record score was calculated incorrectly and the Department of Corrections (DOC) was incorrectly aggregating his sentences. In his "no

merit” letter, counsel noted that the court already had directed that these sentences were to run concurrent to each other and concurrent to the sentences that Defendant is presently serving. He also explained to Defendant that the sentencing guidelines do not apply to probation violation hearings; hence, his prior record score was not used to determine his sentence in these cases. Finally, he informed Defendant that, while Defendant could perhaps file a civil claim against the DOC concerning his claim of unlawful aggregation, such a claim was not cognizable under the PCRA. Counsel, however, did not address Defendant’s claim that he was entitled to over 800 days credit for time served.

The court conducted an independent review of the record in this case. The court agrees with counsel’s assessment of the issues that he addressed in his “no merit” letter.

Defendant initially claims that his sentences are being run consecutive. In its sentencing order dated August 12, 2013 and docketed August 15, 2013, the court clearly stated: “These sentences shall run concurrent to each other and concurrent to the sentences that the Defendant is presently serving.” Defendant submitted his sentence status summary from the DOC to show that the DOC was running his sentences in his 2008 case consecutive to everything. The sentence status summary is attached to this Opinion as Exhibit A.

Contrary to Defendant’s assertions, it is clear from this document that the DOC is running Defendant’s sentences concurrent to his back time in cases 1601-2010 and 1849-2010.

Defendant owes 1 year, 2 months and 30 days of back time, which began on June 14, 2013 and will be completed on September 13, 2014. Defendant’s sentence in the above-captioned cases began on August 12, 2013 and his minimum sentence will expire on May 12, 2014. If

the DOC was running Defendant's sentences in these cases consecutive to his back time, the sentence status summary would list the effective date of these sentences as September 14, 2014 and the expiration of the minimum as June 14, 2015. Therefore, Defendant's claim that the DOC is running these sentences consecutive clearly lacks merit.¹

The court also agrees with counsel's assessment that Defendant's complaint regarding the DOC's aggregation of his sentences is not cognizable under the PCRA. If Defendant believes the DOC is improperly computing his sentences, his remedy is to file for a writ of mandamus with the Commonwealth Court to compel the DOC to compute his sentences properly. See Sturgis v. Doe, 26 A.3d 1221 (Pa. Commw. 2011); Oakman v. Pa. Dep't of Corr., 903 A.2d 106 (Pa. Commw. 2006).

Nevertheless, the court believes there is some merit to Defendant's request for time served, albeit not the number of days alleged by Defendant due to sentences and credit he has received in other cases.

Since Defendant's other criminal cases in Lycoming County formed the basis of many of his violation hearings in the above-captioned cases, the court notifies the parties of its intention to take judicial notice of the records contained in the following files: 42-2008; 44-2008; 46-2008; 1970-2008; 1601-2010; 1846-2010; 1008-2013; and 1260-2013. See Pa.R.E. 201(regarding judicial notice of adjudicative facts).

On April 24, 2008, Defendant pled guilty to one consolidated count of forgery encompassing counts 1, 2, and 3 in case 42-2008, one consolidated count of forgery

¹ It is possible that the Board has taken further action against Defendant and recommitted him as a convicted

encompassing counts 1 through 19 in case 44-2008, and one consolidated count of forgery encompassing counts 1 and 2 in case 46-2008. Each consolidated count of forgery was graded as a felony of the third degree. The court sentenced Defendant to pay restitution and to be placed under the supervision of the Lycoming County adult probation office for a period of 23 months under the intermediate punishment program with the first 9 months to be served at the pre-release center. The court stated that the sentence was effective January 10, 2008 and it also gave Defendant credit for time served from December 24, 2007 to January 6, 2008.

On October 21, 2008, Defendant was arrested for public drunkenness. On October 24, 2008, Defendant reported to the adult probation office and admitted consuming alcohol on October 21, 2008. His probation officer initiated violation proceedings against Defendant and a preliminary intermediate punishment hearing was held on October 29, 2008. On that date, Defendant was released on \$5,000 ROR bail with the condition that he be placed on a SCRAM unit (which detects alcohol consumption) for 90 days.

On October 3, 2008, Defendant was charged with access device fraud, conspiracy, and theft in case 1970-2008 as a result of an incident that occurred in May 2007. On April 29, 2009, Defendant pled guilty to the theft charge and was sentenced to a 12-month period of probation.

On April 29, 2009, Defendant had a preliminary intermediate punishment violation hearing where he was given \$10,000 bail with the special condition that he apply

parole violator. If so, Defendant could be required by law to serve that time first. 61 Pa.C.S. §6138(a)(5)(i).

for the drug court program. Defendant posted bail through a bondsman, and was released from prison on May 4, 2009.²

On May 7, 2009, Defendant's probation officer conducted a field visit at Defendant's residence. When Defendant answered the door, he smelled of alcohol. He also admitted to using marijuana two days earlier, and he was taken into custody. On June 17, 2009, his original 23-month intermediate punishment sentence was revoked and he was resentenced to supervision for a period of 36 months under the intermediate punishment program with the condition that he attend and successfully complete the drug court program.

On November 4, 2009, Defendant was directed to undergo 48 hours of incarceration as a sanction for violating the conditions of the drug court program by failing to attend individual counseling.

On November 25, 2009, Defendant was ordered to undergo 60 days of incarceration for violating the drug court program by relapsing. This sentence was effective November 18, 2009.

Defendant violated the drug court program again by using a controlled substance. On March 23, 2010, he was ordered to undergo 90 days of incarceration in the Lycoming County prison. This sentence was effective February 23, 2010.

On August 5, 2010, Defendant was incarcerated on a detainer because he used controlled substances, ran from supervision, and he was going to be charged with new

²The inmate locator computer system for Lycoming County indicates that Defendant was committed on the intermediate punishment violation on April 23, 2009.

criminal offenses.³

On February 7, 2011, Defendant entered a guilty plea to a consolidated count of forgery in case 1610-2010 and a consolidated count of forgery in case 1846-2010. He was sentenced to an aggregate term of two to four years of incarceration, effective September 13, 2010. He was RRRI eligible, with his RRRI minimum being 18 months. Defendant's intermediate punishment under cases 42-2008, 44-2008, and 46-2008 also was revoked and he was sentenced to a two-year term of probation to be served consecutive to the sentence imposed in cases 1601-2010 and 1846-2010.

Defendant was paroled and released from incarceration on or about May 28, 2012. Over the course of the next year, he had several technical parole violations for drug use, which were addressed by requiring him to attend various counseling and treatment programs. When he failed to successfully complete an inpatient treatment program, he was committed to a community corrections center from May 7, 2013 to June 11, 2013.⁴

On June 13, 2013, Williamsport police went to Defendant's home in response to a dispatch of an unresponsive male. Two small children, ages 8 and 3, were present in the residence. The police and medics noticed an empty blue bag of heroin, a bent spoon, and a fresh needle mark on Defendant's arm. Defendant also had a needle in his pocket, which the medics disposed of in their temporary sharps container.

As a result of this incident, Defendant was taken into custody on a state parole

³Defendant was charged with forgery, theft and bad checks in case 1601-2010 on October 7, 2010 and similar charges in case 1846-2010 on December 15, 2010.

⁴The information about Defendant's release on state parole and his state parole supervision history came from

detainer, and he was charged with possession of drug paraphernalia, two counts of recklessly endangering another person and two counts of endangering the welfare of children in case 1008-2013.

In this same time frame, Defendant also was charged with theft and two counts of bad checks in case 1260-2013, as a result of checks that he wrote in late February 2013 to Elite Games.

Defendant also was detained without bail for a probation violation hearing in cases 42-2008, 44-2008, and 46-2008, pending resolution of Defendant's new criminal charges.

On July 15, 2013, Defendant pled guilty to one count of recklessly endangering another person in case 1008-2013. He was sentenced to 12 to 24 months of incarceration in a state correctional institution, with credit for time served from June 14 through June 20, 2013. This sentence was to be served consecutive to any parole violation Defendant received from the Pennsylvania Board of Probation and Parole.

In cases 1601-2010 and 1846-2010, Defendant was recommitted as a technical parole violator on June 14, 2013. The Board determined that he owed 1 year, 2 months and 30 days of back time, which would expire on September 13, 2014. See Exhibit A.

On August 12, 2013, Defendant pled guilty to one count of bad checks in case 1260-2013. He was sentenced to six months to one year of incarceration in a state correctional institution to be served consecutive to all the sentences Defendant was presently

the report of Defendant's parole officer that was attached to and submitted with the court presentation form

serving.

Defendant's probation also was revoked under cases 42-2008, 44-2008 and 46-2008 on August 12, 2013. He was resentenced to undergo 9 to 23 months of incarceration in a state correctional institution concurrent to each other and concurrent to the sentences Defendant was presently serving.

The court acknowledges Defendant has been incarcerated in excess of 800 days if one considers all of Defendant's cases. While Defendant served a significant period of incarceration on his 2008 cases that are the subject of this PCRA petition, portions of the more than 800 days were spent serving the sentences he received in cases 1601-2010, 1846-2010, and 1008-2013.

Specifically, Defendant was serving his initial sentence in cases 1601-2010 and 1846-2010 from September 13, 2010 through May 28, 2012. Similarly, Defendant began serving his back time for his state technical parole violations in those cases on June 14, 2013. He also was sentenced on July 15, 2013 to a consecutive term of 1 to 2 years of state incarceration with credit for time served from June 14, 2013 to June 20, 2013 in case 1008-2013. Since Defendant was already serving other state sentences when he was sentenced on August 12, 2013 in cases 42-2008, 44-2008, and 46-2008, he is not entitled to any credit for time served from September 13, 2010 through May 28, 2012 or from June 14, 2013 to August 11, 2013. Commonwealth v. Merigris, 681 A.2d 194 (Pa. Super. 1996); Commonwealth v. Hollawell, 604 A.2d 723 (Pa. Super. 1992).

It appears, however, that Defendant would be entitled to credit for time served for the following time frames:

- (1) December 27, 2007 to January 6, 2008 and January 10, 2008 through September 27, 2008 – when Defendant was serving the first 9 months of his original intermediate punishment sentence.
- (2) April 23, 2009 through May 4, 2009 – when Defendant was incarcerated on a detainer for a violation of his original intermediate punishment sentence.
- (3) May 7, 2009 through June 17, 2009- when Defendant was incarcerated on a detainer for an intermediate punishment violation until his original intermediate punishment was revoked and he was resentenced to a new, 36-month intermediate punishment sentence with the condition that he successfully complete the drug court program.
- (4) November 4, 2009 to November 6, 2009- when Defendant was incarcerated for 48 hours as a sanction for a drug court program violation.
- (5) November 18, 2009 to January 16, 2010 – when Defendant was incarcerated for 60 days as a sanction for a drug court program violation.
- (6) February 23, 2010 to May 23, 2010 – when Defendant was incarcerated for 90 days as a sanction for a drug court violation.
- (7) August 5, 2010 through September 12, 2010 – when Defendant was removed from the drug court program and incarcerated without bail

pending disposition of his new criminal charges in cases 1601-2010 and 1846-2010.

The court also notes that Defendant requested credit for time served during his violation hearing on August 12, 2013 and the court tended to agree that he was entitled to at least some of the credit he was claiming. See Transcript, August 12, 2013, at 15-17.

Accordingly, unless either party objects within 20 days, the court intends to grant in part Defendant's request for credit for time served.

ORDER

AND NOW, this ___ day of April 2014, after a review of the record in this matter, the court notifies the parties that it intends to grant Defendant's PCRA petition in part and give him some credit for time served as outlined in the foregoing opinion without holding an evidentiary hearing. In all other respects, the court intends to dismiss Defendant's PCRA petition without holding an evidentiary hearing. Either party may respond to this notice within 20 days of the date of this order. If no response is filed and submitted to the court within this timeframe, the court will grant Defendant credit for time served as outlined above.

The court denies counsel's motion to withdraw.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)

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