IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	CR-764-2010
v.	:	
	:	OTN: L 558359-4
ANTHONY DAVIDSON,	:	
Defendant	:	PCRA PETITION

O P I N I O N AND O R D E R

Before the Court is a Petition for Post-Conviction Relief filed by Defendant on June 6, 2014, pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541-9546, and a Motion to Withdraw as Counsel filed by Defendant's court-appointed counsel pursuant to *Commonwealth v. Turner*, 518 Pa. 492, 544 A.2d 927 (Pa. 1988), and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988). After conducting an independent review of Defendant's petition and considering appointed counsel's motion, for the reasons provided below, the Court finds that Defendant's petition lacks merit and that counsel's motion to withdraw is granted pursuant to *Commonwealth v. Pitts,* 603 Pa. 1, 981 A.2d 875 (Pa. 2009). The Defendant is notified of the Court's intention to dismiss the PCRA Petition, unless he files an objection to dismissal within twenty days (20) of today's date.

I. Factual and Procedural Background

On May 11, 2010, Trooper Brett Herbst of the Pennsylvania State Police charged Defendant with twenty three offenses occurring on or about April 12, April 16, April 22, April 30, May 6, and May 11, 2010 related to controlled purchases of cocaine and heroin. As Appointed Counsel summarized, Mr. Davidson was charged with the following:

> ten (10) counts of Delivery of a Controlled Substance and Possession with the Intent to Deliver a Controlled Substance, each an ungraded felony, four (4) counts of Possession of a Controlled Substance, each an ungraded misdemeanor, four (4) counts of Criminal Use of a Communication Facility, each a felony of the third degree, one (1) count of Possession of a Small amount of Marijuana and one (1) count of Possession of Drug

Paraphernalia, each an ungraded misdemeanor and one (1) count of Possession of a Firearm with an Altered Serial Number and one (1) count of Possession of a Firearm Prohibited, each a felony of the second degree.

At the time of jury selection, on August 21, 2012, Mr. Davidson entered a guilty plea to Count 1, delivery of a controlled substance (Cocaine)[1], a felony, pursuant to a plea agreement.

Mr. Davidson's attorney, Peter T. Campana, Esq., indicated to the Court that there was an agreement as to sentencing. That same date, August 21, 2012, the Court imposed sentence pursuant to the plea agreement. In addition to costs, fees and blood work, the sentence of the Court was "that the defendant shall undergo incarceration in a State Correction Institution for an indeterminate period of time, the minimum of which shall be three (3) years and the maximum of which shall be ten (10) years." Defendant waived RRRI eligibility. Defendant was provided credit for time served. As a result of the plea agreement, any charges not disposed of by the plea, and which did not merge, were dismissed. As a further part of the plea agreement, the felony 2 charge for unlawful control of a firearm in CR 426-2011[2] was dismissed in its entirety. The defendant did not file any motion to withdraw his plea or a direct appeal to secure relief from his conviction.

II. Time for Filing PCRA Petitions

42 Pa. C.S. § 9545(b)(1) requires that all petitions filed pursuant to the Post Conviction Relief Act be filed within *one (1) year* of the date that Defendant's judgment becomes final; this one-year requirement includes second and/or subsequent PCRA petition(s). In this instance, the imposition of sentence was August 21, 2012. Defendant's sentence became final thirty (30) days after this denial because Defendant did not seek appellate review. *See* 42 Pa. C.S. § 9545(b)(3).

[1] 35 P.S. § 780-113(A)(30)

[2] In *Commonwealth v. Anthony Davidson*, CR 425-2011, by information, defendant was charged pursuant to 18, Pa. C.S. A. § 6105(A)(1) with one count of persons not to possess, use, manufacture, control sell or transfer firearms, a felony in the second degree, for having control of .22 caliber Mossberg long rifle on April 22, 2010, one of the dates on which he was also charged with delivery of a controlled substance.

Therefore, the Defendant was required to file his petition by August 21, 2013. Defendant filed the instant petition on June 6, 2014, well beyond the one-year filing requirement. Therefore, on its face, the petition appears to be untimely.

However, the PCRA statute provides for three (3) exceptions to the timeliness requirement. *See* 42 Pa. C.S. § 9545(b)(1). These exceptions include:

> (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.

42 Pa. C.S. § 9545(b)(1)(i)-(iii).[3] If a PCRA petitioner attempts to file an untimely PCRA petition, it is the burden of the petitioner to plead and prove one of the exceptions to the one-year timeliness requirement. *Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999); *Commonwealth v. Taylor*, 933 A.2d 1035, 1039 (Pa. Super. 2007). If a PCRA petition is found to be untimely, "[u]nder the plain language of Section 9545 [of the Post Conviction Relief Act], the substance of [petitioner's] PCRA petition must yield to its untimeliness." *Taylor*, 933 A.2d at 1043.

[3] Even these exceptions to the timeliness requirement have a timeliness element; any PCRA petition raising one of these timeliness exceptions should be "filed within 60 days of the date the claim could have been presented." 42 Pa. C.S. § 9545(b)(2).

In this instance, Defendant failed to affirmatively plead any one of the PCRA timeliness exceptions. *See Taylor*, 993 A.2d at 1039. In addition to failing to affirmatively plead one of the timeliness exceptions, Defendant did not provide any genuine issue of material fact regarding the timeliness of his PCRA petition or applicability of any exception. Therefore, Defendant's June 6, 2014 PCRA petition should be dismissed pursuant to 42 Pa. C.S. § 9545(b) as untimely.

III. Lack of Merit to Substantive Claims.

In addition to the instant petition being untimely, the Court finds that there is no merit to the underlying claims of ineffectiveness/duress related to the plea or claims of illegality of the sentence.[4] The record demonstrates the voluntariness of Mr. Davidson's plea. *See, e.g., Commonwealth v. Lewis,* 430 Pa. Super. 336, 634 A.2d 633 (Pa. Super. 1993); and *Commonwealth v. Rush*, 909 A.2d 805 (Pa. Super. 2006) (cited by appointed counsel) In the present case, the Defendant executed a written guilty plea colloquy form (GPQ 11-2010) on August 21, 2012. In that written guilty plea colloquy, Mr. Davidson indicated that it was his decision to plead guilty because he committed the crime, that he thoroughly discussed all of the facts and circumstances with his attorney, and that he was satisfied with the representation and advice of his attorney. Mr. Davidson further indicated that his plea was given freely without force threats, promises, pressure or intimidation. Mr. Davidson's attorney certified that he thoroughly explained the written guilty plea colloquy. In exchange for the plea, a felony of the second degree count for having control of a firearm as a person not to possess was dismissed in CR 425-2011. Furthermore, all counts that did not merge with the delivery count also were dismissed.

[4] Defendant makes a bare assertion of erroneous legal advice concerning the plea but fails to identify any facts in support of that assertion and there is no evidence of record to suggest the defendant received erroneous legal advice concerning the plea or that such advice induced the plea.

In addition to the written colloquy, the defendant made an oral colloquy on the record which demonstrates the voluntariness of the plea. In the presence of his attorney, Mr. Davidson testified that he "possessed a quantity of cocaine and the CI, Confidential Informant, came and purchased narcotics on me on 4/12/2010." N.B. 8/21/14 at 4:9-11. On the record, Mr. Davidson confirmed that he sold and delivered cocaine to a confidential informant. N.B. 8/21/14 at 4:21-24. Mr. Davidson confirmed that he gave truthful answer to the questions on the written guilty plea colloquy and that he had a chance to discuss any questions with his attorney. N.B. 8/21/14 at 5:12-25. Defendant's attorney certified to the Court that he believed this was a knowing, intelligent and voluntary plea. N.B. 8/21/14 at 6: 13-17. Accordingly, the Court finds that there is no merit to the underlying claims of ineffectiveness/duress related to the plea.

The Court also believes that there is no merit to the claim that the Court imposed an illegal sentence by failing to provide reasons for an alleged deviation from the sentencing guidelines or by failing to consider the guidelines. The plea agreement included a specific sentence. The Court imposed the agreed upon sentence. The written colloquy states: "Terms of Plea Agreement: SENTENCE TO BE 3-10 YRS SCI; ▲ [Defendant] TO WAIVE RRRI; REMAINING COUNTS TO BE DISMISSED." On the record in open Court, Defense counsel confirmed in defendant's presence that the plea agreement was for a specific sentence of 3 to 10 years. N.B. 8/21/14 at 7:10-22. Defendant never filed a motion to withdraw his plea nor did he file a direct appeal of his sentence. As appointed counsel indicated, the sentence was well below that advisory guideline range where a consolidated count, even with merger, made defendant eligible to receive a sentence on at least five counts and charges which could add to the sentence were dismissed as part of the plea agreement. Moreover, the court imposed exactly the sentence agreed upon as part of the plea agreement. Therefore, the Court concludes that the underlying substantive claims of defendant's PCRA petition lack merit.

IV. Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's June 6, 2014 PCRA Petition. As the Court finds that no purpose would be served by conducting any further evidentiary hearing regarding this matter, a hearing will not be scheduled. Pa.R.Crim.P. 909(B)(2); *See Commonwealth v. Walker,* 36 A.3d 1, 17 (Pa. 2011) (holding that a PCRA petitioner is not entitled to an evidentiary hearing as a matter of right, but only when the PCRA petition presents genuine issues of material facts). *See also Commonwealth v. McLaurin*, 45 A.3d 1131, 1135-36 (Pa. Super. 2012).

Pursuant to Pennsylvania Rules of Criminal Procedure 907(1), the parties are hereby notified of the Court's intention to deny the petition. The 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 June 6, 2014 petition.

O R D E R

AND NOW, this **15**th day of **October**, Defendant is hereby notified that it is the Court's intention to dismiss his June 6, 2014 PCRA Petition, unless he files an objection to that dismissal ***within twenty days (20) of today's date***. This Opinion and Order will be served on Defendant as set forth in Pa.R.Crim.P. 907(1).

BY THE COURT,

October 15, 2014
Date

_____
Richard A. Gray, Judge

cc: DA (KO)
Donald F. Martino, Esq., Appointed Counsel
Anthony Davidson, Inmate # KS3184 **(certified and regular mail)**
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