IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-650-2009**
	:	
vs.	:	
	:	**Notice of Intent to Dismiss PCRA**
	:	**Petition Without Holding an**
FRANCIS C. LAUBACH, JR.,	:	**Evidentiary Hearing**
Defendant	:	

OPINION AND ORDER

This matter came before the court on Defendant's petition for writ of habeas corpus, which the court will treat as a Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

On January 21, 2009, two girls were walking to the bus stop. A four-door green Ford pulled up to them. The driver shut the car off and asked them if they wanted a ride. The girls said "no." The driver restarted the car and began to follow them. The girls turned around and hurried back home. The driver turned the car around and followed them. The girls provided a description of the driver and the car to the police. The police checked out the area and observed a green Ford Escort pull into a parking lot. The driver, who matched the description provided by the girls, was identified as Defendant Francis Laubach, Jr.

Defendant was charged with luring a child into a motor vehicle,[1] a misdemeanor of the first degree, and driving a motor vehicle while his operating privileges were suspended or revoked as a result of a driving under the influence violation (DUS-DUI related),[2] a summary offense.

[1] 18 Pa.C.S.A. §2910.
[2] 75 Pa.C.S.A. §1543(b).

On August 3, 2009, the court accepted Defendant's guilty plea to the charges and sentenced him to two years on the Intermediate Punishment program with the first 30 days to be served at the Lycoming County Prison Pre-Release Center for luring a child and a consecutive 90 days of in-home detention for DUS-DUI related. Thereafter, the court realized that luring a child was a predicate offense under Megan's Law.

Defendant filed a motion to withdraw his guilty plea because Megan's Law registration was not part of the plea negotiated by the parties. In fact, he contended in his motion that the District Attorney represented to his counsel that he did not think Defendant would be required to register as a sexual offender under Megan's Law for the luring charge. The court scheduled a hearing and argument on Defendant's motion and asked the parties to be prepared to address the case of ***Commonwealth v. Leidig***, 956 A.2d 399 (Pa. 2008).[3]

The hearing on Defendant's motion was continued at the request of defense counsel to allow counsel and the District Attorney to try to resolve the issue by agreeing to substitute another offense of the same grading. Unfortunately, the issue could not be resolved by the parties. Therefore, the court again scheduled a hearing and argument on Defendant's motion to withdraw his guilty plea. At the time scheduled for this hearing, though, the defense withdrew the motion, and the court ordered an evaluation by the Sexual Offender Assessment Board (SOAB). On March 29, 2010, the court advised Defendant of his

[3] In ***Leidig***, the Pennsylvania Supreme Court held that registration was a collateral consequence of which a defendant need not be notified prior to entering a guilty plea; therefore, the failure to be advised of such was not a basis to withdraw a guilty plea.

obligation to register under Megan's Law for a period of ten years.

On September 28, 2011, the Pennsylvania Supreme Court decided ***Commonwealth v. Hart***, 28 A.2d 898 (Pa. 2011). In ***Hart***, the Court held that an attempt to lure does not include the act of simply extending an offer of an automobile ride to a child when it is unaccompanied by any other enticement, inducement, threat or command for the child to enter the vehicle.

On December 16, 2013, the Pennsylvania Supreme Court decided ***Commonwealth v. Neiman***, 84 A.3d 603 (Pa. 2013). In ***Neiman***, the Court determined that Act 152 of 2004 was unconstitutional because it violated the single subject rule of Art. III, section 3 of the Pennsylvania Constitution. Act 152 included the amendment to Megan's Law which added luring a child into a motor vehicle as a predicate offense.

On August 6, 2014, Defendant filed a *pro se* petition for relief in which he sought to set aside his registration requirements on the basis that: (1) luring a child into a motor vehicle was a misdemeanor of the first degree with a maximum penalty of five years, so he should not be required to register for more than five years; (2) he was not found to be a sexually violent predator; and (3) ***Neiman*** found Megan's Law unconstitutional. Thereafter, Defendant hired counsel. Defendant, through his counsel, withdrew his petition for relief. An order was entered on December 3, 2014 marking the motion withdrawn without prejudice to Defendant and his attorney to file for relief under a different procedure if appropriate under the law.[4]

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[4] Even if Defendant had pursued his pro se petition for relief, he would not have been entitled to relief under ***Neiman.*** Megan's Law was amended by Act 178 of 2006, which became effective on January 1, 2007. Although Act 178 amended 42 Pa.C.S.A. §9795.1(a)(1) to include indecent assault graded as a misdemeanor of the first degree **or higher**, the amendment also listed luring a child into a motor vehicle as an offense requiring

On January 13, 2015, Defendant filed his petition for writ of habeas corpus. The court held a conference with counsel on February 3, 2015 to discuss whether the court was required to treat the petition as filed under the Post Conviction Relief Act (PCRA) and whether Defendant would be entitled to relief.

After an independent review of the record, the court is constrained to find that it must treat Defendant's petition as a PCRA petition and that Defendant is not entitled to relief.

The PCRA is the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the purpose, including habeas corpus and coram nobis. 42 Pa.C.S.A. §9542; see also ***Commonwealth v. Turner***, 80 A.3d 754, 769-770 (Pa. 2013). Any petition or request for relief that challenges an individual's conviction or sentence filed after the judgment of sentence becomes final must be treated as a PCRA petition. ***Commonwealth v. Johnson***, 803 A.2d 1291, 1293 (Pa. Super. 2002)("We have repeatedly held that the PCRA provides the sole means for obtaining collateral review and that any petition filed after the judgment becomes final will be treated as a PCRA petition); cf., ***Commonwealth v. Judge***, 916 A.2d 511, 520-521 (Pa. 2007)(appellant's claim properly analyzed as request for habeas corpus relief because his claim that his deportation from Canada violated international law did not challenge the reliability of the conviction or sentence and did not fall within the scope of the PCRA).

In his petition, Defendant asserts that he pled guilty on the advice of trial

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registration for a period of ten years. Therefore, the Court noted in ***Neiman*** that Act 152 as it pertained to section 9795.1(a)(1) was only effective from January 24, 2005 to December 31, 2006. 84 A.3d at 606 n.10. The offense date for Defendant's crimes was January 21, 2009, well after the Act 178 amendment of Megan's Law took effect.

counsel, he was not aware of the elements of the offense or that it carried a registration requirement under Megan's Law when he pled guilty, and the facts underlying the criminal complaint are insufficient to establish the charge of luring; therefore, he requests that his conviction for luring be stricken as a matter of law. In essence, Defendant is claiming that counsel was ineffective and/or his guilty plea was unlawfully induced. These claims are cognizable under the PCRA. 42 Pa.C.S.A. §9543(2)(ii), (iii). Therefore, the court must treat Defendant's petition for writ of habeas corpus as a PCRA petition.

The timeliness of a PCRA petition must be addressed as a threshold matter. ***Commonwealth v. Callahan***, 103 A.3d 118, 121 (Pa. Super. 2014). Section 9545(b) of the Judicial Code, which contains the time limits for filing a PCRA petition, states:

> (b) Time for filing petition
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
> (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.
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.
> (3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

42 Pa.C.S.A. §9545(b).

The time limits of the PCRA are jurisdictional in nature. ***Commonwealth v. Howard,*** 567 Pa. 481, 485, 788 A.2d 351, 353 (Pa. 2002); ***Commonwealth v. Palmer***, 814 A.2d 700, 704-05 (Pa.Super. 2002). "[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). To avail himself of one of the statutory exceptions, Defendant had to allege facts in his petition to show that one of these exceptions apply, including the dates the events occurred, the dates he became aware of the information or event, and why he could not have discovered the information earlier. *See* ***Commonwealth v. Breakiron***, 566 Pa. 323, 330-31, 781 A.2d 94, 98 (Pa. 2001); ***Commonwealth v. Yarris***, 57 Pa. 12, 731 A.2d 581, 590 (Pa. 1999). "[W]hen a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." ***Commonwealth v Gamboa-Taylor***, 562 Pa. 70, 77, 753 A.2d 780, 783 (Pa. 2000).

Defendant pled guilty and was sentenced on August 3, 2009. He had thirty days to file any appeal, see Pa.R.App.P. 903(a), but no appeal was filed. Therefore, his judgment of sentence became final on September 3, 2009.

To be considered timely, Defendant needed to file his petition on or before September 3, 2010, or allege facts to support one of the statutory exceptions. Defendant did neither. Thus, his petition is untimely and the court lacks jurisdiction to grant him any relief.

The Pennsylvania Supreme Court decided ***Hart*** on September 28, 2011. If Defendant had filed his petition shortly after ***Hart*** was published, perhaps Defendant could have invoked the statutory exception contained in section 9545(b)(1)(ii). Defendant, however, did not file his petition until more than three years after ***Hart*** was decided.

Defendant also would not be entitled to relief under the PCRA because he has already completed his sentence. To be eligible for relief, Defendant must be serving a sentence of imprisonment, probation or parole for the crime or serving another sentence which must expire before he may commence serving the disputed sentence. 42 Pa.C.S.A. §9543(a)(1). Defendant was sentenced on August 3, 2009 to serve two years under the Intermediate Punishment Program with the first thirty days to be served at the pre-release center for the luring offense and a consecutive 90 days on in-home detention for the DUS-DUI related offense. Therefore, Defendant completed his sentence in 2011.[5]

Defendant also is not entitled to relief because his claims have been waived. In order to be eligible for relief, the allegation of error cannot be previously litigated or waived. 42 Pa.C.S.A. §9543(a)(3). An issue is waived "if petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state

[5] Defendant also would not be entitled to *habeas corpus* relief, because his sentence has expired. 42 Pa.C.S.A. §6503(a)("an application for habeas corpus to inquire into the cause of detention may be brought by or on behalf of any person restrained of his liberty within this Commonwealth under any pretense whatsoever."); see also ***Commonwealth v. Turner***, 80 A.3d 754, 766 (Pa. 2013)("The legislature's exclusion from collateral relief of individuals whose liberty is no longer restrained is consistent with the eligibility requirements for review under the general state *habeas corpus* statute, 42 Pa.C.S. §6501 et seq.").

postconviction proceeding." 42 Pa.C.S.A. §9544(b).

Defendant could have filed a petition for writ of habeas corpus as part of an omnibus pretrial motion before he pled guilty to challenge whether his conduct was legally sufficient to constitute luring. His case could have been the one in which the Pennsylvania Supreme Court defined the term "luring" instead of ***Hart***.

Defendant filed a motion to withdraw his guilty plea on August 5, 2009, after he became aware that he was subject to Megan's Law's registration requirements when he reported to the Lycoming County Prison on August 3, 2009. In that motion, he also could have sought to withdraw his plea because his conduct was insufficient to constitute luring. Defendant, however, did not raise this issue and ultimately elected to withdraw his motion.

Unfortunately, like the petitioner in ***Commonwealth v. Turner***, 80 A.3d 754 (Pa. 2013), the court does not believe that Defendant has any avenue of relief through the court system at this late date.

ORDER

AND NOW, this ___ day of September 2015, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are 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.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Mary Kilgus, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file