IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	CR:. 1758-2008
Plaintiff,	:	OTN: K-773662-1
	:	
vs.	:	82 MDA 2015
	:	
ANDREW A. MONROE	:	
Defendant.	:	PCRA / **APPEAL / 1925 (a)**

OPINION AND ORDER

Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

This Court issues the following Opinion and Order pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) in response to an appeal of the dismissal of Defendant's ***Second*** Petition for Post-Conviction Relief filed on October 14, 2014 by Defendant *pro se* pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541-9546. Upon review of Defendant's concise statement of matters complained of on appeal and his objections to dismissal of his PCRA petition, the Court believes that the issues are essentially the same issues addressed by this Court in its Opinion and Order dated November 21, 2014. The Court concludes that the issues are untimely, waived and without merit. The Court relies upon its Opinion and Order dated November 21, 2014 and its Opinion and Order dated December 2, 2010 relating to Defendant's first PCRA petition, and respectfully submits the following in support of its request for affirmance of dismissal.

Defendant's PCRA petition filed on October 14, 2014 is untimely because it was filed more than one year after the date on which Defendant's sentence became final (November 28, 2010), and no exception to timeliness was established by Defendant. *See*, 42 Pa. C.S. § 9545(b)(1). The Defendant appears to claim an exception to timeliness by asserting that his sentence was illegal in violation of the Superior Court's ruling in Commonwealth v. Newman,

2014 PA Super 178; 99 A.3d 86 (Pa. Super. 2014). Defendant asserts that he filed his claim within 60 days of the Superior Court's decision in Newman becoming available in the prison library. Defendant's claim is without merit.

Defendant cannot successfully claim an exception to timeliness under Newman because the Defendant was not sentenced pursuant to a statutory mandatory. Defendant was only sentenced to serve a period of incarceration under Count 2 (aggravated assault). Defendant's sentence was pursuant to the terms of the plea agreement and within the standard guideline range. Defendant's sentence, to serve a period of incarceration with a minimum of 90 months (7 ½ years) under Count 2, fell within the standard guideline range as reflected on the basic sentencing matrix, § 303.16. The offense gravity score was 11 and the prior record score was 5. Aggravated assault involving serious bodily injury has an OGS of 11 and a PRS of 5 and has a standard guideline range of 72-90 months.[1] Consequently, there is no merit to the claim for an exception to timeliness on the grounds that the sentence was illegal under Newman.

Even assuming, for the sake of argument, that the sentence had been unconstitutional under Newman, the claim was not timely raised. Any PCRA petition raising one of the applicable timeliness exceptions should be "filed within 60 days of the date the claim could have been presented." 42 Pa. C.S. § 9545(b)(2). Since Newman arose from the U.S. Supreme Court decision in Alleyne v. United States, 133 S.Ct. 2151, 186 L. Ed. 2d 314 (2013), which set forth constitutional parameters for statutory mandatory sentences, a challenge on that basis could have been presented as of the date of the Alleyne decision (June 17, 2013). Since the Defendant did

[1] Applying a deadly weapon enhancement, the sentence guideline range was 90 to 108 months. A deadly weapon enhancement is not a mandatory minimum.

not file the claim until well over a year after the Alleyne decision, the Defendant's claim would be untimely even if it raised claims under Newman and Alleyne. See, 42 Pa. C.S. § 9545(b)(2). [2]

In addition to the claims being untimely, the claims are waived. Defendants could have raised all of his claims at the time of sentencing, in a request for reconsideration, on direct appeal (which he did not file) and/or in his first PCRA petition that was filed on March 31, 2010 and dismissed on January 10, 2011, with the exception of asserting that his sentence was illegal under Newman, which is inapplicable as previously discussed. Other than the decision in Newman, all the remaining claims raised in the instant PCRA petition were known to Defendant at the time of sentencing. As of the time of sentencing, the Defendant had sufficient knowledge of facts giving rise to any claim that consecutive probation violated his plea agreement. As of the time of sentencing, the Defendant had sufficient knowledge of facts giving rise to any claim that Defendant had not been informed that the probation could have been imposed pursuant to the plea agreement. As of the time of sentencing, the Defendant had sufficient knowledge of facts giving rise to any claim that it is unlawful for his sentence of supervision to exceed his sentence for incarceration. Accordingly, these claims are waived. As directed by 42 Pa.C.S. § 9544(b), an issue is waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state post-conviction proceeding."

Even if the claims were timely and were not waived, the Defendant's claims are without merit. Upon review of the Defendant's pro se PCRA petition, objection to dismissal,[3] and concise statement of errors, the Defendant's primary contention is that his sentence to

[2] Furthermore, according to Commonwealth v. Miller, 2014 PA Super 214 (Pa. Super. 2014), the time-bar exception does not apply because a new rule of constitutional law has not been specifically held to retroactively apply to cases in which the judgment of sentence had become final.

[3] The Court's Opinion and Order dated November 21, 2014 stated that Defendant's objection to dismissal must be filed within 20 days of that date. Defendant's objection to dismissal was filed 24 days after that date on December 15, 2014. The Court's Order dismissing the PCRA petition crossed with the filing of the objection and was filed the same date. The Defendant's objection did not raise any meritorious claims or reason to delay disposing of this matter.

consecutive probation violated the terms of his plea agreement and is illegal.[4] This Court disagrees. The sentence was in accordance with the terms of the Defendant's plea agreement and was within the sentencing guidelines. The plea agreement explicitly permitted the Court to determine whether and to what extent supervision by the Board of Probation and Parole would be imposed for Count 10 and/or Count 11. While the issue of supervision was left to the Court, the plea agreement was that the Defendant would not serve additional jail time for either of those Counts. Pursuant to the plea agreement, Defendant was not sentenced to serve any jail time for Counts 10 and 11, even though the standard guideline range calls for incarceration. The offense gravity score for Count 10 (carrying a firearm without a license, a felony of the third degree), was 9, and for Count 11 (persons not to possess, a felony of the second degree) it was 10; Defendant's prior record score was 5. The sentence imposed by the Court for supervision by the Board of Probation and Parole was in accordance with the explicit terms of the plea agreement. Defendant executed a written guilty plea colloquy form (GPQ 10-2008) on September 2, 2009 in which the terms of the plea agreement were explicitly written as follows:

> "Terms of Plea Agreement: 90 mo minimum – (7 ½ year)
> up to the court if additional probation time for
> Count 10 and/or 11 -(no additional jail time) –
> c.m.- restitution
> effective date 9/23/08."
> *See*, (GPQ 10-2008) (page 1 of 7, signed by Defendanton page 6 of 7 and dated September 2, 2009.

Therefore, the Court concludes that the PCRA petition, which essentially challenges the consecutive sentence to probation as not being part of the plea, lacks merit on its face.

The Court also believes there is no merit to Defendant's contention that the sentence is illegal for included consecutive sentences for probation.

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[4] The Defendant claims that he did not know he was "going to be pleading to consecutive probation after the 7 ½ to 20 year sentence" and further contends that the consecutive probation violated the plea, and is illegal.

> Generally, Pennsylvania law affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. Any challenge to the exercise of this discretion ordinarily does not raise a substantial question." Commonwealth v. Mastromarino, 2010 PA Super 128, 2 A.3d 581, 587 (Pa. Super. 2010)(citations omitted)

The Court also believes there is no merit to Defendant's contention that his sentence is illegal on the grounds that Defendant's probation of ten years exceeds the length of his minimum sentence of incarceration for Count 2 (7 and ½ years). The factual allegations under Count 2, aggravated assault, comprised the Defendant shooting the victim in the chest with a firearm. According to the Affidavit of Probable Cause, sworn to by agent Stephen J. Sorage of the Williamsport Police Department on September 23, 2008, Agent Sorage arrived at the scene of a criminal investigation on September 22, 2008 and spoke with the victim of a single gunshot wound to his right chest. The victim identified Defendant as the shooter before being rushed by ambulance into emergency surgery. Count 10 and 11 were entirely separate offenses. According to the criminal complaint, under Count 10, Defendant carried a concealed firearm on his person and in a vehicle without a license to carry a firearm. Under Count 11, Defendant possessed a firearm despite it being unlawful for him to do; on March 1, 2007 Defendant plead guilty to Aggravated Assault and was therefore prohibited by law from possessing a firearm. As the offenses for Count 10, 11 and 2 did not merge with each other, the length of incarceration imposed for Count 2 did not limit the possible sentence for Count 10 or 11. As noted on page 1 of 7 of Defendant's written guilty plea colloquy form (GPQ 10-2008) dated September 2, 2009, the standard sentence guideline range for Count 10 was listed as 48-60 months of ***incarceration*** and for Count 11 was listed as 60-72 months of ***incarceration***. Consequently, this Court believes there is no merit to any challenge to the legality of Defendant's sentence, which

imposed five years (60 months) of ***supervision*** for Count 10 and 11, each to run consecutively to each other and Count 2.

Finally, there is no merit to a claim that trial counsel was ineffective for failing to inform the defendant that the Court could impose probation or that it could be consecutive. In order to succeed on a claim for ineffective assistance of counsel, Defendant must overcome the presumption of counsel effectiveness by proving the following three factors, that: (1) Defendant's underlying claim has arguable merit, (2) trial counsel had no reasonable basis for her action or inaction, and (3) the performance of trial counsel prejudiced Defendant. Commonwealth v. Chmiel, 612 Pa. 333, __, 30 A.3d 1111, 1127 (Pa. 2011); Commonwealth v. Pierce, 527 A.2d 973, 975-76 (Pa. 1987)). *See also*, Strickland v. Washington, 466 U.S. 668, 687-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Commonwealth v. Sampson, 900 A.2d 887, 890 (Pa. Super. Ct. 2006), *appeal denied*, 907 A.2d 1102 (Pa. 2006) (*citing* Commonwealth v. Lynch, 820 A.2d 728, 733 (Pa. Super. 2003). A claim of ineffectiveness will be denied if the petitioner's evidence fails to satisfy any one of these prongs. Commonwealth v. Busanet, 618 Pa. 1 54 A.3d 35, 45 (Pa. 2012). There is no merit to the claim that trial counsel failed to inform the Defendant about probation when it is expressly written on the form executed by the Defendant at the time he entered his plea and at the time of sentencing. Moreover, there is no evidence of prejudice. Defendant never contends that he would have rejected the plea agreement had he known he could get consecutive probation. Defendant does not challenge the term of his sentence for incarceration under Count 2. Without an affirmative statement to the contrary, the significant benefit of the plea agreement suggests that the Defendant would not have risked significantly more incarceration by rejecting a plea which ruled out incarceration for Counts 4, 10 and 11 and which dismissed Count 1, Count 3, and Counts 5-9. Those Counts consisted of a

felony count of criminal attempt – homicide, a felony 2 count of aggravated assault (deadly weapon), and three counts of felony 1 robbery, one count of felony 2 robbery and 1 count of felony 1 robbery of motor vehicle. As to Count 4, criminal mischief, a felony of the third degree, the sentence of the Court was to pay restitution, even though the offense gravity score was listed as 5 and the prior record score was listed as 5. As such, the Defendant failed to meet the first and third prong to overcome the presumption of trial counsel's effectiveness, and the claim on this basis should be dismissed. Busanet, supra.

For these reasons, and those stated in this Court's opinion dated November 21, 2014 and December 2, 2010 referenced above, this Court respectfully requests that its judgment to dismiss the Defendant's second PCRA petition without a hearing be affirmed.

BY THE COURT,

March 9, 2015
Date

Richard A. Gray, J.

cc: DA (KO)

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(Superior & 1)