

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-1831-2012;
	: CR-1834-2012
vs.	:
	:
	:
ANTHONY MONROE,	:
Appellant	: 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this court's order dated March 5, 2015, which dismissed Appellant's Post Conviction Relief Act (PCRA) petition without holding an evidentiary hearing because the petition was untimely.

By way of background, Appellant was charged in case 1831-2012 with delivery of a controlled substance (heroin),¹ an ungraded felony; possession with intent to deliver a controlled substance (heroin)², an ungraded felony; and criminal use of a communication facility,³ a felony of the third degree. These crimes occurred on or about October 4, 2012. Appellant was also charged with delivery of a controlled substance (heroin), possession with intent to deliver a controlled substance (heroin) and criminal use of a communication facility in case 1834-2012. These offenses occurred on or about March 21, 2012.

¹ 35 P.S. §780-113(a)(30).

² 35 P.S. §780-113(a)(30).

³ 18 Pa.C.S. §7512.

On November 19, 2012, Appellant entered a plea of guilty to count 1, delivery of a controlled substance in case 1831-2012. He was sentenced to pay costs and fines and to undergo incarceration in a state correctional institution for three to six years. The remaining charges in case 1831-2012 and all the charges in case 1834-2012 were dismissed.

On September 9, 2014, Appellant wrote a letter to the court in which he claimed that his arrest was illegal because he was arrested without a valid warrant in that the magistrate never actually signed it. The court treated Appellant's letter as a Post Conviction Relief Act (PCRA) petition. See *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002) ("any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition"). As this was Appellant's first such petition and he appeared to be indigent, the court appointed counsel to represent him and gave counsel an opportunity to file an amended PCRA petition or 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 filed motion to withdraw which included a no merit letter. Appellant submitted a response to the motion, in which he challenged the validity of the arrest warrant on the basis that it lacked probable cause and was not signed by the Magisterial District Judge (MDJ). Appellant also asserted that his sentence was illegal pursuant to *Alleyn v. United States*, 133 S.Ct. 2151 (2013) and PCRA counsel failed to comply with *Anders v. California*, 386 U.S. 738, 744 (1967) when counsel filed his motion to withdraw. Therefore, he requested that the court deny counsel's motion to withdraw and grant him an evidentiary hearing to establish the merit of his claims. After conducting an independent review of the record, the court gave Appellant notice of its intent to dismiss his PCRA petition without

holding an evidentiary hearing because his petition was untimely. The court also granted counsel's motion to withdraw.

On March 4, 2015, Appellant filed a response to the court's intent to dismiss his PCRA petition. The response, however, did not address the timeliness of his petition, but instead addressed the merits of his claims that his arrest and search of his person were unlawful. The court reviewed Appellant's response but still dismissed his PCRA petition because it was untimely.

Appellant filed a timely notice of appeal. He raised the following claims in his concise statement: (1) the arrest was made without a valid warrant to arrest and without justifiable probable cause; (2) the warrant used to arrest and convict him was neither signed or authorized by a judge or magistrate in violation of his constitutional rights; (3) ineffective assistance of trial and post-trial counsel which undermined the truth-determining process such that no reliable adjudication of guilt or innocence could have taken place; (4) "improper use of obstruction by governmental commonwealth officials" of Appellant's right of appeal where meritorious appealable issues existed and were not properly preserved by counsel; (5) there was credible evidence that could have been used during pre-trial and during trial that would have changed the outcome; (6) tainted evidence was used to convict Appellant in that neither the warrant nor the statement of probable cause were signed by a judge or magistrate; therefore, there was insufficient evidence to prove his guilt beyond a reasonable doubt; (7) the court violated the requirements of 42 Pa.C.S. §9721(b) by imposing a sentence of confinement that was not consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant; and (8) the court abused its discretion by sentencing

Appellant to an excessive period of incarceration.

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, Appellant 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).

Appellant pled guilty and was sentenced on November 19, 2012. No appeal was taken from this sentence. Therefore, Appellant’s judgment of sentence became final on or about December 19, 2012 and any PCRA petition related to his conviction and sentence had to be filed by December 19, 2013 to be considered timely on its face.

Appellant did not file his letter/petition until September 9, 2014. He also did not plead any facts in his petition that would support any of the statutory exceptions. Therefore, Appellant’s claims were patently untimely and the court lacked jurisdiction to grant him any relief.

Even if Appellant’s petition was timely, most if not all, of his claims would be waived. “[A]n 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 postconviction proceeding.” 42 Pa.C.S.A. §9544(b).

Appellant could have raised any issues regarding the validity of his arrest in an omnibus pretrial motion before he entered his guilty plea, but he did not do so. Instead, Appellant pled guilty to one count of delivery of a controlled substance on November 19, 2012. Furthermore, “[a] guilty plea constitutes a waiver of all nonjurisdictional defects and defenses. When a defendant pleads guilty, he waives the right to challenge anything but the legality of his sentence and the validity of his plea.” *Commonwealth v. Jones*, 593 Pa. 295, 929 A.2d 205, 212 (2007)(citations omitted).

Appellant could have attempted to challenge the discretionary aspects of his sentence in a post sentence motion or a direct appeal, but he did not do so. Therefore, his claims that his sentence was excessive are also waived.

Even if Appellant’s claims were not waived, they either lack merit or Appellant has not suffered any prejudice.

As the Pennsylvania Supreme Court recently stated in *Commonwealth v. Spatz*, 84 A.3d 294 (Pa. 2014):

Counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him. In Pennsylvania, we have refined the Strickland performance and prejudice test into a three-part inquiry. Thus, to prove counsel ineffective, the petitioner must show that: (1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result. If a petitioner fails to prove any of these prongs, his claim fails. Generally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. Where matters of strategy and tactics are concerned, a finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable

probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.

84 A.3d at 311-12 (quotations, quotation marks, and citations omitted).

Appellant's claims that his arrest was invalid in case 1381-2012 lack arguable merit. No arrest warrant was issued in this case. According to the affidavit of probable cause, an undercover police officer was present when Appellant delivered heroin to a confidential informant. Appellant was arrested after he fled on foot while attempting to rip up the "buy" money. Based on the officer's own observations of the delivery, there was probable cause to arrest Appellant. The police have the authority to arrest an individual for a felony offense without a warrant. Pa.R.Crim.P. 502(2)(a), (b); *Commonwealth v. Zook*, 532 Pa. 79, 615 A.2d 1, 6 (1992). Therefore, Appellant's arrest in this case was valid.

The police also have the authority to search an individual incident to a lawful arrest. *Commonwealth v. Rickabaugh*, 706 A.2d 826, 836 (Pa. Super. 1997) ("a search incident to a lawful arrest is one of the well-recognized exceptions to the warrant requirement and 'does not depend upon whether there is any indication that the person arrested possesses weapons or evidence, as the fact of a lawful arrest, standing alone, authorizes a search.'"). Therefore, any search of Appellant's person incident to his arrest also was lawful.

Appellant's assertion that his arrest was unlawful because the affidavit of probable cause contained in the criminal complaint was not signed by a judge or a magistrate also lacks merit. The original affidavit of probable cause was signed by MDJ Jon Kemp, who was the on-duty magistrate the evening of Appellant's arrest. Appellant's copy was not signed, because MDJ Kemp arraigned him by video at approximately 8:45 p.m.

With respect to case 1834-2012, whether the arrest warrant was valid is not relevant. Appellant clearly did not suffer any prejudice even if the warrant was not valid because all the charges in this case were dismissed.

Appellant also is not entitled to relief pursuant to *Alleyne* for several reasons. First, *Alleyne* does not apply retroactively; therefore; it does not apply to petitioners who raise such a challenge in a PCRA. *Commonwealth v. Riggle*, 2015 PA Super 147 (July 7, 2015).

Second, Appellant's trial counsel in this case would not be ineffective for failing to assert an *Alleyne* challenge to Appellant's sentence, because Appellant was sentenced on November 19, 2012 and the decision in *Alleyne* was not issued until June 17, 2013. Counsel cannot be ineffective for failing to predict a change in the law. *Commonwealth v. Gribble*, 863 A.2d 455, 464 (Pa. 2004); see also *Commonwealth v. Hill*, 104 A.3d 1220, 1240 (Pa. 2014) ("review of counsel's conduct cannot indulge 'the distorting effects of hindsight,' but instead, counsel's performance must be judged in light of the circumstances as they would have appeared to counsel at the time."); *Commonwealth v. Spatz*, 896 A.2d 1191, 1238 (Pa. 2006) ("it is well established that the effectiveness of counsel is examined under the standards existing at the time of performance.").

Third, the court did not conduct fact finding in imposing Appellant's sentence. Rather, the court merely imposed the sentence agreed upon by the parties.

For the foregoing reasons, Appellant is not entitled to relief.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Anthony Monroe, KU-8828
1 Kelley Drive, Coal Township PA 17866-1021
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)