

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

: No. CR-319-2007

vs.

:
:
:

STEVEN TAWNEY,
Defendant

: **Notice of Intent to Dismiss Motion to**
: **Modify Sentence Nunc Pro Tunc and**
: **Motion for Post Conviction Collateral**
: **Relief**

OPINION AND ORDER

Before the court is the Defendant's motion to modify sentence nunc pro tunc filed on February 12, 2015 and Defendant's motion for post conviction collateral relief. The relevant facts follow.

Tawney was arrested and charged with conspiracy to commit burglary, burglary, criminal trespass, theft by unlawful taking, receiving stolen property, and criminal mischief. On April 9, 2007, in exchange for a standard range sentence to be served concurrent to any other sentence, Tawney pled guilty to criminal trespass, a felony of the second degree; theft by unlawful taking, a felony of the third degree; and criminal mischief, a summary offense. On June 5, 2007, the court sentenced Tawney to six (6) months to five (5) years' incarceration in a state correction institution for theft by unlawful taking, and a consecutive three-year term of probation for criminal trespass. On August 17, 2007, Tawney filed a pro se motion to modify sentence nunc pro tunc, which was denied on November 9, 2007.

In July of 2012, parole agents found controlled substances, drug paraphernalia and a large amount of money in Tawney's residence. He was charged with new criminal offenses, as well as probation violations.

Tawney pled guilty to the new criminal charges and received a sentence of four (4) to eight (8) years' incarceration in a state correctional institution.

On September 5, 2013, Tawney came before the court for his probation violation hearing as a convicted violator. Probation officials were seeking a sentence of two to four years' incarceration at a state correctional institution to be served consecutive to the sentence Tawney received on the new criminal charges. Tawney's counsel, however, noted that Tawney was cooperating with law enforcement and had agreed to forfeit over \$46,000. The court considered all the relevant factors, including but not limited to the circumstances of the case, Tawney's age and background, Tawney's cooperation, and his poor supervision history and then imposed a sentence of one (1) to two (2) years' incarceration in a state correctional institution to be served consecutive to the his sentence on the new criminal charges.

On November 22, 2013, Tawney filed a motion to modify and reduce his sentence, which the court treated as a first PCRA petition. In his motion, Tawney alleged that the court erred in sentencing him by failing to consider the sentencing guidelines, his good rapport with his supervising parole agent, his employment, his good behavior for six years, his family situation, and his cooperation. After appointing counsel and giving counsel the opportunity to file an amended petition or a no merit letter, the court reviewed the record and counsel's no merit letter and dismissed the petition without holding an evidentiary hearing. In its notice of intent to dismiss, the court specifically noted the comments that it made on the record at the probation violation concerning its reasons for the sentence, including the statement "I wouldn't be doing my job if I gave you anything less than that."

The court also found that Tawney was not prejudiced by anything done by his counsel at the probation violation hearing; he only helped. Tawney did not appeal this decision.

On February 12, 2015, Tawney filed another motion to modify sentence nunc pro tunc. In this motion, Tawney asserted that his attorney sent someone else to handle his hearing and he was forced to have a hearing with an attorney who had no knowledge of his case and he was not happy with the outcome. He wrote to his attorney and asked him to file a motion for modification of sentence, but claimed that he was abandoned by counsel. He also claimed that his attorney told him he would either get 2 years added on to the tail end of his 4 to 8 years or at worst 2 months to 2 years, not 1 to 2 years. He did not, however, state any basis for his sentence to be modified.

On April 8, 2015, Tawney filed a motion for post conviction collateral relief in which he made the same allegations regarding his abandonment by counsel. He also indicated that he already stated his reasons for reconsideration.

In *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002), the Superior Court stated: “We have repeatedly held that the PCRA provides the sole means for obtaining collateral review, and that any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition.” In accordance with *Johnson*, the court will treat both of Tawney’s current motions as a second PCRA petition.

Any PCRA petition, including a second or subsequent petition, must be filed within one year of the date the judgment became final, unless the petition alleges and the petitioner proves that one of the three statutory exceptions applies. 42 Pa.C.S.A. §9545(b)(1). A judgment of sentence becomes final at the conclusion of direct review or the

expiration of time for seeking such review. 42 Pa.C.S.A. §9545(b)(3).

Tawney's probation violation sentence was imposed on September 5, 2013. He had thirty days to file an appeal, but he did not do so. Therefore, his judgment of sentence became final on or about October 5, 2013.

To be considered timely, Tawney's motions had to be filed on or before October 2014 or Tawney had to allege facts to support one of the statutory exceptions. To avail himself of one of these exceptions, Tawney 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).

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). "[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).

Tawney's motions were not filed until February 12, 2015 and April 8, 2015. He did not allege facts to support any of the statutory exceptions in either motion. Therefore, the court lacks jurisdiction to address the merits of Tawney's petition.

Even if the motions had been timely filed, the court would not be able to reach the merits of Tawney's claims because they are waived.

To be eligible for relief under the PCRA, a defendant must plead and prove that the allegation of error has not been waived. 42 Pa.C.S. §9543(a)(3). 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 postconviction proceeding." 42 Pa.C.S. §9543(b).

Tawney could have litigated his issues at the time the court sentenced him on his probation violation, in an appeal from his probation violation sentence or in his first PCRA petition, but he did not. Therefore, his claims are waived.

Even if the merits were to be addressed, Tawney would not be successful. To establish ineffective assistance of trial counsel, a defendant must plead and prove that the underlying claim is of arguable merit, counsel's performance lacked a reasonable basis designed to effectuate the defendant's interests, and prejudice. Commonwealth v. Pierce, 567 Pa. 186, 786 A.2d 203 (2001); Commonwealth v. Correa, 444 Pa. Super. 621, 664 A.2d 607 (1995). Tawney was not prejudiced by counsel's alleged ineffectiveness. Prejudice in this context means that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different. Commonwealth v. King, 618 Pa. 405, 57 A.3d 607, 613 (2012). Counsel is presumed effective and the defendant bears the burden of proving otherwise. Commonwealth v. Fears, 86 A.3d 795, 804 (Pa. 2014).

As the court noted in response to Tawney's first PCRA petition, the "court considered all of the appropriate circumstances when it re-sentenced Tawney on his

probation violation and made him RRRRI eligible. Tawney was not prejudiced by anything done by his counsel at the probation violation hearing; he was only helped. His claims to the contrary are baseless.” Opinion and Order, June 16, 2014, at 5. In other words, even if counsel had filed a motion for modification of sentence as Tawney allegedly requested, the court would not have modified his sentence. The court weighed the facts and circumstances in Tawney’s favor against the nature and seriousness of his probation violation which was based on a new conviction for possessing approximately 100 grams of cocaine with the intent to deliver it. The facts in Tawney’s favor caused the court to reject his probation officer’s recommendation of a two to four year sentence. The court, however, would not have imposed a sentence less than one to two years in this case. In fact, during Tawney’s hearing the court specifically stated:

What I’m going to do is I’m going to give you an extra one to two years. I think five to ten is appropriate under all the circumstances. I’m going to weigh the factors we spoke about, and I think there is some reason to give that sort of weight in your favor.

At the same time I wouldn’t be doing my job if I gave you anything less than that.

N.T., September 5, 2013, at 18.

For the foregoing reasons, Tawney is not entitled to relief on any of his pending motions.

ORDER

AND NOW, this ___ day of June 2015, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court finds that it lacks jurisdiction to address the merits of Tawney’s PCRA petition. In the alternative,

Tawney's claims are waived or he was not prejudiced by counsel's actions or failure to act.

As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this court's intention to dismiss the petition. Tawney 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)
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