

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR- 249-2011;
: CR-344-2011
vs. :
: Notice of Intent to Dismiss PCRA
: Without Holding Evidentiary Hearing and
MALINDA WHITE, : Order Granting Counsel’s Motion to
Defendant : Withdraw.

OPINION AND ORDER

This matter came before the court on May 12, 2015 for a conference on Ms. White’s “Reconsideration of Sentence Nunc Pro Tunc” which the court treated as a Post Conviction Relief Act (PCRA) petition in accordance with *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 of sentence becomes final will be treated as a PCRA petition.”). The relevant facts follow.

Under 249-2011, Ms. White was charged with retail theft, a felony of the third degree, and two counts of possession of drug paraphernalia, ungraded misdemeanors. Under 344- 2011, Ms. White was charged with sixteen counts of forgery, all felonies of the third degree.

On April 4, 2011, Ms. White entered a guilty plea to the retail theft and forgery charges and waived her eligibility for a Recidivism Risk Reduction Incentive (RRRI) in exchange for a sentence of four to eight years of incarceration in a state correctional institution. The court accepted Ms. White’s guilty plea and sentenced her in accordance with the plea agreement.

Ms. White filed a timely notice of appeal in which she asserted three related

issues: (1) whether the trial court issued an illegal sentence by failing to calculate and impose a RRRI minimum sentence as required by 61 Pa.C.S. §4501, et seq; (2) whether RRRI eligibility is a waivable statutory right or a statutory mandate similar to limitations on maximum penalties or mandatory sentences; and (3) whether the district attorney abused his discretion by requiring Ms. White to waive RRRI eligibility as part of a negotiated guilty plea agreement. On June 8, 2012, the Pennsylvania Superior Court affirmed Ms. White's judgment of sentence. See 801 MDA 2011.

Ms. White did not timely file a petition for allowance of appeal but, on October 26, 2012, the Pennsylvania Supreme Court permitted Ms. White to file such a petition nunc pro tunc. The Pennsylvania Supreme Court denied the petition for allowance of appeal on March 20, 2013.

On or about February 17, 2015, Ms. White mailed to the court her "Reconsideration of Sentence nunc pro tunc" which the court treated as a PCRA petition. Ms. White asked the court to grant her RRRI on the above cases. In support of her request, she stated, "At sentencing my lawyer told me it was against my rights to take it away, however today I know its [sic] a privilege, and I wish for the courts to reconsider."

As this was Ms. White's first PCRA and she appeared to be indigent, the court appointed counsel to represent her 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). The court noted it appeared that the petition was untimely and the issues raised therein may have been previously litigated on direct appeal; therefore, the court directed that any filing

should address these issues.

On May 7, 2015, appointed counsel filed a petition to withdraw from representing Ms. White, which included a no merit letter because the petition was untimely.

After an independent review of the record, the court also finds that Ms. White's petition is untimely.

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 Pennsylvania Supreme Court denied Ms. White's petition for allowance of appeal on March 20, 2013. Ms. White had ninety days after the Pennsylvania Supreme

Court denied her petition to file any petition for writ of certiorari with the United States Supreme Court. United States Supreme Court Rule 13. Therefore, Ms. White's judgment became final on June 19, 2013.

To be considered timely, Ms. White had to file her PCRA petition on or before June 19, 2014 or allege facts in her petition to demonstrate one of the statutory exceptions. To avail herself of one of these exceptions, Ms. White had to allege facts in her petition to show that one of these exceptions apply, including the dates the events occurred, the dates she became aware of the information or event, and why she 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).

Ms. White's petition was not mailed until February 17, 2015 and she did not allege facts to support any of the exceptions. Therefore, the court lacks jurisdiction to

address the merits of Ms. White's petition.¹

ORDER

AND NOW, this ___ day of May 2015, upon review of the record, the court finds that Ms. White's petition is untimely.

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. Ms. White 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.

The court also grants counsel's petition to withdraw. Ms. White has the right to represent herself or to hire a private attorney to pursue her issues. The court, however, will not appoint another attorney to represent her.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Donald Martino, Esquire
Malinda White, OS 8796
PO Box 180, Muncy PA 17756
Work file

¹ The court also notes that even if the petition had been timely filed, Ms. White's claims regarding RRRI were previously litigated or waived. 42 Pa.C.S.A. §9544.