

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA	:	CR-1262-2010
	:	
v.	:	
	:	
SKYLER P. ANDREWS,	:	
Defendant	:	PCRA

OPINION AND ORDER

On May 17, 2011, Defendant was sentenced to a term of incarceration of three (3) to six (6) years to be followed by a period of four (4) years probation. On direct appeal, Defendant’s judgment of sentence was affirmed by the Superior Court by Order entered September 21, 2012. No further review was sought and thus Defendant’s sentence became final on October 23, 2012, and he had until October 23, 2013, to file a PCRA petition. On December 30, 2014, The Honorable Marc F. Lovecchio of the Lycoming County Court of Common Pleas found that Defendant violated the probationary portion of his sentence. Judge Lovecchio revoked Defendant’s probation and resentenced him to three (3) to twenty-four (24) months incarceration. The instant petition was filed on August 10, 2015.

In an Opinion issued January 19, 2016, this Court found that no exception to the one-year filing requirement provided this court with jurisdiction to consider Defendant’s claim that his sentence, a mandatory minimum sentence under 18 Pa.C.S. Section 7508, was illegal. On February 5, 2016, however, the court vacated that Opinion and Order to consider whether Defendant’s sentencing on December 30, 2014, pursuant to a probation revocation, extended the filing deadline.

This issue is controlled by the Superior Court’s holding in Commonwealth v. Anderson:

Instead of pleading one of the exceptions, appellant argues that his judgment of sentence did not become final until thirty (30) days after the June 3, 1998, probation revocation hearing. The crux of appellant's argument is that the revocation of probation "reset the clock" on the PCRA time limitations. Accordingly, he insists that his October 2, 1998, petition is timely because it was filed within one year of July 3, 1998. We find that only in limited situations will a probation revocation "reset the clock" on a PCRA petition.

Probation revocation does not materially alter the underlying conviction such that the period available for collateral review must be restarted. The Legislature did, however, by its enactment of 42 Pa. C.S.A. § 9543(a)(2)(vii), intend to provide collateral review to probation revocation issues. As such, we find that probation revocation presents a special situation insofar as determining timeliness under § 9545. We hold that where a new sentence is imposed at a probation revocation hearing, the revocation hearing date must be employed when assessing finality under § 9545(b)(3) to any issues directly appealable from that hearing. To hold otherwise would frustrate the purpose behind the PCRA.

For example, appellant's revocation sentence was not imposed until June 3, 1998. If we employed the finality date utilized above, June 4, 1997, to determine timeliness under § 9545, it would mean appellant would have had one day to file a petition challenging his new sentence. Furthermore, had appellant's original sentence been imposed two days earlier, he would *never* have been able to obtain post-conviction review of his probation revocation sentence if the clock were not reset. Appellant's petition, however, deals only with counsel's ineffectiveness surrounding the May 5, 1997, sentencing. Appellant does not raise any issues challenging the June 3, 1998, probation revocation hearing.

We further note that direct review of a sentence imposed after probation revocation is available, even where no appeal was taken after the imposition of the original probation. *See Commonwealth v. Gilmore*, 465 Pa. 202, 348 A.2d 425 (Pa. 1975). The scope of review in a direct appeal following revocation, however, is limited to the validity of the revocation proceedings and the legality of the judgment of sentence. *See Commonwealth v. Gheen*, 455 Pa. Super. 499, 688 A.2d 1206 (Pa. Super. 1997). Since the timeliness provisions of the PCRA specifically provide that the one-year limit only begins to run at the conclusion of direct review, 42 Pa. C.S.A. § 9545(b)(1) and (3), we find that as to these two issues, PCRA relief is potentially available. Therefore, the time for seeking PCRA relief following the revocation of probation and the imposition of a new sentence runs for one year from the conclusion of direct review of that new sentencing order, *but only as to the issues of the validity of the revocation proceedings and the legality of the new sentence*. Compare *Commonwealth v. Weimer*, 2000 PA Super 199, 756 A.2d 684 (Pa. Super. 2000) (one-year period ran from probation revocation resentencing date, but all issues pertained to

either validity of proceedings in failing to grant allocution or to legality of new sentence).

Appellant's probation was revoked and a new sentence was imposed on June 3, 1998. No direct appeal was filed. Thus, under § 9545(b)(3), as to the validity of the revocation proceedings and the resulting new sentence, appellant's judgment of sentence became final thirty (30) days later, on July 3, 1998, when the time for seeking review expired. Thereafter, appellant had one year, until July 5, 1999, to file a PCRA petition raising any cognizable issue concerning either the validity of the revocation proceedings or the legality of the new sentence. Appellant filed his petition within one year of this date, but the petition did not raise any issue pertaining to either of these matters. Thus, the petition was, indeed, untimely filed.

Commonwealth v. Anderson, 788 A.2d 1019, 1021-22 (Pa. Super. 2001) (emphasis in original, footnotes omitted).

In the case at bar, Defendant has raised the legality of his original sentence. The original sentence was imposed pursuant to the mandatory three (3) year minimum sentence required under 18 Pa.C.S. Section 7508, which has since been ruled unconstitutional in Commonwealth v. Fennell, 105 A.3d 13 (Pa. Super 2014). Defendant is correct that the original sentence was illegal, however, he is time-barred from attacking it collaterally in a Petition for Post Conviction Relief. Commonwealth v. Washington, 2016 Pa. LEXIS 1536 (Pa. July 19, 2016). The legality of his *new* sentence of three to twenty-four months, imposed at the revocation proceedings, has not been challenged; therefore, under Anderson, the petition is untimely.

Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the Defendant is hereby notified that this Court intends to dismiss his PCRA petition for the reason discussed in the Opinion dated January 19, 2016. The Defendant may respond to the proposed dismissal within 20 days of the date of the notice. After a further conference held on April 25, 2016, and upon

further review, the court concludes that the resentencing on December 30, 2014, did not render Defendant's otherwise untimely PCRA petition timely.

ORDER

AND NOW, this _____ day of August 2016, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for leave to withdraw appearance filed July 1, 2016, is hereby GRANTED and Donald Martino, Esq. may withdraw his appearance in the above captioned matter.

The appointment of Donald Martino, Esquire is hereby terminated and Mr. Martino may withdraw from the above-captioned case.

BY THE COURT,

Nancy L. Butts, President Judge

cc: DA (KO)
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