

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-208-2001 (01-10,208)
vs. : CR-1718-2001 (01-11718)
 : CR-1756-2001 (01-11756)
 : CR-1758-2001 (01-11758)
 : CR-1011-2002 (02-11011)
ANN FRANKHOUSER, :
Defendant : Notice of Intent to Dismiss PCRA
 : Without Holding and Evidentiary Hearing
 : and Order Granting Counsel's Motion to
 : Withdraw

OPINION AND ORDER

This matter came before the court on the Post Conviction Relief Act (PCRA) petition filed by Defendant, Ann Frankhouser. The relevant facts follow.

Ms. Frankhouser was charged with numerous separate theft offenses. As pertains to this matter, she entered guilty pleas to retail theft, a felony of the third degree, under Information 208-2001; retail theft, a misdemeanor of the first degree, under Information 1718-2001; two counts of theft by deception, misdemeanors of the first degree, under Information 1756-2001; retail theft, a felony of the third degree, under Information 1758-2001; and retail theft, a felony of the third degree, under Information 1011-2002.

On October 16, 2002, Ms. Frankhouser was sentenced to seven years of probation for retail theft under Information 208-2001, five years of probation for retail theft under Information 1718-2001, five years of probation for each count of theft by deception under Information 1756-2001, seven years of probation for retail theft under Information 1758-2001, and seven years of probation for retail theft under Information 1011-2002, which

were to be served consecutive to each other and consecutive to numerous other cases.¹ The sentencing order was docketed on October 31, 2002.

Ms. Frankhouser filed a PCRA petition on December 29, 2003, which was dismissed on or about August 6, 2004.

On or about June 3 2014, Ms. Frankhouser was detained for violating her probation by committing a new criminal offense, by committing a traffic summary offense, and by continuing to use controlled substances in violation of her conditions of supervision. Following a hearing on June 12, 2014, the court found that probable cause existed for these violations. A final hearing was held on December 11, 2014. At that hearing, the court found that Ms. Frankhouser violated the conditions of her probation by continuing to use heroin “over at least an admitted period of three months.”² The court revoked Ms. Frankhouser’s probation and sentenced her to serve a sentence of two to seven years of incarceration in a state correctional institution.³ On December 22, 2014, Ms. Frankhouser’s counsel filed a motion for reconsideration of her sentence. Following a hearing on January 13, 2015, the court denied the reconsideration motion.

On July 2, 2015, the court amended and clarified its final probation violation order to correct the maximum sentence for count 1, theft by deception, under Information 1756-2001 and clarify that the court’s intent was for Ms. Frankhouser to serve an aggregate term of two to seven years’ state incarceration less credit for time served from June 3, 2014

¹ Ms. Frankhouser was sentenced on twelve separate cases on October 16, 2002. Her aggregate sentence was 18-36 months of incarceration followed by 41 years of probation supervision with the Pennsylvania Board of Probation and Parole (PBPP).

² The new criminal charges were not resolved until October 8, 2015, when Ms. Frankhouser entered a guilty plea and was sentenced for possession of drug paraphernalia. See CP-41-CR-0001212-2014.

³ The court imposed separate sentences for each count in each case with a two year minimum and a statutory

to December 9, 2014.

Ms. Frankhouser's current PCRA petition was filed in the Clerk of Courts office on February 18, 2016. In her petition, Ms. Frankhouser asserts that: (1) she was neither informed in writing of her final Gagnon hearing as required by law nor given time or notice to have either a fair or honest revocation hearing or reconsideration; (2) despite several attempts to communicate with her attorney, she was only ever given a few minutes to speak with her attorney at the hearing; (3) she was given bail for one day with no time to prepare for any hearings; (4) her Eighth Amendment rights were violated by her medical needs being ignored or neglected; and (5) the grading of most counts is incorrect.

Although this was Ms. Frankhouser's second PCRA petition from her underlying conviction, it was her first such petition related to her probation revocation. Therefore, the court appointed counsel to represent Ms. Frankhouser and gave counsel an opportunity to file either an amended PCRA petition or a 'no merit' letter pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988).

Counsel filed a motion to withdraw, which included a no merit letter.

After an independent review of the record, the court finds that Ms. Frankhouser's petition is untimely and she is not entitled to relief as a matter of law.

"A PCRA petition, including a second or subsequent petition, must be filed within one year of the date the judgment of sentence becomes final." *Commonwealth v. Mitchell*, 141 A.3d 1277, 1284 (Pa. 2016). A judgment becomes final at the conclusion of

limit maximum, but directed that each sentence be served concurrent to each other. The court also found Ms. Frankhouser was eligible for a recidivism risk reduction incentive (RRRI) minimum of 18 months.

direct review or the expiration of the time for seeking the review. 42 Pa.C.S.A. §9545(b)(3). The PCRA's time limits are jurisdictional in nature, implicating a court's power to adjudicate a controversy. *Commonwealth v. Ali*, 86 A.3d 173, 177 (Pa. 2014). In other words, if the petition is not timely filed, the court lacks jurisdiction to hold a hearing or to grant relief.

Ms. Frankhouser was sentenced on October 16, 2002. She did not file any post sentence motions. She had 30 days from the imposition of sentence to file a direct appeal. Pa.R.Crim.P. 720(A)(3). Therefore, her underlying conviction became final on November 15, 2002. To be considered timely, any PCRA petition related to Ms. Frankhouser's underlying conviction and sentencing had to be filed by Monday, November 17, 2003, or allege facts to support one of the statutory exceptions contained in 42 Pa.C.S.A.9545(b)(1).

A defendant can file a PCRA petition related to a probation or parole revocation hearing, but such a petition is limited to the revocation proceedings and the sentence imposed as result of the revocation proceedings. *Commonwealth v. Cappello*, 823 A.2d 936, 940 (Pa. Super. 2003). The filing of such a petition does not re-set the time limits for filing a PCRA with respect to with the defendant's underlying conviction or original sentence. *Commonwealth v. Anderson*, 788 A.2d 1019, 1021-1022 (Pa. Super. 2000).

The court revoked Ms. Frankhouser's probation and resentenced her on December 11, 2014, but the order was not filed until December 30, 2014. Ms. Frankhouser filed a timely motion for reconsideration on Monday, December 22, 2014. The court held a hearing on that motion and denied it on January 13, 2015.

Despite the fact that Ms. Frankhouser filed a timely motion for

reconsideration of her probation violation sentence that was not denied until January 13, 2015, her sentence became final on January 29, 2015 at the latest, because a motion to modify or reconsider sentence does not toll the time period for filing an appeal from a re-sentencing following a probation violation hearing. Pa.R.Crim.P. 708(E). Therefore, to be considered timely, any PCRA petition related to Ms. Frankhouser's probation revocation proceedings had to be filed on or before January 29, 2016, or allege facts to support one of the statutory exceptions.

Since Ms. Frankhouser's current PCRA petition was not filed within one year of either the date her underlying conviction became final or the date her sentence as a result of the revocation proceedings became final and she has not alleged facts to support any of the statutory exceptions, her PCRA petition is untimely. Therefore, the court lacks jurisdiction to hold an evidentiary hearing or grant any relief in this case.⁴

Furthermore, the fact that the court entered an order on July 2, 2015 amending the grading of the retail theft under Information 1756-2001 and clarifying the credit for time served does not alter this analysis, as Ms. Frankhouser is not challenging any aspect of the July 2, 2015 order.⁵

⁴ Even if the PCRA petition had been filed in a timely manner, Ms. Frankhouser is not entitled to relief because most, if not all, of her issues lack merit. For example, Ms. Frankhouser argues that all of her retail theft charges should have been graded as misdemeanors due to the value of the items taken. This argument is clearly without merit. Retail theft constitutes a felony of the third degree when the offense is a third or subsequent offense, regardless of the value of the merchandise. 18 Pa.C.S.A. §3929(b)(iv). Ms. Frankhouser had at least two prior convictions for retail theft. See CP-41-CR-0001682-1996; CP-41-CR-0000896-1995. Therefore, all of her retail theft convictions should have been graded as felonies of the third degree.

⁵ In his motion to withdraw, PCRA counsel questioned whether the court had jurisdiction to enter this order. The court entered this order pursuant to its inherent authority to correct patent and obvious errors. See *Commonwealth v. Holmes*, 933 A.2d 57 (Pa. 2007). Ms. Frankhouser pled guilty to retail theft graded as a misdemeanor of the first degree under Information 1756-2001. The statutory maximum sentence for a misdemeanor of the first degree is five years. 18 Pa.C.S.A. §1104. Therefore, the court committed a patent and obvious error when it sentenced Ms. Frankhouser to two to seven years of incarceration on this offense.

ORDER

AND NOW, this ___ day of December 2016, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court will not schedule an evidentiary hearing in this matter and the parties are hereby notified of the court's intent to dismiss the PCRA petition on the basis that it is untimely. Ms. Frankhouser 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)
Donald F. Martino, Esquire
Ann Frankhouser
1106 Allegheny Street, Jersey Shore PA 17740
Gary Weber, Esquire (Lycoming Reporter)
Work file