

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

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	<b>CR</b>	<b>1450-2014</b>
	:		<b>1498-2014</b>
v.	:		<b>395-2015</b>
	:		<b>401-2015</b>
<b>JOHN A. DRUMMOND</b>	:		
<b>Defendant</b>	:	<b>PCRA</b>	

**OPINION AND ORDER**

On April 20, 2016, Counsel for the Defendant filed a Petition to Withdraw from Representation of Post-Conviction Collateral Relief pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super.1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant has failed to raise any meritorious issues in his PCRA Petition, and his petition should be dismissed.

***Background***

This request for Post Conviction Relief is in regards to the four docket numbers in the above caption. After various pleas, and a criminal trial, the following convictions and sentences ensued: Petitioner Drummond entered a plea of guilty to two (2) counts of Harassment, a summary offense; and two (2) counts of Possession with the Intent to Deliver, each a felony of the third degree. Petitioner went to trial on a DUI and related charges and was found guilty by a jury on June 16, 2015.

For the summary offenses of Harassment, Petitioner Drummond was sentenced to pay a fine of \$25.00 for each offense; and the cost of prosecution, for each offense.

Petitioner Drummond received a sentence of one (1) to five (5) years on the DUI conviction and a sentence of 60 days on the Driving under Suspended License, DUI related

conviction. Petitioner received time credit for 143 days previously served on the DUI and related offenses. The one (1) to five (5) year sentence for the DUI and DUI related convictions was to run consecutive to any other sentences he received on his sentencing day of October 29, 2015.

For the drug related convictions, Petitioner Drummond received a sentence, on October, 29, 2015, of state incarceration, the minimum of which was two (2) years and the maximum of which was four (4) years. Petitioner Drummond was given credit for time served from February 26, 2015, through April 5, 2015 [eight (8) days] and from May 6, 2015, through June 16, 2015, [41 days], for his two (2) – four (4) min/max sentence. Guilty Plea/Sentence, 10/29/15, p. 17. Petitioner Drummond was represented by a Public Defender at trial. Petitioner neither filed post-sentence motions nor took a direct appeal to the Superior Court after his order of sentence on October 29, 2015. Rather he sent a letter to the court asserting that he did not get the correct time credit on his sentence. The court treated this letter as a timely Petition for Post Conviction Relief, received within one year of when judgment of sentence became final and assigned the Petitioner counsel in accordance with Pa.R.Crim.P. 904(C).<sup>1</sup>

After correspondence with court appointed counsel, Petitioner raises three issues in his request for post-conviction relief:

- (1) Whether the trial erred in failing to give time credit for all of the days that Defendant was incarcerated leading up to his sentencing on October 29, 2016.
- (2) Whether the trial court erred in assessing the crime victim compensation/victim service fee on the summary convictions for Harassment under docket numbers CR-1450-2014 and CR-395-2015.

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<sup>1</sup> “when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant’s first petition for post-conviction collateral relief.” Pa.R.Crim.P. 904.

(3) Whether there was ineffectiveness assistance of counsel as Defendant alleges that his Counsel told him his sentences would run concurrent rather than consecutive.

***Whether the trial court erred in assessing the crime victim compensation/victim service fee on the summary convictions for Harassment under docket numbers CR-1450-2014 and CR-395-2015.***

The Trial Court sentenced Defendant to a fine of \$25 for both counts of harassment pursuant to its statutory authority to do so. 42 Pa.C.S. § 9726 (2016) Fines. The Trial Court made no mention of the Crime Victims Compensation (Act 96 of 1984) [\$35] or the Victim Witness Service Act (Act 111 of 1998) [\$25] and merely stated that the “Defendant pay the costs of prosecution”. Sentencing Order p. 2 10/29/2015. Even if the Trial Court had not mentioned the costs of prosecution in its sentencing order, the Clerk of Courts would have assessed the Cost of Prosecution pursuant to her statutory mandate to do so by Act 84. 42 Pa. C.S. § 9728(b) and (b.2).

Drummond argues that deductions for the Crime Victim Fund are not appropriate because “they are summary offense charge it ain’t a state sentence on them.” Letter from Inmate Drummond to Trial Court dated 1/18/16. Section 1101 of the Crime Victims Act expressly provides:

(a) Imposition.

(1) A person who pleads guilty or nolo contendere or who is convicted of a crime shall, in addition to costs imposed under 42 Pa.C.S. § 3571(c) (relating to Commonwealth portion of fines, etc.), pay costs of at least \$60 and may be sentenced to pay additional costs in an amount up to the statutory maximum monetary penalty for the offense committed.

....

(b) Disposition.

(1) There is established a special nonlapsing fund, known as the Crime Victim's Compensation Fund. This fund shall be used by the Office of Victims' Services for payment to claimants and technical assistance. Thirty-five dollars of the costs

imposed under subsection (a)(1) and (2) plus 30% of the costs imposed under subsection (a)(1) which exceed \$60 shall be paid into this fund. All costs imposed under subsection (a)(3) shall be paid into this fund.

....

(c) Payment. This cost shall be imposed notwithstanding any statutory provision to the contrary.

....

(e) Court order. No court order shall be necessary in order for the defendant to incur liability for costs under this section. Costs under this section must be paid in order for the defendant to be eligible for probation, parole or accelerated rehabilitative disposition. 18 P.S. § 11.1101 (text emphasis added).

Title 204 Chapter 35 of the Pennsylvania Administrative Code establishes the order for the distribution of funds collected by the Criminal Division of Courts of Common Pleas and any other entity on behalf of the Court Using the Common Pleas Criminal Court Case Management System (CPCMS). It establishes that payment first go to any collection agency fees, and then to the Crime Victim Compensation Fund and the Victim Witness Services Act next, but only in cases in which the defendant has been sentenced to incarceration, probation or is admitted into accelerated rehabilitative disposition program (See 18 P.S. § 11.1101). 35 Pa. Bull. 3542.

Otherwise, these costs shall be distributed in accordance with subsection (A)(6) of these regulations. 35 Pa. Bull. 3542. Subsection(A)(6) says that all other fines, fees, costs, reparations, penalties and other remittances except for judgment or satisfaction fees shall be distributed based upon a pro rata formula. In other words, if Defendant is sentenced to incarceration, probation, or ARD, the costs Associated with the Crime Victims Act are paid in priority; if not, then they are paid on a pro rata basis. It does not mean that they are not paid at all. Additionally, Section (c) of the Crime Victims Act says that these \$60 in fees must be paid “notwithstanding any statutory provision to the contrary” so even if it looks like there is a colorable statutory based argument that Defendants do not have to pay Crime Victims Act costs when they have pled guilty and are

sentenced to summary offenses, the Crime Victims Act itself supersedes such provisions. See Crime Victims Act. 18 P.S. § 11.1101 Payment.

***Whether the trial erred in failing to give time credit for all of the days that Defendant was incarcerated leading up to his sentencing on October 29, 2016.***

Credit for Time Served is governed by Section 9760 of Title 42 of the Pennsylvania Consolidated Statutes. The court is statutorily required to give credit against the maximum term and any minimum term to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal. 42 Pa.C.S. § 9760. Defendant did receive credit for the time he spent incarcerated on DUI charges from August 28, 2014, to September 5, 2014, and June 17, 2015, to October 28, 2015. Guilty Plea/Sentence Transcript, 10/29/2015, p.20. If Defendant were not given proper credit for time served, that possibly would lead to a sentence greater than lawful maximum, but as Defendant was found guilty of a first degree misdemeanor and pled guilty to two third degree felonies, the former having a maximum sentence of five years and the latter two have maximum sentences of seven (7) years, and his min/ max on the M1 being one to five and his min max on the latter two being two to four, he is in no danger of being sentenced to something greater than the lawful maximum. He simply was not. As the trial court stated to Defendant during sentencing

THE COURT: So then I am just going to go by what [Defense Counsel] has here on the face sheet of the colloquy, that your total exposure, that means just adding all the maximums up, you're looking at 40 years in jail or a \$400,600 fine of both. You understand that?

THE DEFENDANT: Yes, ma'am. Guilty Plea/Sentence, 10/29/14, p.4.

Furthermore, any complaints regarding credit for time served could have been brought directly to the court through post sentence motions and/or the direct appeal process which the court advised him he could do. Guilty Plea/Sentence, 10/29/15, p. 19. Defendant's failure to bring this issue up during the direct appeal means he has waived it. See 42 Pa C.S. § 9544(b). Issues waived.

***Whether there was ineffectiveness assistance of counsel as Defendant alleges that his Counsel told him his sentences would run concurrent rather than consecutive.***

Defendant's counsel did ask that Defendant's sentences on the DUI conviction and drug convictions run concurrent. When the Public Defender presented argument at the sentencing proceeding, she argued what Defendant continues to argue to Court in his 1/18/16 letter:

MS. DAVIS: Mr. Drummond reports to me that he has a mother that he cares for and that she is quite ill. He's most anxious to be back into the community so that he can care for her. He understands that under this plea agreement he's looking at two years minimum in a state correctional institution. We would just ask that the Court keep all of those things in mind when sentencing him to the companion DUI case. We would ask that that run concurrent to the state correctional sentence. If the Court is not inclined to do so we would ask the Court to sentence him to the bottom end of the standard range on that, Your Honor, and I think that is basically all I have to say for Mr. Drummond. p. 13-14.

The District Attorney knew that the Public Defender was going to argue for concurrent sentences and stated as much. There was no agreement between the District Attorney and Public Defender to a consecutive sentence; and, even if there were such an agreement, it was within the power of the court to not accept that agreement as Defendant was made aware by the Trial Court.

MR. BIICHLE: I believe that that Defense is going to argue that it should run concurrent and obviously the Commonwealth would argue that it should be consecutive. p. 4-5.

And the Court stated to Mr. Drummond

THE COURT: So, Mr. Drummond, you understand that there is no agreement as to how these three charges that you're pleading guilty to today and the one that you had previously pled guilty to [found guilty by jury] how they are to be sentenced, it's going to be totally up to me. p. 5.

Later the Court states

...when an individual takes a trial that means they're reluctant to accept responsibility. It doesn't mean they get a longer sentence, it just means that when it comes to consecutive or concurrent I'm more inclined to go consecutive on these cases...I'm going to sentence you consecutive with the DUI and the other cases. p. 16.

To succeed in an ineffectiveness of assistance of counsel claim in the Post Conviction Relief proceeding, Defendant, or his PCRA counsel would need to show by the preponderance of the evidence that Defendant's conviction or sentence resulted from ineffective assistance of counsel that so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa.C.S. § 9543. On June 16, 2015, a jury found Defendant guilty of his DUI charge and he pled guilty to the two Possession with Intent to Deliver charges. The Court fails to see anywhere on the record where it was any action of counsel that so undermined the path to these convictions that the convictions could be questioned.

### ***Conclusion***

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pa.R.Crim.P. 907(1), the parties are hereby notified of this Court's intention to deny the Defendant's PCRA Petition. The Defendant 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.

**ORDER**

**AND NOW**, this 31st day of May, 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 April 20, 2016, is hereby GRANTED and Donald Martino, Esq. may withdraw his appearance in the above captioned matter.

BY THE COURT,

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Nancy L. Butts, President Judge

cc: DA  
Donald Martino, Esq.  
John Andrew Drummond MH1912  
SCI Chester  
500 E. Fourth Street  
Chester, PA 19013