

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1008-2013
vs. :
 : CRIMINAL DIVISION
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 : Notice of Intent to Dismiss PCRA

OPINION AND ORDER

This matter came before the court on Defendant's Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

On June 13, 2013, police responded to a report of an unresponsive male at a residence on Penn Street in the city of Williamsport. When they arrived at the residence, the officers found two children, ages 8 and 3, alone on the first floor and, on the second floor, an unresponsive male with fresh needle marks on his arm, a needle in his pocket and an empty blue bag with heroin residue nearby. The 8 year old child told the police that he was hungry and wanted to ask his dad for something to eat but his dad wouldn't answer. The 2 year old had no pants on, and the house was in disarray with common items dangerous to children lying about where the children could access them. As a result of this incident, Defendant Joel Kendall was charged with possession of drug paraphernalia, two counts of recklessly endangering another person, and two counts of endangering the welfare of children.

On July 15, 2013, Kendall entered a guilty plea to recklessly endangering another person, a misdemeanor of the second degree, and was sentenced to incarceration in a state correctional institution for 12 to 24 months, to be served consecutive to any parole violation Kendall received from the Pennsylvania Board of Probation and Parole.

Sometime in March 2015, Kendall wrote a letter to a paralegal in the Lycoming County Public Defender's Office asking her to file a PCRA on his behalf, because his attorney told him his prior record score (PRS) was a RFEL, but he believed his PRS was only a five. According to Kendall, the guidelines are a county sentence with the lower PRS and not a two year state sentence.

The Public Defender's Office forwarded the letter to the court and requested the appointment of a conflict counsel, because Kendall had been represented by an assistant public defender and he was claiming that she was ineffective. The court treated the letter as a PCRA petition, appointed counsel to represent Kendall, and gave counsel the opportunity to file an amended petition or a *Turner*¹/*Finley*² no merit letter. Counsel then filed a motion to withdraw, which included a no merit letter, because counsel found that Kendall's petition was untimely.

After an independent review of the record, the court agrees that Kendall's petition is untimely.

The timeliness of a PCRA petition must be addressed as a threshold matter. *Commonwealth v. Callahan*, 103 A.3d 118, 121 (Pa. Super. 2014). 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;

¹ *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988).

² *Commonwealth v. Finley*, 379 Pa. Super. 390, 550 A.2d 213 (1988).

(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 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). “[A]ny petition filed outside of the one-year jurisdictional time bar is unreviewable unless it meets certain listed exceptions and is filed within sixty days of the date the claim first could have been presented.” *Commonwealth v. Lesko*, 609 Pa. 128, 15 A.3d 345, 361 (2011). To avail himself of one of the statutory exceptions, a petitioner must 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). “[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).

For PCRA purposes, "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." 42 Pa.C.S. §9545(b)(3).

Kendall pled guilty and was sentenced on July 13, 2013. He did not file any post sentence motions or an appeal. Therefore, his sentence became final on August 13, 2013. To be considered timely, Kendall's PCRA petition needed to be filed on or before August 13, 2014 or Kendall needed to alleged facts to support one of the statutory exceptions to the one year filing period. Kendall's petition was not filed by August 13, 2014 and he did not allege facts to support any of the exceptions. Therefore, Kendall's petition is patently untimely, and the court lacks jurisdiction to hold an evidentiary hearing or grant him any relief.³

The court also will grant counsel's motion to withdraw.

³ Even if his petition had been timely filed, Kendall would not be entitled to relief, because he was not prejudiced. His plea agreement was for a 12 month minimum sentence. The offense gravity score for recklessly endangering another person is a 3. With a PRS of 5, the standard guideline range for Kendall's minimum sentence would be 6 to 16 months. Therefore, his 12-month minimum sentence would still be within the standard guideline range. The minimum sentence cannot exceed one-half of the maximum sentence. 42 PA. CONS. STAT. ANN. §9756(b). Therefore, the court was required to impose a maximum sentence of two years in order to comply with the plea agreement and section 9756(b).

ORDER

AND NOW, this ___ day of January 2016, 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 hold an evidentiary hearing or grant any relief to Kendall. 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 Kendall's PCRA petition. Kendall 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 motion to withdraw. Kendall may hire private counsel or represent himself, but the court will not appoint counsel to represent him unless he shows in a response that his petition is timely.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Donald Martino, Esquire
Joel Kendall, MC 1401
SCI Coal Township, 1 Kelley Drive, Coal Township PA 17866