

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-2044-2015
vs. :
: CRIMINAL DIVISION
: Notice of Intent to Dismiss PCRA
CHRISTOPHER KEEFER, : Without Holding an Evidentiary Hearing
Defendant : and Granting Counsel's Motion to
: Withdraw

OPINION AND ORDER

On December 7, 2015, Defendant pled guilty to driving under the influence with a high rate of alcohol. On May 10, 2016, Defendant was sentenced to an indeterminate term of incarceration, the minimum of which was three (3) months and the maximum of which was six (6) months. The sentence was run consecutive to any and all other sentences that Defendant was serving and because it aggregated to a state sentence, Defendant was required to serve his incarceration in a State Correctional Institution.

Defendant did not file a post sentence motion nor did Defendant file an appeal.

On June 28, 2017, Defendant forwarded a letter to the Lycoming County Prothonotary requesting Post Conviction Relief. By Order of Court dated June 30, 2017, the court appointed counsel to represent Defendant.

As this was Petitioner's first petition, he was entitled to counsel. The court gave counsel the opportunity to file an amended PCRA petition or a no merit letter.

On September 12, 2017, PCRA counsel filed a motion to withdraw, which included 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)(en banc).

After an independent review of the record, the court is constrained to find that the petitioner is not entitled to relief.

The PCRA is the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for that purpose. 42 Pa. C.S.A. § 9542; see also *Commonwealth v. Turner*, 80 A.3d 754, 770 (Pa. 2013). Any petition or request for relief that challenges an individual's conviction or sentence filed after the judgment of sentence becomes final must be treated as a PCRA petition. *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002).

The timeliness of a PCRA petition must be addressed as a threshold matter. *Commonwealth v. Callahan*, 101 A.3d 118, 121 (Pa. Super. 2014). The time limits of the PCRA are jurisdictional in nature. *Commonwealth v. Howard*, 567 Pa. 481, 485, 788 A.2d 351, 356 (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 (60) 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, petitioner had to allege facts in his petition to show that one of the 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 (2001).

[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. § 9543 (b) (3).

The petitioner was sentenced on May 10, 2016. The Order became final thirty (30) days after it was filed because, at that point, the appeal period expired. That date is June 10, 2016. Accordingly, the PCRA petition had to be filed on or before June 10, 2017.

The petition filed by Petitioner was dated June 26, 2017. It was filed on June 28, 2017. It was postmarked from the Pennsylvania Department of Corrections on June 26, 2017. The petition is untimely.

Further, none of the exceptions set forth in the PCRA apply. 42 Pa. C.S.A. § 9545 (b).

In his PCRA petition, Petitioner argues that the United State Supreme Court decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) provides relief to him. Generally speaking, in *Birchfield*, the Supreme Court held that the search incident to arrest doctrine permits law enforcement to conduct warrantless breath tests but not blood tests on suspected drunk drivers. *Birchfield* was decided on June 23, 2016. Therefore, there is no reason that Petitioner could not have filed his PCRA petition on or before June 10, 2017. Petitioner waived his *Birchfield* claim by failing to assert it in a timely manner.

Petitioner also cannot avail himself of the exception contained in 42 Pa.C.S.A. §9545(b)(1)(iii) because he did not file his PCRA petition within 60 days after *Birchfield* was decided and the Court in *Birchfield* did not hold that the decision applied retroactively.

ORDER

AND NOW, this ___ day of December 2017, as it appears to the court the Petitioner's petition is untimely and the court lacks jurisdiction to address the merits of Petitioner's claim, the court gives Petitioner notice of its intent to dismiss the petition without holding an evidentiary hearing. Petitioner has twenty (20) days within in which to response to this proposed dismissal. If Petitioner does not respond or if his response does not allege facts which show that his petition is timely, the court will enter a final Order dismissing his petition without holding an evidentiary hearing.

The court also grants PCRA counsel's motion to withdraw from this case. Defendant is notified that he may represent himself or he may hire private counsel to represent him.

If Petitioner files a response which alleges facts that arguably show his petition is timely, the court will reappoint counsel to represent petitioner and schedule an evidentiary hearing to give petitioner the opportunity to present evidence in support of the timeliness of his petition.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Don Martino, Esquire

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Work file