

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR- 1818-2007
	:	CR-1494-2011
vs.	:	
	:	
	:	
DANIEL CASSIDY,	:	Notice of Intent to Dismiss PCRA
Defendant	:	Without Holding An Evidentiary Hearing

OPINION AND ORDER

This matter came before the court on the defendant’s motion to modify and/or vacate sentence filed on February 16, 2018, which the court treated as a Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

On October 3, 2008, the defendant pled guilty to two counts of theft by unlawful taking, graded as felonies of the third degree, under information 1818-2007. On March 13, 2009, he was sentenced to two years of probation on each count to be served consecutive to each other and consecutive to the defendant’s sentence of 11 ½ to 23 months incarceration under information 569-2008.

In October 2011, the defendant was arrested and charged with eight counts of access device fraud under information 1494-2011. On May 8, 2012, the defendant pled guilty to one count of access device fraud graded as a felony of the third degree and he was sentenced. The defendant’s commission of this new crime violated his probationary sentences under information 1818-2007. His probation was revoked and he was re-sentenced.

On May 17, 2012, the court amended the sentences it imposed on the defendant. The court sentenced the defendant to six to twelve months of incarceration on each count of theft by unlawful taking under information 1818-2007 to be served consecutive to each other. The

court sentenced the defendant to eighteen months to six years of incarceration for access device fraud under information 1494-2011. The court ordered this sentence to be served consecutive to the sentences imposed under information 1818-2007. The aggregate sentence imposed was two and one-half (2 ½) years to eight (8) years' incarceration in a state correctional institution with 390 days credit for time served. The defendant was RRRI eligible and his RRRI minimum was twenty-two and one-half (22 ½) months. The defendant did not file any post-sentence motions or an appeal.

On February 16, 2018, the defendant filed his motion to modify and/or vacate sentence, which the court treated as a PCRA petition. The court appointed counsel to represent the defendant and directed counsel 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)(en banc). Counsel filed a motion to withdraw which included a *Turner/Finley* no merit letter.

After an independent review of the record, the court concludes that it lacks jurisdiction to address the defendant's claims.

In his petition, the defendant asserts (1) the Pennsylvania Board of Probation and Parole (PBPP) erroneously revoked his parole and violated the "contract" of his sentence by arbitrarily adding days to the defendant's maximum sentence date; and (2) a nonspecific claim of ineffective assistance of counsel by Attorney Matthew Welickovitch related to his failure to respond to the defendant.

This court lacks jurisdiction to address any of the defendant's claims related to the revocation of his state parole or the PBPP's or the Department of Corrections' calculation of

his maximum sentence. When a defendant's maximum sentence is two years or more, the PBPP has exclusive authority over the defendant's parole and the Commonwealth Court has exclusive jurisdiction over any appeals of the PBPP's parole orders. *Commonwealth v. Vega*, 754 A.2d 714, 718 (Pa. Super. 2000)(appeals from administrative parole orders are within the exclusive jurisdiction of the Commonwealth Court; the PCRA is not the proper vehicle to seek review of the PBPP's decisions); *Commonwealth v. Perry*, 563 A.2d 511, 513 (Pa. Super. 1999)(a challenge to the Department of Corrections or the PBPP's computation or construction of a sentence may not be brought by a PCRA petition); *Commonwealth v. McDermott*, 547 A.2d 1236, 1240 (Pa. Super. 1988)(appeals from administrative parole orders are within the exclusive jurisdiction of the Commonwealth Court; attempts to circumvent the Commonwealth Court's jurisdiction over administrative parole matters via Post Conviction Hearing Act and *habeas corpus* petitions have been rejected). Therefore, this court lacks the authority to address any of the defendant's claims related to the revocation of his state parole or the calculation of his maximum sentence. The only way the defendant could challenge the PBPP's actions was to file an appellate petition for review with the Commonwealth Court as he was directed to do in the letter from the PBPP to the defendant mailed January 10, 2018.

This court also lacks jurisdiction to address any claims that Attorney Welickovitch was ineffective because the defendant did not file his PCRA petition in a timely manner.

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;

(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.

424 Pa. C.S. §9545(b)(1). These time limits are jurisdictional in nature. “[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 [PCRA] court has no power to address the substantive merits of a petitioner's PCRA claims.” *Commonwealth v. Zeigler*, 148 A.3d 849, 853 (Pa. Super. 2016)(quoting *Commonwealth v. Gamboa-Taylor*, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000)).

Attorney Welickovitch represented the defendant in these cases in 2012. He did not represent the defendant during his state parole revocation proceedings which were held at SCI-Benner in Centre County. The court issued the defendant’s amended sentencing order on May 17, 2012. The defendant did not file post sentence motions or an appeal. Therefore, the defendant’s judgment of sentence became final on or about June 18, 2012.

To be considered timely, the defendant had to either file his petition on or before June 18, 2013 or allege facts to support one of the three limited exceptions. The cover letter to the defendant’s petition is dated January 31, 2018. Even if the court utilized that date as the

filing date of the defendant's petition, it is untimely by over 4 ½ years. The defendant also does not allege any facts to support any of the statutory exceptions. Accordingly, the defendant's petition is patently untimely, and this court lacks jurisdiction to hold an evidentiary hearing or grant him any relief.

ORDER

AND NOW, this ___ day of July 2018, the parties are hereby notified of this Court's intention to deny the defendant's petition without holding an evidentiary hearing. 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.

The court grants Attorney Martino's motion to withdraw as counsel. The defendant is notified that he may represent himself or he may hire private counsel but the court will not appoint counsel to represent the defendant unless his response to this order shows that his petition is timely

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)
Donald Martino, Esquire
Daniel Cassidy, c/o Lycoming County Prison
Gary Weber, Esquire (Lycoming Reporter)
Work file