

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-889-2015  
:   
vs. : CRIMINAL DIVISION  
:   
:   
CLAYTON POLICASTRO, : Notice of Intent to Dismiss PCRA  
Defendant : Without Holding An Evidentiary Hearing

**OPINION AND ORDER**

On July 16, 2018, the Lycoming County Clerk of Courts received a letter dated July 12, 2018, from Clayton Policastro (hereinafter “Petitioner”). In the letter, Petitioner seeks credit for time served from January 5, 2016 until September 23, 2016. The Clerk forwarded the letter to the court. The court must treat Petitioner’s letter as his second Post Conviction Relief Act (PCRA) petition. *Commonwealth v. Beck*, 848 A.2d 987, 989 (Pa. Super. 2004); *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002).

By way of background, on January 5, 2016, Petitioner pled guilty to theft by unlawful taking, a felony of the third degree. Pursuant to the parties’ negotiated plea agreement, the court sentenced Petitioner to undergo incarceration in a state correctional institution for a minimum of one year and a maximum of 30 months. The court awarded Petitioner credit for time served from May 15, 2015 to May 27, 2015. Petitioner did not file a post sentence motion or an appeal.

On October 14, 2016, Petitioner filed a petition for credit, which the court treated as Petitioner’s first PCRA petition. The court appointed counsel to represent Petitioner, and counsel filed of 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 and based on the documents attached to that petition, the court found Petitioner was not entitled to credit for time served from April 8, 2016 to September 23, 2016 in this case, because he was serving a state “parole hit” or “back time” on a prior case as a result of his conviction in this case. The court gave Petitioner notice of its intent to dismiss his petition without holding an evidentiary hearing. Petitioner did not respond to that notice, and the court dismissed his first PCRA petition on October 12, 2017.

In his current petition, Petitioner again seeks credit for time served, but this time he seeks credit from January 5, 2016 to September 23, 2016.

After a review of the record, the court finds Petitioner’s second PCRA is untimely and, in the alternative, his claims are previously litigated or waived.

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;

(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 (2002); *Commonwealth v. Palmer*, 814 A.2d 700, 704-05 (Pa. Super. 2002). “[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 (2000).

The court sentenced Petitioner on January 5, 2016. He did not file a post sentence motion or an appeal. Therefore, his judgment of sentence became final thirty days thereafter, i.e. on February 4, 2016. To be considered timely, Petitioner had to file his current petition on or before February 6, 2017, or allege facts to support one of the three exceptions. Even if the court considered the petition filed as of July 12, 2018, it is patently untimely and it does not assert any of the statutory exceptions. Therefore, the court lacks jurisdiction to hold an evidentiary hearing or to grant Petitioner any relief.

In the alternative, any issues with respect to credit for time served were previously litigated or waived. “[A]n issue has been previously litigated if ... (3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.” 42 Pa. C.S.A. §9544(a). “[A]n issue is waived if the petitioner could have raised it but failed to do

so...in a prior state post conviction proceeding.” 42 Pa. C.S.A. §9544(b). To the extent Petitioner seeks the same credit as in his first PCRA petition, the issue has been previously litigated. To the extent Petitioner seeks additional credit, the issue is waived.

**ORDER**

AND NOW, this 11<sup>th</sup> day of September 2018, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court finds that no purpose would be served by conducting a hearing. The parties are hereby notified of the court's intention to dismiss the Petition. Petitioner 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,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
Clayton Policastro, MR-6230  
SCI Frackville, 1111 Altamont Blvd, Frackville PA 17931  
Gary Weber, Esquire (Lycoming Reporter)  
Work file