

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

vs.

MATTHEW SMITH,  
Defendant

/  
: No. CR-434-2011; CR-905-2015

:

: CRIMINAL DIVISION

:

: Notice of Intent to Dismiss PCRA petition  
: and Order Granting Counsel's Motion to  
: Withdraw

**OPINION AND ORDER**

This matter came before the court on Matthew Smith's Post Conviction Relief Act (PCRA) petition, wherein he sought credit for time served.

By way of background, on October 7, 2011, Matthew Smith (hereinafter "Petitioner") pled guilty to delivery of a controlled substance (marijuana), an ungraded felony, in case CR-434-2011. On October 27, 2011, the court imposed a split sentence of 7 to 24 months' incarceration plus three years' consecutive probation. The court awarded Petitioner credit for time served from March 21, 2011 to October 26, 2011.

In case CR-905-2015, on February 16, 2016, Petitioner pled guilty to possession of drug paraphernalia, an ungraded misdemeanor. The commission of this new offense violated Petitioner's probation in case 434-2011.

On February 18, 2016, the court revoked Petitioner's probation in case 434-2011 and re-sentenced him to 1 to 3 years' incarceration in a state correctional institution. The court also imposed a consecutive sentence of 30 days to 1 year incarceration in case 905-2015. The aggregate sentence imposed was 1 year 30 days to 4 years with credit for time served from May 18, 2015 to February 17, 2016.

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On February 29, 2016, Petitioner filed a post sentence motion in case 905-2015. In this motion, Petitioner challenged the court's dismissal of his motion to suppress as untimely, and he contended the court should have held a hearing on the motion in the interests of justice. On March 9, 2016, the court summarily denied Petitioner's post sentence motion. The court noted that Petitioner waived any issue regarding the legality of the search when he pled guilty. On March 17, 2016, Petitioner filed a notice of appeal in case 905-2015. On March 28, 2017, the Pennsylvania Superior Court affirmed Defendant's judgment of sentence.

On March 5, 2018, Petitioner filed his PCRA petition. Petitioner alleged: "When I was resentenced on SIP to a 1 to 3 years the reasons I was resentenced for I had already did jail time for them and I did not receive time credit for it on my resentence."

As this was Petitioner's first PCRA petition, the court appointed counsel to represent Petitioner and directed counsel to either file 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*). PCRA counsel filed a motion to withdraw as counsel, which included a *Turner/Finley* no merit letter.

After an independent review of the record, the court finds that Petitioner is not entitled to relief.

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).

In case 494-2011, Petitioner was sentenced on February 18, 2016. He did not file a post-sentence motion or an appeal in this case. Therefore, his judgment of sentence became final on the first business day thirty days thereafter, i.e., Monday, March 21, 2016. To

be considered timely, Petitioner had to file his PCRA petition on or before March 21, 2017 or allege facts to support one of the statutory exceptions. Petitioner, however, did not file his PCRA petition until March 5, 2018 and he did not allege facts to support any of the exceptions. Therefore, with respect to case 434-2011, the PCRA petition is untimely, and the court lacks jurisdiction to hold an evidentiary hearing or grant Petitioner any relief.

Although the PCRA petition is timely with respect to case 905-2015, Petitioner is not entitled to relief because his petition lacks merit. Petitioner was never sentenced to the State Intermediate Punishment (SIP) program. Therefore, he did not serve jail time with respect to SIP for which he failed to receive credit. Neither Petitioner nor PCRA counsel sets forth the dates for which he is seeking credit for time served. However, the court awarded Petitioner all the credit for time served to which he was entitled.

The court notes that Petitioner was incarcerated from March 31, 2011 to October 26, 2011 in case 434-2011. Petitioner's PCRA is untimely with respect to case 434-2011. Even if the petition had been timely filed, though, Petitioner is not entitled to credit for this time on his probation revocation, because the time from March 31, 2011 to October 26, 2011 was used to satisfy the incarceration portion of his original split sentence.

*Commonwealth v. Bowser*, 783 A.2d 348, 350 (Pa. Super. 2001), *appeal denied*, 798 A.2d 1286 (Pa. 2002) ("Credit has been given once; had no credit been given, [Bowser] would not have been paroled ..., and his probation would not have begun for some months thereafter. We see no reason to award duplicate credit in the second component of the sentence.").

## **ORDER**

AND NOW, this 12 day of September 2018, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, as no purpose would be served by conducting a hearing, none will be scheduled and the parties are hereby notified of this 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.

The court also grants PCRA counsel's petition to withdraw. Petitioner may hire private counsel or represent himself, but the court will not appoint counsel to represent him in this matter.

By  The Court,

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Marc F. Lovecchio, Judge

cc: ~~✓~~ Kenneth Osokow, Esquire (DA)  
~~✓~~ Donald F. Martino, Esquire  
~~✓~~ Matthew Smith, c/o Lycoming County Prison  
~~✓~~ Work file