

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-1229-2015
	:
vs.	: CRIMINAL DIVISION
	:
DERRICK BOONE,	: Notice of Intent to Dismiss PCRA and
Defendant	: Order Granting IFP and Denying
	: Appointment of Counsel

OPINION AND ORDER

Before the court is the second Post Conviction Relief Act (PCRA) petition filed by Defendant Derrick Boone.

By way of background, on or about April 25, 2015, Boone was charged with one count of homicide, two counts of aggravated assault with a deadly weapon, one count of persons not to possess a firearm, one count of firearms not to be carried without a license, one count of possession of a weapon, two counts of simple assault, one count of voluntary manslaughter, two counts of aggravated assault, and one count of discharging a firearm into an occupied structure.

On November 28, 2017, Boone pled guilty to two counts of aggravated assault with a deadly weapon, felonies of the second degree; one count of persons not to possess firearms, a felony of the second degree; and voluntary manslaughter, a felony of the first degree. On that same date and in accordance with the negotiated plea agreement, the court sentenced Boone to 12 to 30 years' incarceration in a state correctional institution. Boone did not file a post sentence motion or a direct appeal.

Boone filed a timely first PCRA petition in which he asserted that his plea was not knowingly, voluntarily and intelligently entered and his counsel was ineffective.

Counsel was appointed to represent Boone. Counsel reviewed Boone's claims and filed a motion to withdraw which contained 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). The court reviewed counsel's no merit letter and, following an independent review of the record, agreed that Boone's first PCRA lacked merit. The court gave Boone notice of its intent to dismiss his first PCRA petition without holding an evidentiary hearing and granted counsel's motion to withdraw. The court advised Boone that he could hire private counsel or represent himself but it would not appoint counsel to represent him. Boone did not respond to the court's notice. The court dismissed Boone's first PCRA and advised Boone of his right to appeal. No appeal was filed.

On or about May 7, 2019, Boone filed his second PCRA petition. Boone asserted that his plea was not knowingly, voluntarily and intelligently entered and that plea counsel and PCRA counsel were ineffective. He asserted that counsels' ineffectiveness resulted in a violation of his constitutional rights and an illegal sentence. Furthermore, he claimed PCRA counsel was ineffective for failing to file an appeal.

The court lacks jurisdiction to hold an evidentiary hearing or to grant Boone any relief. Section 9545(b)(1) 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.

42 Pa. C.S.A. §9545(b)(1)(emphasis added). For PCRA purposes, “a judgment becomes final at the conclusion of direct review...or at the expiration of time for seeking the review.”

Boone was sentenced on November 28, 2017. He did not file a post sentence motion or an appeal. Therefore, his judgment became final on or about December 28, 2017. To be considered timely, Boone’s PCRA petition had to be filed on or before December 28, 2018 or he had to plead one of the exceptions. He did neither. Therefore, his second PCRA petition is untimely.

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). When 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 one year 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. 42 Pa. C.S.A. §9545(b); see also *Commonwealth v Gamboa-Taylor*, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000).¹

Even if Boone’s petition had been timely filed, he still would not be entitled to

¹The time limit for filing a claim pursuant to one of the exceptions was increased from 60 days to one year effective December 24, 2018. *Gamboa-Taylor* states the prior 60-day time limit, but otherwise is applicable.

relief. In addition to proving the timeliness of his petition, a PCRA petitioner must show that his claims were not previously litigated or waived. 42 Pa. C.S.A. §9543(a)(3). An issue is previously litigated if it has been raised and decided in a prior PCRA petition. 42 Pa. C.S.A. §9544(a)(3). An issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state postconviction proceeding. 42 Pa.C.S.A. §9544(b). Boone's claims regarding the validity of his guilty plea and trial counsel's ineffectiveness are either previously litigated or waived. They either were raised or could have been raised in Boone's first PCRA petition.

Boone's claim that PCRA counsel was ineffective for failing to file an appeal is completely meritless. The court permitted PCRA counsel to withdraw and advised Boone of that fact as well as the fact that his options were to represent himself or hire private counsel. Thereafter, the court advised Boone of his appeal rights. Any failure to file a PCRA appeal was Boone's fault, not the fault of PCRA counsel who no longer represented him.

ORDER

AND NOW, this ___ day of September 2019, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are hereby notified of the court's intention to dismiss the Petition. Boone 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 grant's Boone's motion for leave to proceed in forma pauperis.

The court denies Boone's application for appointment of counsel.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Derrick Boone, NF-3694
SCI-Houtzdale, PO Box 1000, Houtzdale PA 16698-1000
Gary Weber, Esquire (Lycoming Reporter)
Work file