

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR- 877-2010  
:   
vs. : CRIMINAL DIVISION  
:   
:   
ROBERT GRAHAM, : Notice of Intent to Dismiss Petition  
Defendant :

**OPINION AND ORDER**

This matter is before the court on the “Motion for Time Credit and Corrected Commitment” filed by Defendant Robert Graham (hereinafter “Graham”). The court must treat this motion as a petition filed under the Post Conviction Relief Act (PCRA).

The PCRA specifically states that it is “the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose... including habeas corpus and coram nobis.” 42 Pa.C.S.A. §9542. The PCRA provides an avenue for relief for claims that a conviction or sentence resulted from a constitutional violation that so undermined the truth-determining process that no reliable adjudication could have taken place or the imposition of a sentence greater than the lawful maximum. 42 Pa.C.S.A. §9543(a)(2)(i) and (vii). Any petition that is filed after the judgment becomes final must be treated as a PCRA petition. *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002).

In his petition, Graham seeks credit for time served from May 3, 2010 to August 6, 2010; October 7, 2010 to December 20, 2010; February 3, 2012 to May 29, 2012; and December 20, 2012 to February 2, 2012. In an attachment to the petition, Graham specifically asks for credit where he “paid \$3500 to the bail bond to be released on the

monitoring box and ankle transmitter from December 20, 2012 to February 2, 2012.”

The court cannot hold an evidentiary hearing or grant Graham any relief on his petition, because it is untimely.

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 Pennsylvania Superior Court affirmed Graham’s judgment of sentence on October 30, 2013. Graham had thirty days within which to file a petition for allowance of appeal to the Pennsylvania Supreme Court, but no such petition was filed. Therefore, Graham’s judgment became final on or about November 29, 2013.

To be considered timely, Graham had to have filed his current petition on or before December 1, 2014.<sup>1</sup> His petition was not filed until May 9, 2019. Therefore, his petition is facially untimely. Graham also does not allege any exception to the one-year limitation period.

Although an illegal sentence can never be waived, it must be asserted in a timely PCRA petition or the statute's jurisdictional limitation will prevent any court from addressing it. *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999)(Although the legality of a sentence is subject to review within the PCRA, any such claim must still first satisfy the PCRA's time limits or one of the exceptions thereto).

Since Graham's petition was filed after December 1, 2014 and he has not alleged sufficient facts to show that his case falls within one of the statutory exceptions, Graham's petition is untimely and the court lacks jurisdiction to hold an evidentiary hearing or to grant Graham any relief.

Even if the court had jurisdiction, it would not grant Graham the relief requested, because he waived his request for credit. Under the PCRA, "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post conviction proceeding." 42 Pa. C.S. §9544(b). Graham had ample opportunities to request credit previously. He could have requested credit for time served in a post sentence motion and appeal, or in his prior PCRA petitions.

Finally, Graham's claim lacks merit. In the sentencing order dated May 30, 2012 (and docketed June 6, 2012), the court awarded Graham credit for time served "from

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<sup>1</sup> November 29, 2014 would be one year from the date Graham's judgment of sentence became final, but that was a Saturday. Therefore, Graham would have had until the next business day, Monday, December 1, 2014 to

May 3, 201 to August 6, 2010; from October 7, 2010 to December 20, 2010; and from February 3, 2012 to May 29, 2012.” Graham is not entitled to credit for time served from December 20, 2012 to February 2, 2012. During this time, Graham was released on bail with electronic monitoring. A defendant is not entitled to credit for time served while on bail on an ankle monitor. *Commonwealth v. Kyle*, 874 A.2d 12, 22 (Pa. 2005)(time spent on bail release subject to electronic monitoring at home is not custody for purposes of credit for time served).

**ORDER**

AND NOW, this \_\_\_\_ day of May 2019, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, no purpose would be served by conducting an evidentiary hearing and none will be scheduled. The parties are hereby notified of this court's intention to dismiss the petition. Robert Graham 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 his petition.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
Robert Graham, KP-4522  
1590 Walters Mill Rd, Somerset PA 15510-0001  
Gary Weber, Esquire (Lycoming Reporter)  
Work file

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have filed a timely PCRA petition.