

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR- 1010-2015
vs. :
 : CRIMINAL DIVISION
 :
 :
 :
 : Notice of Intent to Dismiss PCRA
 : Without Holding An Evidentiary Hearing

OPINION AND ORDER

On or about April 30, 2020, the court received a letter from Defendant David Gehr. In his letter, Gehr contends that the offense gravity score and prior record score utilized at his sentencing hearing were wrong.

The court will treat the letter as Gehr’s second Post Conviction Relief Act (PCRA) petition. *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002)(“We have repeatedly held that the PCRA provides the sole means for obtaining collateral review, and that any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition.”); see also *Commonwealth v. Jackson*, 30 A.3d 516, 521 (Pa. Super. 2011). As a matter of law, however, the court cannot hold a hearing or grant Gehr relief.

Gehr’s petition is untimely. The timeliness of any PCRA petition is a jurisdictional requisite. *Commonwealth v. Beatty*, 207 A.3d 957, 961 (Pa. Super. 2019). A petitioner must file any PCRA petition, including a second or subsequent petition, within one year of the date the underlying judgment becomes final. 42 Pa.C.S.A. §9545(b)(1); *Beatty*, *id.* at 962. “[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.” 42 Pa. C.S.A. §9545(b)(3).

If the petitioner fails to file his petition within one year of that date, he must plead and prove one of the following three statutory exceptions:

(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. §9545(b)(1). Additionally, the petitioner must present his claimed exception within one year of the date the claim could have been presented. 42 Pa. C.S.A. §9545(b)(2).

“[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 [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.”

Commonwealth v. Gamboa-Taylor, 753 A.2d 780, 783 (Pa. 2000).

Gehr pleaded guilty on January 5, 2016. The trial court originally sentenced him on April 20, 2016. Gehr, through trial counsel, filed a motion in which he sought to withdraw his plea or, in the alternative, reconsideration of his sentence. The trial court denied Gehr’s motion to withdraw his guilty plea but granted reconsideration of sentence and ran his sentence of 18 months to five years for DUI concurrent, rather than consecutive, to his five to ten year sentence for persons not to possess a firearm. Gehr filed a direct appeal challenging his guilty plea. The Pennsylvania Superior Court rejected those challenges but

remanded for re-sentencing on his DUI conviction as the enhanced sentence for his chemical test refusal was illegal pursuant to *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). The trial court re-sentenced Gehr on August 10, 2017. Gehr did not file a post sentence motion or an appeal. Therefore, Gehr's judgment of sentence became final on September 11, 2017.

To be considered timely, Gehr had to file his current PCRA petition on or before September 11, 2018, or he had to assert one of the three statutory exceptions. He has done neither. Therefore, Gehr's petition is untimely, and the trial court lacks jurisdiction to hold an evidentiary hearing or grant Gehr any relief.

Furthermore, Gehr waived his claims. For PCRA purposes, 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 postconviction proceeding." 42 Pa. C.S. §9544(b). Gehr is challenging his prior record score and the offense gravity score for his persons not to possess conviction. Gehr claims that his prior record score included a receiving stolen property conviction that the author of the pre-sentence investigation report (PSI) incorrectly reported as a felony of the third degree instead of a misdemeanor of the second degree and included a simple assault conviction for which he was found not guilty.¹ He also claims that

¹ During the sentence reconsideration hearing on May 27, 2016, the court had its law clerk retrieve the court file for the simple assault offense (CR-309-1996), which also included DUI, resisting arrest and disorderly conduct offenses. See Transcript 5/27/16, at 34. Gehr was disputing both the simple assault and the resisting arrest. The court reviewed the file. The court acknowledged Gehr was acquitted of simple assault, but he was convicted of resisting arrest. Id. at 38. The court even showed Gehr and his counsel the relevant documents from the file. See id. at 37-38.

Furthermore, the errors in the PSI did not affect Gehr's prior record score. Gehr had a prior burglary conviction from 1988, which involved an entry into cabin adapted for overnight accommodation at which time no person was present. See CP-41-CR-0000219-1988. Therefore, the burglary would be a felony of the first degree, but not a completed crime of violence as defined in 42 Pa.C.S. §9714(g). He also had a misdemeanor receiving stolen property conviction, and five DUI convictions. Gehr would receive three points for the burglary conviction. 204 Pa. Code §§303.7(a)(2), 303.15. Gehr would receive four points (one point each) for his 2nd, 3rd, 4th and 5th DUI convictions. 204 Pa. Code §303.7(a)(4). He would also receive one point for his two "Other Misdemeanor Offenses" (his 1st DUI conviction and his receiving stolen property conviction). 204 Pa.

the offense gravity score for persons not to possess should have been a 9, and not a 10, because he did not have any bullets.² Gehr could have raised these claims in a timely post sentence motion, on direct appeal or in Gehr's first PCRA petition but did not. Gehr clearly was aware that the trial court utilized an offense gravity score of ten, because the trial court stated such on the record during the proceedings and Gehr attached a copy of the coversheet or first page of the guilty plea colloquy to his prior PCRA pleadings and responses. Gehr also would have known whether the firearm was loaded or whether he possessed any ammunition. As Gehr knew the relevant facts throughout the proceedings in this case, these claims are waived.

ORDER

AND NOW, this ___ day of July, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court notifies the parties of its intent to dismiss Gehr's petition/letter without holding an evidentiary hearing. Gehr may respond to this proposed dismissal within twenty (20) days. Any response must show how the petition is timely by alleging facts to support one of the statutory exceptions and that the claims are not waived. If no response is received within that time or if the response does not

Code §303.7(a)(5). Therefore, his true prior record score was an eight, but the guidelines cap the prior record score at five. 204 Pa. Code §303.4(a)(3).

²The guilty plea colloquy indicated that the offense gravity score was a 10, and Gehr stated repeatedly that he had the firearm in his vehicle for hunting. Typically, when one is hunting, he has ammunition so that he can shoot whatever animal he is hunting. Therefore, the court did not question the offense gravity score listed on the guilty plea colloquy. Even if counsel and the court misconstrued Gehr's statements, the court lacks jurisdiction to hold an evidentiary hearing or to grant Gehr any relief.

demonstrate that the petition is timely and the claims are not waived, the court will enter an order dismissing the petition.

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
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Work file