

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-151-2011  
vs. :  
: CRIMINAL DIVISION  
: ANTHONY LATTIMORE,  
: Defendant :  
:

**OPINION AND ORDER**

Anthony Latimore (hereinafter “Petitioner”) submitted documents to the Lycoming County Prothonotary and Clerk of Courts on or about August 19, 2020 and August 26, 2020. Although the documents are somewhat difficult to understand, it appears that Petitioner is seeking discovery and he is attempting to challenge his underlying conviction on the following grounds: his trial counsel was ineffective and the verdict was against the weight of the evidence. The court will treat these documents as a request for discovery and a second Post Conviction Relief Act (PCRA) petition.

After a review of the record, the court lacks jurisdiction to hold an evidentiary hearing or grant Petitioner any relief because his petition is patently untimely, Petitioner completed his sentence, and Petitioner waived his claims.

By way of background, on July 12, 2010, Petitioner was charged with various drug-related offenses arising out of incidents that occurred on March 5, 2010 and March 6, 2010.

On July 24, 2011, a jury found Petitioner guilty of one count of criminal conspiracy to deliver a controlled substance, two counts of criminal use of a communication facility, one count of possession with intent to deliver a controlled substance, and one count

of possession of a controlled substance.

On August 31, 2011, the court sentenced Petitioner to an aggregate term of two and one-half (2 ½) to five (5) years' incarceration in a state correctional institution. The court gave Petitioner credit for time served from December 12, 2010 until August 20, 2011. Petitioner did not file a post sentence motion or an appeal.

On July 29, 2019, Petitioner filed his first PCRA petition. Petitioner alleged that: (1) counsel was ineffective because there were inconsistencies at trial; (2) the case or the charges were a problem to his freedom; (3) his guilty plea was unlawfully induced; and (4) his right to appeal was obstructed by government officials.

On August 2, 2019, the court appointed counsel to represent Petitioner and directed counsel to file either an amended PCRA petition or a *Turner/Finley*<sup>1</sup>no merit letter.<sup>2</sup>

On December 3, 2019, PCRA counsel filed a motion to withdraw which included a no merit letter.

The court conducted an independent review of the record. On January 24, 2020, the court gave Petitioner notice of its intent to dismiss his first PCRA petition without holding an evidentiary hearing because his petition was untimely, he was no longer serving a sentence in this case, and he did not plead guilty. Petitioner did not respond to the notice. On February 20, 2020, the court dismissed Petitioner's first PCRA petition.

As previously stated, Petitioner filed documents in late August seeking discovery and an evidentiary hearing on claims of ineffective assistance of counsel, the

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<sup>1</sup> *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988); *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988)(en banc).

<sup>2</sup> The docket entry incorrectly describes the order as an order scheduling a PCRA hearing. Instead, the court appointed counsel, directed counsel to file either an amended petition or a no merit letter and scheduled a

weight of the evidence and improper obstruction by government officials.

The PCRA is the exclusive vehicle for obtaining post-conviction relief regardless of the manner in which the pleading or petition is titled. *Commonwealth v. Hromek*, 232 A.3d 881, 884 (Pa. Super. 2020); *Commonwealth v. Taylor*, 65 A.3d 462, 466 (Pa. Super. 2013); *Commonwealth v. Kutnyak*, 781 A.2d 1259, 1261 (Pa. Super. 2001). The court must treat any pleading filed after the judgment of sentence becomes final as a PCRA petition as long as the pleading falls within the purview of the PCRA. *Commonwealth v. Tedford*, 228 A.3d 891, 904 n.10 (Pa. 2020); *Hromek*, 232 A.3d at 884; *Commonwealth v. Torres*, 223 A.3d 715, 716 (Pa. Super. 2019). Therefore, the court must treat Petitioner’s filings as a PCRA petition and a request for discovery under the PCRA petition.

To be considered timely, a PCRA petition, including a second or subsequent petition, must be filed within one year of the date the judgment of sentence becomes final, or the petitioner must plead and prove facts to support one of the three limited exceptions to the one-year time limit.

A judgment of sentence “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).

The three exceptions are:

- (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;

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conference with counsel for both parties on a date after the filing deadline.

(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). However, the term “government officials” does not include defense counsel, whether appointed or retained. 42 Pa. C.S.A. §9545(b)(4).

A petition invoking one of these exceptions must be filed within one year of the date the claim could first have been presented if the claim arose on or after December 24, 2017. 42 Pa. C.S.A. §9545(b)(2). If the claim arose prior to December 24, 2017, the petition invoking the exception must be filed within sixty days of the date the claim could first have been presented. *Commonwealth v. Hernandez*, 79 A.3d 649, 651 (Pa. Super. 2013).

The PCRA’s time limits are mandatory and jurisdictional in nature such that when a petition is not filed in a timely manner, 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).

The court sentenced Petitioner on August 30, 2011. Neither Petitioner nor the Commonwealth filed a post sentence motion or a motion to modify sentence. Therefore, Petitioner had thirty (30) days from August 30, 2011 within which to file an appeal. Pa.R.Crim.P. 720(A)(3). Petitioner did not file an appeal. Therefore, his judgment of sentence became final on September 29, 2011.

To be considered timely, Petitioner's second PCRA petition had to be filed on or before October 1, 2012<sup>3</sup> or Petitioner had to allege facts in his petition to support one of the three exceptions. Petitioner's PCRA petition was not filed until late August 2020, and he has not alleged any facts to support any of the exceptions.

Petitioner's second petition is patently untimely. Therefore, the court lacks jurisdiction to hold an evidentiary hearing or to grant Petitioner any relief in this case.

In the alternative, Petitioner is not eligible for relief because he has served his sentence. As Petitioner was not sentenced to death and is not seeking relief based on DNA evidence obtained under section 9543.1(d)(relating to postconviction DNA testing), Petitioner must plead and prove by a preponderance of the evidence that he is currently serving a sentence of imprisonment, probation or parole for the crimes in this case or he is serving a sentence which must expire before he may commence serving the sentence imposed for the crimes in this case. 42 Pa.C.S.A. §9543(a)(1). There is nothing in Petitioner's second petition to show that he is still serving the sentence imposed in this case.<sup>4</sup> Furthermore, there is nothing in his petition or the court file to indicate that Petitioner had any parole violations that would have resulted in any adjustment to or extension of his maximum date such that he is still incarcerated or on parole in this case. As it appears that Petitioner finished serving his sentence in this case on or about December 12, 2015, Petitioner would not be eligible for relief even if he had filed

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<sup>3</sup> As September 29, 2012 fell on a Saturday, his one year time limit would expire on Monday, October 1, 2012. 1 Pa.C.S.A. §1908.

his second petition in a timely manner.

Finally, Petitioner's claims are previously litigated or waived. To be eligible for relief, the allegation of error cannot have been 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 proceeding collaterally attacking the conviction or sentence. 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). Petitioner raised many of the same issues in his first PCRA petition, which was also dismissed because it was patently untimely and Petitioner was no longer serving the sentence in this case. Although Petitioner did not previously assert a claim that the verdict was against the weight of the evidence, Petitioner waived this claim by failing to assert it before sentencing, in a post-sentence motion or in his first PCRA petition.

A challenge that the verdict was against the weight of the evidence must be raised with the trial judge in a motion for a new trial, at any time before sentencing or in a post-sentence motion, otherwise it is waived. Pa. R. Crim. P. 607(A) and cmt. Petitioner did not raise this claim before sentencing or in a post-sentence motion; therefore he waived this claim.

Even if Petitioner rephrased his claim as one that trial counsel was ineffective for failing to challenge the verdict as against the weight of the evidence, the claim would still be waived. Petitioner could have asserted such a

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<sup>4</sup> Petitioner is incarcerated in a state correctional institution because of convictions in CP-41-CR-0001585-2018.

claim in his first PCRA petition, but he did not. Therefore, Petitioner waived this claim.

Since Petitioner's petition is patently untimely, he is no longer serving the sentence in this case, and his claims were previously litigated or waived, the court lacks jurisdiction to hold an evidentiary hearing or grant him any relief.

The court will also deny Petitioner's request for discovery. There is no discovery at any stage of PCRA proceedings, except upon leave of court after a showing of exceptional circumstances. Pa. R. Crim. P. 902(E)(1) Petitioner has not alleged or shown exceptional circumstances. In fact, given that Petitioner is not entitled to relief as a matter of law because his claims are untimely or waived and he is no longer serving the sentence in this case, there would be no point or benefit to granting discovery in this case. Rather, it would be a waste of taxpayer funds and scarce judicial resources.

### **ORDER**

AND NOW, this \_\_\_\_ day of November 2020, 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 a hearing in this case. The court notifies the parties of its intention to dismiss Petitioner's filings. Petitioner may respond to this proposed dismissal within

twenty (20) days. If the court does not receive a response from Petitioner within that time, the court will enter an order dismissing his filings.

By The Court,

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Marc F. Lovecchio, Judge

cc: Ryan Gardner, Esquire (DA)  
Anthony Lattimore, #QB1383  
SCI Albion, 10745 Route 18, Albion PA 16475-0001  
Work file  
Gary Weber, Esq.