

G. Weber

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

: No. CR-21-2011;
: CR-1011-2012

vs.

:
: CRIMINAL DIVISION

MICHAEL LAQUAY SMITH,
Defendant

: Notice of Intent to Dismiss PCRA
: Without Holding An Evidentiary Hearing

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LYCOMING COUNTY
CLERK OF COURTS
THOMAS D. HEAR
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OPINION AND ORDER

Before the court is the second Post Conviction Relief Act (PCRA) petition filed by Petitioner, Michael Laquay Smith.

By way of background, under Information 21-2011, Petitioner was charged with three counts of delivery of a controlled substance, three counts of possession with intent to deliver a controlled substance, and three counts of criminal use of a communication facility as a result of allegedly delivering crack cocaine to a confidential informant on September 21, 2010, September 25, 2010, and September 27, 2010, and utilizing a telephone to arrange the transactions.

Under Information 1011-2012, Petitioner was charged with three counts of delivery of a controlled substance, three counts of possession with intent to deliver a controlled substance, and three counts of criminal use of a communication facility as a result of allegedly delivering crack cocaine to a confidential informant on April 20, 2012, May 11, 2012, and May 18, 2012 and utilizing a cell phone to arrange the transactions.

On February 1, 2013, Petitioner pleaded guilty to one consolidated count of delivery of a controlled substance under Information 21-2011 and two counts of delivery of a controlled substance under Information 1011-2021, in exchange for an aggregate sentence of

five to ten years' incarceration in a state correctional institution, consisting of two to four years' incarceration for the consolidated count of delivery under Information 21-2011 and eighteen months to three years' incarceration for each delivery conviction under Information 1011-2012. The court then proceeded to sentence Petitioner in accordance with the plea agreement.

Petitioner filed a timely appeal. In his concise statement, Petitioner asserted that his sentence was excessive; his plea was not knowing, voluntary, and intelligent; and his plea counsel was ineffective. The court issued an appeal opinion in support of Petitioner's judgment of sentence. The court noted that his ineffective assistance of counsel claims could not be asserted on appeal but rather must be deferred to PCRA proceedings and that his other claims were waived and/or lacked merit.

On November 12, 2014, the Pennsylvania Superior Court dismissed Petitioner's appeal.

Petitioner filed a timely first PCRA petition in which he alleged that plea counsel was ineffective by giving him incorrect advice regarding his eligibility for boot camp. Following amendment of his petition, continuance requests, and an evidentiary hearing, the court issued an opinion and order on May 4, 2015 denying the first PCRA petition.

On October 27, 2021, Petitioner filed his second PCRA petition. Petitioner alleges that the Pennsylvania Parole Board violated his binding, plea-bargained contract and re-sentenced him when the Board added nine (9) months to his maximum date, changing it from October 22, 2021 to July 17, 2022. Petitioner does not state when the Board action occurred. He merely asserts that he filed an appeal with Board but it still proceeded to violate

his plea-bargained contract.

The court finds that Petitioner is not entitled to relief as a matter of law.

First, the court finds that the Petition is untimely. Any 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 one of the three statutory exceptions. 42 Pa. C.S. A. §9543(b)(1). A judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of Pennsylvania or at the expiration of time for seeking the review. 42 Pa.C.S.A. §9545(b)(3). Here, the Pennsylvania Superior Court dismissed Petitioner's direct appeal on November 12, 2014. Petitioner had 30 days to file a petition for allowance of appeal with the Pennsylvania Supreme Court, but no such petition was filed. Therefore, Petitioner's judgment of sentence became final on December 12, 2014.

To be considered timely, Petitioner needed to file his petition on or before December 14, 2015 or he needed to allege facts to support one of the exceptions.¹ Petitioner did not file his current petition until October 27, 2021. Although he checked the boxes for all three statutory exceptions, he does not allege sufficient facts to invoke properly any of these exceptions. For example, Petitioner does not state when the Board recalculated his maximum date or the date when he became aware of the Board's decision. He does not state any case that recognized a constitutional right and held it to apply retroactively and he does not state how there was governmental interference with his ability to file his current PCRA petition.

Second, the court finds that Petitioner's claims are not cognizable under the

¹ December 12, 2015 was a Saturday. Therefore the one-year time period would be extended to the next

PCRA. A PCRA petition is not the proper method to challenge the decisions of the Board or the Department of Corrections calculation of sentences. *Commonwealth v. Camp*, 772 A.2d 70, 75 (Pa. Super. 2001)(“a PCRA petition is not the proper avenue for challenging the determination of the Parole Board”); *Commonwealth v. Vega*, 754 A.2d 714, 718 (Pa. Super. 2000)(PCRA is not the proper method to challenge decisions of the Pennsylvania Board of Probation and Parole); *Commonwealth v. Perry*, 563 A.2d 511, 513 (Pa. Super. 1989)(a PCRA petition is not a proper method of contesting the Department of Corrections calculation of sentences). Rather, jurisdiction over appeals or challenges to parole orders are within the exclusive jurisdiction of the Commonwealth Court. 42 Pa. C.S.A. §763; *Pittman v. Pa. Bd. of Prob. & Parole*, 639 Pa. 40, 159 A.3d 466, 470 n.7 (2017); *Commonwealth v. Vega*, 754 A.2d 714, 718 (Pa. Super. 2000).

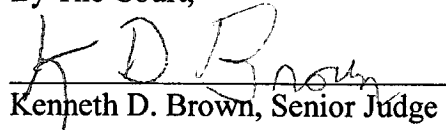
Finally, Petitioner’s claims lack merit. The Board is not changing Petitioner’s sentence; the Board is simply requiring Petitioner to serve his entire sentence in jail. The Board has the power and authority to do this. Contrary to Petitioner’s assertions, the Board’s actions do not amount to illegally changing his sentence. *Marshall v. Pa. Bd. of Prob. & Parole*, 200 A.3d 643, 648 (Pa. Commw. 2018)(“By definition, when the Board imposes backtime, it does not alter a judicially-imposed sentence; it simply requires the prisoner to serve some or all of the time remaining on the original sentence.”); *Hughes v. Pa. Bd. of Prob. & Parole*, 179 A.3d 117, 121 (Pa. Commw. 2018)(“when the Board imposed backtime, the Board *did not impose an additional sentence* on Hughes but, rather, directed Hughes to *complete the originally judicially mandated sentence.*”).

ORDER

AND NOW, this 12 day of November 2021, 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 the Petition without holding an evidentiary hearing.

Petitioner may respond to this proposed dismissal within twenty (20) days.

By The Court,


Kenneth D. Brown, Senior Judge

cc: District Attorney
Michael Laquay Smith
21-01-037
Luzerne County Correctional Facility
99 Water Street
Wilkes-Barre PA 18702
Senior Judge Kenneth D. Brown
Gary Weber, Esquire