

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CP-41-CR-0000882-2015
	:
vs.	: CRIMINAL DIVISION
	:
	:
MICHAEL RAKEEM SPENCER,	: Notice of Intent to Dismiss PCRA
Defendant	: Without Holding An Evidentiary Hearing

OPINION AND ORDER

This matter came before the court on a second Post Conviction Relief Act (PCRA) petition filed by Michael Rakeem Spencer (hereinafter “Spencer”).

By way of background, on July 29, 2016, following a jury trial, was found guilty of, among other charges: Count 1, criminal attempt to commit homicide of Tyree Green, a felony of the first degree; Count 3, aggravated assault (attempting to cause or causing serious bodily injury to Julie Rosa-Santiago), a felony of the first degree, Count 5, aggravated assault (attempting to cause or causing serious bodily injury to Anthony Snyder), a felony of the first degree; Count 9, aggravated assault (attempting to cause or causing bodily injury to Georgianna Strait), a felony of the first degree; and Count 12, aggravated assault (attempting or causing bodily injury to Jessica Eckman with a deadly weapon), a felony of the second degree. Although Petitioner was found guilty of numerous other related charges, they are not relevant for the purposes of this Opinion.

On October 12, 2016, the court sentenced Petitioner to an aggregate term of twenty-seven and a half (27½) years to fifty-five (55) years of incarceration in a state correctional institution, which consisted of six (6) to twelve (12) years on count 1; six and one-half (6 ½) to thirteen (13) years each on counts 3, 5 and 9; and two (2) to four (4) years on count 12. All

of these sentences were consecutive to each other. The remaining sentences merged or were concurrent.

Spencer filed a Post-Sentence Motion on October 31, 2016. Among the issues raised by Spencer in his Post-Sentence Motion were that the court abused its discretion in sentencing him to consecutive sentences and that the evidence was insufficient to convict him with respect to all of the counts. On January 20, 2017, the court denied Spencer's Post-Sentence Motion.

Spencer timely appealed his conviction and sentence to the Pennsylvania Superior Court. In his Concise Statement of Matters Complained of on Appeal, Petitioner claimed that the evidence was insufficient to convict him of the offenses and that the verdict was against the weight of the evidence. By Opinion and Order of the Superior Court dated February 22, 2018, the judgment of sentence was affirmed.

Spencer subsequently sought allowance of appeal to the Pennsylvania Supreme Court. On August 20, 2018, the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal.

Spencer filed a pro se PCRA petition on May 31, 2019. In the pro se petition, Spencer asserted the following claims: (1) the propriety of consecutive sentences; (2) sufficiency and weight of the evidence; and (3) ineffectiveness of counsel. Spencer asserted in a conclusory manner that counsel was ineffective by failing to meet, prepare and strategize a defense; failing to investigate allegations, witnesses and to seek witnesses; failing to know the law; refusing to discuss any matters of defense; ignoring his requests; not calling witnesses; not being diligent in defending against the charges; failing to set up a defense strategy; being biased and prejudiced against Spencer; failing to retain an expert to testify; failing to

“correct” false testimony; and utilizing scare tactics to “play confidence gamesmanship against Spencer to sandbag him.

At a subsequent Grazier hearing on October 3, 2019, Spencer waived his right to counsel and elected to represent himself. The Commonwealth filed a written Answer to the pro se PCRA petition on October 30, 2019. On January 2, 2020, Spencer changed his mind and elected to have counsel appointed to represent him. Helen Stolinis, Esquire was appointed to represent Petitioner.

PCRA counsel initially filed a no merit letter and petition to withdraw. However, after obtaining additional transcripts, PCRA counsel withdrew her request to withdraw as counsel and filed an Amended Post-Conviction Relief Petition on October 6, 2020. In the amended petition, PCRA counsel alleged that counsel was ineffective for failing to object to the jury instructions that were provided with respect to consciousness of guilt and for failing to object to portions of the trial taking place outside of Petitioner’s presence.

The trial court gave notice of its intent to dismiss several of the claims without holding an evidentiary hearing (see Opinion and Order entered December 14, 2020) but directed further amendment and an evidentiary hearing with respect to the claims asserted in paragraphs 16, 17 and 18 of the Supplemental Amended Post-Conviction Relief Act petition. See Order entered October 22, 2021. Shortly thereafter, the trial judge left the bench. The evidentiary hearing was continued several times due to issues with transporting Petitioner to the evidentiary hearing. The evidentiary hearing was held on July 13, 2022, and the petition was denied on January 17, 2023.

Spencer appealed. The Superior Court affirmed the lower court’s denial of Spencer’s first PCRA petition on September 18, 2023. Spencer did not file a petition for allowance of

appeal with the Pennsylvania Supreme Court.

On November 20, 2023, Spencer submitted a letter indicating that he would like to file a PCRA petition nunc pro tunc. In his letter, Spencer stated that his claims include, but are not limited to: (a) "Merger of sentences §9765; (b) Same Offense Doctrine; and (c) Legality of Sentences." He asked that the court appoint counsel to represent him and that a hearing be held to resolve the merits of his claims. Pursuant to *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002), the court will treat the letter filed by Spencer as a second Post Conviction Relief Act (PCRA) petition.

DISCUSSION

1. *Spencer does not have a right to counsel for his second PCRA petition*

An indigent petitioner has a rule-based right to appointed counsel on a first PCRA petition. Pa. R. Crim. P. 904(C). For a second or subsequent petition, however, a petitioner only has a rule-based right to counsel if an evidentiary hearing is required. Pa. R. Crim. P. 904(D). An evidentiary hearing is not required on Spencer's second PCRA petition because it is untimely. In fact, because the petition is untimely, the court lacks jurisdiction to hold an evidentiary hearing in this case.

2. *Spencer's petition is untimely*

For a PCRA Petition to be considered timely it must satisfy the following requirements:

- (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. § 9545(b)(1) (emphasis added). A petitioner must “affirmatively plead and prove” the exception, upon which he or she relies. *Commonwealth v. Taylor*, 933 A.2d 1035, 1039 (Pa. Super. 2007).

A judgment becomes final at the conclusion of direct review or at the expiration of time for seeking the review. 42 Pa. C.S.A. § 9545(b)(3). 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).

The Pennsylvania Supreme Court denied Spencer’s petition for allowance of appeal on August 20, 2018. Spencer had 90 days within which to file a petition for writ of certiorari with the United States Supreme Court. He did not file such a petition. Therefore, his judgment of sentence became final on or about Monday, November 19, 2018. To be considered timely, Spencer either had to file his current petition on or before Tuesday, November 19, 2019 or allege facts to satisfy one of the statutory exceptions. He did neither.

Furthermore, the fact that Spencer labeled his petition as “nunc pro tunc” and is asserting a challenge to the legality of his sentence cannot save his petition. There is no equitable tolling in the PCRA context. *Commonwealth v. Fahy*, 558 Pa. 313, 737 A.2d 214, 222 (1999).

Moreover, although legality of sentence is not subject to waiver, it is subject to be lost by failing to satisfy the PCRA time limitation or one of the exceptions. *Fahy*, 737 A.2d at 223.

Therefore, Spencer’s second PCRA petition is patently untimely, and the court lacks jurisdiction to hold an evidentiary hearing or grant any relief to Spencer.

3. *Spencer’s claims are previously litigated or waived*

Even if Spencer had timely filed his petition, he would not be entitled to relief because his claims are previously litigated or waived. To be eligible for relief, a petitioner must **plead** and prove by a preponderance of the evidence that his claims have not been previously litigated or waived. 42 Pa. C.S.A. §9543(a)(3). A claim is previously litigated if “the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue;” or “it has been raised and decided in a proceeding collaterally attacking the conviction or sentence” (i.e., it was raised and decided in a prior PCRA proceeding). 42 Pa. C.S.A. §9544(a). A claim 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).

In his post sentence motion, Spencer alleged that the trial court could not sentence him consecutively because Spencer’s conduct was all part of one continuous course of conduct. The trial court rejected this claim, noting that Spencer committed separate crimes because there were different victims. Spencer fired several bullets in the direction of Tyree Green with the intent to kill him, but the bullets struck four separate bystanders between

Spencer and Green. Three of those bystanders suffered serious bodily injury as a result of being shot by Spencer and the fourth bystander suffered bodily injury from a deadly weapon. Spencer's current claims are just different theories of his original claim in his post sentence motion. Spencer could have raised his current claims on direct appeal, but he did not do so. Spencer also could have raised these claims in his first PCRA petition either as a direct claim or as a claim of ineffective assistance of counsel claim. He did not do so. Therefore, to the extent that Spencer's claims do not challenge the legality of his sentence, his claims are previously litigated or waived.

4. *Spencer's claims lack merit*

Even if Spencer timely filed his petition and his claims were not previously litigated or waived, the specific claims he lists in his letter lack merit. Spencer alleges three specific claims that really are more like a single claim based on three related theories. Spencer's claims include "merger of sentences §9765", the "same offense" doctrine, and legality of sentences. It appears that Spencer is asserting that his sentences are illegal because his crimes only constituted a single offense or that his aggravated assault sentences should have merged with each other and with the attempted homicide conviction. The court cannot agree.

None of Spencer's individual sentences exceeded the statutory maximum. The trial court imposed an aggregate sentence of 27 ½ years to 55 years' incarceration in a state correctional facility. This aggregate sentence consisted of 6 to 12 years on Count 1, criminal attempt homicide of Tyree Green, a felony of the first degree; 6 ½ to 13 years on Count 3, aggravated assault causing serious bodily injury to Julie Rosa-Santiago, a felony of the first degree; 6 ½ to 13 years on Count 5, aggravated assault causing serious bodily injury to Anthony Snyder, a felony of the first degree; 6 ½ to 13 years on Count 9 aggravated assault

causing serious bodily injury to Georgianna Strait, a felony of the first degree; and 2 to 4 years on Count 12, aggravated assault causing bodily injury with a deadly weapon to Jessica Eckman, a felony of the second degree. Tyree Green was not struck by any of the bullets; therefore, the statutory maximum for attempted homicide was 20 years. 18 Pa. C.S.A. §1102(c). The statutory maximum for each of the aggravated assaults causing serious bodily injury was 20 years. 18 Pa. C.S.A. §1103(1). The statutory maximum for aggravated assault causing bodily injury with a deadly weapon was 10 years. 18 Pa. C.S.A. §1103(2). Since the maximum sentence imposed on Counts 1, 3, 5, & 9 did not exceed 20 years and the maximum imposed on Count 12 did not exceed 10 years, Spencer's sentences did not exceed the lawful maximums.

Section 9765 of the Judicial Code states:

No crime shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements are the one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa. C.S.A. §9765.

Spencer's convictions do not merge. The crimes do not arise from a single criminal act because Spencer fired six shots. None of the bullets struck Tyree Green, but the bullets struck four bystanders in the alley who also were leaving Imbibe, a bar/night club.

While some of the elements of the offenses overlap, not all of the statutory elements are the same. On direct appeal, the Superior Court found that the Commonwealth presented sufficient evidence to prove that Spencer was the shooter. To prove attempted homicide for Count 1, the Commonwealth was required to prove that Spencer fired shots at Tyree Green,

Spencer had the specific intent to kill Tyree Green when he fired those shots and that firing the shots constituted a substantial step toward killing Tyree Green. For Count 3, aggravated assault, the Commonwealth had to prove that Spencer caused serious bodily injury to Julie Rosa-Santiago and that he did so intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. For Count 5, aggravated assault, the Commonwealth had to prove that Spencer caused serious bodily injury to Anthony Snyder and that he did so intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. For Count 9, aggravated assault, the Commonwealth had to prove that Spencer caused serious bodily injury to Georgianna Strait and that he did so intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. For Count 12, the Commonwealth had to prove that Spencer caused bodily injury to Jessica Eckman, he did so intentionally or knowingly and that he caused such injury with a deadly weapon.

Each of these crimes involved a separate victim. There is no merger when the crimes involve different victims. *Commonwealth v. Hernandez*, 230 A.3d 480, 487-488 (Pa. Super. 2020)(crimes of homicide and recklessly endangering another person (REAP) as a result of the defendant shooting at an individual leaving club did not merge where the victims of the homicide and the REAP were different). Since there were separate victims, the aggravated assaults constituted separate crimes. Therefore, Spencer's claims regarding merger, the same offense doctrine and legality of sentence lack merit.

ORDER

AND NOW, this 1st day of December 2023, upon review of the record and pursuant

to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court finds that there is no need for an evidentiary hearing. The court notifies the parties of its intent to dismiss the PCRA petition because the petition is untimely, and all of the specific claims asserted therein lack merit. Spencer 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.

By The Court,

Nancy L Butts, President Judge