

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CP-41-CR-0001421-2017
	:
vs.	: Notice of Intent to Dismiss PCRA
	: Without Holding An Evidentiary Hearing
	: and Order Granting Counsel's Motion
DAVID MICHAEL DAUBERT,	: to Withdraw
Defendant	:

OPINION AND ORDER

This matter came before on the Post Conviction Relief Act (PCRA) petition filed by David Michael Daubert.

Background

In a separate case (CR-732-2016), Daubert was sentenced to a county sentence of 7 months to 23 months followed by 30 months' probation. He was paroled but violated his parole and, on July 20, 2017, he was sentenced to serve a 90-day setback with eligibility for Work Release/Work Crew. He was serving his sentence at the Lycoming County Pre-Release Center (PRC) and was placed on a work crew at the Lycoming County Landfill ("Landfill"). On August 9, 2017, Defendant left his work crew assignment at the Landfill without being granted leave to do so. As a result, he was charged in 1421-2017 with Escape, a felony of the third degree.

On September 11, 2017, Daubert entered a guilty plea to Escape for a negotiated sentence of 1 to 3 years' incarceration in a state correctional institution. Daubert waived a pre-sentence investigation report and requested immediate sentence. The court sentenced Daubert to 1 to 3 years' incarceration in a state correctional institution in accordance with the plea agreement. Neither a post-sentence motion nor an appeal was filed.

On July 23, 2024, Daubert filed a pro se motion for modification of sentence in which he alleged that his escape conviction was improperly graded as a felony of the third degree and he asked for his sentences to run concurrent to each other.¹ On September 12, 2024, he filed another motion for modification of sentence asserting ineffective assistance of counsel in that counsel lied to him and told him that all of his sentences would run concurrent to each other. The sentences that were run consecutively for an aggregate sentence of 3 years to 8 years were his sentences in this case, his new revocation sentence in 732-2016 which was imposed as a result of his conviction in this case, and his Luzerne County case (CP-40-CR-0002032-2016).

The court treated these motions collectively as a first PCRA petition. *See Commonwealth v. Price*, 876 A.2d 988, 992 (Pa. Super. 2005)(untimely reconsideration of sentence properly treated as a PCRA petition); *Commonwealth v. Kutnyak*, 781 A.2d 1259, 1261 (Pa. Super. 2001)(untimely post-sentence motion to withdraw guilty plea properly treated as a PCRA petition). The court appointed counsel to represent Daubert and directed counsel to file either an amended PCRA petition or a *Turner/Finley* no merit letter. On December 31, 2024, counsel filed a copy of the no merit letter that he sent to Daubert. On March 17, 2025, counsel filed a motion to withdraw.

DISCUSSION

Following a review of the record, the court finds that Daubert's PCRA petition is

¹ In May 2023, Daubert filed a "Motion to Modify, Reconsider Sentence, Compassionate Release Nunc Pro Tunc based on losing several family members in a fire that occurred on August 2, 2022. The court summarily denied this motion because is had not authority to modify sentence for "compassionate release" that was not related to the incarcerated individual's terminal illness. *See* 42 Pa. C.S. §9777.

untimely and that his claims lack merit.

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 court accepted the guilty plea and sentenced Daubert on September 11, 2017. Daubert had 10 days within which to file a post-sentence motion and 30 days within which to file a notice of appeal. Neither was filed. Therefore, Daubert’s judgment of sentence became final on or about October 11, 2017.

To be considered timely, Daubert had to file his PCRA petition on or before October 11, 2018 or allege one of the three statutory exceptions. His petitions were not filed until July 23, 2024 and September 12, 2024 (more than five years too late) and neither of the petitions asserted any of the statutory exceptions.

The PCRA time limitations are mandatory and jurisdictional in nature. *Commonwealth v. Natividad*, 650 Pa. 328, 200 A.3d 11, 25 (2019). 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). No court may disregard these time limits in order to reach the merits of claims raised in an untimely PCRA petition. *Commonwealth v. Lambert*, 584 Pa. 461, 884 A.2d 848, 851 (2005).

As Daubert's petitions are untimely and he has not asserted any of the statutory exceptions, the court lacks jurisdiction to hold an evidentiary hearing or to grant Daubert any relief.

Even if Daubert had timely filed his petitions, he would not be entitled to relief. His conviction was properly graded as a felony of the third degree, because he was a convicted individual who escaped. Daubert incorrectly relies on 18 Pa. C.S. §5121(d)(1)(i)(A) for his argument that the escape should have been graded as a misdemeanor of the second degree because he was incarcerated on a misdemeanor offense. Daubert's argument ignores subparagraph (B).

Section 5121(d)(1) states:

(d) Grading.--

(1) An offense under this section is a felony of the third degree where:

(i) the actor was:

(A) under arrest for or detained on a charge of felony;

(B) convicted of a crime; or

(C) found to be delinquent of an offense which, if committed by an adult, would be classified as a felony and the actor is at least 18 years of age at the

time of the violation of this section;
(ii) the actor employs force, threat, deadly weapon or other dangerous instrumentality to effect the escape; or
(iii) a public servant concerned in detention of persons convicted of crime intentionally facilitates or permits an escape from a detention facility.
(2) Otherwise an offense under this section is a misdemeanor of the second degree.

18 Pa. C.S. §5121(d). In case 732-2017, Daubert was convicted of Count 4, Indecent Assault, a misdemeanor of the first degree. He was serving the sentence imposed for that conviction when he escaped from his work crew detail at the Landfill. Based on section 5121(d)(1)(i)(B), Daubert's conviction for Escape was properly graded as a felony of the third degree.

Furthermore, the court had no ability to run his sentence in this case concurrent to the conviction for Receiving Stolen Property as those sentences were imposed by other judges **after** Daubert was sentenced in this case.² Since the sentence in this case was imposed first, it was the other judges in Daubert's other cases who had the discretion to run those sentences concurrent to or consecutive with the sentence imposed in this case.

Conclusion

Daubert's petition is untimely. Therefore, the court lacks jurisdiction to hold an evidentiary hearing or to grant him relief. Moreover, even if his petition had been timely filed, Daubert would not be entitled to relief as his Escape conviction was properly graded as felony of the third degree and his other sentences which he contends were supposed to run concurrent with this sentence were imposed by other judges in other cases after Daubert was

² On November 9, 2017, the Honorable Marc F. Lovecchio revoked Daubert's probation and sentenced Daubert to 1 to 3 years' incarceration in a state correctional institution in CP-41-CR-0000732-2016 (Lycoming County). On November 6, 2018, the Honorable Joseph F. Sklarosky, Jr. sentenced Daubert to 12 to 24 months' incarceration for Receiving Stolen Property, a felony of the third degree, in case CP-40-CR-0002032-2018

sentenced in this case.

ORDER

AND NOW, this 21st day of April 2025, it is hereby **ORDERED and DIRECTED** as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure 907(1), that it is the intention of this Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The court grants the motion of Tyler Calkins to withdraw his appearance as counsel in this case. Petitioner may represent himself or hire private counsel but the court will not appoint any other counsel on this untimely, meritless petition.
3. **Petitioner will be notified at the address below through means of certified mail.**

By The Court,

Nancy L Butts, President Judge

cc: Martin Wade, Esquire (ADA)
Tyler Calkins, Esquire
David Michael Daubert, ND-5029 (certified mail)
SCI Mahanoy
301 Grey Line Drive
Frackville, PA 17931
Thomas Heap, Clerk of Courts
Jerri Rook

(Luzerne County).