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The Pittsburgh Legal Journal Opinions are published fortnightly by the Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
412-261-6255
www.acba.org
© Allegheny County Bar Association 2022
Circulation 5,367

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OPINIONS

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**Commonwealth of Pennsylvania v.
Jeremy Upshur, Appellant
Appeal of:
Jeremy Upshur, Appellant**

Criminal Appeal—Sentencing—Time Credit—PCRA—Violation of Probation

Trial court not required to give time credit for probation violation where the aggregate sentence imposed is less than the statutory maximum sentence available to the court.

No. CP-02-CR-00046-2012. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—December 10, 2021.

OPINION

On May 21, 2012, Appellant, Jeremy Upshur, pled guilty to two counts of Indecent Assault of a Person Under the Age of 13, Unlawful Contact With a Minor, Endangering the Welfare of a Child, and Corruption of Minors.¹ This Court sentenced Appellant to an aggregate sentence of one year less one day to two years less two days incarceration, with nine years of consecutive probation. Appellant violated his probation and was resentenced by this Court on four occasions, most recently on December 10, 2019. On that date, this Court imposed a new aggregate sentence of 4-10 years of incarceration and two years of probation to follow. Appellant did not file a direct appeal.

However, on November 10, 2020, Appellant filed a pro se “Motion for Time Credit and Corrected Commitment.” This Court appointed counsel, who subsequently raised the issue of time credit as an amended PCRA petition on June 15, 2021. This Court ultimately dismissed the Petition without a hearing on September 14, 2021. On October 15, 2021, Appellant filed a Notice of Appeal and on November 19, 2021, Appellant filed his Concise Statement of Matters Complained of on Appeal.

MATTERS COMPLAINED OF ON APPEAL

Appellant asserts that this Court erred in imposing a sentence that failed to award time credit for all periods of Appellant’s incarceration. (Statement of Errors Complained of on Appeal, p. 4).

DISCUSSION

Appellant asserts that this Court erred in failing to award time credit for three time periods: 11/20/11 to 5/21/12, a period of 184 days; 5/22/12 to 11/19/12, 182 days; and 5/6/13 to 5/5/14, 365 days. Time credit issues are governed by 42 Pa.C.S. § 9760, which states:

§ 9760. Credit for time served

After reviewing the information submitted under section 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:

- (1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.
- (2) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody under a prior sentence if he is later reprosecuted and resentenced for the same offense or for another offense based on the same act or acts. This shall include credit in accordance with paragraph (1) of this section for all time spent in custody as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same act or acts.
- (3) If the defendant is serving multiple sentences, and if one of the sentences is set aside as the result of direct or collateral attack, credit against the maximum and any minimum term of the remaining sentences shall be given for all time served in relation to the sentence set aside since the commission of the offenses on which the sentences were based.
- (4) If the defendant is arrested on one charge and later prosecuted on another charge growing out of an act or acts that occurred prior to his arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former charge that has not been credited against another sentence.

42 Pa.C.S. § 9760. In addition, Appellant may not receive a time credit on more than one sentence for the same time served. *Commonwealth v. Ellsworth*, 97 A.3d 1255, 1257 (Pa. Super. 2014). On May 21, 2012 this Court gave the 184 days spent in pre-trial incarceration as a time credit towards his original sentence. Since this time was applied to his original sentence, it cannot be applied in a subsequent sentence. *Commonwealth v. Merigris*, 681 A.2d 194, 195 (Pa. Super. 1996).

Next, this Court considers the 182 days that Appellant spent incarcerated pursuant to the original sentence and the 365 days he spent incarcerated following his first probation violation hearing. A sentence following a probation violation is constrained only by statutory maximum sentence available at the time an individual is sentenced to probation. *Commonwealth v. Fish*, 752 A.2d 921, 923 (Pa. Super. 2000). However, in calculating the time available for sentencing, the sentencing judge must reduce the maximum time available by the time an individual has spent incarcerated for that offense. *Commonwealth v. Williams*, 662 A.2d 658 (Pa. Super. 1995). However, “when the total sentence for the probation violation, added to the initial sentence, is less than the statutory maximum, there is no requirement to give any credit for any of the time served on the original sentence.” *Commonwealth v. Bowser*, 783 A.2d 348 (Pa. Super. 2011). Therefore, the success of Appellant’s claim hinges on whether the maximum sentence imposed at the probation violation hearing, added to the time Appellant had previously served for these offenses, exceeds the statutory maximum.

This Court originally sentence Appellant to a year minus one day to two years minus two days. After his violation hearing on May 6, 2013, this Court resentenced Appellant to one year minus one day to two years minus two days. At his next violation hearing on November 15, 2015, he was not sentenced to additional incarceration. On December 10, 2019, this Court sentenced Appellant consecutive to 2-5 years at each of the Indecent Assault counts, for an aggregate sentence of 4-10 years. Each Indecent Assault count carried a maximum sentence of seven years, for a total of 14 years maximum sentence. The sentence imposed on December 10, 2019, added to the previous sentences imposed, equals 6 years less two days to 14 years less 4 days, which is less than the statutory maximum of 14 years. Since the aggregate of the sentences imposed does not exceed the statutory maximum, this Court was not required to award time credit. *Commonwealth v. Bowser*, 783 A.2d 348, 350 (Pa. Super. 2001). As a result, the PCRA lacks merit, and this Court did not err in dismissing it.

CONCLUSION

For all the above reasons, the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:

/s/Rangos, J.

Date: December 10, 2021

¹ 18 Pa.C.S. §§ 3126 (a) (7), 6318 (a) (1), 4303 (a) (1), and 6301 (a) (1) (ii), respectively.

Commonwealth of Pennsylvania v. Louis Dickerson

Criminal Appeal—Post-Conviction Relief Act

Petitioner filed a petition pursuant to the Post-Conviction Relief Act requesting to withdraw his guilty plea. Court denied petition finding that there was no legal authority to impose a duty or obligation on trial counsel to inform client of rights pursuant to Post-Conviction Relief Act.

No. CC 2017-12021. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—January 19, 2022.

OPINION

Before this Court for consideration is Petitioner's Post-Conviction Relief Act ("PCRA") petition. On March 26, 2018, Petitioner pled guilty to Voluntary Manslaughter and Tampering With Physical Evidence. On June 21, 2018, this Court sentenced Petitioner to separate sentences of not less than five nor more than ten years of incarceration relative to the Voluntary Manslaughter conviction, followed by a term of five years' probation. No further penalty was imposed at the remaining counts. Petitioner did not file a direct appeal. On August 19, 2019, Petitioner filed a pro se motion seeking to withdraw his guilty plea. Counsel was appointed to represent Petitioner and an amended PCRA petition was filed on November 25, 2019. The Commonwealth of Pennsylvania responded and a hearing was convened on September 15, 2020. After further briefing by the parties, this Court entered a final order dismissing the PCRA petition on June 15, 2021. The PCRA petition filed by Petitioner was untimely and no valid exception to the timeliness requirements exist are evident in this case.

Generally, a petition for PCRA relief, including a second or subsequent petition, must be filed within one year of the date the judgment is final. *Commonwealth v. Grafton*, 928 A.2d 1112, 1113 (Pa.Super. 2007); *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa. Super. 1997). The PCRA's time restrictions are jurisdictional in nature and if a PCRA petition is untimely, neither the appellate court nor the trial court has jurisdiction over the petition. Without jurisdiction, the courts are without legal authority to address the substantive claims contained in the petition. *Commonwealth v. Derrickson*, 923 A.2d 466 (Pa.Super. 2007). Title 42 Pa.C.S.A. § 9543 states, in pertinent part,

(a) General rule. --To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime;

* * *

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
- (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
- (v) Deleted.
- (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
- (vii) The imposition of a sentence greater than the lawful maximum.
- (viii) A proceeding in a tribunal without jurisdiction.
- (3) That the allegation of error has not been previously litigated or waived.
- (4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.
- (b) Exception. --Even if the petitioner has met the requirements of subsection (a), the petition shall be dismissed if it appears at any time that, because of delay in filing the petition, the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner. A petition may be dismissed due to delay in the filing by the petitioner only after a hearing upon a motion to dismiss. This subsection does not apply if the petitioner shows that the petition is based on grounds of which the petitioner could not have discovered by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth.

With respect to timeliness requirements, Title 42 Pa.C.S. § 9545(b) states:

(b) Time for filing petition. —

(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.

If an exception to the timeliness requirements exists, a petition pursuant to the PCRA must be filed within 60 days of the date that the claim could have been presented. See 42 Pa.C.S. § 9545 (b) (2); *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 94 (Pa. 1998).

The petitioner was sentenced on June 21, 2018. He did not file a direct appeal. Since Petitioner did not file a direct appeal from his conviction, his judgment of sentence became final, for purposes of filing a timely PCRA petition, 30 days after imposition of sentence. *Commonwealth v. Jerman*, 762 A.2d 366, (Pa.Super. 2000); 42 Pa.C.S.A. § 9545(b). Therefore, Petitioner's judgment of sentence was final on July 21, 2018. This Court construes Petitioner's pro se filing seeking to withdraw his guilty plea as his initial PCRA petition and that petition was filed on August 19, 2019. A period of one year and 28 days elapsed before Petitioner filed the instant PCRA petition and his judgment of sentence became final. Because the petition was filed beyond the one-year limitation period prescribed in the Post-Conviction Relief Act, the PCRA petition was untimely unless a valid exception to the timeliness requirement exists.

Petitioner claims that the "after-discovered evidence" exception applies to his PCRA petition because he did not learn of his ability to file a PCRA petition due to the per se ineffective assistance of prior counsel. Specifically, Petitioner alleges that he was never advised by trial counsel that he had a right to file a PCRA petition nor did prior counsel advise of the time constraints for filing a PCRA petition. Petitioner claims that the first time he ever became aware that he could file a PCRA petition was when prior counsel sent Petitioner a letter dated August 12, 2019 (after the one-year period had already expired) informing him of his ability to file a PCRA petition. Because he did not learn of his ability to file a PCRA petition until he received trial counsel letter which was after the time for filing a PCRA petition expired, Petitioner claims that the information contained in prior counsel's letter was "after-discovered evidence."

This Court consciously considered Petitioner's position. However, after reviewing the relevant legal authority, this Court was constrained to deny the instant PCRA because this Court could find no legal authority imposing a duty or obligation on trial counsel to inform a client of his or her rights under the Post-Conviction Relief Act. Petitioner's counsel conceded the lack of such legal authority during the PCRA hearing. Absent such legal authority, this Court could not find that Petitioner sufficiently proved an exception to the timeliness requirement. Accordingly, this Court was without jurisdiction to entertain the PCRA petition.

For the foregoing reasons, the denial of petitioner's PCRA petition should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: January 19, 2022