

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-1462-2012  
:   
vs. : CRIMINAL DIVISION  
:   
:   
SHYNELL WALKER, : Notice of Intent to Dismiss 2<sup>nd</sup> PCRA  
Defendant : Without an Evidentiary Hearing  
:

**OPINION AND ORDER**

This matter came before the court on Defendant’s second Post Conviction Relief Act (PCRA) petition, which was filed on July 29, 2015.

At approximately 4:45 p.m. on August 14, 2012, Officer Thomas Bortz and Officer Brian Chilson were on an “interdiction” detail in the 500 block of Memorial Avenue near Flanagan Park in Williamsport. The officers observed a dark blue or black Volvo parked at the entrance of 565 Memorial Avenue. The vehicle raised Officer Bortz’ suspicions because there is no residence on that side of the street, it is a predominantly minority neighborhood, and the vehicle was occupied by two Caucasian males. The Volvo also had a sticker on the back of it, indicating it had been purchased from a dealer in Berwick or Danville. The driver was laid back in his seat and the passenger was on a cell phone and his “head was on a swivel” – turning as if he was looking for someone. As the officers drove past in their marked vehicle, the driver sat up, backed the Volvo out of its parking spot, and drove west on Memorial Avenue.

The officers turned around to follow the Volvo. Just before the Volvo reached Walnut Street, the driver pulled the vehicle over to the curb and Defendant Shynell Walker got into the rear passenger seat. The Volvo then turned onto Walnut Street. When

the vehicle reached the intersection of Walnut and Fourth Streets, it stopped at the red light and the officers were right behind it. The light changed to green and the vehicle proceeded into the intersection a few feet as if it was going to continue south on Walnut Street. There was another vehicle traveling north with its left turn signal on. The vehicle in which Walker was a passenger stopped, and the driver waved to signal the driver of the oncoming vehicle to turn left in front of him. After that vehicle turned left, the driver of the Volvo quickly turned on his right turn signal and turned right onto Fourth Street. The police stopped the Volvo, because the driver, who was not a police officer or his designee, unlawfully directed traffic by signaling the oncoming driver to turn left in front of him, and the driver failed to activate his turn signal at least 100 feet before the intersection.

When the officers walked up to the Volvo to speak to the occupants, they immediately noticed an odor of marijuana. After they got the driver and the front seat passenger out of the vehicle to speak to them separately, the officers could still smell the odor of marijuana inside the vehicle. The front seat passenger and the driver told the police that they drove to Williamsport so that the front seat passenger could buy heroin from Walker. The front seat passenger was going to pay the driver for the ride to Williamsport by giving him some of the heroin. The police took Walker into custody and searched him. They found ten bags of heroin, four bags of marijuana, some money and a cell phone on Walker's person.

Walker was charged with possession with intent to deliver a controlled substance (heroin), possession of a small amount of marijuana, possession of drug paraphernalia, and possession of a controlled substance (heroin).

Walker filed a motion to suppress on the basis that the police unlawfully stopped the Volvo. The court held a hearing and argument on Walker's suppression motion on December 14, 2012, and it denied the motion in an Opinion and Order entered December 18, 2012.

Walker waived his right to a jury trial. A bench trial was held on March 8, 2013, and the court found Walker guilty of all the charges.

On May 30, 2013, the court sentenced Walker to 30 to 60 months of incarceration in a state correctional institution. Walker filed a timely notice of appeal.

Walker presented two issues on appeal: (1) the court erred in denying his motion to suppress; and (2) the court erred by permitting Officer Bortz to testify as an expert concerning possession with intent to deliver on the basis that the evidence was cumulative in light of the testimony of the two others in the vehicle who testified that they picked up Walker and intended to purchase heroin from him. In a memorandum decision filed May 29, 2014,<sup>1</sup> the Superior Court rejected Walker's claims and affirmed his judgment of sentence. Walker did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

Walker filed a first PCRA petition, in which he again asserted claims that the court erred in denying his suppression motion and permitting Officer Bortz to testify as an expert concerning possession with intent to deliver, as well as a claim that counsel was ineffective for not appealing his "mandatory sentence." The court appointed counsel to represent Walker and gave counsel an opportunity to file either an amended PCRA petition or a no merit letter pursuant to *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988)

---

<sup>1</sup> 1019 MDA 2013.

and *Commonwealth v. Finley*, 379 Pa. Super. 390, 550 A.2d 213 (1988). Counsel corresponded with Walker about his claims. In his correspondence to counsel, Walker raised three additional issues: counsel was ineffective for failing to file a motion to suppress the in-car video from the police vehicle; the sentence imposed was in violation of or inconsistent with the Fair Sentencing Act; and counsel was ineffective for failing to question Officer Bortz regarding his smelling marijuana inside the vehicle during the traffic stop. Counsel reviewed these claims and, finding that none of them entitled Walker to relief, filed a no merit letter.

Following an independent review of the record, the court agreed with counsel's assessment that none of Walker's claims entitled him to an evidentiary hearing or relief. The court gave Walker notice of its intent to dismiss his first PCRA petition without holding an evidentiary hearing. Walker did not file a response thereto, so the court dismissed his first PCRA petition on April 27, 2015. Walker did not appeal this decision.

On July 29, 2015, Walker filed his second PCRA petition, which he asserted (1) the trial court erred by denying the motion to suppress when the police had no reasonable suspicion or probable cause to stop the Volvo after it made a proper turn; (2) the trial court erred by permitting Officer Bortz to testify as both an expert and fact witness concerning possession with intent to deliver, as the evidence was cumulative based since two other individuals in the Volvo testified they picked up Walker; and (3) ineffective assistance of counsel for not appealing an alleged mandatory sentence pursuant to *Alleyne*.

The court lacks jurisdiction to hold an evidentiary hearing or grant Walker any relief.

Any PCRA petition, including a second or subsequent petition, must be filed within one year after the judgment becomes final or the petitioner must plead and prove one of the three statutory exceptions to the one-year time limit. 42 Pa.C.S.A. §9545(b). “[A] judgment 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 Pennsylvania Superior Court decided Walker’s direct appeal on May 29, 2014. Walker had thirty (30) days within which to file a petition for allowance of appeal to the Pennsylvania Supreme Court, but he did not do so. Therefore, Walker’s judgment of sentence became final on June 29, 2014.

To be considered timely, Walker had to file his second PCRA petition on or before June 29, 2015 or allege facts in his petition to demonstrate one of the statutory exceptions. To avail himself of one of these exceptions, Walker had to allege facts in his petition to show that one of these exceptions apply, including the dates the events occurred, the dates he became aware of the information or event and why he could not have discovered the information earlier. *See Commonwealth v. Breakiron*, 566 Pa. 323, 330-31, 781 A.2d 94, 98 (Pa. 2001); *Commonwealth v. Yarris*, 57 Pa. 12, 731 A.2d 581, 590 (Pa. 1999). Walker’s petition was not filed until July 29, 2015. He also did not allege facts to support any of the exceptions nor could he, because all the issues raised in the current petition were also raised in his first PCRA petition.

The time limits of the PCRA are jurisdictional in nature. *Commonwealth v. Howard*, 567 Pa. 481, 485, 788 A.2d 351, 353 (Pa. 2002); *Commonwealth v. Palmer*, 814

A.2d 700, 704-05 (Pa.Super. 2002). “[W]hen 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 60 days 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.” *Commonwealth v Gamboa-Taylor*, 562 Pa. 70, 77, 753 A.2d 780, 783 (Pa. 2000). Therefore, the court does not have jurisdiction to hold an evidentiary hearing or grant Walker relief.

Even if the court had jurisdiction, Walker would not be entitled to relief because all of his issues were previously litigated or waived. To be eligible for relief, a petitioner must also be able to plead and prove that “the allegation of error has not been previously litigated or waived.” 42 Pa.C.S.A. §9543(a)(3). An issue is considered 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.” 42 Pa.C.S.A. §9544(a). “[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.” 42 Pa.C.S.A. §9544(b).

The highest appellate court in which Walker could have had review as a matter of right was the Pennsylvania Superior Court. The first two issues in Walker’s PCRA petition were asserted in Walker’s direct appeal and rejected by the Pennsylvania Superior Court.<sup>2</sup> Therefore, they were previously litigated.

---

<sup>2</sup> Although Walker could have filed a petition for allowance of appeal to the Pennsylvania Supreme Court, such an appeal does not entitle Walker to review as a matter of right. Instead, the Pennsylvania Supreme Court has

In Walker's third issue he claims ineffective assistance of counsel for not appealing his mandatory sentence. Based on the documents attached to his pro se petition, it appears that Walker believes he has a claim pursuant to *Alleyne v. United States*, 133 S.Ct. 2151 (2013). This claim was raised and rejected in Walker's first PCRA petition. Therefore, this claim was also previously litigated.

This claim also lacks merit. The court did not impose a mandatory minimum sentence; rather, the court imposed a sentence in the aggravated range of the sentencing guidelines because Walker was on parole supervision for a federal conviction when he committed the offenses in this case. N.T., May 30, 2013, at 3-4, 8. Since no mandatory sentence was imposed in this case, Walker does not have a valid claim pursuant to *Alleyne*.

For the foregoing reasons, the court concludes that Walker is not entitled to relief on any of his claims. Accordingly, the court will give Walker notice of its intent to dismiss his second PCRA petition without holding an evidentiary hearing.

### **ORDER**

AND NOW, this \_\_\_ day of August 2015, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court finds that no purpose would be served by conducting an evidentiary hearing, and none will be scheduled. The parties are hereby notified of the court's intention to dismiss Walker's second PCRA petition. Walker 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

---

the discretion to allow or disallow the appeal.

dismissing the petition.

By The Court,

---

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
Shynell Walker, LB-5065  
SCI Pine Grove, 191 Fyock Road, Indiana PA 15701  
Gary Weber, Esquire (Lycoming Reporter)  
Work file