

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA : No. CR-1353-2009  
vs. :  
: CRIMINAL DIVISION  
:  
: Application for Leave to file  
ULYSSES V. HOFFMAN, : Post-Sentence Motion, nunc pro tunc  
Defendant : Motion to Vacate Illegal Sentence (2<sup>nd</sup>  
PCRA)

**OPINION AND ORDER**

By way of background, Ulysses Hoffman (“Petitioner”) pled guilty on January 13, 2010 to two counts of rape of an impaired person in violation of 18 Pa. C.S. § 3121(a)(4). On December 15, 2010, Petitioner was sentenced on each count, concurrently, to a period of state incarceration, the minimum of which was seven (7) years and the maximum of which was twenty (20) years. At sentencing, Petitioner was informed of his obligation to register with the Pennsylvania State Police (PSP) as a lifetime registrant, in accordance with Megan’s Law. (Sentencing Transcript, December 15, 2010, at 14-17). Petitioner did not file any post-sentence motions or an appeal.

On June 29, 2011, Petitioner filed a pro se PCRA petition, in which he asserted that his sentence in this case was excessive and he alleged that trial counsel provided ineffective assistance of counsel in another case (CR-1666-2009). By Order dated August 29, 2012, the court dismissed Petitioner’s PCRA petition. Petitioner appealed this decision, but on April 10, 2013, his appeal was dismissed for failing to file a brief.

Petitioner, presently an inmate at SCI – Waymart, mailed two petitions dated August 29, 2017 and then filed on September 11, 2017. The first is an Application for Leave to file a Post-Sentence Motion Nunc Pro Tunc (hereinafter “Post-Sentence Application”).

The second is a motion to vacate illegal sentence (hereinafter “Motion to Vacate”). Petitioner asserts that his sentence was illegal and should be vacated because he was ordered “under Megan’s Law...to register as a sex offender for the remainder of his life” and that “Megan’s Law with SORNA violates the ex post facto clauses.”

As to the pending petitions, the court will first address Petitioner’s Post-Sentence Application. Pursuant to Rule 720 of the Pennsylvania Rules of Criminal Procedure, a written post-sentence motion must be filed no later than ten (10) days after the imposition of sentence.

Petitioner was sentenced on December 15, 2010. However, because December 25, 2010 was both a holiday and a Saturday, any post-sentence motion had to be filed no later than December 27, 2010 to be considered timely.

Petitioner asserts that the court has jurisdiction to consider his present motion pursuant to 42 Pa. C.S.A. §5505. For the court to have jurisdiction pursuant to that section, however, Petitioner needed to file his present Post-Sentence Application within thirty (30) days after he was sentenced, that is on or before January 18, 2011.<sup>1</sup>

Accordingly, the court cannot and will not address Petitioner’s Post-Sentence Application as a post-sentence motion.

In *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002), however, the Superior Court noted that it has “repeatedly held that the PCRA provides the sole means for obtaining collateral review and that any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition.” Therefore, in accordance with

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<sup>1</sup> January 15, 2011 fell on a Saturday. Monday, January 17, 2011 was a holiday, Martin Luther King Day. Accordingly, Petitioner had until January 18, 2011 for his Application to be filed within the thirty (30) days

*Johnson*, the court will treat both Petitioner's Post-Sentence Application and his Motion to Vacate as a PCRA petition. This would constitute defendant's second petition.

Any PCRA petition, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petitioner pleads and proves one of the three statutory exceptions. 42 Pa. C.S.A. §9545 (b) (1).

Petitioner's judgment of sentence became final on or about January 18, 2011. Therefore, to be facially timely, his petition had to be filed by January 18, 2012. Clearly, the petitions, dated August 29, 2017, are late by approximately 5 ½ years.

One exception to the one-year filing period is if the petition alleges and the petitioner proves that the right asserted is a constitutional right that was recognized by the Supreme Court of Pennsylvania after the time period set forth above and the right has been held by that court to apply retroactively. 42 Pa. C.S.A. §9545 (b) (1) (iii). Any petition invoking this exception must be filed within sixty (60) days the claim could have been presented. 42 Pa. C.S.A. §9545 (b) (2).

Petitioner does not allege any facts to support an exception to the one-year filing requirement but, based on a reading of the Motion to Vacate as well as the Post-Sentence Application, it appears to the court that petitioner is seeking to obtain relief pursuant to the Pennsylvania Supreme Court decision in *Commonwealth v. Muniz* - Pa.-, 164 A.3d 1189 (2017).

The holding in *Muniz* created a substantive constitutional right. More specifically, the Supreme Court determined that Pennsylvania's Sex Offender Registration

and Notification Act (SORNA) 42 Pa. C.S. §§ 9799.10-9799.41, as applied retroactively, was unconstitutional under the ex post facto clauses of the United States and Pennsylvania Constitutions. Because SORNA's purpose was punitive, a retroactive application of SORNA to past sexual offenders violated the ex post facto clause of both constitutions. *Muniz*, at 1218, 1223.

For Petitioner's second PCRA petition to be considered timely, it first must be filed within sixty (60) days of the date the claim could have been presented. 42 Pa. C.S.A. §9545 (b) (2). It clearly was. *Muniz* was decided on July 19, 2017, and Petitioner's motions, which are now being treated as a second PCRA, were mailed on August 29, 2017, and filed on September 11, 2017.

Further, in order to be timely, the petition must allege that the right asserted is a constitutional right that was recognized by the Supreme Court of Pennsylvania after the one-year time bar on the filing of PCRA petitions. Clearly, *Muniz* established a constitutional right with respect to the retroactive application of SORNA. See also, *Commonwealth v. Rivera-Figueroa*, 2017 PA Super 359 (November 14, 2017); *Commonwealth v. Butler*, 2017 PA Super 344 (October 31, 2017).

The precise issue, however, to be determined is whether the exception applies in light of the statutory language that requires that its decision be held "by that court to apply retroactively."

### **ORDER**

AND NOW, this \_\_\_\_ day of December 2017, Ryan Gardner, Esquire is appointed as counsel for Petitioner. This appointment is necessary in the interests of justice.

Pa. R. Crim. P. 904(E). Counsel shall file an amended PCRA petition to comply with the requirements of Rule 902 of the Pennsylvania Rules of Criminal Procedure and to set forth specific averments regarding the timeliness of the petition pursuant to 42 Pa. C. S. §9545(b) and the retroactivity of *Muniz*. The amended PCRA petition must be filed within 60 days of the date of this Order.

The Commonwealth shall file an Answer within 30 days of receipt of the amended PCRA petition.

Argument on the timeliness of the petition is scheduled for April 24, 2018, at 9:00 a.m. in courtroom #4 of the Lycoming County Courthouse. Counsel for Petitioner shall file a supporting brief no later than 14 days prior to the argument. The Commonwealth shall file its opposing brief no later than 7 days prior to the argument.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
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Work file