

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CR-1479-2014
	:	
v.	:	
	:	
TIMOTHY J. MILLER, JR,	:	
Defendant	:	PCRA

OPINION AND ORDER

On February 15, 2017, PCRA Counsel for the Defendant filed a Motion to Withdraw as Counsel pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super.1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant has failed to raise any meritorious issues in his PCRA Petition, and his petition should be dismissed.

Background

On September 25, 2015, Defendant entered a plea of guilty to two (2) counts of Driving Under the Influence of Alcohol¹ and one (1) count of Driving Under a Suspended License (alcohol related), a summary offense². As it was Defendant's fourth DUI offense in four years, the grading of the DUI under the influence general impairment was at a misdemeanor two and the Driving with High Rate of Alcohol was a misdemeanor one.³ The mandatory minimum sentence for a conviction under 3802(b) fourth or subsequent offence is one year imprisonment.⁴ In accordance with the plea agreement, the Defendant was sentenced to a state correctional institution for

¹ 75 Pa.C.S. §§ 3802(a)(1) and 3802(b).

² 75 Pa.C.S. § 1543(b)(1.1)(i).

³ 75 Pa.C.S. § 3803 (grading).

⁴ 75 Pa.C.S. § 3804(penalties).

a minimum of fifteen months and a maximum of five (5) years. Without the evidence of the blood alcohol level, Defendant would only be subject to the maximum sentence available for his guilty plea under 3802(a)(1): two years incarceration and a fine of \$5,000.

On August 18, 2016, Defendant filed a Motion for Post Conviction Relief, alleging a constitutional violation in his case. On August 29, 2016, this Court issued an Order appointing counsel in accordance with Pa.R.Crim.P. 904(C),⁵ and scheduled a court conference for November 2, 2016. After the court conference, appointed counsel filed a Motion to Withdraw as Counsel and a *Turner-Finley* letter on February 15, 2017. After thorough review and consideration, this Court finds that there are no genuine issues of material fact and that Defendant is not entitled to post-conviction relief, and no purpose would be served by any further proceedings.

Jurisdiction

Defendant is potentially eligible for Post Conviction Relief in that he is currently serving a term of probation. 42 Pa.C.S. § 9543(a)(1)(i). Defendant's PCRA Petition is timely pursuant to 42 Pa.C.S. Section 9545(b). Title 42 Pa.C.S. Section 9545(b) requires that a PCRA petition be filed within one (1) year of the date the judgment in a case becomes final, or else meet one of the timeliness exceptions under 42 Pa.C.S. § 9545(b)(1). Here, Defendant was sentenced on September 25, 2015, and took no appeal to the Superior Court of Pennsylvania. Thus, his judgment of sentence became final thirty (30) days later on October 26, 2015. 42 Pa.C.S. § 9545(b)(3).

⁵ "when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant's first petition for post-conviction collateral relief." Pa.R.Crim.P. 904.

Defendant filed his PCRA Petition on August 18, 2016, which is within one (1) year of the date the judgment became final and thus the Petition is timely and the Court has jurisdiction to consider whether it has merit.

Whether Defendant's consent to have his blood tested for blood alcohol concentration was per se unconstitutional per Birchfield v. North Dakota.

Birchfield v. North Dakota⁶ held that warrantless breath tests to prevent the destruction of BAC evidence are constitutional searches incident to arrest, but warrantless blood tests are not. Though the Supreme Court referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply,

it is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (U.S. 2016).

Defendant insists in his petition for post-conviction relief that though he consented to the test of his blood, his consent was coerced by the officer's warnings regarding the enhanced criminal penalties if he refused to consent to the test. Petitioner did not refuse the blood test. Petitioner's enhanced sentence is not related to a refusal but is related to the results of the blood alcohol test.

If this were a direct appeal of his sentence, the Petitioner would be eligible for relief: In Commonwealth v. Evans, 153 A.3d 323 (Pa. Super. 2016) the Superior Court reversed the denial of a suppression in a DUI case where the driver had consented to the chemical test of his blood. The driver argued that his consent was not voluntary

⁶ BIRCHFIELD V. NORTH DAKOTA, 136 S. CT. 2160 (2016).

and that he was coerced into an involuntary blood test based upon the officer's warnings (i.e. the increased criminal penalty for refusal if later found guilty of a violation of 3802(a), incapable of safe driving). The driver argued that the taking of his blood violated his right to be free from unreasonable searches pursuant to both Article 1 Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution. The Superior Court reversed the denial of the suppression of the BAC results in accordance with Birchfield. Evans at 331.

Because this is collateral review, the Court must first determine whether Birchfield will apply. The Supreme Court of Pennsylvania has not yet ruled on the issue of whether Birchfield relief will be available retroactively. Therefore, the Court will rely on the reasoning of Commonwealth v. Washington, 142 A.3d 810 (Pa. 2016) (holding that Alleyne relief will not be available in Pennsylvania on collateral review) in determining whether Petitioner is entitled to Birchfield relief on collateral review:

To determine whether the rule applies retroactively to cases at the collateral review stage, additional analysis is necessary, either per Teague and its progeny or under some state law formulation that is consistent with the authority recognize in Danforth v. Minnesota (explaining that Teague limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "nonretroactive" by Teague).

Washington at 819.

This Court conducts its own Teague⁷ analysis. New constitutional rules regarding criminal procedure, unless they fall within exception to the general rule, are not applicable during collateral review. Teague at 310.

⁷ Teague v. Lane, 489 U.S. 288 (1989).

Under Teague, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced. Teague recognized, however, two categories of rules that are not subject to its general retroactivity bar. First, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include "rules forbidding criminal punishment of certain primary conduct," as well as "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." Second, courts must give retroactive effect to new "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding."

Montgomery v. Louisiana, 136 S.Ct. 718, 728 (U.S. 2016) (internal citations omitted).

The Supreme Court in Montgomery found that the proscription against lifetime mandatory imprisonment for juvenile offenders was a substantive change in constitutional law and thus held that the State of Louisiana must offer collateral relief to Petitioner Montgomery on collateral review. The Supreme Court of the United States reasoned that the change in the law rendering Montgomery's sentence illegal was substantive "The hearing [to determine youth's incorrigibility] does not replace but rather gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." Montgomery held that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. Substantive rules have been described in various ways (see quote above). Justice Harlan defined substantive constitutional rules as "those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe". Montgomery at 729.

Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful. Procedural

rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating " the manner of determining the defendant's culpability." Schriro, 542 U.S. at 353, 124 S.Ct. 2519, 159 L.Ed.2d 442; Teague, supra, at 313, 109 S.Ct. 1060, 103 L.Ed.2d 334. Those rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." Schriro, supra, at 352, 124 S.Ct. 2519, 159 L.Ed.2d 442. Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful. For this reason, a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction or sentence.

Montgomery at 729-730.

The Court believes that Birchfield represents a change in constitutional criminal procedure and therefore is not amenable to retroactive application on collateral review. Petitioner is indeed correct that his blood was drawn in violation of his constitutional right to be free from illegal search and seizures; however, there is no remedy available for him on collateral review. The illegal blood draw did result in an increased sentence greater than the lawful maximum. Though Montgomery v. Louisiana did find that that sentencing juveniles to life in a prison affected a substantive constitutional right (8th amendment – cruel and unusual punishment); the Supreme Court of Pennsylvania did not find that to be the case in Washington (6th amendment – right to a jury trial), which resulted in what would later become a greater than lawful maximum sentence for Petitioner Washington. Believing that the Supreme Court of Pennsylvania will determine that Birchfield is a change in constitutional criminal procedure, this Court gives no retroactive effect to its dictates on collateral review. The exclusionary rule provided by the 4th amendment is not a constitutional remedy; rather it is a tool to deter illegal police conduct. Though the police conduct in the case at bar was later

determined to be unconstitutional, at the time it was, and will remain the law in Petitioner's case. The Court can provide no relief.

Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pa.R.Crim.P. 907(1), the parties are hereby notified of this Court's intention to deny the Defendant's PCRA Petition. The Defendant 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.

ORDER

AND NOW, this 8th day of June, 2017, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for leave to withdraw appearance filed February 15, 2017, is hereby GRANTED and William Miele, Esq. may withdraw his appearance in the above captioned matter.

BY THE COURT,

Nancy L. Butts, P.J.

cc: DA
William Miele, Esq.
Timothy John Miller, Jr.
216 S Broad St
Hughesville, PA 17737
Law clerk (S. Roinick)