

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**VERNON ROBINSON,
Defendant**

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CR-1848-2003

PCRA

OPINION AND ORDER

On January 5, 2017, the Defendant filed a petition for relief under the Post-Conviction Relief Act (PCRA). On April 25, 2017, this Court appointed PCRA Counsel. On May 24, 2017, PCRA Counsel filed a petition to withdraw from representation and a “no merit letter” pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super.1988). A court conference was scheduled for June 27, 2017, but neither PCRA Counsel nor the Commonwealth believed discussion beyond the “no merit letter” was needed. In the petition, the Defendant argues that he is entitled to relief because he “was sentenced under a mandatory minimum sentence provision which has recently been deemed to be unconstitutional” He cites Alleyne v. United States¹. For the reasons set forth in this opinion, the Court finds that the Defendant’s petition lacks merit and will be dismissed.

Background

On December 22, 2003, Vernon Robinson (Defendant) was charged with four (4) counts of Delivery and Possession with the Intent to Deliver a Controlled Substance² an ungraded felony; two (2) counts of Criminal Use of a Communication

¹ 133 S.Ct. 2151 (U.S. 2013).

² 35 P.S. 780-133 (a) 30.

Facility³, a felony of the third degree; two (2) counts of possession of a controlled substance⁴; and two (2) counts of possession of drug paraphernalia⁵ both ungraded misdemeanors. Defendant proceeded to trial on June 23, 2004, and was convicted on all counts. Defendant filed post-verdict motions which were denied by the Court. On September 23, 2004, Defendant was sentenced to an aggregate period of incarceration of sixty (60) to one hundred twenty (120) months to be served in a state correctional facility.

Defendant was sentenced, over the objection of Defense Counsel, to a mandatory sentence enhancement for vending contraband sentences within a prohibited distance from a school. Sentencing Transcript, 3/15/2005, at 8-9. Post sentence motions were filed on September 24, 2005, which were denied by this Court on January 4, 2005. Timely notice of appeal was filed to the Superior Court of Pennsylvania on January 24, 2005, and the Superior Court denied the appeal by opinion and order dated December 14, 2005. In its unpublished memorandum opinion, No. 159 MDA 2005, the Superior Court affirmed the decision of the trial court finding that Commonwealth v. Bromley, 862 A.2d 598, 601-603 (Pa. Super. 2004) held that sentencing enhancements adduced at a post-trial proceeding are congruent with federal law. Commonwealth v. Vernon Robinson, No. 159 MDA 2005 (Pa. Super. 2005) at 5.

Judge Ford Elliott in a concurring memorandum wrote "I join in the decision reached by the majority because it is compelled by the recent authority of this court.

³ 18 Pa. C. S. § 7512(a).

⁴ 35 P.S. § 780-113(a)16.

⁵ 35 P.S. § 780-113(a)32.

However, in all candor, I have serious reservations about the resolution of the sentencing claim presented.”

A petition for allowance of appeal was filed with Supreme Court of Pennsylvania and was denied on May 9, 2006. No petition for certiorari was filed with the United States Supreme Court. Therefore, Defendants judgment of sentence became final 90 days after his denial of appeal to the Pennsylvania Supreme Court or August 9, 2007.

Defendant filed his initial timely PCRA on February 26, 2007, and was appointed counsel to represent him. After preliminary conference and without a hearing, the PCRA petition was dismissed on December 12, 2007. No appeal was taken from the court’s denial of that initial petition.

On January 5, 2017, the Defendant filed a second *pro se* PCRA petition. The Defendant alleges that trial counsel was ineffective and the trial court violated his constitutional rights by sentencing him to an unconstitutional mandatory minimum sentence in violation of Alleyne v. United States⁶. Donald F. Martino, Esquire was appointed to represent the Defendant for the second PCRA Petition. On May 24, 2017, Attorney Martino filed a Petition to Withdraw as Counsel and a Memorandum Pursuant to Turner/Finley. After an independent review of the record and an additional PCRA conference, the Court agrees with Attorney Martino that Defendant failed to raise any meritorious issues in his PCRA Petition.

⁶ Alleyne v. United States, 133 S. Ct. 2151, 2153 (U.S. 2013) (holding that because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an “element” that must be submitted to the jury).

Discussion

The Court begins by addressing the timeliness of Defendant's petition, as the PCRA time limitations implicate the Court's jurisdiction and may not be altered or disregarded in order to address the merits of collateral relief claims. See Commonwealth v. Bennett, 930 A.2d 1264, 1267 (Pa. 2007).

Under the PCRA, any petition for relief, including second and subsequent petitions, must be filed within one year of the date on which the judgment of sentence becomes final. Id. There are three exceptions:

(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)(i)-(iii).

Any petition attempting to invoke these exceptions "shall be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2); See Commonwealth v. Gamboa-Taylor, 753 A.2d 780, 783 (Pa. 2000).

Under the jurisdictional requirements of Section 9545 (b)(1), Defendant's petition would have been required to be filed within one (1) year from the date his conviction became final. His Petition for Allowance of Appeal was denied on May 9, 2006. Defendant's judgment of sentence became final 90 days after his denial of

appeal to the Pennsylvania Supreme Court or August 9, 2006. Any timely petition would have had to have been filed no later than August 9, 2007.

To justify an exception to the timeliness requirement, Defendant asserts that he learned about the Commonwealth v. Hopkins⁷ case from his wife. Hopkins was decided on June 15, 2015, and the Defendant's second petition was filed on January 5, 2017. Defendant still has not proven an exception to the timeliness requirement. The Defendant argues that he is entitled to relief as a result of Hopkins. "[A] judicial opinion does not qualify as a previously unknown 'fact' capable of triggering the timeliness exception set forth in section 9545(b)(1)(ii) of the PCRA." Commonwealth v. Cintora, 69 A.3d 759, 763 (Pa. Super. 2013).

The Court notes that even if the Defendant could prove an exception to the timeliness requirement, any Alleyne challenge may only be reached on direct appeal because the Pennsylvania appellate courts have held that Alleyne is not to be applied retroactively to PCRA petitioners. Commonwealth v. Riggle, 119 A.3d 1058, 1064-1067 (Pa. Super. 2015); Commonwealth v. Miller, 102 A.3d 988, 995 (Pa. Super. 2014); Commonwealth v. Washington, 142 A.3d 810, 820 (Pa. 2016) (holding that Alleyne does not apply retroactively to cases pending on collateral review, and that Appellant's judgment of sentence, therefore, is not illegal on account of Alleyne.) Though Petitioner has been raising the issue of the illegality of his sentence since the time of his sentencing, the Court finds the decision in Washington controlling and can

⁷ Commonwealth v. Hopkins, 117 A.3d 247 (Pa. 2015) (decided June 15, 2015) (holding the statutory section under which Defendant was sentenced, 18 Pa.C.S. § 6317 (Drug-free school zones) unconstitutional).

provide no relief. See Commonwealth v. Cabeza⁸ (holding where an appellate decision overrules prior law and announces a new principle, unless the decision specifically declares the ruling to be prospective only, the new rule is to be applied retroactively to cases where the issue in question is properly preserved at all stages of adjudication up to and including any direct appeal.) As Hopkins was decided far past the time of Defendant's direct appeal period, and the Supreme Court of Pennsylvania has specifically declined to give Alleyne relief collaterally, the Court is not only without jurisdiction to provide relief but there would be no substantive basis for it do so even if Petitioner had filed within 60 days of the Hopkins decision.

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 Pennsylvania Rule of Criminal Procedure 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.

⁸ Commonwealth v. Cabeza, 469 A.2d 146, 148 (1983).

ORDER

AND NOW, this 30th day of August, 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 **Motion to Withdraw as Counsel** filed May 24, 2017, is hereby **GRANTED** and Donald F. Martino, Esq. may withdraw his appearance in the above captioned matter.

BY THE COURT,

Nancy L. Butts, P.J.

cc: DA (KO)
Donald F. Martino, Esq.
Vernon Robinson
Registration number 71974-066
3057 Easton Turnpike
Waymart, PA 18472
S. Roinick (file)