

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CR-1322-2002
	:	
v.	:	
	:	CRIMINAL DIVISION
MARK TANNER,	:	
Defendant	:	PCRA

OPINION AND ORDER

On September 19, 2014, the Defendant (Petitioner) filed a Post-Conviction Relief Act (PCRA) Petition.

I. Background

On August 22, 2003, a jury found Petitioner guilty of Kidnapping, Unlawful Restraint, Aggravated Assault, Simple Assault, Recklessly Endangering Another Person, and Possessing Instruments of Crimes. On October 14, 2003, the Court sentenced Petitioner to incarceration for an aggregate term of 8.5 to 18 years.

On May 13, 2004, Petitioner filed a PCRA Petition. On September 10, 2004, Petitioner's PCRA Counsel filed an amended PCRA petition. Ineffectiveness of trial counsel was one of the issues raised in the petition. On June 6, 2005, the PCRA Court reinstated Petitioner's appeal rights based on "counsel's failure to timely file an appeal of his conviction." The PCRA Court denied the petition on all other issues, including the allegation of counsel's ineffectiveness during trial. On July 5, 2005, PCRA Counsel filed notice that he was appealing the PCRA Court's order of June 6, 2005. In a decision issued on February 27, 2007, the Superior Court found that Petitioner's trial counsel was not ineffective. However, Petitioner's sentence was vacated and the case was remanded for a competency evaluation. After a competency evaluation

and hearing, the Court found that Petitioner was competent to stand trial. Therefore, Petitioner's sentence was reinstated.

On June 26, 2009, Petitioner filed another PCRA petition. On December 1, 2009, PCRA Counsel filed an amended PCRA Petition. In the petition, PCRA Counsel argued that Petitioner's counsel was ineffective for not appealing the Court's finding that Petitioner was competent to stand trial. On February 8, 2010, the Court reinstated Petitioner's appeal rights. On March 5, 2010, PCRA Counsel filed notice that he was appealing the Court's finding that Petitioner was competent to stand trial. In a decision issued June 15, 2012, the Superior Court affirmed the trial court's determination that Petitioner was competent to stand trial. Petitioner did not file an appeal in the Supreme Court of Pennsylvania.

In his current petition, Petitioner asserts that his constitutional rights were violated because the Commonwealth was allowed to exercise preemptory challenges and the jury was not informed of any sentencing information. He also asserts that counsel was ineffective for not objecting to the use of preemptory challenges. Finally, he asserts that counsel was ineffective because the jury was not given sentencing information.

II. Discussion

“[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. § 9544(b); Commonwealth v. Brown, 872 A.2d 1139, 1144 (Pa. 2005). Petitioner could have raised the preemptory challenges issue before trial, at trial, on appeal or in a prior state postconviction proceeding. Therefore, the issue is waived.

Petitioner could have raised the ineffective assistance of counsel issues in his first PCRA petition. In fact, Petitioner did raise ineffective assistance of counsel issues in his first petition, and the Superior Court of Pennsylvania found that he had not shown that trial counsel was ineffective. Therefore, the ineffective assistance of counsel issues are waived.

Regarding the jury not being informed of sentencing issues, this Court believes that Petitioner is arguing that the jury did not find all of the elements of the offenses beyond a reasonable doubt. The issue could have been raised on appeal. Therefore, it is waived. If Petitioner is asserting a right that was recognized in Alleyne v. United States,¹ the issue does not fall under 42 Pa. C.S. § 9545(b)(1)(iii) because neither the Supreme Court of the United States nor the Supreme Court of Pennsylvania held the right to apply retroactively. See Commonwealth v. Miller, 2014 PA Super 214, 11-12.

“‘[T]hough not technically waivable, a legality [of sentence] claim may nevertheless be lost should it be raised . . . in an untimely PCRA petition for which no time-bar exception applies, thus depriving the court of jurisdiction over the claim.’” Miller, 2014 PA Super 214, 13 (quoting Commonwealth v. Seskey, 86 A.3d 237, 241 (Pa. Super. 2014)).

At the very latest, Petitioner’s judgment of sentence became final July 15, 2012.² Petitioner’s current petition is untimely because it was not filed by July 15, 2013.³ No time-bar exception applies. Therefore, this Court lacks jurisdiction over Petitioner’s claims.

¹ 133 S. Ct. 2151 (2013).

² “[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. § 9545(b)(3). “[A] petition for allowance of appeal shall be filed with the Prothonotary of the Supreme Court within 30 days after the entry of the order of the Superior Court or the Commonwealth Court sought to be reviewed.” Pa. R.A.P. 1113(a).

³ A petitioner must file a PCRA petition within one year of the date the judgment becomes final. 42 Pa. C.S. § 9545(b)(1).

III. Conclusion

All of the issues that Petitioner raises are waived. The Petition is also untimely.

ORDER

AND NOW, this _____ day of October, 2014, the Petitioner is notified that this Court intends to dismiss his PCRA petition because the issues raised are waived and the petition is untimely. The Court will dismiss the petition unless the Petitioner files an objection to that dismissal within twenty (20) days of date of this Order.

By the Court,

Nancy L. Butts, President Judge