

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA	:	
Plaintiff	:	
	:	
v.	:	No. CR 1330- 2011
	:	CRIMINAL DIVISION
NAFIS BUIE,	:	
Defendant	:	PCRA

OPINION AND ORDER

Before the Court are Defendant’s Post Conviction Relief Act (PCRA) Petition and his attorney’s Motion to Withdraw as Counsel. On October 26, 2015, current Counsel for the Defendant filed a Motion to Withdraw as Counsel pursuant to Commonwealth v. Turner, 544 A.2d 927 (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 December 9, 2011, Nafis Buie (Defendant) pleaded guilty to one consolidated count of Possession with Intent to Deliver, an ungraded felony, pursuant to a plea agreement whereby he was to receive an aggregate sentence of state incarceration, the minimum of which was to be five years and the maximum of which was ten years. Sentencing was scheduled for April 25, 2012.

Sentencing was continued until May 8, 2012. On May 8, 2012, Judge Joy Reynolds McCoy sentenced the Defendant to an aggregate period of state incarceration, the minimum of which was to be five years and the maximum of which was ten years.

The Defendant filed a *pro-se* PCRA Petition on August 11, 2015. In the PCRA Petition, Defendant asserted ineffectiveness of counsel, illegal sentence, and judicial misconduct. Defendant raises the legality of mandatory minimum sentences as an ***Alleyne*** challenge. *Alleyne v. United States*, 133 S.Ct. 2151(2013). In ***Alleyne***, the Supreme Court held that "facts that increase mandatory minimum sentences must be submitted to the jury" and must be found beyond a reasonable doubt. ***Commonwealth v. Miller***. 102 A.3d 988, 994 (Pa. Super. 2014). On August 28, 2015, Donald Martino, Esquire, was appointed to represent the Defendant. A PCRA conference was scheduled for November 9, 2015. Attorney Martino filed a Turner/Finley letter and a Petition to Withdraw from Representation on October 26, 2015.

Discussion

After an independent review of the record, the Court agrees with counsel's no merit letter.

In order to address the merits of the Defendant's PCRA, the Court must first address timeliness. Any PCRA Petition must be filed within one year of the date of the judgement of sentence became final, or allege facts to support one of

the statutory exceptions. 42 Pa.C.S.A. § 9545(b). A judgement becomes final at the conclusion of direct review or the times for seeking such review 42 Pa.C.S.A. § 9545(b)(3).

The Court sentenced the Defendant on May 8, 2012. Defendant did not file any post sentence motions or an appeal prior to the instant PCRA Petition. Therefore, his judgement became final on or about June 8, 2012.

The instant PCRA was not filed by the statutory June 8, 2013, deadline, nor does it allege facts to support a statutory exception. The Court lacks jurisdiction to hold any evidentiary hearings or to grant any relief. Therefore, on its face, the Petition appears to be untimely.

However, the PCRA statute provides for three (3) exceptions to the timeliness requirement. See 42 Pa. C.S. § 9545(b)(1). These exceptions include:

- (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).¹ If a PCRA petitioner attempts to file an untimely PCRA petition, it is the burden of the petitioner to plead and prove one of the exceptions to the one-year timeliness requirement. ***Commonwealth v. Beasley***, 741 A.2d 1258, 1261 (Pa. 1999); ***Commonwealth v. Taylor***, 933 A.2d 1035, 1039 (Pa. Super. 2007). If a PCRA petition is found to be untimely, “[u]nder the plain language of Section 9545 [of the Post-Conviction Relief Act], the substance of [petitioner’s] PCRA petition must yield to its untimeliness.” ***Taylor***, 933 A.2d at 1043.

In this instance, Defendant failed to affirmatively plead any one of the PCRA timeliness exceptions. See ***Taylor***, 933 A.2d at 1039. In addition to failing to affirmatively plead one of the timeliness exceptions, Defendant did not provide any genuine issue of material fact regarding the timeliness of his PCRA petition or applicability of any exception. Therefore, Defendant’s August 11, 2015, PCRA petition should be dismissed pursuant to 42 Pa. C.S. § 9545(b) as untimely.

The Superior Court has held in ***Commonwealth v. Miller*** that the ***Alleyne*** argument does not, in itself, meet one of the exceptions to timeliness necessary

¹ Even these exceptions to the timeliness requirement have a timeliness element; any PCRA petition raising one of these timeliness exceptions should be “filed within 60 days of the date the claim could have been presented.” 42 Pa. C.S. § 9545(b)(2).

for this Court to maintain jurisdiction. In *Miller*, the Defendant, through an untimely PCRA, raised before the Superior Court two issues:

[1.] Whether [a] newly recognized constitutional right ... [in *Alleyne v. United States*, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)], has been held to appeal [sic] retroactively, within the 60-day filing period begins [sic] to run upon the date of the underlying judicial decision of June 17, 2013[?]

[2.] Whether the decision was rendered during the pendency of [Appellant]'s PCRA appeal and the issue was properly preserved[?]

Commonwealth v. Miller. 102 A.3d 988, 992 (Pa. Super. 2014).

The Defendant in *Miller* attempted to argue that *Alleyne* created a new constitutional right which applied retroactively. *Id.* at 994. The Superior Court held, "neither our Supreme Court, nor the United States Supreme Court has held that *Alleyne* is to be applied retroactively to cases in which the judgment of sentence had become final". *Id.* at 995. The Superior Court held that no exception to timeliness was created by the *Alleyne* decision and that the Court would still need jurisdiction to entertain the PCRA. As the Superior Court noted,

"[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." As a result, the PCRA court lacked jurisdiction to consider the merits of Appellant's second PCRA petition, as it was untimely filed and no exception was proven.

Id. (internal citations omitted).

This Court lacks jurisdiction due to the untimeliness of the Defendant's PCRA Petition. **Alleyn**e has not been held to create an exception to the timeliness requirement.

Additionally, the Defendant did not file the instant PCRA decision within 60 days of the **Alleyn**e decision. See 42 Pa. C.S. § 9545(b)(2). (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

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.

ORDER

AND NOW, this **22nd** day of **December, 2015**, upon review of the record, 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 August 28, 2015, is hereby GRANTED and Don Martino, Esquire, may withdraw his appearance in the above-captioned matter. The Defendant is notified that he has the right to represent himself or to hire private counsel, but the court will not appoint another attorney to represent him unless he sets forth facts in his response to show that his PCRA petition is timely and contains an issue of arguable merit.

By the Court,

Joy Reynolds McCoy, Judge

JRM/jan

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