

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-262-2012  
:   
vs. : Order treating “Petition for Writ of  
: Habeas Corpus” as PCRA and  
: Notice of Intent to Dismiss PCRA Without  
NAFIS JONES, : Holding Evidentiary hearing  
Defendant :

**OPINION AND ORDER**

This matter came before the court on Defendant’s “Petition for Writ of Habeas Corpus,” in which he challenges the constitutionality and/or legality of his sentence in light of *Alleyne v. United States*, 133 S.Ct. 2151 (2013) and *Commonwealth v. Munday*, 78 A.3d 661 (Pa. Super. 2013). The relevant facts follow.

The Commonwealth charged Defendant with the following crimes: Count 1, possession with intent to deliver a controlled substance (heroin), an ungraded felony; Count 2, delivery of a controlled substance (heroin), an ungraded felony; Count 3, possession of a controlled substance (heroin), an ungraded misdemeanor; Count 4, criminal use of a communication facility, a felony of the third degree; Count 5, criminal attempt to alter or obliterate marks of identification, a felony of the third degree; Count 6, possession of a firearm with an altered manufacturer’s number, a felony of the second degree; Count 7, receiving stolen property (a revolver), a felony of the second degree; Count 8, criminal conspiracy to receive stolen property, a felony of the second degree; Count 9, persons not to possess firearms, a felony of the second degree; and Count 10, firearms not to be carried without a license, a felony of the third degree.

On May 10, 2012, Defendant entered a guilty plea to Count 2, delivery of a

controlled substance and Count 9, persons not to possess firearms in exchange for a sentence of 5 to 10 years of incarceration in a state correctional institution. That same day, the court accepted Defendant's guilty plea and imposed an aggregate sentence of 5 to 10 years of incarceration in accordance with the plea agreement. Defendant did not file any post sentence motions or an appeal.

On January 11, 2013, Defendant filed a pro se PCRA petition in which he challenged the validity of his guilty plea and the legality of his sentence. Defendant did not provide much information to support a basis for these claims other than a statement that he "expected a minimum sentence for his guilty plea, not the maximum" and a case citation followed by the comment "plea involuntary, because breech (sic) of plea agreement." As that was Defendant's first PCRA petition and Defendant was indigent, the court appointed counsel to represent him and gave counsel an opportunity to file either an amended PCRA petition or a no merit letter pursuant to *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley*, 379 Pa. Super. 390, 550 A.2d 213 (1988).

Counsel filed a no merit letter and a motion to withdraw from representing Defendant, but when the court conducted its independent review of the record it discovered that Defendant was advised of the incorrect maximum penalties for delivery of a controlled substance, and his prior juvenile adjudication for a felony drug offense was not a disqualifying offense for the offense of persons not to possess a firearm. Therefore, the court denied counsel's petition to withdraw and promptly scheduled the matter for a conference with counsel.

Counsel requested more time to consult with Defendant regarding his options.

Recognizing that Defendant could be exposing himself to the potential of a greater sentence if he withdrew his guilty plea, the court continued the matter to give counsel more time to consult with Defendant. After consulting with Defendant, counsel filed a motion to withdraw the PCRA petition. The court scheduled the matter for a hearing at which Defendant was present via videoconferencing. After conducting a colloquy with Defendant to ensure that he was knowingly, voluntarily and intelligently withdrawing his PCRA petition, the court granted the motion and marked the PCRA petition withdrawn and dismissed on November 5, 2013.

On December 1, 2014, Defendant filed his petition for writ of habeas corpus, in which he asserts that the sentence imposed violates his constitutional rights in light of *Alleyne v. United States*, 133 S.Ct. 2151 (2013) and *Commonwealth v. Munday*, 78 A.3d 661 (Pa. Super. 2013).

Despite Defendant's assertions to the contrary, the court finds that it must treat Defendant's petition as a PCRA petition. The issue is not whether Defendant is entitled to a remedy, but whether his claims are or were cognizable under the PCRA.

The PCRA specifically states that it is "the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose... including habeas corpus and coram nobis." 42 Pa.C.S.A. §9542. The PCRA provides an avenue for relief for claims that a conviction or sentence resulted from a constitutional violation that so undermine the truth-determining process that no reliable adjudication could have taken place or the imposition of a sentence greater than the lawful maximum. 42 Pa.C.S.A. §9543(a)(2)(i) and (vii). Defendant asserts claims that the sentence imposed

violates his constitutional rights or was illegal; therefore, his claims are or were cognizable under the PCRA. See also *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002)(“any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition”).

Any PCRA petition, including a second or subsequent petition, must be filed within one year of the date the judgment of sentence became final or alleged facts to support one of the statutory exceptions. 42 Pa.C.S.A. §9545(b). A judgment becomes final at the conclusion of direct review or the time for seeking such review.

The court sentenced Defendant on May 10, 2012, and Defendant did not appeal. Therefore, Defendant’s judgment became final on or about June 9, 2012. To be considered timely, Defendant needed to file his current petition on or before June 9, 2013 or alleged facts to support one of the statutory exceptions. Defendant’s petition was not filed until December 1, 2014 and it did not allege any facts to support an exception to the one-year filing period. Therefore, Defendant’s petition is untimely and the court lacks jurisdiction to hold an evidentiary hearing or to grant Defendant any relief. *Commonwealth v. Williams*, 105 A.3d 1234, \_\_\_ (Pa. 2014)(“The PCRA time restrictions are jurisdictional in nature. Thus, if a PCRA petition is untimely, neither this Court nor the PCRA court has jurisdiction over the petition.”).

Even if the petition had been filed earlier, Defendant would not be entitled to relief. The Pennsylvania Superior Court has held that a petitioner cannot raise a successful *Alleyne* claim in a PCRA petition because neither the United State Supreme Court nor the Pennsylvania Supreme Court has held that *Alleyne* is to be applied retroactively to cases in

which the judgment of sentence has become final. *Commonwealth v. Miller*, 102 A.3d 988, 995 (Pa. Super. 2014). Defendant also did not file his petition within 60 days of the *Alleynes* decision, which was issued on June 17, 2013. Moreover, the court did not impose a mandatory minimum sentence in this case. Instead, the court imposed two consecutive sentences which were in the aggravated sentencing guideline range to achieve the aggregate sentence of 5 to 10 years of incarceration contemplated by the parties' plea agreement.

Accordingly, the following order is entered:

**ORDER**

AND NOW, this \_\_\_ day of March 2015, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, as no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this court's intention to deny the petition. 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.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
Nafis Jones, KP 2254  
SCI Pine Grove, 191 Fyock Road, Indiana PA 15701  
Work File