

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-412-2008
 :
 GREGORY PACKER, : Notice of Intent to Dismiss PCRA
 Defendant : Without Holding an Evidentiary Hearing

OPINION AND ORDER

Gregory Packer (“Packer”) was charged with involuntary deviate sexual intercourse with a child (IDSI with a child), aggravated indecent assault of a child, and indecent assault of a complainant less than 13 years of age.

On November 18, 2008, a jury found Packer guilty of IDSI with a child and indecent assault of a complainant less than 13 years of age.¹ On May 13, 2009, the court imposed an aggregate sentence of incarceration in a state correctional institution for an indeterminate term with a minimum of fifteen (15) years and three (3) months to a maximum of forty-seven (47) years and imposed a fine of \$10,000.² Packer filed a timely post sentence motion which the court denied on June 15, 2009.

Packer filed a timely appeal. On October 27, 2010, the Pennsylvania Superior Court affirmed Packer’s convictions, but vacated the fine and remanded the case to the trial court for a hearing regarding Packer’s ability to pay.

The court held a hearing on December 17, 2010 and did not impose any fine due to Packer’s inability to pay based on his expected length of incarceration and his lack of

¹ At the close of the Commonwealth’s case, the court granted Packer’s motion for judgment of acquittal for the offense of aggravated indecent assault of a child.

financial resources.

On June 8, 2015, Packer filed a “Motion to Modify and Correct Illegal Sentence Nunc Pro Tunc,” in which he asserted that his sentence was illegal due to the United States Supreme Court decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013). The court treated this motion as a Post Conviction Relief Act (PCRA) petition. As this was Packer’s first such petition, the court appointed counsel to represent Packer and gave counsel the opportunity to file an amended PCRA petition or 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). The court specifically directed, however, that any filing address the timeliness of Packer’s motion and *Commonwealth v. Miller*, 102 A.3d 988 (Pa. Super. 2014).

On August 3, 2015, PCRA counsel filed a motion to withdraw which included a no merit letter. In response thereto, Packer filed a motion for appointment of new counsel and a petition for an extension of time to file an amended PCRA petition.

After an independent review of the record, the court is constrained to find that it must treat Packer’s petition as a PCRA petition and that Packer is not entitled to relief.

The PCRA is the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for that purpose. 42 Pa.C.S.A. §9542; see also *Commonwealth v. Turner*, 80 A.3d 754, 769-770 (Pa. 2013). Any petition or request for relief that challenges an individual’s conviction or sentence filed after the judgment of

²The aggregate consisted of a sentence of 15 to 40 years for IDSI with a child and a consecutive term of 3

sentence becomes final must be treated as a PCRA petition. *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002)(“We have repeatedly held that the PCRA provides the sole means for obtaining collateral review and that any petition filed after the judgment becomes final will be treated as a PCRA petition).

The timeliness of a PCRA petition must be addressed as a threshold matter. *Commonwealth v. Callahan*, 103 A.3d 118, 121 (Pa. Super. 2014). Section 9545(b) of the Judicial Code, which contains the time limits for filing a PCRA petition, states:

(b) Time for filing petition

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(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.

(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.

(3) For purposes of this subchapter, 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.

(4) For purposes of this subchapter, “government officials” shall not include defense counsel, whether appointed or retained.

42 Pa.C.S.A. §9545(b).

The time limits of the PCRA are jurisdictional in nature. *Commonwealth v. Howard*, 567 Pa. 481, 485, 788 A.2d 351, 353 (Pa. 2002); *Commonwealth v. Palmer*, 814 A.2d 700, 704-05 (Pa.Super. 2002). “[A]ny petition filed outside of the one-year jurisdictional time bar is unreviewable unless it meets certain listed exceptions and is filed within sixty days of the date the claim first could have been presented.” *Commonwealth v. Lesko*, 609 Pa. 128, 15 A.3d 345, 361 (2011). To avail himself of one of the statutory exceptions, Packer had to allege facts in his petition to show that one of these exceptions apply, including the dates the events occurred, the dates he became aware of the information or event, and why he could not have discovered the information earlier. *See Commonwealth v. Breakiron*, 566 Pa. 323, 330-31, 781 A.2d 94, 98 (Pa. 2001); *Commonwealth v. Yarris*, 57 Pa. 12, 731 A.2d 581, 590 (Pa. 1999). “[W]hen a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner’s PCRA claims.” *Commonwealth v Gamboa-Taylor*, 562 Pa. 70, 77, 753 A.2d 780, 783 (Pa. 2000).

For PCRA purposes, “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).

The Pennsylvania Superior Court decided Packer’s appeal on October 27,

2010. Packer had thirty days within which to file a petition for allowance of appeal to the Pennsylvania Supreme Court. None was filed, and the record was remanded to the trial court in accordance with the Superior Court decision for a hearing regarding Packer's ability to pay a fine. The court held that hearing on December 17, 2010, and found that Packer lacked the ability to pay a fine. Any appeal to the Superior Court from that order was required to be filed within thirty (30) days thereafter. No appeal was filed. Therefore, Packer's judgment became final on or about January 17, 2011.

To be considered timely, Packer had to file a PCRA petition by January 17, 2012, or allege facts in his petition to show that one of the statutory exceptions applied and that he filed his petition within sixty (60) days of the date the claim could have first been presented. Packer's petition was not filed until June 8, 2015. He also did not allege any facts to show that one of the statutory exceptions applied or that he filed within 60 days of the date the claim could have first been presented. Therefore, Packer's petition is untimely and the court lacks jurisdiction to grant him any relief.

PCRA counsel wrote to Packer explaining the time limits and asking him to provide further information to him, including the exception that he believed applied to his case and why he believed it applied. When Packer failed to provide to PCRA counsel any factual information that would support one of the exceptions, PCRA counsel filed a motion to withdraw which contained a no merit letter explaining why Packer's petition was untimely.

It appears that Packer, through his petition and his correspondence with

counsel, was attempting to raise two claims: (1) his sentence was illegal pursuant to *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and (2) appellate counsel was ineffective for failing to file a petition for allowance of appeal to the Pennsylvania Supreme Court.

The United States Supreme Court decided *Alleyne* on June 17, 2013. To be considered timely, any claim based on that decision had to be filed on or before August 17, 2013. Packer's petition was not filed until June 8, 2015. Since this claim was not presented within sixty (60) days after *Alleyne* was decided, it is untimely.

The fact that Packer may not have been aware of *Alleyne* during that time frame does not excuse the late filing. As PCRA counsel explained in his no merit letter: "The sixty day period begins to run upon the date of the underlying judicial decision. Ignorance of the law does not excuse a petitioner's failure to file his petition within the 60 days. Neither the court system nor the correctional system is obliged to educate or update prisoners concerning changes in case law." *Commonwealth v. Brandon*, 51 A.3d 231, 235 (Pa. Super. 2012)(citations omitted). Furthermore, even if Packer had timely filed his *Alleyne* claim, he would not be entitled to relief, 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).

In response to counsel's timeliness inquiries, Packer claimed his appellate counsel abandoned him in that he requested counsel to file an appeal to the Pennsylvania Supreme Court, but counsel failed to do so. This was not raised as a separate claim in

Packer's petition. Instead, Packer attempted to use this assertion to justify the lateness of his filing. Packer also asserts that appellate counsel violated Rule 122 and various disciplinary code rules and rules of professional responsibility, as well as failed to file a *Turner/Finley* letter. It is evident from Packer's filings that he does not fully understand these rules or the situations when a *Turner/Finley* letter is required or appropriate.

As PCRA counsel explained in his letter to Packer, neither trial counsel nor appellate counsel could file a PCRA petition on his behalf, because it would be a conflict of interest to raise their own ineffectiveness. See *Commonwealth v. Lesko*, 15 A.3d 345, 359-360 (Pa. 2011)(counsel cannot raise a claim of his own ineffectiveness). Furthermore, pursuant to Rule 122, their obligation to represent him ceased when his direct appeal was over at the expiration of the time to file any further appeal after the trial court held the hearing regarding Packer's ability to pay a fine. PA. R. CRIM. P. 122(B)(2)("When counsel is appointed, the appointment shall be effective until final judgment, including any proceedings upon direct appeal.").

A *Turner/Finley* letter is only prepared when counsel believes a PCRA petition lacks merit. Trial counsel and appellate counsel did not (and could not) represent Packer with respect to any PCRA petition; therefore, they had no obligation to file a *Turner/Finley* letter.

Packer could have had a PCRA claim of ineffective assistance of counsel for failing to file a petition for allowance of appeal with the Pennsylvania Supreme Court, but at this point in the proceedings such a claim would be untimely. A petition for allowance of

appeal had to be filed within thirty (30) days after the Superior Court entered its decision affirming Packer's conviction. PA. R. APP. P. 1113(a). The Superior Court issued its decision on October 27, 2010. Therefore, a petition for allowance of appeal had to be filed by November 29, 2010.³ Packer did not file his PCRA petition until June 8, 2015.

Packer seems to be claiming that he asked appellate counsel to file a petition for allowance of appeal, but counsel failed to do so. Packer would need to allege when he asked counsel to file a petition for allowance of appeal, the efforts he took to determine if such a petition had been filed, and when he discovered that such a petition had not been filed.

The difficulty for Packer is that through the exercise of due diligence he could have or should have realized that a petition for allowance of appeal had not been filed long before he filed his PCRA petition. If a petition for allowance of appeal had been filed, the trial court would not have had jurisdiction to hold the hearing on Packer's ability to pay a fine in this case. Even if Packer did not have the legal knowledge to realize this, he could have asked counsel about any appeal at the time of the hearing. Certainly, if Packer had been diligent, he could have discovered in less than 4 ½ years that a petition for allowance of appeal had not been filed. See *Commonwealth v. Carr*, 786 A.2d 1164, 1168 (Pa. Super. 2001)(Appellant had a full year to determine if an appeal had been filed on his behalf, which could have been readily discovered through a phone call to his attorney or the clerk of courts).

³ The thirty day period would have expired on November 27, 2010, but that was a Saturday. Therefore, Packer had until Monday, November 29, 2010 to file his petition for allowance of appeal. PA. R. APP. P. 107; 1 PA. CONS. STAT ANN. §1908.

The court recognizes that Packer is incarcerated and his avenues for seeking such information might be limited to writing letters or having family or friends make inquiries on his behalf via telephone calls or internet searches, rather than making a phone call to his attorney or the clerk of court himself. The problem is Packer has not alleged with any specificity when he requested counsel to file a petition for allowance of appeal to the Pennsylvania Supreme Court, the efforts he took to determine whether a petition for allowance of appeal had been filed, when he discovered that such an appeal had not been filed, and why he could not have discovered that information sooner. As with all cases where the court intends to dismiss a PCRA petition without holding an evidentiary hearing, the court will give Packer an opportunity to respond. Packer's response should address these problems with particularity, and include dates as well as copies of any documents that would support his allegations. For example, the court does not want Packer to make a general statement that he wrote ten letters to counsel and he did not discover a petition for allowance of appeal had not been filed until 2015. Instead, the court wants Packer to state the date he sent each letter; submit a copy of the letters and any receipts or proof of mailing, if he has them; the date counsel responded to any letter; submit a copy of counsel's letters in response, if any; explain how he discovered that a petition for allowance of appeal had not been filed and the date of that discovery; and explain why he could not have discovered that information earlier.

ORDER

AND NOW, this ____ day of December 2015, as it appears that Packer's

petition is untimely and the court lacks jurisdiction to address the merits of Packer's claim, the court gives Packer notice of its intent to dismiss his petition without holding an evidentiary hearing pursuant to Rule 907(1). Packer has twenty days within which to respond to this proposed dismissal. If Packer does not respond or his response does not allege facts which show that his petition is timely, the court will enter a final order dismissing his petition without holding an evidentiary hearing.

The court also grants counsel's motion to withdraw.

If Packer files a response which alleges facts that arguably show his petition is timely, the court will re-appoint counsel to represent Packer and schedule an evidentiary hearing to give Packer the opportunity to present evidence to support the timeliness of his petition.

By the court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Donald Martino, Esquire
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Work file