

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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| COMMONWEALTH OF PENNSYLVANIA | : | CR-1262-2010 |
| | : | |
| v. | : | |
| | : | CRIMINAL DIVISION |
| SKYLER P. ANDREWS, | : | |
| Defendant | : | PCRA |

OPINION AND ORDER

On August 10, 2015, the Defendant filed a petition for relief under the Post-Conviction Relief Act (PCRA).¹ On August 21, 2015, this Court appointed PCRA counsel. On October 28, 2015, PCRA counsel filed a motion to withdraw as counsel and “no merit letter” pursuant to Commonwealth v. Turner² and Commonwealth v. Finley.³ A court conference was scheduled for November 17, 2015, but neither PCRA counsel nor the Commonwealth believed that discussion beyond the “no merit letter” was needed. In the petition, the Defendant argues that he is entitled to relief because his sentence is illegal. He cites Alleyne v. United States,⁴ Commonwealth v. Wolfe,⁵ Commonwealth v. Hopkins,⁶ and Commonwealth v. Newman.⁷

I. Background

The Defendant was sentenced on May 17, 2011. On September 21, 2012, the Superior Court of Pennsylvania affirmed his judgment of sentence. He did not file a petition for allowance of appeal with the Supreme Court of Pennsylvania.

¹ 42 Pa.C.S. § 9541 et seq.

² 544 A.2d 927 (Pa. 1988).

³ 550 A.2d 213 (Pa. Super. 1988).

⁴ 133 S.Ct. 2151 (2013).

⁵ 106 A.3d 800 (Pa. Super. 2014).

⁶ 117 A.3d 247 (Pa. 2015).

⁷ 99 A.3d 86 (Pa. Super. 2014).

II. Discussion

“[T]he timeliness of a PCRA petition is a jurisdictional requisite.” Commonwealth v. Brown, 111 A.3d 171, 175 (Pa. Super. 2015). Any petition under [the PCRA] . . . 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.

42 Pa.C.S. § 9545(b)(1).

“[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 [Pennsylvania] 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). “Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely when it is filed with the Clerk of [the Supreme Court of the United States] within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.” U.S.Sup.Ct.R. 13.

Here, the Superior Court affirmed the Defendant's judgment of sentence on September 21, 2012. The Defendant did not file a petition for allowance of appeal. Therefore, his judgment of sentence became final on October 23, 2012. See Pa.R.A.P. 1113(a) (providing that "a petition for allowance of appeal shall be filed with the Prothonotary of the [Pennsylvania] Supreme Court within 30 days after the entry of the order of the Superior Court . . . sought to be reviewed"). Because the PCRA petition was not filed within one year of October 23, 2012, the Defendant must plead and prove one of the exceptions in 42 Pa.C.S. § 9545(b)(1) for this Court to have jurisdiction.

The Defendant argues that he is entitled to relief as a result of Alleyne, Wolfe, Hopkins, and Newman. "[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).

In Newman, the Pennsylvania Superior Court "found that Alleyne v. United States render[ed] 42 Pa.C.S.A. § 9712.1 unconstitutional." 99 A.3d at 103. The Court determined Alleyne's effect on 42 Pa.C.S.A. § 9712.1; it did not recognize a constitutional right. Therefore, Newman does not get the Defendant into the exception set forth in 42 Pa.C.S. § 9545(b)(1)(iii). In addition, Newman is a Pennsylvania Superior Court decision, so even if it recognized a constitutional right separate from Alleyne, it would not satisfy the exception in 42 Pa.C.S. § 9545(b)(1)(iii). See § 9545(b)(1)(iii) (requiring that the right asserted be recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania).

In Wolfe, the Superior Court followed the instructions of Newman and held that 42 Pa.C.S. § 9718 was facially unconstitutional. 106 A.3d at 805. The Court determined Alleyne and Newman's effect on 42 Pa.C.S.A. § 9718; it did not recognize a constitutional right.

Therefore, Wolfe does not get the Defendant into the exception in 42 Pa.C.S. § 9545(b)(1)(iii). In addition, Wolfe is a Pennsylvania Superior Court decision, so even if it recognized a constitutional right separate from Alleynes, it would not get the Defendant into the exception in 42 Pa.C.S. § 9545(b)(1)(iii).

In Hopkins, the Commonwealth conceded that the mandatory sentencing provision of 18 Pa.C.S. § 6317 was unconstitutional pursuant to Alleynes, but contended that the “proof of sentencing” provision was severable. The Pennsylvania Supreme Court rejected that argument, and held that the provision could not be severed without the court usurping the role of the legislature and recrafting the relevant portions of Section 6317. In Hopkins, the Court determined Alleynes’s effect on 18 Pa.C.S. § 6317; the Court did not recognize a constitutional right. Therefore, Hopkins does not get the Defendant into the exception in 42 Pa.C.S. § 9545(b)(1)(iii).

Likewise, Alleynes does not get the Defendant past the PCRA time-bar. In Commonwealth v. Miller,⁸ a petitioner filed a PCRA petition more than one year after the date that his judgment of sentence became final. 102 A.3d at 993. The PCRA court dismissed the petition, and the petitioner appealed the dismissal. Id. at 991-92. On appeal, the petitioner argued “that the time-bar exception at Section 9545(b)(1)(iii) applie[d] in [his] case.” Id. at 993. “Specifically, [the petitioner] aver[red] that the United States Supreme Court’s decision in Alleynes announced a new constitutional right that applies retroactively.” Id. The Superior Court of Pennsylvania held that the PCRA Court correctly dismissed the petition. Id. at 996. The Court wrote, “[N]either our Supreme Court, nor the United States Supreme Court has held that

⁸ 102 A.3d 988 (Pa. Super. 2014).

Alleyne is to be applied retroactively to cases in which the judgment of sentence had become final. This is fatal to [the petitioner's] argument regarding the PCRA time-bar." Id. at 995.

Although the Miller court was "aware that an issue pertaining to Alleyne goes to the legality of the sentence," it concluded that "the PCRA court lacked jurisdiction to consider the merits of . . . [the] petition, as it was untimely filed and no exception was proven." Id. at 995-96. "Though 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." Id. at 995. (quoting Commonwealth v. Seskey, 86 A.3d 237, 241 (Pa. Super. 2014)). "The PCRA's time restrictions are jurisdictional in nature. Thus, [i]f a PCRA petition is untimely, neither [the Superior Court] nor the trial court has jurisdiction over the petition." Seskey, 83 A.3d at 241 (quoting Commonwealth v. Albrecht, 994 A.2d 1091, 1093 (Pa. 2010)).

III. Conclusion

After conducting an independent review, this Court finds that the Defendant's petition is untimely. In addition, he has not proven an exception to the PCRA time-bar. Therefore, this Court does not have jurisdiction over the petition.

ORDER

AND NOW, this _____ day of January, 2016, it hereby ORDERED and DIRECTED as follows:

1. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the Defendant is hereby notified that this Court intends to dismiss his PCRA petition for the reason discussed in the foregoing Opinion. The Defendant may respond to the proposed dismissal within 20 days of the date of the notice.
2. The Motion to Withdraw as Counsel, filed on October 28, 2015, is hereby GRANTED, and PCRA Counsel may withdraw from the above-captioned case.

By the Court,

Nancy L. Butts, President Judge