

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR- 877-2010
:
vs. : CRIMINAL DIVISION
:
:
ROBERT GRAHAM, : Notice of Intent to Dismiss Petition
Defendant : as Untimely

OPINION AND ORDER

This matter is before the court on the “Motion to Correct Illegal Sentence” filed by Defendant Robert Graham (hereinafter “Graham”). The court must treat this motion as a petition filed under the Post Conviction Relief Act (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 undermined 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 his sentence violated his constitutional rights or was illegal; therefore, his claims are or were cognizable under the PCRA. Any petition that is filed after the judgment becomes final must be treated as a PCRA petition. *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002).

The court, however, cannot hold an evidentiary hearing or grant Graham any relief on his petition, because it is untimely.

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 Pennsylvania Superior Court affirmed Graham’s judgment of sentence on October 30, 2013. Graham had thirty days within which to file a petition for allowance of appeal to the Pennsylvania Supreme Court, but no such petition was filed. Therefore, Graham’s judgment became final on or about November 29, 2013.

To be considered timely, Graham had to have filed his current petition on or before December 1, 2014.¹ His petition was not filed until August 12, 2016. Therefore, his

¹November 29, 2014 would be one year from the date Graham’s judgment of sentence became final, but that was a Saturday. Therefore, Graham would have had until the next business day, Monday, December 1, 2014 to have filed a timely PCRA petition.

petition is facially untimely.

Graham also does not allege any exception to the one-year limitation period. Graham asserts that “he was not afforded during his trial the right to review the fingerprint evidence because none existed when he was going to trial” but he received a copy of this “newly discovered evidence” from the Public Defender’s Office on July 15, 2016. This allegation, though, does not render Graham’s petition timely. Regardless of when Graham reviewed the fingerprint evidence, the evidence was available at the time of trial. In fact, his counsel hired an expert, who challenged the fingerprint evidence during Graham’s trial. Furthermore, the claim in Graham’s petition is that his sentence is illegal due to *Alleyne v. United States*, 133 S.Ct. 2151 (2013) and *Commonwealth v. Hopkins*, 117 A.3d 247 (Pa. 2015). Graham’s allegations regarding his review of the fingerprint evidence are simply not relevant to his claim that his sentence was illegal.

Although an illegal sentence can never be waived, it must be asserted in a timely PCRA petition or the statute’s jurisdictional limitation will prevent any court from addressing it. *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999)(Although the legality of a sentence is subject to review within the PCRA, any such claim must still first satisfy the PCRA's time limits or one of the exceptions thereto).

Since Graham’s petition was filed after December 1, 2014 and he has not alleged sufficient facts to show that his case falls within one of the statutory exceptions, Graham’s petition is untimely and the court lacks jurisdiction to hold an evidentiary hearing

or to grant Graham any relief. Moreover, even if Graham's petition were timely, he would not be entitled to relief, because the Pennsylvania Supreme Court recently held that *Alleyn* does not apply retroactively to cases on collateral review. *Commonwealth v. (Terrence) Washington*, 2016 Pa. LEXIS 1536 (July 19, 2016).

ORDER

AND NOW, this ___ day of August 2016, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, no purpose would be served by conducting any further hearing and none will be scheduled. The parties are hereby notified of this court's intention to dismiss the petition as untimely. Defendant Robert Graham 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 his petition.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Robert Graham, KP-4522
1600 Walters Mill Rd, Somerset PA 15510
Gary Weber, Esquire (Lycoming Reporter)
Work file