

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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| COMMONWEALTH OF PENNSYLVANIA | : | CR-1313-2007 |
| | : | |
| v. | : | |
| | : | CRIMINAL DIVISION |
| NIHEEM KEYS, | : | |
| Defendant | : | PCRA |

OPINION AND ORDER

On September 11, 2015, the Defendant filed a petition for relief under the Post-Conviction Relief Act (PCRA).¹ On September 21, 2015, the Court appointed PCRA counsel. On October 26, 2015, PCRA Counsel filed a motion to withdraw as counsel and a “no-merit letter” pursuant to Commonwealth v. Turner² and Commonwealth v. Finley.³ A court conference to discuss the petition was scheduled for November 30, 2015, but neither PCRA counsel nor the Commonwealth believed discussion beyond the “no merit letter” was needed. In the PCRA petition, the Defendant argues that he is entitled to relief because “his mandatory minimum sentence pursuant to 42 Pa.C.S.A § 9712 is unconstitutional in light of the Supreme Court of Pennsylvania’s decision in Commonwealth v. Hopkins.”⁴

I. Background

The Defendant was sentenced on July 30, 2008. He did not appeal his judgment of sentence. On March 11, 2013, the Defendant filed a *pro se* “Motion for Modification of Sentence Nunc Rpo [*sic*] Tunc.” Counsel was not appointed at that time, and the motion for modification of sentence was denied on April 10, 2013.

¹ 42 Pa.C.S. § 9541 *et seq.*

² 544 A.2d 927 (Pa. 1988).

³ 550 A.2d 213 (Pa. Super. 1988).

⁴ 117 A.3d 247 (Pa. 2015).

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], 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.

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). “[T]he notice of appeal [to the Pennsylvania Superior Court] shall be filed within 30 days after the entry of the order from which the appeal is taken.” Pa. R.A.P. 903(a). “[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 Defendant was sentenced on July 30, 2008. He did not appeal his judgment of sentence, so it became final on September 2, 2008. See Pa. R.A.P. 903(a) (stating that the notice of appeal shall be filed within 30 days after the entry of the order from which the appeal is taken). Therefore, the Defendant had a year from September 2, 2008 to file a timely PCRA petition; he did not do so. The Court did not treat the motion for modification of sentence as a PCRA petition, but it would have been untimely as it was not filed within a year of September 2, 2008. In the “no merit letter,” PCRA counsel notes that the motion for modification of sentence was “untimely.” The present petition is also untimely as it was not filed within a year of September 2, 2008. Because a timely PCRA petition was not filed, the Defendant must plead and prove one of the exceptions in 42 Pa.C.S. § 9545(b)(1) for this Court to have jurisdiction. He has not done so.

The Defendant argues that he is entitled to relief as a result of Hopkins. “[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 Hopkins, the Commonwealth conceded that the mandatory sentencing provision of 18 Pa.C.S. § 6317 was unconstitutional pursuant to Alleyne v. United States,⁵ 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 Alleyne’s effect on 18 Pa.C.S. § 6317; the Court did not recognize a constitutional

⁵ 133 S. Ct. 2151 (2013).

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,⁶ 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 Alleynes 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 Alleynes 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

⁶ 102 A.3d 988 (Pa. Super. 2014).

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, the Court finds that the Defendant did not file a timely PCRA petition. In addition, he has not proven an exception to the PCRA time-bar.

Therefore, this Court does not have jurisdiction.

ORDER

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

1. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1) and for the reasons discussed in the foregoing opinion, the Defendant is hereby notified that this Court intends to dismiss his PCRA petition, which was filed on September 11, 2015. The Defendant may respond to the proposed dismissal within 20 days of the date of the notice.
2. The Motion to Withdraw as Counsel, which was filed on October 26, 2015, is hereby GRANTED, and Attorney may withdraw from the above-captioned case.

By the Court,

Nancy L. Butts, President Judge