

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA	
COMMONWEALTH	: No. CR-1473-2010
vs.	:
	:
	:
DAVERE McClAIN,	: Notice of Intent to Dismiss PCRA
Defendant	:
	:

**OPINION AND ORDER**

This matter came before the court on Defendant Davere McClain’s motion to modify and correct illegal sentence nunc pro tunc. The relevant facts follow.

Davere McClain (“McClain”) was charged with delivery of a controlled substance (heroin), possession with intent to deliver a controlled substance, receiving stolen property, criminal use of a communication facility, firearms not to be carried without a license, possession of a controlled substance, and possession of drug paraphernalia. According to the affidavit of probable cause, these charges arose when officers went to Mahaffey Lane in Old Lycoming Township to serve a warrant and observed McClain and another individual seated in a vehicle in the driveway. As the police approached the vehicle, McClain bent over and appeared to place something under the driver’s seat. The police asked the occupants what they were doing. McClain and the individual in the passenger’s seat gave conflicting stories. The passenger told the police he had called McClain (who he knew as “Jersey”) to purchase heroin from him. He was just getting in McClain’s vehicle to get the heroin when the police arrived. McClain admitted that there was a handgun under the driver’s seat. He initially claimed the passenger was trying to sell him the handgun when the police arrived.

McClain was searched. The police found 30 packets (3 bundles) of heroin in the crotch area of his pants. McClain then admitted he was selling the heroin to the passenger. He also admitted that the handgun was his and he had purchased it the day before on the street.

On May 26, 2011, McClain entered a plea agreement to all of the charges for a sentence of 5-10 years of incarceration in a state correctional institution. On that date, the Commonwealth also gave McClain notice that it intended to pursue a five-year mandatory minimum sentence.

On July 27, 2011, the court sentenced McClain in accordance with the plea agreement. The sentences for each count were as follows: Count 1, delivery of a controlled substance – 5 to 10 years of incarceration in a state correctional institution; Count 3, receiving stolen property – five years of probation concurrent to Count 1; Count 4, criminal use of a communication facility – five years of probation concurrent to Count 1; Count 5, firearms without a license – five years of probation concurrent to Count 1; Count 7, possession of drug paraphernalia – one year of probation concurrent to Count 1. Counts 2 and 6 merged with Count 1 for sentencing purposes. McClain did not file any post sentence motions or an appeal.

On July 1, 2015, McClain filed his motion to modify and correct illegal sentence nunc pro tunc. In his motion McClain asserted that his sentence was illegal and/or unconstitutional pursuant to *Alleyne v. United States*, 133 S.Ct. 2151 (U.S. 2013) and several Pennsylvania appellate courts cases that applied *Alleyne* to Pennsylvania's mandatory sentencing statutes. The court treated this motion as a Post Conviction Relief Act (PCRA)

petition. See *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002)(any petition filed after judgment of sentence becomes final is treated as a PCRA petition). Since this was McClain’s first such petition and he appeared to be indigent, the court appointed counsel to represent McClain and gave counsel an 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).

On August 12, 2015, counsel filed a motion to withdraw which included a *Turner/Finley* no merit letter. Counsel’s explained that McClain’s petition was untimely and lacked merit.

On August 27, 2015, McClain filed a response to counsel’s motion to withdraw, in which he argued that his issues had merit and he asked the court to appoint him “effective” counsel. The response, however, did not address the timeliness of McClain’s petition.

The court held a conference with counsel on September 29, 2015. The Commonwealth agreed that McClain’s petition was untimely and lacked merit.

After an independent review of the record, the court also finds that McClain’s petition is untimely and lacks merit.

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, a petitioner must 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).

McClain was sentenced on July 27, 2011. He had thirty days to file any appeal from this sentence, but no appeal was filed. Therefore, his judgment of sentence became final on or about August 26, 2011.

To be considered timely, McClain had to file his PCRA petition on or before August 26, 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. McClain did not file his petition until July 1, 2015. Although he alleged in his original petition that the court had jurisdiction to entertain his claims because a claim that a sentence is illegal is non-waivable, McClain did not allege any facts to show that one of the statutory exceptions applied or that he filed it within 60 days of the date the claim could have first been presented. Therefore, McClain's petition is untimely, and the court lacks jurisdiction to grant him any relief.

The court recognizes that neither *Alleyne* nor any of the appellate court

decisions cited in McClain's petition were in existence prior to the date his conviction became final. Nevertheless, McClain still cannot avail himself of these decisions for two reasons. First, none of these decisions held that they were to apply retroactively. 42 Pa.C.S.A. §9545(b)(1)(iii); *Commonwealth v. Miller*, 102 A.3d 988, 995 (Pa. Super. 2014)(neither the United States 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).

Second, McClain did not file his petition within sixty days of the date any of these cases were decided. 42 Pa.C.S.A. §9545(b)(2). *Alleyne* was decided on June 17, 2013. Therefore, even if *Alleyne* had been held to apply retroactively, McClain would have had to file his petition on or before August 16, 2013 to be considered timely.

McClain also relied on *Commonwealth v. Newman*, 99 A.3d 86 (Pa. Super. 2014)(en banc); *Commonwealth v. Ferguson*, 107 A.3d 206 (Pa. Super. 2015); *Commonwealth v. Metterson*, 2014 WL 3537671 (Pa. Super. 2014); and *Commonwealth v. Johnson*, 93 A.3d 806 (Pa. 2014).

*Newman* was decided on August 20, 2014. To avail himself of the *Newman* decision, McClain would have had to file his petition on or before October 19, 2014 to be considered timely. Furthermore, *Newman* was not a decision by the United States Supreme Court or the Pennsylvania Supreme Court that recognized a constitutional right after the one year filing period. 42 Pa.C.S.A. §9545(b)(1)(iii). Instead, it is a Superior Court decision applying a constitutional right recognized in *Alleyne*.

*Ferguson* was decided on January 5, 2015. For any claim pursuant to

*Ferguson* to be considered timely, McClain's petition had to be filed on or before March 6, 2015. As with *Newman*, *Ferguson* also was not a decision by the United States Supreme Court or the Pennsylvania Supreme Court that recognized a constitutional right after the one year filing period.

The court attempted to locate *Metterson*, but could not find such a case.<sup>1</sup> The court did, however, find the Superior Court case in *Commonwealth v. Matteson*, 96 A.3d 1064 (Pa. Super. 2014). *Matteson* was decided on July 18, 2014. To avail himself of the *Matteson* decision, McClain needed to file his petition on or before September 16, 2014. Like *Newman* and *Ferguson*, *Matteson* did not recognize a constitutional right after the one year filing period, but merely applied the constitutional right announced in *Alleynes*.

The *Johnson* case cited by McClain was the Pennsylvania Supreme Court's order dated June 13, 2014, granting allowance of appeal to determine whether a challenge to a sentence pursuant to *Alleynes* implicates the legality of the sentence and is therefore non-waivable. *Johnson* did not hold that *Alleynes* was non-waivable. Moreover, the Pennsylvania Supreme Court dismissed the appeal as improvidently granted on December 24, 2014.

For the foregoing reasons, McClain's petition is patently untimely.

Even if the petition had been timely filed, McClain would not be entitled to relief as a matter of law. McClain's case was not on direct appeal when *Alleynes* was decided. McClain has only raised this claim in hindsight in a PCRA petition. The Pennsylvania Superior Court has held that *Alleynes* is not entitled to retroactive effect under these circumstances. *Commonwealth v. Riggle*, 119 A.3d 1058, 1067 (Pa. Super. 2015).

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<sup>1</sup>The court has access to Lexis, but not Westlaw.

Therefore, the court finds that McClain's petition lacks merit.

Accordingly, the following order is entered:

**ORDER**

**AND NOW**, this \_\_\_ day of January 2016, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court finds that it lacks jurisdiction to grant McClain any relief because his petition is untimely. The court also finds that McClain is not entitled to relief as a matter of law because his petition lacks merit.

The court grants counsel's motion to withdraw. McClain may represent himself or hire private counsel to represent him. The court, however, will not appoint new counsel to represent McClain, unless he shows in his response that his petition is timely and he would be eligible for relief.

As no purpose would be served by conducting any hearing, none will be scheduled and the parties are hereby notified of the court's intention to deny the petition. McClain may respond to this proposed dismissal within twenty (20) days. Any response must address the timeliness of the petition. If no response is received within that time period or if any response does not allege facts to show that the petition is timely, the court will enter an order dismissing the petition.

By The Court,

\_\_\_\_\_  
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
Donald Martino, Esquire  
Davere McClain, KD-7242



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