

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-1673-2010
	:	CR-163-2011
vs.	:	
	:	
	:	
BRANT ZEIBER,	:	Notice of Intent to Dismiss PCRA Petition
Defendant	:	Without Holding an Evidentiary Hearing

OPINION AND ORDER

This matter came before the court on the pro se Post Conviction Relief Act (PCRA) petition filed by Petitioner Brant Zieber. The relevant facts follow.

1673-2010:

On September 12, 2010, police filed a criminal complaint against Petitioner, charging him with two count of persons not to possess a firearm, two counts of firearms not to be carried without a license, one count of possession with intent to deliver a controlled substance (heroin), one count of possession of a controlled substance (heroin), two counts of possession of drug paraphernalia, one count of possession of a small amount of marijuana, one count of false identification to law enforcement, one count of possession of a firearm with an altered manufacturer's number, and underage drinking. The persons not to possess a firearm charges were dismissed at the preliminary hearing.

163-2011:

On November 22, 2010, the persons not to possess firearms charges were re-filed and held for court.

On May 10, 2011, Petitioner pled guilty to Count 1, persons not to possession, a felony of the second degree under 163-2011 and Count 3, possession with intent to deliver

heroin, an ungraded felony, in exchange for a sentence of five (5) to ten (10) years of incarceration in a state correctional institution on each count to be served concurrently to each other. The court sentenced Petitioner in accordance with the plea agreement and noted that the five-year minimum was a mandatory minimum under both Informations. Petitioner did not file any post sentence motions or an appeal.

On October 8, 2015, Petitioner filed a pro se PCRA petition challenging the mandatory minimum sentences imposed in his cases. The court appointed to counsel to represent Petitioner and gave counsel the opportunity to file either 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). Counsel filed a motion to withdraw, which included a no merit letter, because counsel found that the petition was untimely.

After an independent review of the record, the court agrees that the petition is untimely and therefore the court lacks jurisdiction to address the merits of Petitioner's claim, to hold an evidentiary hearing or to grant Petitioner any relief.

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).

The court sentenced Petitioner on May 10, 2011. Neither post sentence motions nor a direct appeal were filed. Therefore, Petitioner's judgment of sentence became final on or about June 9, 2011. To be considered timely, the petition needed to be filed by June 9, 2012 or petitioner had to allege facts to support one of the statutory exceptions and be filed within 60 days of the date the claim could have first been brought.

Petitioner claims that he filed his petition within 60 days of learning of the Pennsylvania Supreme Court's decision in *Commonwealth v. Hopkins*, 98 MAP 2013 (June 2015) at the SCI Rockview law library on October 1, 2015; therefore, his petition is timely. The court cannot agree.

The Pennsylvania Supreme Court did not hold that *Hopkins* was to be applied retroactively. Furthermore, the petition was not filed within 60 days after the decision was rendered.

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).

The court recognizes that Petitioner is attempting to avail himself of the exception contained in subsection (b)(1)(ii) and not (b)(1)(iii). Petitioner's reliance on subsection (b)(1)(ii), however, is misplaced, because the Pennsylvania Supreme Court has held that "subsequent decisional law does not amount to a 'new' fact under section 9545(b)(1)(ii) of the PCRA. *Commonwealth v. Watts*, 23 A.3d 980, 987 (Pa. 2011).

ORDER

AND NOW, this ____ day of July 2016, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are hereby notified of this court's intention to dismiss the petition without holding an evidentiary hearing. Petitioner 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 the petition.

The court also grants counsel's motion to withdraw. Petitioner is advised that he has the right to hire private counsel or represent himself, but the court will not appoint counsel to represent him unless he alleges something in his response that convinces the court that his petition is timely.

By The Court,

Marc F. Lovecchio, Judge

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

Brant Zeiber, #KB6887
SCI Rockview, Box A, Bellefonte PA 16823-0820
Work file