

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-1539-2003
v.	:	CR-1540-2003
	:	
PETER STEVEN JONES,	:	PCRA
Defendant	:	

OPINION AND ORDER

On April 26, 2017, PCRA Counsel for the Defendant filed a Petition to Withdraw from Representation pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super.1 988). After an independent review of the entire record, the Court agrees with PCRA Counsel that the Defendant is ineligible for PCRA relief. He is not boot camp eligible and the mandatory minimum sentencing scheme he was sentenced under, though now found unconstitutional, is not afforded retroactive relief pursuant to the Supreme Court of Pennsylvania's decision in Commonwealth v. Washington.¹

Background

On October 11, 2004, Defendant entered a guilty plea to the charges of Robbery², Aggravated Assault³, Theft By Unlawful Taking⁴, Receiving Stolen Property⁵, and Firearms not to be Carried without a License under CR-1539-2003. On that same date, he entered a plea of guilty under CR-1540-2003 to Criminal Attempt-

¹ 142 A.3d 810 (Pa. 2016).

² 18 Pa.C.S. § 3701(a)(1)(ii).

³ 18 Pa.C.S. § 2702(a)(4).

⁴ 18 Pa.C.S. § 3921(a).

⁵ 18 Pa.C.S. § 3925(a).

Robbery⁶, Robbery⁷, Aggravated Assault⁸, and Firearms Not To Be Carried Without A License⁹.

On January 24, 2005, this Court sentenced Defendant to five to ten years for the Robbery, five to ten years on the Criminal Attempt – Robbery, to run concurrent to the Robbery conviction. The Defendant received seven (7) years of probation on both Firearms Not To Be Carried Without A License convictions, to run consecutive to each other and consecutive to the sentences for the robberies. The Defendant's total sentence was to run consecutive to any and all other sentences he was serving at the time sentence was imposed in the above captioned docket numbers. In aggregate, this Court imposed a sentence of incarceration of five to ten years, to be followed by fourteen years of probation.

On February 3, 2005, Defendant through Counsel filed a timely motion for reconsideration of sentence, which the Court denied on February 15, 2005. No direct appeal was taken from the judgement of sentence. Thus, Defendant's judgement of sentence became final on March 17, 2005.

On March 20, 2008, Defendant filed a *pro se* motion for reconsideration of sentence *nunc pro tunc*. The Court denied the request for relief on March 27, 2008, and the Defendant took no appeal of the Court's decision.

On November 14, 2015, Defendant again filed a *pro se* "Motion To Waive Boot Camp Eligibility". The Court entered an order denying Defendant's motion on December 11, 2014. Defendant did file a direct appeal of the Court's Order.

⁶ 18 Pa. C.S. § 901(a).

⁷ 18 Pa.C.S. § 3701(a)(1)(ii).]

⁸ 18 Pa.C.S. § 2702(a)(4).

⁹ 18 Pa.C.S. § 6106.

On January 20, 2016, the Superior Court in an unpublished memorandum No. 122 MDA 2015, remanded the matter to this Court for appointment of counsel and for further proceedings consistent with this memorandum (“the failure to appoint counsel to assist an indigent, first time PCRA petitioner is manifest error.” Memorandum at 7.)

Pursuant to the Superior Court’s Order, this Court appointed the Public Defender’s Office to represent Petitioner on his Petition for Post Conviction Relief. A court conference on the Petition was scheduled for May 31, 2016. After the court conference, Defense Counsel was given 45 days from the receipt of the guilty plea and sentencing transcripts in the above captioned docket numbers to file an Amended Petition for Post Conviction Relief or file a Turner/Finley Letter. Order of Court, 6/8/2016.

On November 14, 2016, PCRA Counsel filed an Amended Petition for Post Conviction Relief arguing that as Defendant was sentenced using an unconstitutional sentencing scheme that he was serving an illegal sentence (“the minimum sentence imposed in the above captioned matters are imposed pursuant to the mandatory requested by the Commonwealth for the use of a firearm in commission of a Robbery” [Order of Sentence, 1/24/2005].

After a court conference on PCRA’s Counsel amended petition, PCRA Counsel was provided with a 30 days to file a Turner/Finley Letter and a Motion to Withdraw as Counsel. On April 26, 2017, Defense Counsel filed a Turner/Finley letter and a Petition to Withdraw from Representation

Jurisdiction

1) *Eligibility for Relief Under the PCRA.*

Incarcerated defendants, or those on probation or parole for a crime, are eligible for relief under the PCRA when they have pled and proved by a preponderance of the evidence the following four components:

- 1) Defendant has been convicted of a crime under the laws of PA and is at the time relief is granted currently serving a sentence of imprisonment, probation or parole for the crime.
- 2) Conviction or sentence resulted from one or more of the following
 - (1) Violation of the US or PA Constitution that so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.
 - (2) Ineffective assistance of counsel – same undermining the truth determining process standard as above “undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place”.
 - (3) Plea of guilty induced where inducement caused Defendant to plead guilty when he is innocent.
 - (4) Improper obstruction by government officials of petitioner’s appeal right where a meritorious appealable issue was properly preserved in the Trial Court.
 - (5) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial had it been introduced.
 - (6) Imposition of sentence greater than the lawful maximum.
 - (7) Proceeding in a tribunal without jurisdiction.
- 3) Allegation of the error has not been previously litigated or waived; and
- 4) Failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel¹⁰.

¹⁰ 42 Pa.C.S. § 9543.

2) ***Timeliness of Amended PCRA Petition.***

Defendant's PCRA Petition is untimely pursuant to 42 Pa.C.S. § 9545(b). Title 42 Section 9545(b) requires that a PCRA petition be filed within one (1) year of the date the judgment in a case becomes final, or else meet one of the timeliness exceptions under 42 Pa.C.S. Section 9545(b)(1). The exceptions set forth in 42 Pa.C.S. § 9545(b)(1) are as follows:

(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.

A PCRA petition raising one of these exceptions "shall be filed within [sixty] days of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2). A petitioner must "affirmatively plead and prove" the exception. Commonwealth v. Taylor, 933 A.2d 1035, 1039 (Pa. Super. 2007). When a PCRA is not filed within one year of the expiration of direct review, or not eligible for one of the exceptions, or entitled to one of the exceptions, but not filed within [sixty] 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. Id. at 1039.

Here, Defendant was sentenced on January 24, 2005, and took no appeal to the Superior Court of Pennsylvania. Thus, his judgment of sentence became final thirty (30) days later on March 17, 2005. 42 Pa.C.S. § 9545(b)(3).

Defendant filed his first motion which the Court treats as PCRA Petition on March 8, 2008, which is beyond one (1) year of the date the judgment became final. His second motion, filed on November 14, 2014, which the Court treated as a PCRA Petition, was filed after the one year date the judgment became final. Therefore, the Defendant must fall within one of the exceptions listed in 42 Pa.C.S. § 9545(b)(1) in order for his PCRA Petition to be deemed timely and to enable the Court to address the merits of the petition. The Defendant has not pled that any of the exceptions set forth in the statute apply to him. Upon independent review of the record by the Court no exception can be found to apply.

3) ***Boot Camp Eligibility***

To begin, the *pro se* motions for Reconsideration of Sentence *nunc pro tunc* and Motion to Waive Bootcamp Eligibility are not cognizable claims under the Post-Conviction Relief Act. They are however, both petitions to challenge the discretionary aspects of Defendant's sentence, which the Court does not have the power to do after its Sentencing Order becomes final. 42 Pa.C.S. § 5505 (Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.) Moreover, the Defendant had already requested modification of his sentence through a timely filed Post Sentence Motion. Therefore, the Court finds the issue is thus waived: "an issue is waived if the petitioner could have raised it but failed to do so." 42 Pa.C.S.A. § 9543.1. Here, Defendant could have raised the issue in a direct appeal to the Superior Court, and yet he did not. Although he could have raised the issue in a timely filed

petition collaterally attacking the sentence but would not have been successful because the sentence is not “greater than the lawful maximum” and thus not amenable to Post Conviction Relief.

Defendant is not nor was he ever an “eligible inmate” for Motivational Boot Camp. 61 Pa.C.S.A. § 3903 (definitions; eligible inmate). At the time of his Lycoming County Sentence in the above captioned docket number, he was serving a sentence of a three to six year period of incarceration from Centre County and a nine to twenty year sentence from a Snyder County conviction. In Tioga County, he was sentenced to nine years to 20 years, wholly concurrent to his other sentences of confinement. See Sentencing Brief, 1/20/2005, at 1. In order to be eligible, an inmate must be serving a minimum of not more than two years and a maximum of which is five years or less. Also, the current conviction and no prior conviction can be related to robbery. As the Defendant was serving multiple sentences for robbery and for lengths of time far exceeding the allowable limits for the Motivational Boot Camp program, he was ineligible for the boot camp program. Though the prosecuting attorney is able to waive the eligibility requirements of the bootcamp program, see 61 Pa.C.S.A. § 3905 (d), given the Defendant’s criminal history and the crimes for which he pled guilty the placement of Defendant in a motivational boot camp program would be inappropriate.

4) ***Unconstitutional Mandatory Minimum Sentence***

The Supreme Court of Pennsylvania held in Commonwealth v. Washington, 142 A.3d 810 (Pa. 2016) that Alleyne will not be applied retroactively to cases on collateral review in Pennsylvania. Using the Teague¹¹ analysis, the Supreme Court of

¹¹ Teague v. Lane, 489 U.S. 288 (1989).

Pennsylvania found Alleyne to be a change in constitutional law regarding criminal procedure. Federal law does not compel retroactive effect be given on collateral review to changes in constitutional criminal procedure and the Supreme Court of Pennsylvania declined to give the change retroactive effect in the Commonwealth. Washington at 819.

Conclusion

Based upon the untimeliness of the petition and the fact that it is without substantive merit, the Court finds no purpose would be served by conducting any further hearing. The Court, is in fact, without jurisdiction to compel further hearing as the petition is untimely, and the Petitioner has not pled or shown that any exception to the one year limitation apply.

ORDER

AND NOW, this 10th day of August, 2017, it is hereby ORDERED and DIRECTED as follows:

1. The **Petition to Withdraw as Counsel** filed April 26, 2017 is hereby **GRANTED**.
2. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.

BY THE COURT,

Nancy L. Butts, P.J.

cc: DA (KO)
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