

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	CP-41-CR-0000625-2014
	:	
vs.	:	
	:	
SAMUEL ALLEN MCHENRY,	:	PCRA
Defendant	:	

OPINION AND ORDER

On July 28, 2017, Defendant, through Counsel, filed a Motion for Post Conviction Relief. After a court conference, a briefing scheduling was set and the following is the Opinion and Order of the Court.

Background

On July 24, 2007, the above named Defendant pled guilty¹ to Statutory Sexual Assault², a felony of the second degree; and Unlawful Contact or Communication with Minor³, a felony of the first degree for offenses in York County, PA⁴.

On May 2, 2014, a criminal information was filed against the Defendant for Failure to Comply with Registration Requirements, a felony of the second degree, under Pennsylvania's Sex Offender Registration and Notification Act (SORNA). The charge related to Defendant's failure to advise the Pennsylvania State Police that his residence had changed. Defendant pled guilty and was sentenced by this Court to a minimum of eleven (11) months and a maximum twenty-four (24 months) less one (1) day with a consecutive 12 month period of probation under the Supervision of the Adult Probation Office of Lycoming County. Sentence, 6/28/2016, at 1. Defendant did

¹ Offense Date 10/14/2006.

² 18 Pa.C.S. § 3122.1.

³ 18 Pa.C.S. § 6318 §§ (a)(1).

not file post sentence motions nor take a direct appeal.

On April 27, 2017, Defendant appeared before the Honorable Dudley A. Anderson for a preliminary parole violation hearing under docket number CR-624-2014. Judge Anderson ordered that “this matter is kept at a preliminary hearing pending disposition of new charges [735-2017]. The Defendant is remanded to the Lycoming County Prison without bail.” Order, 5/4/2017.

On May 12, 2017, the Defendant was again charged with Failure to Comply with Registration Requirements, a felony of the second degree, under Pennsylvania’s Sex Offender Registration and Notification Act (SORNA) under docket number CR-735-3015. It was alleged that Defendant was a Tier II Registrant under SORNA and that he did terminate his employment and failed to notify the Pennsylvania State of Police of his employment change within 72 hours. On January 9, 2018, this Court issued an Opinion and Order granting Defendant’s Motion to Dismiss in CR-735-2017 finding that Defendant could not be charged with Failure to Register under SORNA and that he could not be deemed to have failed to register under Megan’s Law III, Act 152 of 2004⁵.

The Defendant was released from the Lycoming County Prison on January 11, 2018, and was ordered to report to the Adult Probation Office upon release as he

⁴ CP-67-CR-0002598-2007.

⁵ Megan's Law III was replaced by SORNA. Commonwealth v. Muniz, 164 A.3d 1189, 1198 (Pa. 2017). “Notably, the penalty provision was contained in the Sentencing Code together with the rest of Megan's Law II. Under Megan's Law III, however, it was moved to the Crimes Code.” Commonwealth v. Derhammer, 173 A.3d 723, 725 (Pa. 2017). FN 4 Megan's Law III did not completely repeal and replace Megan's Law II; rather, it made significant changes to Megan's Law II. See Commonwealth v. Muniz, Pa. , , 164 A.3d 1189, 1197 (2017) (describing Megan's Law III has having "made . . . amendments to Megan's Law II").

would still be on supervision in CR-625-2014. Defendant requests that the Court vacate his sentence in CR-625-2014 and discharge Defendant from confinement and probation.

Discussion

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
 - i. A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
 - ii. Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
 - iii. A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
 - iv. The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
 - v. Deleted.
 - vi. The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
 - vii. The imposition of a sentence greater than the lawful maximum.
 - viii. A 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 counsel.

42 Pa.C.S. § 9543 (eligibility for relief).

Defendant is currently under the supervision of the Adult Probation Office of Lycoming County for the above captioned docket number so he is potentially eligible for relief. He is currently serving this penalty under a law that is constitutionally barred under Muniz thus meeting the requirement of (2)(i) *supra*. The Muniz claim has not been previously litigated as the highest appellate court in which the petitioner could have had review as a matter of right has not ruled on the merits of the issue nor has it been raised and decided in a proceeding collaterally attacking the conviction or sentence, 42 Pa.C.S.A. § 9544, thus meeting (3) *supra*. Nor is the Muniz claim waived as the argument in Muniz was not taken until December 2016, and Muniz was not decided until July of 2017, so the failure to litigate the issue prior to or during trial, during unitary review, or on direct appeal could have not have been the result of any rational, strategic, or tactical decision of counsel as the potential for Muniz relief did not exist during these periods, thus meeting the showing required by (4) *supra*.

The Superior Court allows petitioners to make Muniz claims in petitions for post conviction relief. “We vacate the order denying PCRA relief and remand this case to the PCRA court to allow Appellant to amend his petition to include a Muniz claim.” Commonwealth v. Rivera-Figueroa, 174 A.3d 674 (Pa. Super. Nov. 14, 2017). In Rivera-Figueroa, the Superior Court also reasoned that the Muniz decision should be retroactively applied in state collateral courts to comply with the United States and

Pennsylvania Constitutions as it represents a change a substantive change in the criminal law.

The Commonwealth argues that Defendant's PCRA petition is late by one day so the Court does not have jurisdiction to grant relief. The Court is not persuaded. Petitioners have one year from the date the judgment becomes final, unless the petitioner alleges and proves one of the three exceptions apply. 42 Pa.C.S.A. § 9545. In a criminal case in which no post-sentence motion has been filed, the notice of appeal shall be filed within 30 days of the imposition of the judgment of sentence in open court. Pa. R.A.P. 903. Therefore, Defendant had until the close of business on July 28, 2016, to file a notice of appeal:

- (a) When any period of time is referred to in any rule, such period in all cases, except as otherwise provided in Rules 107 and 108, shall be so computed as to exclude the first and include the last day of such period.
- (b) Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.

Pa. R.C.P. No. 106

The first day a PCRA petition could have been appropriately filed was July 29, 2016. Defendant filed his PCRA petition on July 28, 2017, which is within the one year jurisdictional limit. In a dispute over the computation of time, the Court would find in the alternative that Defendant's claim is timely under Section 9545(b)(1)(iii) of the Post Conviction Relief Act. 42 Pa.C.S. §§ 9541-9546.

The Court finds that it does have jurisdiction to consider the petition, that the claim is properly raised under the PCRA, and that the Defendant is entitled to relief as a matter of law as explained *supra*.

ORDER

AND NOW, this 8th day of February, 2018, after a briefing schedule, and over the objection of the Commonwealth, the Petition for Post Conviction Relief is hereby **GRANTED**.

The Sentence of the Court in CR-625-2014 is hereby VACATED and the Defendant is to be immediately released from the supervision of the Adult Probation Office.

The Court finds pursuant to Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017) (petition for a writ of certiorari denied Jan. 22, 2018), Commonwealth v. Rivera-Figueroa, 174 A.3d 674 (Pa. Super. Nov. 14, 2017) and Commonwealth v. Derhammer, No. 121 MAP 2016, 2017 Pa. LEXIS 3190 (Pa. Nov. 22, 2017), that Defendant is serving a constitutionally barred penalty and is entitled to relief under the Post Conviction Relief Act.

By the Court,

Nancy L. Butts, President Judge

cc: DA (KO)
Peter T. Campana, PCRA Counsel
Gary Weber, Esq.
APO