

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1977-2014
:
vs. : CRIMINAL DIVISION
:
:
JACK GIRARDI, :
Petitioner :

OPINION AND ORDER

This matter came before the court on Jack Girardi’s motion to modify sentence, which the Court treated as a Post Conviction Relief Act (PCRA) petition.

By way of background, Jack Girardi (hereinafter “Petitioner”) was charged with numerous sexual offenses including, but not limited to, rape of a child, statutory sexual assault, involuntary deviate sexual intercourse (IDSI) with a child, and aggravated indecent assault of a child. These offenses occurred between July 1, 2013 and June 30, 2014. On October 20, 2015, a jury convicted Petitioner. On January 13, 2016, the court sentenced Petitioner to an aggregate term of 18 to 40 years’ incarceration in a state correctional institution. The court also designated Petitioner as a sexually violent predator (SVP). Petitioner filed a timely post sentence motion, which the court denied on February 22, 2016. Petitioner filed a timely direct appeal. On September 15, 2016, the Pennsylvania Superior Court rejected Petitioner’s claims and affirmed his judgment of sentence.

On October 26, 2017, Petitioner filed a motion to modify sentence. In his motion, Petitioner challenged his sexual registration requirements under Pennsylvania’s Sexual Offender Registration and Notification Act (SORNA) based on the Pennsylvania Supreme Court’s decision in *Commonwealth v. Muniz*, 164 A.3d 1181 (Pa. 2017). The court

treated Petitioner's motion as a PCRA petition pursuant to *Commonwealth v. Johnson*, 803 A.2d 1291 (Pa. Super. 2002). In *Johnson*, the Superior Court stated: "We have repeatedly held that the PCRA provides the sole means for obtaining collateral review, and that any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition." *Id.* at 1293. The court appointed counsel to represent Petitioner and directed counsel 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)(en banc).

Counsel filed a PCRA petition in which Petitioner's SVP designation was challenged based on *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017), as well as *Commonwealth v. Muniz*, 164 A.3d 1181 (Pa. 2017) and *Commonwealth v. Rivera-Figueroa*, 174 A.3d 674 (Pa. Super. 2017). Counsel alleged that the petition was timely because it was filed within sixty (60) days of *Rivera-Figueroa*.

The Commonwealth filed an Answer asserting that the petition was untimely in that the Pennsylvania Supreme Court did not hold *Muniz* to apply retroactively and no case has held *Butler* applies retroactively.

The court scheduled this matter for an argument. In the interim, however, the Pennsylvania Superior Court issued its decision in *Commonwealth v. Murphy*, 180 A.3d 402 (Pa. Super. 2018) in which it distinguished *Rivera-Figueroa* and held that *Muniz* does not apply to an untimely PCRA petition. In light of this and other developments in the law with respect to sexual offender registration requirements, the court gave counsel a further opportunity to either amend the petition or file a no merit letter. No further pleadings were

filed in this case.

After a review of the record and the law, the court concludes that Petitioner is not entitled to relief in this case.

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*, 788 A.2d 351, 353 (Pa. 2002); *Commonwealth v. Palmer*, 814 A.2d 700, 704-05 (Pa. Super. 2002).

[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, 753 A.2d 780, 783 (Pa. 2000).

The Pennsylvania Superior Court affirmed Petitioner's judgment of sentence on September 15, 2016. Petitioner had 30 days within which to file a petition for allowance of appeal with the Pennsylvania Supreme Court. No such petition was filed. Therefore, Petitioner's judgment of sentence became final on October 17, 2016.¹ To be considered timely, Petitioner had to file his petition on or before October 17, 2017, or allege facts to support one of the statutory exceptions. The original petition was dated October 23, 2017, and filed on October 26, 2017; therefore, even with the benefit of the prison mailbox rule, the petition is facially untimely.

Petitioner also fails to satisfy any of the statutory exceptions. In *Muniz*, the Pennsylvania Supreme Court found that the retroactive application of SORNA violated the *ex post facto* clauses of the United States and Pennsylvania constitutions, but it did not hold, and has not held in any other case, that *Muniz* applies retroactively to individuals such as Petitioner whose judgment became final before the decision was announced. In fact, the Pennsylvania Superior Court has held that *Muniz* does not apply retroactively to individuals in Petitioner's situation. As the Pennsylvania Superior Court recently stated in

Commonwealth v. Murphy:

[B]ecause Appellant's PCRA petition is untimely (unlike the petition at issue in *Rivera-Figueroa*), he must demonstrate that the **Pennsylvania**

¹October 15, 2016 was a Saturday. When the last day of a time period falls on a weekend or legal holiday, it is not counted and the time period ends on the next business day, which in this case would have been Monday, October 17, 2016. 1 Pa. C.S. §1908.

Supreme Court has held that *Muniz* applies retroactively in order to satisfy section 9545(b)(1)(iii). Because at this time, no such holding has been issued by our Supreme Court, Appellant cannot rely on *Muniz* to meet that timeliness exception.

180 A.3d 402, 405-06 (Pa. Super. 2018)(emphasis original)(citation omitted).

Even if the Pennsylvania Supreme Court had held that *Muniz* applies retroactively, Petitioner did not file his petition within sixty (60) days of the *Muniz* decision. Any petition invoking one of the exceptions in section 9545(b)(1) must be filed within sixty (60) days of the date the claim could have been presented. 42 Pa. C.S. §9545(b)(2). *Muniz* was decided on July 19, 2017. To be considered timely under section 9545(b)(1)(iii), Petitioner’s PCRA petition would have had to have been filed by September 18, 2017.

Neither *Butler* nor *Rivera-Figueroa* satisfy the “new constitutional right” exception of 42 Pa. C.S. 9545(b)(1)(iii), because they are decisions of the Pennsylvania Superior Court, and not decisions of the United State Supreme Court or the Pennsylvania Supreme Court. Therefore, the court lacks jurisdiction to hold an evidentiary hearing or grant Petitioner relief.

Even if the court had jurisdiction, the court questions whether Petitioner would be entitled to relief in this case. SORNA was not applied retroactively to Petitioner. SORNA was enacted on December 20, 2011 and became effective on December 20, 2012. Petitioner committed his sexual offenses between July 1, 2013 and June 30, 2014. Therefore, there is no *ex post facto* violation in this case, and SORNA applies to Petitioner.

The court also notes that the Pennsylvania Supreme Court has granted

allowance of appeal in *Butler*.²

ORDER

AND NOW, this ___ day of October 2018, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, as no purpose would be served by conducting a hearing in this matter, none will be scheduled. The parties are hereby notified of this court's intention to dismiss the Petition. 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.

By The Court,

Nancy L. Butts, President Judge

cc: Kenneth Osokow, Esquire (DA)
William Miele, Esquire (PD)
Smart Communications/PADOC
Jack Girardi, MK1450
SCI Albion
P.O. Box 33028
St. Petersburg, FL 33733
Work file

² 190 A.3d 581 (Pa. 2018).