

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1660-2012
:
vs. : CRIMINAL DIVISION
:
:
PAUL LOWMILLER, :
Defendant :

OPINION AND ORDER

This matter came before the court on the Petition to Vacate SVP Designation filed by the Lycoming County Public Defender on behalf of Paul Lowmiller (hereinafter “Petitioner”).

By way of background, Petitioner was charged with committing statutory sexual assault, indecent assault, and corruption of minors against a 14 year old female between July 1, 2009 and September 27, 2011. On January 8, 2013, Petitioner pled guilty to statutory sexual assault,¹ a felony of the second degree, and indecent assault, a misdemeanor of the second degree.² On February 4, 2014, the court determined that Petitioner was a sexually violent predator (SVP), and it sentenced him to one to two years’ incarceration in a state correctional institution followed by eight years’ probation for statutory sexual assault. Indecent assault merged for sentencing purposes.

On January 19, 2018, the Lycoming County Public Defender filed a petition to eliminate Petitioner’s SVP designation based on the appellate court decisions in *Muniz*,³

¹ 18 Pa. C.S.A. §3122.1(a)(1).

² 18 Pa. C.S.A. §3126 (a)(8).

³ *Commonwealth v. Muniz*, 640 Pa. 699, 164 A.3d 1181 (2017).

Butler,⁴ and *Rivera-Figueroa*.⁵ The Commonwealth filed an answer in which it asserted that the petition was an untimely Post Conviction Relief Act (PCRA) petition. On April 23, 2018, the Lycoming County Public Defender filed a petition to withdraw as counsel based on *Murphy*.⁶

Petitioner is challenging his registration requirements and his SVP designation. His claims rely on the holding in *Muniz* that SORNA's registration requirements constitute punishment. Therefore, his petition to vacate his SVP designation is either a claim that his sentence is unlawful or a claim related to a constitutional violation that would be cognizable under the PCRA. *See* 42 Pa. C.S.A. §9543(a)(2). Accordingly, the court must evaluate Petitioner's claims under the PCRA.

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

⁴ *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017).

⁵ *Commonwealth v. Rivera-Figueroa*, 174 A.3d 674 (Pa. Super. 2017).

⁶ *Commonwealth v. Murphy*, 180 A.3d 402 (Pa. Super. 2018).

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 (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*, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000).

The court sentenced Petitioner on February 4, 2014. Petitioner did not file a post-sentence motion or an appeal. Therefore, his judgment of sentence became final on March 6, 2014. To be considered timely, Petitioner had to file his petition on or before March 6, 2015 or allege facts to support one of the statutory exceptions. Petitioner’s petition was filed on January 19, 2018, nearly three years late.

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 a Petitioner whose judgment became final long 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 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, 405-406 (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 60 days of the *Muniz* decision. Any petition invoking one of the exceptions in section 9545(b)(1) must be filed within 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.

ORDER

AND NOW, this ___ day of September 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.

The court also GRANTS counsel's motion to withdraw. Petitioner may represent himself or hire private counsel to represent him, but the court will not appoint counsel to represent him further in this matter unless or until he alleges facts to show that his Petition is timely.

By The Court,

Nancy L. Butts, President Judge

cc: Kenneth Osokow, Esquire (DA)
William Miele, Esquire (PD)
Paul Lowmiller, c/o Lycoming County Prison
Work file