

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-412-2008
vs. :
 : CRIMINAL DIVISION
 :
 :
 :
GREGORY PACKER, : Notice of Intent to Dismiss PCRA without
Defendant : holding an evidentiary hearing and Order
 : permitting counsel to withdraw

OPINION AND ORDER

By way of background, Gregory Packer (hereinafter “Petitioner”) was charged with involuntary deviate sexual intercourse (IDSI) of a child, aggravated indecent assault of a child, and indecent assault of a complainant less than 13 years of age. These offenses occurred between May 15, 2007 and February 26, 2008. On November 18, 2008, Petitioner was convicted of ISDI of a child and indecent assault of a complainant less than 13 years of age. On May 13, 2009, Petitioner was sentenced to an aggregate term of 15 years 3 months to 47 years’ incarceration in a state correctional institution. Petitioner filed a post sentence motion and an appeal. On October 27, 2010, the Pennsylvania Superior Court affirmed Petitioner’s conviction and judgment of sentence, except the imposition of a fine and remanded the matter to the trial court to develop a record with regard to an appropriate fine. On December 17, 2010, following a hearing and finding that Petitioner lacked financial resources, the court did not impose any fine. No further appeal was taken.

On June 8, 2015, Petitioner filed a “Motion to Modify and Correct Illegal Sentence Nunc Pro Tunc” which the court treated as a Post Conviction Relief Act (PCRA) petition and denied it as untimely. Petitioner appealed, claiming that Pennsylvania’s Megan’s Law was unconstitutional. On January 6, 2017, the Superior Court affirmed the

dismissal of Petitioner's first PCRA. Petitioner filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on August 1, 2017.

On September 14, 2017, Petitioner filed another PCRA petition, again challenging his registration requirements. Petitioner asserted that his registration requirements were unconstitutional based on the Pennsylvania Supreme Court's decision in *Commonwealth v. Muniz*, 640 Pa. 699, 164 A.3d 1181 (Pa. 2017). He also contended that his petition was timely because it was filed within 60 days of the *Muniz* decision.

In light of the drastic changes in SORNA due to *Muniz*, *Rivera-Figueroa*,¹ and *Butler*,² the court appointed counsel to represent Petitioner even though this was a second or subsequent PCRA petition. The court 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). On June 26, 2018, counsel filed a motion to withdraw as counsel and a no merit letter in which he asserted that the current petition was untimely.

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

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

¹ *Commonwealth v. Rivera-Figueroa*, 174 A.3d 674 (Pa. Super. 2017).

² *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017), *alloc. granted*, 190 A.3d 581 (Pa. 2018).

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 (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).

Pursuant to the Pennsylvania Superior Court’s remand to the court, the court held a hearing on December 17, 2010, regarding Petitioner’s financial ability to pay a fine. Finding that Petitioner lacked the financial means to pay any fine, no new fine was imposed. No appeal was taken from this order. Petitioner’s judgment of sentence became final on or

about January 18, 2011.³ Therefore, Petitioner's current PCRA petition is facially untimely.

Petitioner claims that his petition is not untimely because it was filed within 60 days of the Pennsylvania Supreme Court's decision in *Muniz*; therefore, he has satisfied the third statutory exception. The court cannot agree.

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 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).

The court also notes that neither *Butler* nor *Rivera-Figueroa* satisfies this exception because they are decisions of the Pennsylvania Superior Court, and not decisions of the United State Supreme Court or the Pennsylvania Supreme Court.

As this PCRA petition is patently untimely, the court lacks jurisdiction to hold an evidentiary hearing or grant Petitioner any relief.

³ January 16, 2011 was a Sunday and January 17, 2011 was Martin Luther King Day. When the last day of the time period falls on a weekend or legal holiday, it is not counted and the time period ends on the next business

The court also notes that these claims could be considered waived. To be eligible for relief, a petitioner must show that the issue has not been waived. 42 Pa. C.S. §9543(a)(3). “[A]n issue is waived if it the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.” 42 Pa.C.S. §9544(b). Petitioner could have challenged the retroactive application of Pennsylvania’s Sexual Offender Registration and Notification Act (SORNA) in his first PCRA petition. The court recognizes that the Pennsylvania Supreme Court had not decided *Muniz* at that time; however, Petitioner was challenging his registration requirements in his first petition and could have been the first litigant to assert an *ex post facto* challenge to SORNA.

Finally, the court finds that Petitioner’s PCRA petition is moot due to legislative amendments to SORNA and the enactment of new Subchapter I of Chapter 97 of the Judicial Code, 42 Pa. C.S. §§9799.51 et seq. Due to the legislative changes, Petitioner will not be required to register pursuant to SORNA as a result of his convictions in this case. SORNA now only applies to individuals who are convicted of sexually violent offenses committed on or after December 20, 2012. Individuals, like Petitioner, who have been convicted of a sexually violent offense committed on or after April 22, 1996 and before December 20, 2012, and who have not completed their registration requirements with the Pennsylvania State Police will be required to register pursuant to Subchapter I. Petitioner has not challenged the constitutionality of Subchapter I or the Acts which enacted it (Act 2018-10 and Act 2018-29).

day, which in this case would have been Tuesday, January 18, 2011. 1 Pa. C.S. §1908.

ORDER

AND NOW, this ___ day of November 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 an evidentiary hearing, none will be scheduled and 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 PCRA counsel's motion to withdraw. Petitioner may represent himself or hire private counsel but the court will not appoint counsel to represent Petitioner further in this matter.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Ryan Gardner, Esquire
Gregory Packer, JB 2938
SCI-Fayette, 50 Overlook Drive, LaBelle PA 15450
Work file
Gary Weber, Esquire (Lycoming Reporter)