

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-600-2008
:
vs. : CRIMINAL DIVISION
:
:
WAYNE SHOWERS, : Notice of Intent to Dismiss PCRA Petition
Defendant :

OPINION AND ORDER

This matter came before the court on Defendant’s second Post Conviction Relief Act (PCRA) petition.

By way of background, Petitioner Wayne Showers was charged with several sexual offenses against two minor females, A.T. and B.P. Following a trial on May 5-6, 2009, a jury convicted Petitioner of aggravated indecent assault of a child and indecent assault of a child under 13 years of age with respect to victim, A.T., and statutory sexual assault, aggravated assault, and indecent assault with respect to victim, B.P. The incidents which formed the basis of these crimes occurred between May 2000 and August 2007. On August 11, 2009, the court sentenced Petitioner to an aggregate term of imprisonment of 52 months to 180 months.

Petitioner filed a direct appeal. Finding all appeal issues were waived, the Pennsylvania Superior Court affirmed Petitioner’s judgment of sentence on June 29, 2010. 1464 MDA 2009.

Petitioner’s direct appeal rights were reinstated through PCRA proceedings. The Pennsylvania Superior Court affirmed Petitioner’s judgment of sentence on July 2, 2014. See 884 MDA 2013. Petitioner filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on January 21, 2015. Petitioner did not file a petition

for certiorari with United States Supreme Court. Therefore, his judgment of sentence became final on April 21, 2015.

Petitioner filed a PCRA petition, in which he challenged the legality of his sentence pursuant to *Alleyne*. The court denied this PCRA petition on July 12, 2016. Showers appealed, but the Pennsylvania Superior Court affirmed the denial of his PCRA petition on April 17, 2017. No petition for allowance of appeal was filed.

On December 27, 2017, the Lycoming County Public Defender filed a second PCRA petition on Petitioner's behalf. In this petition, Petitioner asserted that, based on *Muniz*,¹ retroactive application of SORNA's registration requirements to Petitioner violated the ex post facto clauses of United State and Pennsylvania Constitutions.

After an independent review of the record, the court finds Petitioner is not entitled to relief 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 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

¹ *Commonwealth v. Muniz*, 640 Pa. 699, 164 A.3d 1181 (2017).

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).

Petitioner’s judgment of sentence became final on April 21, 2015. To be facially timely, Petitioner was required to file his PCRA petition on or before April 21, 2016. Petitioner alleges that his petition is timely because it was filed within 60 days of the date of the Superior Court decision in *Figueroa-Rivera*, which held that *Muniz* applies retroactively in the PCRA context. 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 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.

Rivera-Figueroa does not satisfy the "new constitutional right" exception of 42 Pa. C.S. 9545(b)(1)(iii), because it is not a decision of the United State Supreme Court or the Pennsylvania Supreme Court.

Even if the petition had been timely filed, the court could not grant him relief. 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). If Petitioner believed that imposition of SORNA's

registration requirements violated the ex post facto clause, he could have asserted this issue in his first PCRA petition. The court recognizes that the Pennsylvania Supreme Court had not decided *Muniz* at that time; however, if Petitioner had asserted this issue in his first PCRA petition, his case could have been the one in which the Pennsylvania Supreme Court held that the retroactive application of SORNA was unconstitutional.

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 these changes, Petitioner will not be required to register pursuant to SORNA. SORNA now only applies to individuals who are convicted of sexually violent offenses committed on or after December 20, 2012. Individuals, like Petitioner, who are or 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 application of Subchapter I or the Acts which enacted it (Act 2018-10 and Act 2018-29).

Petitioner has also filed pro se PCRA petitions challenging discretionary aspects of his sentencing. Petitioner is not entitled to relief for several reasons. Petitioner is not entitled to hybrid representation. *Commonwealth v. Pursell*, 555 Pa. 233, 724 A.2d 293, 302 (1999) (“We will not require courts considering PCRA petitions to struggle through *pro se* filings of defendants when qualified counsel represent those defendants.”). Petitioner is currently being represented by William Miele, the chief public defender of Lycoming County. When a represented defendant files a written motion, petition or document that is not

signed by his attorney, the clerk of courts is required to accept it for filing, time stamp it with the date of receipt and make a docket entry, and place it in the criminal case file. Pa. R. Crim. P. 576(A)(4). However, such only serves to provide a record of the filing; it does not trigger any deadline or require any response. Pa. R. Crim. P. 576, comment. Therefore, the court will take no action on Petitioner's pro se petitions.

Even if the court could take action on these petitions, Petitioner would not be entitled to relief. First, the petitions are patently untimely. Second, any direct claims related to discretionary aspects of sentencing are not cognizable under the PCRA. Third, even if such claims are cognizable as a claim of ineffective assistance of counsel, they are waived because they could have been asserted at the time of sentencing, in post-sentence motions, on appeal (if preserved on the record or in a post-sentence motion) or in Petitioner's prior PCRA petition. 42 Pa. C.S. 9544(b) ("an issue is waived if 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."). Fourth, the claims lack merit. Petitioner asserts that all of his prior attorneys were ineffective for failing to object during trial, orally motion for mistrial, or file a motion for sentence reconsideration based on the "tainted" testimony of A.T. or to assert an ineffective assistance of counsel claim based on such. Petitioner's claims and arguments miss the mark. Taint is not an evidentiary objection at trial or a basis to seek sentence reconsideration. It is an issue regarding the competency of the child witness to testify at trial. *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003). It is an issue properly asserted in a motion that is decided by the court outside the presence of the jury, typically prior to trial. Since a witness is presumed competent to testify in Pennsylvania, the

moving party bears the burden of production of evidence of taint and the burden of persuasion to show taint by clear and convincing evidence. A mere assertion that the child's statements are or were inconsistent is not sufficient.

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, no purpose would be served by conducting a hearing in this case. The parties are hereby notified of the 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,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)
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