

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1876-2015;
vs. : CR-823-2016
:
: Notice of Intent to Dismiss PCRA Petition
JOHN M. FRISOSKY, : and Order Granting Counsel's Motion
Defendant : to Withdraw

OPINION AND ORDER

Before the court is the Post Conviction Relief Act (PCRA) petition filed by Petitioner, John M. Frisosky.

By way of background, on or about September 25, 1998, Petitioner was convicted of a sexual offense in Michigan. He was sentenced to 5 to 15 years' incarceration and a lifetime sexual offender registration. Sometime after Petitioner was released from incarceration, he moved to Pennsylvania for work purposes.

Under Information 1876-2015, Petitioner was charged with two counts of failure to comply with registration requirements for failing to register a change of residence and failing to register periods of time that he was traveling out of state for his employment.

Under Information 823-2016, Petitioner was charged with three counts of failure to comply with registration requirements for failing to appear for his quarterly update, failing to register a change of address and failing to register a change or termination of employment.

On December 2, 2016, Petitioner pleaded guilty to one count under each Information, each graded as a felony of the second degree, related to his failure to notify appropriate authorities of a change of residence.

On February 21, 2017, the court sentenced Petitioner to an aggregate term of 4 to 10 years' incarceration in a state correctional institution. Petitioner did not file a post sentence motion or an appeal.

On November 20, 2018, Petitioner filed his PCRA petition. Petitioner seeks to have his sentence vacated and to be released from prison based on the Pennsylvania Supreme Court's decision in *Muniz*.¹ Petitioner makes a boilerplate assertion that the facts and case law in *Muniz* were unknown to him and could not have been ascertained by the exercise of due diligence.

As this was Petitioner's first PCRA, the court appointed counsel and directed counsel to file either an amended PCRA petition or a no merit letter pursuant to *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley*, 379 Pa. Super. 390, 550 A.2d 213 (1988)(en banc). Counsel filed a motion to withdraw which included a *Turner/Finley* no merit letter. Counsel concluded that the PCRA petition lacked merit because it was untimely; therefore, the court lacked jurisdiction to grant Petitioner any relief.

After an independent review of the record, the court agrees with counsel's assessment.

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:

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

(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*, 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 21, 2017. In the absence of an appeal, a judgment of sentence becomes final 30 days after it is entered. Petitioner did not file a notice of appeal. Therefore, his judgment of sentence became final on March 21, 2017.

To be considered facially timely, Petitioner would have had to file his PCRA petition by March 21, 2018. Petitioner did not file his PCRA petition until November 20, 2018; therefore, his PCRA is facially untimely.

Petitioner asserts that his claim is timely because he was unaware of the facts and case law in *Muniz* and that the facts and case law could not be ascertained by the exercise of due diligence. The court, however, finds that none of the statutory exceptions applies in this case.

The first exception does not apply, because Petitioner has not alleged any interference by government officials.

Petitioner also cannot satisfy the “new fact” exception under section 9545(b)(1)(ii), because judicial decisions such as *Muniz* are law, not facts. *Commonwealth v. Watts*, 23 A.3d 980, 987 (Pa. 2011).

Finally, the decision in *Muniz* does not satisfy the third exception. 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).

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, 2017.²

Petitioner asserts that a challenge to the legality of a conviction and sentence is never waived and/or time-barred. This is not accurate. “Although legality of sentence is always subject to review within the PCRA, claims must still satisfy the PCRA’s time limits or one of the exceptions thereto.” *Commonwealth v. Fahy*, 558 Pa. 313, 329, 737 A.2d 214, 223 (1999); see also *Commonwealth v. Infante*, 63 A.3d 358, 365 (Pa. Super. 2013); *Commonwealth v. Fowler*, 930 A.2d 586, 592 (Pa. Super. 2007); *Commonwealth v. Beck*, 848 A.2d 987, 989 (Pa. Super. 2004). “Thus, a collateral claim regarding the legality of a sentence can be lost for failure to raise it in a timely manner under the PCRA.” *Infante, id.*

As the petition was filed more than one year after Petitioner’s judgment of sentence became final and Petitioner has not alleged sufficient facts to satisfy any of the

²The statute has since been amended such that any petition invoking an exception must be filed within one year of the date the claim could have been presented. This change does not apply in this case, as Petitioner’s alleged claim arose on July 19, 2017, the date *Muniz* was decided. The amendment only applies to claims that arose on December 24, 2017 or thereafter. Moreover, even if the amendment applied to this case, the petition would still be untimely, because the Pennsylvania Supreme Court has not held that *Muniz* applies retroactively and the petition was not filed within one year of the *Muniz* decision.

statutory exceptions, the court lacks jurisdiction to hold an evidentiary hearing or grant any relief in this case.

ORDER

AND NOW, this ___ day of June 2019, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court notifies the parties of its intention to deny his PCRA petition without holding an evidentiary hearing. 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 petition to withdraw. Petitioner may represent himself or hire private counsel, but the court will not appoint counsel to represent Petitioner in this matter.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)
Donald Martino, Esquire
John Frisosky, # MW-5940
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Work file