

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-994-2017
	:
vs.	: CRIMINAL DIVISION
	:
	:
CODY CHESTNUT,	: Notice of Intent to Dismiss PCRA
Defendant	: Without Holding An Evidentiary Hearing

OPINION AND ORDER

This matter came before the court on the second Post Conviction Relief Act (PCRA) petition filed by Cody Chestnut (“Chestnut”).

Factual and Procedural Background

The Commonwealth charged Chestnut with aggravated assault – causing serious bodily injury, a felony of the first degree; strangulation, a felony of the second degree; unlawful restraint, a misdemeanor of the first degree; simple assault, a misdemeanor of the second degree; and harassment, a summary offense. Following a jury trial held on April 10-11, 2018, the jury found Chestnut guilty of aggravated assault and simple assault, but acquitted him of strangulation and unlawful restraint.

On June 18, 2018, the court sentenced Chestnut to 5 to 12 years’ incarceration in a state correctional institution (SCI). As Chestnut no longer had funds to continue to pay his privately-retained trial counsel, the court permitted trial counsel to withdraw and appointed the Public Defender to represent Chestnut for any post-sentence motion and appeal. The court granted new counsel until July 17, 2018 to file a post-sentence motion nunc pro tunc.

On July 16, 2018, Chestnut filed a post-sentence motion nunc pro tunc in which he sought a new trial and arrest of judgment, which the court denied on October 16, 2018.

Chestnut filed a timely notice of appeal on October 29, 2018. The Pennsylvania Superior Court affirmed Chestnut's judgment of sentence on August 19, 2019, and the Pennsylvania Supreme Court denied Chestnut's petition for allowance of appeal on February 3, 2020.

On March 11, 2020, Chestnut filed his first PCRA petition, in which he alleged trial counsel was ineffective for failing to call certain character witnesses. Trial counsel called two character witnesses at trial, but there were numerous additional character witnesses that were available and that Chestnut wanted called as witnesses at trial. The court appointed PCRA counsel to represent Chestnut. The court held an evidentiary hearing at which PCRA counsel presented the character witnesses, but did not call trial counsel. On May 18, 2021, the court denied Chestnut's first PCRA petition.

On May 28, 2021, Chestnut appealed the denial of his first PCRA petition to the Pennsylvania Superior Court, which affirmed the trial court decision in a memorandum decision issued on February 25, 2022.

On November 7, 2022, Chestnut filed what he designated as an amended PCRA petition against his PCRA appellate counsel, seeking reinstatement of his appellate rights *nunc pro tunc* because this attorney was ineffective for failing to call trial counsel as a witness at his PCRA evidentiary hearing. On November 17, 2022, Chestnut filed a form PCRA petition in which he sought appointment of counsel and an evidentiary hearing to prove that PCRA counsel was ineffective for failing to call trial counsel as a witness at his first PCRA hearing. On December 9, 2022, Chestnut filed a "PCRA amendment letter" in which he asserted new claims of trial counsel error with respect to a concession on a self-defense/justification jury instruction and failing to poll the jury, as well as his claim that

PCRA counsel was ineffective for failing to call trial counsel as a witness at his PCRA hearing.¹ On May 11, 2023, Chestnut filed an “Answer to PCRA petition” in which he sought either the appointment of new counsel or to proceed pro se and an evidentiary hearing in the interests of justice. Chestnut does not address the timeliness requirements of the PCRA or any of the statutory exceptions in any of his filings. Chestnut also did not seek or obtain leave of court to file any supplemental or amended petitions.

DISCUSSION

Is Chestnut’s second PCRA petition untimely?

For a PCRA Petition to be considered timely it must satisfy the following requirements:

(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.

42 Pa. C.S. § 9545(b)(1) (emphasis added). A petitioner must “affirmatively plead and

¹ Any claims regarding trial counsel’s ineffectiveness are previously litigated or waived because they were required to be asserted and litigated in Chestnut’s first PCRA petition.

prove” the exception, upon which he or she relies. *Commonwealth v. Taylor*, 933 A.2d 1035, 1039 (Pa. Super. 2007). Chestnut has not pled any of the statutory exceptions.

A judgment becomes final at the conclusion of direct review or at the expiration of time for seeking the review. 42 Pa. C.S.A. §9545(b)(3). In other words, Chestnut’s judgment of sentence became final once all of his avenues of direct appeal (not appeals from PCRA petitions) were exhausted. The Pennsylvania Superior Court affirmed Chestnut’s judgment of sentence on October 29, 2018. Chestnut filed a petition of allowance of appeal, which the Pennsylvania Supreme Court denied on February 3, 2020. Chestnut would have had 90 days within which to file a petition for writ of certiorari with the United States Supreme Court. USCS Sup. Ct. R. 13. Therefore, Chestnut’s judgment of sentence became final on or about May 4, 2020.

To be considered timely, Chestnut had to file his second PCRA petition on or before May 4, 2021 or allege facts to support one of the three statutory exceptions to the one-year time limit. He has done neither.

The court also finds that Chestnut cannot rely on the Pennsylvania Supreme Court’s decision in *Commonwealth v. Bradley*, 261 A.3d 381 (Pa. 2021) to claim that his petition is timely. *Bradley* involved a timely first PCRA petition. The Pennsylvania Superior Court has declined to extend *Bradley* to cases involving untimely or serial petitions. *Commonwealth v. Stahl*, 292 A.3d 1130, 1136 (Pa. Super. 2023)(“Nothing in *Bradley* creates a right to file a second PCRA petition outside the PCRA’s one-year time limit as a method of raising ineffectiveness of PCRA counsel or permits recognition of such a right”). This conclusion is further supported by numerous, persuasive non-precedential decisions of the Pennsylvania Superior Court. See, e.g., *Commonwealth v. Morton*, No. 614 WDA 2022, slip op. at 3-4,

2023 WL 118686 (Pa. Super. filed Jan. 6, 2023)(unpublished memorandum); *Commonwealth v. Dixon*, No. 1145 EDA 2022, slip op. at 4-6, 2022 WL 17973240 (Pa. Super. filed Dec. 28, 2022) (unpublished memorandum); *Commonwealth v. Bingaman*, No. 123 WDA 2022, slip op. at 5-7, 2022 WL 12198179 (Pa. Super. Oct. 21, 2022) (unpublished memorandum); *Commonwealth v. Bernal*, No. 974 MDA 2021, slip op. at 4-6 & nn.2, 3, 2022 WL 4138187 (Pa. Super. filed Sept. 13, 2022) (unpublished memorandum); *Commonwealth v. Dennis*, No. 1926 EDA 2021, slip op. at 7-9, 2022 WL 3714286 (Pa. Super. filed Aug. 29, 2022) (unpublished memorandum).

Chestnut’s petition cannot satisfy the first statutory exception because the term “government official” does not include defense counsel, whether appointed or retained. 42 Pa.C.S.A. §9545(b)(4).

Chestnut’s petition does not satisfy the second statutory exception because neither the *Bradley* decision nor the discovery of PCRA counsel’s ineffectiveness constitute a “new fact” that was unknown to the petitioner. *Commonwealth v. Watts*, 611 Pa. 80, 23 A.3d 980 (2011)(a judicial decision does not amount to a new “fact” under section 9545(b)(1)(ii) of the PCRA); *Bradley*, 261 A.3d at 404 n.18 (declining to adopt an approach that would deem a petitioner’s “discovery” of initial PCRA counsel’s ineffective assistance to constitute a “new fact” that was unknown to petitioner to overcome the PCRA’s time bar provision in a successive PCRA petition). In fact, in his concurring opinion, Justice Dougherty expressly stated “our decision today does not create an exception to the PCRA’s jurisdictional time-bar, such that a petitioner represented by the same counsel in the PCRA court and on PCRA appeal could file an untimely successive PCRA petition challenging initial PCRA counsel’s ineffectiveness because it was his ‘first opportunity to do so’ and he noted the statements in

the majority opinion that support this conclusion. *Bradley*, 261 A.3d at 406-407.

Chestnut’s petition also does not satisfy the third exception. The newly-recognized constitutional right exception has two requirements: (1) the right asserted by the petitioner must be a constitutional right recognized by the United States Supreme Court or the Pennsylvania Supreme Court after the one-year time period for filing a timely PCRA petition; and (2) the right was held by “that court” to apply retroactively. *Commonwealth v. Taylor*, 283 A.3d 178, 187 (Pa. 2022). The *Bradley* Court did not recognize a new constitutional right; it recognized a procedure or mechanism on appeal for a petitioner to vindicate his or her rule-based right to effective PCRA counsel.² See *Bradley*, 261 A.3d at 391 (a petitioner has a rule-based right to effective assistance of counsel for a first PCRA petition but the question of how to raise a claim of PCRA counsel’s ineffectiveness has proven to be vexing). The Court also did not expressly hold that *Bradley* would apply retroactively.

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). When 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

² There is no constitutional right to counsel during collateral review; there is only a rule-based right to counsel pursuant to Rule 904 of the Pennsylvania Rules of Criminal Procedure. *Commonwealth v. Peterson*, 648 Pa. 313, 324 n.3, 192 A.3d 1123, 1130 n.3 (2018); *Commonwealth v. Jones*, 572 Pa. 343, 364, 815 A.3d 598, 611 (2002).

exceptions, but not filed within one year 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. 42 Pa. C.S.A. §9545(b); see also *Commonwealth v Gamboa-Taylor*, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000). Chestnut's petition is untimely. Therefore, the court lacks jurisdiction to hold an evidentiary hearing or to grant any relief to Chestnut. Similarly, since the court lacks jurisdiction to hold an evidentiary hearing and this is not a first PCRA petition, the court is not required to appoint counsel to represent Chestnut. *See* Pa. R. Crim. P. 904(D).

The court also finds that Chestnut was not prejudiced by PCRA counsel's alleged failure. In addition to noting with respect to the first PCRA petition that Chestnut failed to establish that trial counsel lacked a rationale or strategic reason for failing to call the character witnesses, the trial court noted that (1) many of the uncalled witnesses' testimony was opinion testimony and not proper reputation testimony; (2) the admissible testimony was cumulative or duplicative of the testimony provided at trial by Jamie Moore and Tiffany Sellers; and (3) Chestnut was not prejudiced by the lack of the uncalled witnesses' testimony, i.e., there was not a reasonable probability that the admissible reputation testimony from the uncalled witnesses would have changed the outcome of the proceedings. *See* Opinion and Order entered May 18, 2021 at pp. 8, 9-12.

ORDER

AND NOW, this 10th day of July 2023, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court finds that as Chestnut's petition is untimely, no purpose would be served by conducting any further hearing and none will be scheduled. The court notifies the parties of the court's intention to dismiss Chestnut's second PCRA petition and related documents. Chestnut 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