NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
BRUCE L. WISHNEFSKY,	:	
	:	
Appellant	:	No. 490 EDA 2014

Appeal from the PCRA Order December 31, 2013
In the Court of Common Pleas of Carbon County
Criminal Division No(s).: CP-13-CR-0000188-1996

BEFORE: GANTMAN, P.J., ALLEN, and FITZGERALD,* JJ.

JUDGMENT ORDER BY FITZGERALD, J.: **FILED JUNE 30, 2014**

Appellant, Bruce L. Wishnefsky, appeals *pro se* from the order of the Carbon County Court of Common Pleas that dismissed, as untimely, his third Post Conviction Relief Act[1] (PCRA) petition challenging his 1998 conviction and sentence to serve forty-five to ninety years' imprisonment.[2] Appellant

* Former Justice specially assigned to the Superior Court.

[1] 42 Pa.C.S. §§ 9541-9546.

[2] Appellant's aggregate sentence contained several five-year mandatory minimum sentences for rape based on the ages of the victims. ***See*** 42 Pa.C.S. § 9718(a)(1) (subsequently amended Nov. 29, 2006). For the purposes of the PCRA, Appellant's judgment of sentence became final on October 16, 2000, when the United States Supreme Court denied his petition for writ of *certiorari* in his direct appeal, and the mechanical date for filing a facially timely PCRA petition expired one year later. ***See*** 42 Pa.C.S. § 9545(b)(1), (3).

claims he is entitled to a time-bar exception in light of ***Alleyne v. United States***, 133 S. Ct. 2151 (2013).[3] Following our review, we discern no basis to disturb the PCRA court's conclusion that although ***Alleyne*** announced a new constitutional procedural rule—*i.e.*, "that facts that increase mandatory minimum sentences must be submitted to the jury" for a finding beyond a reasonable doubt, ***id.*** at 2163—there is no indication that ***Alleyne*** was intended to apply retroactively.

We thus adopt the PCRA court's opinion as dispositive and only add that our review confirms that no appellate court, let alone the United States or Pennsylvania Supreme Court, has held that ***Alleyne*** applies retroactively for the purposes of a second or subsequent attempt at collateral review. ***See, e.g.***, ***United States v. Winkelman***, 746 F.3d 134, 136 (3d Cir. 2014). We also conclude that Appellant's assertion that ***Alleyne*** may be applied retroactively to him as an "old rule" dictated by ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), is a frivolous attempt to circumvent the PCRA's timeliness requirements.

Order affirmed.

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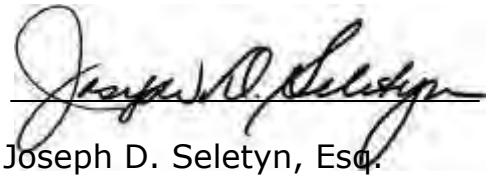
[3] ***See*** 42 Pa.C.S. § 9545(b)(1)(iii) (creating timeliness exception if "a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively."); ***Commonwealth v. Abdul-Salaam***, 812 A.2d 497, 501 (Pa. 2002) (holding that "ruling on retroactivity of the new constitutional law must have been made prior to the filing of the petition for collateral review.").

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/30/2014

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	NO. 188 CR 1996
	:	
BRUCE L. WISHNEFSKY, Defendant	:	

Gary F. Dobias, Esquire — Counsel for Commonwealth
District Attorney

Bruce L. Wishnefsky — Pro se

MEMORANDUM OPINION

Nanovic, P.J. - March 5, 2014

Defendant, Bruce Wishnefsky, appeals our dismissal of his Post Conviction Relief Act (PCRA)[1] Petition that collaterally challenged his sentence based on the recent United States Supreme Court decision of Alleyne v. United States, 133 S.Ct. 2151 (2013). Because Alleyne has not been held to apply retroactively, and because Defendant did not file his petition within sixty days of the date Alleyne was announced, Defendant's petition was untimely, requiring dismissal for lack of subject matter jurisdiction. For these reasons, we recommend our dismissal be affirmed.

PROCEDURAL AND FACTUAL BACKGROUND

On numerous occasions between 1987 and 1992, two young girls, whose ages during this time period ranged from five years

[1] 42 Pa.C.S.A. §§ 9541-9546.

old to twelve years old, were forced by their father to have sexual intercourse with Defendant. As a result, on April 24, 1998, a jury convicted Defendant of eight counts of forcible rape,[2] eight counts of statutory rape,[3] seven counts of indecent assault,[4] two counts of corruption of minors,[5] six counts of involuntary deviate sexual intercourse,[6] four counts of aggravated indecent assault,[7] and two counts of conspiracy to commit rape.[8]

The Honorable Richard W. Webb sentenced Defendant to an aggregate sentence of not less than forty-five years nor more than ninety years' incarceration in a state correctional institution. This sentence consisted of eight consecutive sentences of five to ten years for the eight counts of rape and two consecutive sentences of two and one-half to five years for the two counts of conspiracy.[9]

At the time of Defendant's sentencing, 42 Pa.C.S.A. § 9718(a)(1) required a person convicted of forcible rape of a victim less than sixteen years of age to be sentenced to a five year mandatory minimum sentence. The five to ten year sentence

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[2] 18 Pa.C.S.A. § 3121(1).
[3] 18 Pa.C.S.A. § 3122.1.
[4] 18 Pa.C.S.A. § 3126(1),(2),(3).
[5] 18 Pa.C.S.A. § 6301.
[6] 18 Pa.C.S.A. § 3123(1),(2),(4),(5).
[7] 18 Pa.C.S.A. § 3125(1),(2),(3), (6).
[8] 18 Pa.C.S.A. §§ 903, 3121(1).
[9] The other crimes either merged for sentencing purposes or were run concurrently to the sentences for rape.

Defendant received for each count of rape was imposed by Judge Webb in accordance with this mandatory minimum.

Defendant appealed the sentence imposed by Judge Webb, which appeal was denied. Defendant's sentence thereafter became final when the United States Supreme Court denied his writ of *certiorari* on October 16, 2000. Defendant next collaterally challenged his conviction and sentence by filing two PCRA petitions, the first filed on August 13, 2001, and the second filed on March 1, 2006. Both petitions were denied.

On September 6, 2013, Defendant filed the instant PCRA petition, his third. In this petition, Defendant challenges his sentence, not his conviction. Specifically, Defendant contends that the United States Supreme Court's decision in Alleyne undermined the legality of his sentence by its holding that any fact that mandates the imposition of a mandatory minimum sentence is an "element" of the crime, not a "sentencing factor," and must be submitted to the jury and found beyond a reasonable doubt. Defendant claims that his sentence violated Alleyne because the age of his victims was a fact that pursuant to statute required a mandatory minimum sentence of no less than five years' imprisonment and was not submitted to or determined by the jury.

After reviewing Defendant's petition, we filed a notice of our intention to dismiss the petition without hearing pursuant

to Pa.R.Crim.P. 907(1). Our notice stated that we intended to dismiss Defendant's petition because it was untimely, depriving us of subject matter jurisdiction. In conformance with Pa.R.Crim.P. 907(1), we gave Defendant twenty days to respond to our notice. Defendant filed a response on December 24, 2013, however, his response did not establish that we had subject matter jurisdiction. Accordingly, on December 31, 2013, we dismissed Defendant's petition for lack of subject matter jurisdiction. Defendant timely appealed this dismissal. We now file this opinion in accordance with Pa.R.A.P. 1925(a).

DISCUSSION

Before addressing the merits of a PCRA petition, we must first determine whether we have subject matter jurisdiction. Commonwealth v. Taylor, 933 A.2d 1035, 1038 (Pa.Super. 2007). In order for a court to have subject matter jurisdiction over a PCRA petition, the petition must be timely. Commonwealth v. Taylor, 67 A.3d 1245, 1248 (Pa. 2013). To be timely, the general rule, with three exceptions, is that the defendant must file his petition within one year from the date defendant's judgment of sentence became final. 42 Pa.C.S.A. § 9545(b)(1).

The three exceptions to this time-bar are: (1) claims of interference by government officials in the presentation of the claim; (2) claims of newly-discovered facts; and (3) claims of an after-recognized constitutional right found by the deciding

court to apply retroactively. 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). To establish any of these exceptions, the defendant must plead and prove facts establishing their applicability. Commonwealth v. Lark, 746 A.2d 585, 588 (Pa. 2000). Additionally, if the defendant invokes one of these exceptions, the petition must "be filed within sixty days of the date the claim could have been presented." 42 Pa.C.S.A. § 9545(b)(2).

Since Defendant's petition was filed more than a decade after his judgment of sentence became final, to be timely, Defendant needed to establish the availability of at least one of the statutory exceptions to the one year time-bar. Defendant claims the third exception is applicable, namely a claim of an after-recognized constitutional right that applies retroactively. Defendant's reliance on this exception is misplaced for two reasons.

(1) Requirement that a Newly Recognized Constitutional Right be Applied Retroactively

First, for this exception to be applicable, the newly recognized constitutional right must be determined by the deciding court to apply retroactively. Commonwealth v. Moss, 871 A.2d 853, 856 (Pa.Super. 2005). The right recognized in Alleyne has not been determined by the United States Supreme Court to apply retroactively. Moreover, when separately

examined, the rule announced in Alleyne is not of that class which apply retroactively.

(a) Substantive Rights

In general, new constitutional rules do not apply retroactively to criminal cases on collateral review. Teague v. Lane, 489 U.S. 288, 310 (1989). However, both the federal and our state Supreme Courts have adopted two exceptions to this rule.[10] Schriro v. Summerlin, 542 U.S. 348, 351 (2004); Commonwealth v. Cunningham, 81 A.3d 1, 4 (Pa. 2013). The first exception is for new substantive rules that either "place particular conduct or persons covered by the statute beyond the State's power to punish" or "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." Cunningham, 81 A.3d at 4. We apply these rules retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." Schriro, 542 U.S. at 352.

(b) Procedural Rules

[10] The Pennsylvania Supreme Court noted that it may adopt a broader test for retroactivity than the test created by the United States Supreme Court in Teague v. Lane, 489 U.S. 288 (1989) because "the Teague rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings." Commonwealth v. Cunningham, 81 A.3d 1, 8-9 (Pa. 2013). Nevertheless, our Supreme Court has yet to adopt such a test and continues to apply the Teague test. *Id.* Accordingly, we applied the Teague test to this petition.

The second exception is for new rules of procedure which, with one exception,[11] do not apply retroactively. *Id.* Such rules do not apply retroactively because they "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* The exception to not applying procedural rules retroactively is for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Cunningham, 81 A.3d at 4 (citing Teague v. Lane, 489 U.S. 288, 310 (1989)). The United States Supreme Court stated that these types of rules are rare and that no such rule has yet to emerge. Schriro 542 U.S. at 352.

Applying this test for retroactivity to the facts before us, Alleyne does not fit either of the two exceptions providing for retroactivity. First, the Supreme Court in Alleyne did not announce a new substantive rule, but a new constitutional rule of procedure. Alleyne clearly did not apply to the first type

[11] In Cunningham, the Court stated that there are two exceptions to the general rule that new rules of procedure do not apply retroactively. Commonwealth v. Cunningham, 81 A.3d 1, 4 (Pa. 2013). However, the Court also recognized that the United States Supreme Court in Schriro v. Summerlin, 542 U.S. 348 (2004) merged one of these exceptions with the rule related to the retroactivity of new substantive rules, leaving only a single exception. *Id.* at 5.

of substantive rule because it did not place certain conduct or persons beyond the State's power to punish.

Nor is it the second kind of substantive rule, one prohibiting a certain category of punishment for a class of defendants. In Schriro, the Court held that the rule it created in Ring v. Arizona, 536 U.S. 584 (2002) - that the Sixth Amendment required a jury to find aggravating circumstances to support a death penalty - was a new rule of procedure. *Id.* at 353. The Court reasoned that

> [Ring] did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize. Instead, Ring altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking [sic] authority in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts.

Id. (citations omitted). Similarly, our state Supreme Court in Cunningham, held that the United States Supreme Court decision in Miller v. Alabama, 132 S.Ct. 2455 (2012) - that the Eighth Amendment prohibits a mandatory life sentence for juvenile offenders - was a procedural rule because that decision did not categorically bar life sentences for juvenile offenders but only prescribed how such sentences can be imposed. Cunningham, 81 A.3d at 10.

Similar to Ring and Miller, Alleyne did not categorically bar mandatory minimum sentences, but only altered how those sentences can be imposed. By holding that the Sixth Amendment requires a jury to find beyond a reasonable doubt any fact increasing a mandatory minimum sentence, Alleyne merely reallocated the decision-making authority in imposing mandatory minimum sentences. Alleyne, 133 S.Ct. at 2163. In the language of Schriro, such a rule is a "prototypical procedural rule."

As a rule of procedure, Alleyne was not a watershed rule. For a rule of procedure to be watershed it must both (1) be necessary to prevent an impermissibly large risk of an inaccurate conviction and (2) "must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Whorton v. Bockting, 549 U.S. 406, 418 (2007). Alleyne does neither.

The rule in Alleyne is not necessary to prevent an impermissibly large risk of an inaccurate conviction because, as the Supreme Court held in Schriro, judicial fact finding, as opposed to jury fact finding, does not seriously diminish the accuracy of the conviction. Schriro, 542 U.S. at 356.

Nor does the rule set forth in Alleyne alter our understanding of bedrock procedural elements because it did not profoundly and sweepingly change our understanding of the Sixth Amendment. *See* Whorton, 549 U.S. at 421 (holding that for a new

rule of procedure to alter our understanding of elements essential to fairness the rule must effect a profound and sweeping change). Rather, Alleyne simply extended the Court's holding in Apprendi v. New Jersey, 530 U.S. 466 (2000). *See* Alleyne, 133 S.Ct. at 2163 (extending Apprendi to apply to mandatory minimum sentences). Based on the foregoing, Alleyne was not the rare rule of procedure that can be classified as watershed.

Consequently, since Alleyne was neither a substantive rule nor a watershed rule of procedure, it does not apply retroactively. Such a holding has been reached by every federal Circuit Court that has addressed this question. *See* United States v. Redd, 735 F.3d 88, 91-92 (2nd Cir. 2013); Simpson v. United States, 721 F.3d 875, 876 (7th Cir. 2013); In Re Payne, 733 F.3d 1027, 1030 (10th Cir. 2013); In re Kemper, 735 F.3d 211, 212 (5th Cir. 2013). Because Alleyne does not apply retroactively, it cannot form the basis for a timely PCRA petition under section 9545(b)(1)(iii).

(2) Requirement that Petition be Filed Within Sixty Days of Judicial Decision

Even if we were to determine that Alleyne should be applied retroactively, this would be of no benefit to Defendant. Since Defendant did not file his petition within sixty days of when it could have been filed as required by 42 Pa.C.S.A. § 9545(b)(2),

his petition was untimely under the PCRA. Under the newly recognized constitutional right exception, "the sixty-day period begins to run upon the date of the underlying judicial decision." Commonwealth v. Brandon, 51 A.3d 231, 235 (Pa.Super. 2012). A defendant's ignorance about a decision will not toll the commencement of this sixty day period. Commonwealth v. Baldwin, 789 A.2d 728, 731 (Pa.Super. 2001). This includes an inmate's lack of knowledge attributable to the prison library not being updated. *See* Commonwealth v. Leggett, 16 A.3d 1144, 1146-47 (Pa.Super. 2011)("[n]either the court system nor the correctional system is obliged to educate or update prisoners concerning changes in case law.").

Since Alleyne was decided on June 17, 2013, for Defendant's petition to be timely it was required to be filed on or before August 16, 2013. Defendant's petition was not filed in the Clerk's office until September 6, 2013, twenty-one days beyond this deadline.[12] Defendant claims this delay is excused because he did not learn of the Alleyne decision until August 25, 2013, since the prison library was not kept current. Under Leggett this is an insufficient basis on which to excuse a late filing.

[12] Defendant's petition was filed with our Clerk of Courts on September 6, 2013. Under the mailbox rule, an imprisoned defendant is deemed to have filed a PCRA petition on the date the defendant gives the petition to the proper prison authority. Commonwealth v. Castro, 766 A.2d 1283, 1287 (Pa.Super. 2001). Defendant claims he gave his petition to the proper prison official on September 3, 2013, making his petition filed on that date. Regardless of whether Defendant's petition was filed on September 3 or 6, it is untimely.

CONCLUSION

In sum, not only is the exception provided for in Section 9545(b)(1)(iii) inapplicable to Defendant's circumstances, regardless, Defendant's petition was untimely, not having been filed within sixty days from the date the Alleyne decision was announced. Consequently, Defendant's petition filed almost thirteen years after his judgment of sentence became final was clearly too late. Accordingly, we lacked subject matter jurisdiction and Defendant's petition required dismissal.

BY THE COURT:

P.J.