

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JAMIT XAVIER DELGADO

Appellant

No. 1005 MDA 2015

Appeal from the PCRA Order April 13, 2015
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0003796-2004
CP-22-CR-0003797-2004

BEFORE: PANELLA, J., LAZARUS, J., and JENKINS, J.

MEMORANDUM BY LAZARUS, J.:

FILED FEBRUARY 01, 2016

Jamit Xavier Delgado appeals *nunc pro tunc* from the order dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA).¹ After careful review, we affirm.

On March 14, 2005, Delgado pled guilty under two docket numbers to possession of a controlled substance, possession of drug paraphernalia, robbery, aggravated assault, criminal conspiracy, and recklessly endangering another person (REAP). Delgado was sentenced on April 25, 2005, to concurrent sentences of five and one half to eleven years' incarceration for each of the robbery, aggravated assault, and criminal conspiracy convictions

¹ 42 Pa.C.S. §§ 9541-9546.

and a concurrent sentence of 9 to 24 months' incarceration for the REAP conviction. Additionally, Delgado was sentenced to concurrent sentences of 12 months of probation for possession of marijuana and possession of drug paraphernalia. Delgado did not file a direct appeal.

Delgado filed a *pro se* PCRA petition on October 29, 2014. The PCRA court appointed counsel, who filed an amended petition on January 13, 2015. The petition raised an ***Alleynes***² challenge to Delgado's sentence since he was sentenced pursuant to the mandatory minimum scheme in 42 Pa.C.S. § 9712.

On March 9, 2015, the PCRA court issued its notice of intent to dismiss Delgado's petition as untimely filed, pursuant to Pa.R.Crim.P. 907, and on April 13, 2015, the court dismissed Delgado's petition without an evidentiary hearing. PCRA counsel filed a second PCRA petition on June 1, 2015, asserting her own ineffectiveness for failing to file a timely requested appeal from the dismissal of Delgado's first PCRA petition. The second petition also sought *nunc pro tunc* restoration of the right to appeal the dismissal of the first petition. ***See Commonwealth v. Lantzy***, 736 A.2d 564 (Pa. 1999) (restoration of appellate rights exclusive remedy when counsel fails to

² ***Alleynes v. United States***, 133 S.Ct. 2151 (2013).

perfect appeal). The PCRA court granted the request to reinstate Delgado's PCRA appellate rights *nunc pro tunc* on June 3, 2015.³ This appeal follows.

On appeal, Delgado raises the following issues for our consideration:

1. Whether [**Alleyn**e] can be applied to [Delgado's] case based on recent court decisions[.]
2. Whether [Delgado] is serving an illegal sentence[.]

Brief for Appellant, at 6.

Our standard and scope of review of the denial of a PCRA petition is well-settled. We review the PCRA court's findings of fact to determine whether they are supported by the record, and review its conclusions of law to determine whether they are free from legal error. **Commonwealth v. Spatz**, 84 A.3d 294, 311 (Pa. 2014). The scope of our review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level. **Id.**

Before we address the merits of Delgado's claims on appeal, we must determine whether his PCRA petition was timely filed. Generally, a petition for PCRA relief, including a second or subsequent petition, must be filed within one year of the date the judgment is final. **See** 42 Pa.C.S. § 9545(b)(3); **see also Commonwealth v. Alcorn**, 703 A.2d 1054 (Pa.

³ Although the order merely states that Delgado's "appellate rights are reinstated *nunc pro tunc*," PCRA Court Order, 6/3/15, it is clear from the record that the parties and the court intended the order to apply to Delgado's appeal from the dismissal of the first PCRA petition rather than his judgment of sentence. **See** PCRA Petition 6/1/15, at ¶¶ 9-11.

Super. 1997). Exceptions to the timeliness requirement exist, however, as set forth at 42 Pa.C.S. § 9545(b).⁴ Where the petition alleges, and the petitioner proves, that an exception to the time for filing the petition is met, the petition will be considered timely. The timeliness requirements of the PCRA are jurisdictional in nature and, accordingly, a PCRA court cannot hear untimely petitions. ***Commonwealth v. Robinson***, 837 A.2d 1157 (Pa. 2003).

Delgado filed his PCRA petition on October 29, 2014. Delgado's judgment of sentence became final for purposes of the PCRA on May 25, 2006, after the time expired for him to file a direct appeal from his judgment

⁴ The three statutory exceptions for an untimely petition under the PCRA consist of the following:

- (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)(i)-(iii). Additionally, a petition invoking a timeliness exception pursuant to the statute must "be filed within 60 days of the date the claim could have been presented." ***Id.*** at § 9545(b)(2).

of sentence. Accordingly, Delgado's petition is facially untimely, and we must determine whether he has pled and proven an exception to the PCRA time-bar.

Here, Delgado attempts to invoke the exceptions to the time-bar regarding after-discovered facts and a newly-recognized constitutional right, citing to **Alleyn** and **Commonwealth v. Newman**, 99 A.3d 86 (Pa. Super. 2014) (en banc).⁵ However, Delgado's PCRA petition admittedly was filed more than 60 days after the **Newman** decision was published. Thus, Delgado fails to comply with the requirements to successfully plead and prove a timeliness exception. 42 Pa.C.S. § 9545(b)(2).

Moreover, even if Delgado's petition had been filed within 60 days of the **Newman** decision, Delgado would be entitled to no relief. In **Commonwealth v. Miller**, 102 A.3d 988 (Pa. Super. 2014), the defendant also filed an untimely PCRA petition raising the claim that his mandatory minimum sentence was illegal. This Court rejected the argument that **Alleyn** announced a new constitutional right under the PCRA that applies

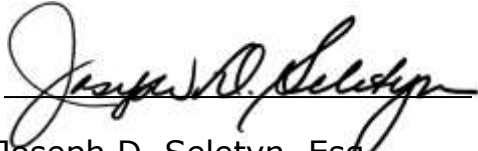
⁵ In **Newman**, this Court relied on the dictates of **Alleyn** and found that the improper sentencing practice under 42 Pa.C.S. § 9712.1 was not severable, and, therefore, that the statute is unconstitutional. In **Newman**, the defendant had been convicted of various drug offenses and was sentenced pursuant to the mandatory minimum; defendant's judgment of sentence was affirmed on appeal. Five days later the **Alleyn** decision was rendered. On en banc reargument, our Court found that **Alleyn** applied retroactively to cases *still pending on direct appeal* when **Alleyn** was handed down.

retroactively. Additionally, the Court found the defendant's allegation that his illegal sentence claim was not waivable on appeal to be meritless because, "in order for th[e] Court to review a legality of sentence claim, there must be a basis for [its] jurisdiction." **Id.** at 995. The Court determined that **Alleyne** is not to be applied retroactively to cases in which the judgment of sentence had become final. **Id.**

Because Delgado's facially untimely petition fails to properly invoke an exception to the timeliness requirements of the PCRA, and because **Alleyne** does not apply retroactively on collateral review, Delgado is not entitled to relief. **Miller, supra.** Therefore, the trial court properly concluded that Delgado's PCRA petition should be dismissed. **Spotz, supra.**

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016