

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

AARON C. GASPARICH,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1050 MDA 2015

Appeal from the PCRA Order Entered June 4, 2015
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0004383-2010

BEFORE: BENDER, P.J.E., SHOGAN, J., and PLATT, J.*

MEMORANDUM BY BENDER, P.J.E.:

FILED FEBRUARY 01, 2016

Appellant, Aaron C. Gasparich, appeals *pro se* from the post-conviction court's June 4, 2015 order denying, as untimely, his third petition filed under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541-9546. We affirm.

On June 29, 2011, Appellant pled guilty to two counts of involuntary deviate sexual intercourse (IDSI) with a child and one count of indecent assault. He was sentenced on September 19, 2011, to two mandatory terms of 10 to 20 years' incarceration for his IDSI offenses, imposed to run concurrently. Appellant did not file a direct appeal.

On August 23, 2012, Appellant filed a timely, *pro se* PCRA petition and counsel was appointed. However, at a hearing conducted on April 30, 2013,

* Retired Senior Judge assigned to the Superior Court.

Appellant requested to withdraw his PCRA petition, which the court granted. On December 29, 2014, Appellant filed a second, *pro se* PCRA petition, which the court ultimately dismissed on April 16, 2015. Appellant did not file an appeal.

On April 24, 2015, Appellant filed his third, *pro se* PCRA petition, which underlies the present appeal. On May 11, 2015, the PCRA court issued a Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's petition without a hearing on the basis that it was untimely filed. Appellant filed a *pro se* response, but the court dismissed his petition on June 4, 2015. Appellant filed a timely, *pro se* notice of appeal, as well as a timely Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Herein, he presents one question for our review: "Did the [PCRA] court err in not correcting an illegal sentence?" Appellant's Brief at 2 (unnumbered).

This Court's standard of review regarding an order denying a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Ragan***, 923 A.2d 1169, 1170 (Pa. 2007). We must begin by addressing the timeliness of Appellant's petition, because the PCRA time limitations implicate our jurisdiction and may not be altered or disregarded in order to address the merits of his claims. ***See Commonwealth v. Bennett***, 930 A.2d 1264, 1267 (Pa. 2007). Under the PCRA, any petition for post-conviction relief, including a second or subsequent one, must be filed within one year of the date on which the judgment of sentence becomes final,

unless one of the following exceptions set forth in 42 Pa.C.S. § 9545(b)(1)(i)-(iii) applies:

(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 held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1)(i)-(iii). Any petition attempting to invoke one of these exceptions “shall be filed within 60 days of the date the claim could have been presented.” 42 Pa.C.S. § 9545(b)(2).

Here, Appellant did not file a direct appeal and, therefore, his judgment of sentence became final on October 19, 2011, thirty days after the imposition of his sentence. **See** 42 Pa.C.S. § 9545(b)(3) (stating judgment of sentence becomes final at the conclusion of direct review or the expiration of the time for seeking the review); Pa.R.A.P. 903(a) (requiring notice of appeal to “be filed within 30 days after the entry of the order from

which the appeal is taken"). Accordingly, Appellant had until October 19, 2012, to file a timely PCRA petition, making his instant petition filed on April 24, 2015, patently untimely. For this Court to have jurisdiction to review the merits of Appellant's claims, he must prove the applicability of one of the exceptions to the timeliness requirements set forth in 42 Pa.C.S. § 9545(b)(1).

In his confusing argument, Appellant seemingly attempts to satisfy the 'new constitutional right' exception of section 9545(b)(1)(iii). This Court has explained the requirements for satisfying the 'new constitutional right' exception, as follows:

Subsection (iii) of Section 9545[(b)(1)] has two requirements. First, it provides that 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 provided in this section. Second, it provides that the right "has been held" by "that court" to apply retroactively. Thus, a petitioner must prove that there is a "new" constitutional right and that the right "has been held" by that court to apply retroactively. The language "has been held" is in the past tense. These words mean that the action has already occurred, *i.e.*, "that court" has already held the new constitutional right to be retroactive to cases on collateral review. By employing the past tense in writing this provision, the legislature clearly intended that the right was already recognized at the time the petition was filed.

Commonwealth v. Miller, 102 A.3d 988, 994 (Pa. Super. 2014) (quoting ***Commonwealth v. Seskey***, 86 A.3d 237, 242-43 (Pa. Super. 2014)).

It appears that Appellant is relying on ***Alleyne v. U.S.***, 133 S.Ct. 2151 (2013), to satisfy the exception set forth in section 9545(b)(1)(iii), contending that ***Alleyne*** renders his mandatory minimum sentences illegal.

In ***Alleyn***, the United States Supreme Court held that “facts that increase mandatory minimum sentences must be submitted to the jury” and found beyond a reasonable doubt. ***Id.*** at 2163. Both this Court and our Supreme Court have applied ***Alleyn*** to strike down various mandatory minimum sentencing statutes in this Commonwealth, including the statute under which Appellant’s mandatory sentence was imposed, 42 Pa.C.S. § 9718. ***See Commonwealth v. Wolfe***, 106 A.3d 800, 805 (Pa. Super. 2014).

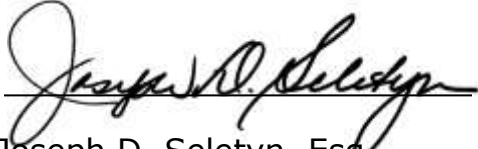
However, this Court has held that ***Alleyn*** cannot satisfy the exception of section 9545(b)(1)(iii), because “[e]ven assuming that ***Alleyn*** did announce a new constitutional right, neither our Supreme Court, nor the United States Supreme Court has held that ***Alleyn*** is to be applied retroactively to cases in which the judgment of sentence had become final.” ***Miller***, 102 A.3d at 995. Additionally, ***Alleyn*** was decided on June 17, 2013; thus, Appellant’s April 24, 2015 petition was filed well beyond the 60-day time-limit of section 9545(b)(2). Accordingly, Appellant’s reliance on ***Alleyn*** does not satisfy the timeliness exception set forth in section 9545(b)(1)(iii).

Appellant also seemingly asserts that the trial court lacked subject matter jurisdiction to sentence him, because the sentence imposed is illegal under ***Alleyn***. Again, Appellant’s claim fails to satisfy any of the above-stated exceptions, and was not raised within 60 days of the date on which it could have first been presented, *i.e.*, the filing date of ***Alleyn***. Thus, the PCRA court did not err in denying Appellant’s petition as being untimely filed.

J-S05014-16

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016