

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOHN NERONE,	:	
	:	
Appellant	:	No. 579 WDA 2015

Appeal from the PCRA Order March 11, 2015,
in the Court of Common Pleas of Cambria County,
Criminal Division, at No(s): CP-11-CR-0000934-2009

BEFORE: BOWES, OLSON, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED FEBRUARY 02, 2016**

John Nerone (Appellant) appeals from the order entered on March 11, 2015, which denied his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm.

The background underlying this matter can be summarized as follows.

On March 10, 2010, a jury convicted [Appellant] of various crimes arising from acts of violence involving his Wife and 2-month-old son. On May 13, 2010, the trial court sentenced [Appellant] to an aggregate sentence of imprisonment of 12 to 45 years. [Appellant’s sentence included two mandatory minimum sentences pursuant to 42 Pa.C.S. § 9718.] The trial court denied [Appellant’s] postsentence motions, and this Court affirmed [his] judgment of sentence *via* a memorandum dated December 21, 2011. [***Commonwealth v. Nerone***, 40 A.3d 200 (Pa. Super. 2011) (unpublished memorandum). Appellant did not file a petition for allowance of appeal with our Supreme Court.]

Commonwealth v. Nerone, 104 A.3d 45 (Pa. Super. 2014) (unpublished memorandum).

*Retired Senior Judge assigned to the Superior Court.

Appellant timely filed a PCRA petition, which the PCRA court denied. This Court affirmed that order. ***Id.*** Appellant filed a petition for allowance of appeal, which the Supreme Court denied on September 30, 2014. ***Commonwealth v. Nerone***, 101 A.3d 102 (Pa. 2014).

On March 4, 2015, Appellant filed a document entitled "Petition for Writ of Habeas Corpus." The petition is dated March 1, 2015, but an envelope attached to the petition indicates that Appellant mailed it on March 2, 2015. Despite the title of the petition, Appellant invoked the PCRA in the body of the document, and the PCRA court treated it as a PCRA petition. In the petition, Appellant argued that his mandatory minimum sentences are illegal pursuant to this Court's decision in ***Commonwealth v. Wolfe***, 106 A.3d 800 (Pa. Super. 2015), which held that the United States Supreme Court's decision in ***Alleyne v. United States***, 133 S.Ct. 2151 (2013) rendered unconstitutional 42 Pa.C.S. § 9718.

On March 11, 2015, the PCRA court denied the petition as untimely filed. Appellant timely filed a notice of appeal. In his brief to this Court, Appellant asks us to consider the questions that follow.

- I. Whether the [PCRA] court misapplied [***Wolfe***]?
- II. Whether the [PCRA] court erred in finding that Appellant's []PCRA petition was not timely filed?
- III. Whether the [PCRA] court erred in not granting [] Appellant an evidentiary hearing?

IV. Whether the trial court imposed an illegal sentence which violated the Double Jeopardy Clause of the United States Constitution?

Appellant's Brief at 3 (unnecessary capitalization omitted).

Our standard of review of the denial of a PCRA petition is limited to examining whether the court's rulings are supported by the evidence of record and free of legal error. **Commonwealth v. Anderson**, 995 A.2d 1184, 1189 (Pa. Super. 2010). We will begin by addressing whether the PCRA court correctly determined that Appellant untimely filed his petition.

Under the PCRA, all petitions must be filed within one year of the date that the petitioner's judgment became final, unless one of three statutory exceptions applies. 42 Pa.C.S. § 9545(b)(1); **Commonwealth v. Chester**, 895 A.2d 520, 522 (Pa. 2006). For purposes of the PCRA, a judgment becomes final at the conclusion of direct review. 42 Pa.C.S. § 9545(b)(3). "The PCRA's time restrictions are jurisdictional in nature." **Chester**, 895 A.2d at 522. "Thus, '[i]f a PCRA petition is untimely, neither this Court nor the trial court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims.'" **Id.** (quoting **Commonwealth v. Lambert**, 884 A.2d 848, 851 (Pa. 2005)).

This Court affirmed Appellant's judgment of sentence on December 21, 2011. Appellant had 30 days to petition our Supreme Court for allowance of appeal. Pa.R.A.P. 1113(a). He did not do so. Thus, for purposes of the

PCRA, Appellant's judgment became final on January 20, 2012. He therefore had until January 20, 2013, in order to file timely a PCRA petition.

Because Appellant untimely filed his PCRA petition in March of 2015, he had the burden of pleading and offering to prove one of the following exceptions:

(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). Moreover, "[a]ny petition invoking an exception provided in [42 Pa.C.S. § 9545(b)(1)] shall be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2).

As an initial matter, in his PCRA petition, Appellant merely baldly asserted that he timely filed his petition pursuant to all of the timeliness exceptions under subsection 9545(b)(1). Moreover, **Wolfe** was filed on December 24, 2014. Giving Appellant the benefit of the doubt, he filed his PCRA petition on March 1, 2015, which is in excess of 60 days from the date Appellant could have presented his petition. That Appellant may have

learned of our decision in **Wolfe** at a date later than December 24, 2014 is of no consequence. **Commonwealth v. Baldwin**, 789 A.2d 728 (Pa. Super. 2001).

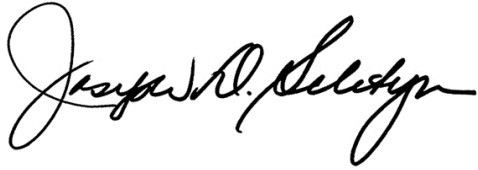
Lastly, to the extent Appellant intended to argue that **Wolfe** makes his petition fit within the exception found at subsection 9545(b)(1)(iii), as noted above, this Court's decision in **Wolfe** rested almost entirely on the holding in **Alleynes**. This Court has held that "**Alleynes** will be applied to cases pending on **direct appeal** when **Alleynes** was issued," but does not apply retroactively to cases on collateral review. **Commonwealth v. Riggle**, 119 A.3d 1058, 1064 (Pa. Super. 2015) (citing **Commonwealth v. Newman**, 99 A.3d 86 (Pa. Super. 2014)) (emphasis added); **see also Commonwealth v. Miller**, 102 A.3d 988, 995 (Pa. Super. 2014) (noting that neither the Pennsylvania Supreme Court nor the United States Supreme Court has declared that **Alleynes** is to be applied retroactively to cases in which the judgment of sentence has become final). Thus, **Wolfe** would not render Appellant's petition timely filed pursuant to subsection 9545(b)(1)(iii). For these reasons, we conclude that the PCRA court did not err by denying Appellant's petition as untimely filed.¹

¹ Appellant complains that the PCRA court failed to provide him with notice pursuant to Pa.R.Crim.P. 907(1) that the court intended to dismiss his petition without holding an evidentiary hearing. Appellant's Brief at 11. Such an error does not warrant relief under the circumstances presented in this appeal. **See Commonwealth v. Lawson**, 90 A.3d 1, 5 (Pa. Super. 2014) ("[O]ur Supreme Court has held that where the PCRA petition is

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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 solid horizontal line.

Joseph D. Seletyn, Esq.

Prothonotary

Date: 2/2/2016

untimely, the failure to provide such notice is not reversible error. Thus, the failure of the PCRA court to provide the Rule 907 notice does not entitle [Lawson] to relief." (quotation marks and citations omitted).