

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

WAYNE AUSTIN SHOWERS

Appellant

No. 1201 MDA 2016

Appeal from the PCRA Order July 12, 2016
In the Court of Common Pleas of Lycoming County
Criminal Division at No(s): CP-41-CR-0000600-2008

BEFORE: BOWES, J., LAZARUS, J., and MUSMANNNO, J.

JUDGMENT ORDER BY LAZARUS, J.:

FILED APRIL 17, 2017

Wayne Austin Showers appeals, *pro se*, from the order, entered in the Court of Common Pleas of Lycoming County, dismissing, without a hearing, his petition filed under the Post-Conviction Relief Act ("PCRA"). 42 Pa.C.S.A. §§ 9541-46. We affirm.

Following a trial on May 5-6, 2009, a jury convicted Showers of aggravated indecent assault of a child and indecent assault of a child under 13 years of age with respect to victim, A.T. The jury also convicted him of statutory sexual assault, aggravated indecent assault, and indecent assault with respect to victim, B.P. The court sentenced Showers to an aggregate term of imprisonment of 52 months to 180 months. On direct appeal, a panel of this Court affirmed. ***Commonwealth v. Showers***, 4 A.3d 702 (Pa. Super. 2010) (unpublished memorandum).

Showers then filed a timely *pro se* PCRA petition. The PCRA court appointed counsel, who filed an amended petition. The PCRA court entered an order reinstating Showers' direct appeal rights *nunc pro tunc* based upon its finding that "Showers was deprived of an independent review of his case and effectively stripped of his right to a direct appeal." Order, 4/13/13, at 2.

On direct appeal, Showers challenged the sufficiency of the evidence with respect to victim A.T. A panel of this court found those claims meritless and affirmed the judgment of sentence. ***Commonwealth v. Showers***, 105 A.3d 781 (Table), filed July 2, 2014 (unpublished memorandum). The Pennsylvania Supreme Court denied Showers' allowance of appeal on January 21, 2015.

Showers filed a *pro se* PCRA petition on September 17, 2015, which the court treated as a first petition. The court appointed counsel. Counsel filed an amended petition on December 4, 2015, claiming the court imposed an illegal mandatory minimum sentence pursuant to 42 Pa.C.S.A. § 9718, in violation of ***Alleyne v. United States***, 133 S. Ct. 2151 (2013) and ***Commonwealth v. Hopkins***, 117 A.3d 247 (Pa. 2015). On May 9, 2016, the PCRA court issued notice of intent to dismiss without a hearing under Pa.R.Crim.P. 907, and on May 11, 2016, counsel filed a motion to withdraw. On July 12, 2016, the PCRA court granted counsel's motion to withdraw and entered an order dismissing Showers' PCRA petition.

In his *pro se* appeal, Showers claims his sentence is illegal under ***Alleyne***. He also claims the trial court had no subject matter jurisdiction

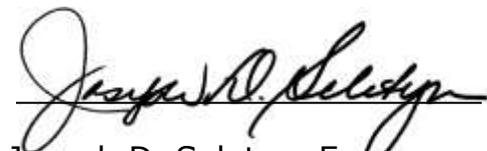
because his prosecution for the charges of aggravated indecent assault, 18 Pa.C.S.A. § 3125(b), violated the statute of limitations. **See** 42 Pa.C.S.A. § 5552(b).

After our review of Showers' arguments, the record and the relevant law, we conclude that the Honorable Marc F. Lovecchio properly disposed of Showers' claim under **Alleyné**. **See** PCRA Opinion, 5/9/14. Further, Showers' claim that his prosecution violated the statute of limitations is waived. Showers raises this claim for the first time in his brief on appeal. **See** 42 Pa.C.S.A. § 9544(b) ("For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.").

We affirm the order dismissing Showers' PCRA petition, and we direct the parties to attach a copy of Judge Lovecchio's opinion in the event of further proceedings.

Order affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/17/2017

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IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
	:	
vs.	:	No. CR-600-2008
	:	
WAYNE SHOWERS,	:	Notice of Intent to Dismiss PCRA
Defendant	:	Without Holding An Evidentiary Hearing

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OPINION AND ORDER

DISTRICT ATTORNEY

This matter came before the court on a Post Conviction Relief Act (PCRA) petition filed by Wayne Showers ("Petitioner"). The relevant facts follow.

On or about April 1, 2008, Petitioner was arrested and charged with rape of a child, involuntary deviate sexual intercourse, two counts of aggravated indecent assault of a child, two counts of statutory sexual assault, one count of unlawful contact with a minor, two counts of indecent assault with a child less than 13 years of age, two counts of corruption of minors, and two counts of indecent assault of a complainant less than 16 years of age, arising out of acts Petitioner allegedly committed against K.T., A.T, and B.P.

Following a jury trial held May 5-6, 2009, Petitioner was convicted of aggravated indecent assault of a child and indecent assault of a child under 13 with respect to A.T., as well as statutory sexual assault, aggravated indecent assault, and indecent assault with respect to B.P.

On August 11, 2009, Petitioner was sentenced to an aggregate term of 52 months to 180 months of incarceration in a state correctional institution, which consisted of 36 to 120 months for aggravated indecent assault of A.T. and 16 to 60 months for statutory

sexual assault of B.P.

Petitioner filed a timely notice of appeal, but all of the issues he wanted to litigate on appeal were waived due to the ineffective assistance of appellate counsel.

Through a PCRA petition, the Court reinstated Petitioner's appeal rights nunc pro tunc.

On July 2, 2014, the Pennsylvania Superior Court denied Petitioner's direct appeal. The issues litigated on appeal related to the sufficiency of the evidence for Petitioner's convictions of aggravated indecent assault and indecent assault against A.T.

Petitioner also filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which was denied on January 21, 2015.

Petitioner filed a pro se PCRA petition on September 17, 2015. In his pro se petition, Petitioner alleged that: (1) trial counsel was ineffective for not polling the jury; (2) the prosecutor committed prosecutorial misconduct during opening arguments by calling him a "child molester;" and (3) his mandatory sentence pursuant to 42 Pa.C.S. §9718 is unconstitutional in light of *Commonwealth v. Hopkins*, 117 A.3d 247 (Pa. 2015) and *Alleyne v. United States*, 133 S.Ct. 2151 (U.S. 2013).

The court treated this petition as a first petition. *Commonwealth v. Callahan*, 101 A.3d 118, 122 (Pa. Super. 2014)(when a petitioner is granted a direct appeal nunc pro tunc in his first PCRA petition, a subsequent PCRA is considered a first PCRA petition for timeliness purposes); see also *Commonwealth v. Karanicolas*, 836 A.2d 940, 944 (Pa. Super. 2003); *Commonwealth v. Lewis*, 718 A.2d 1262, 1263 (Pa. Super. 1998). The court appointed counsel to represent Petitioner and gave counsel an opportunity to file either an

amended PCRA petition or a “no merit” letter pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988).

Counsel obtained transcripts from Petitioner’s trial and sentencing, then filed an amended PCRA petition on December 4, 2015. In the amended PCRA petition, counsel claimed that Petitioner’s constitutional rights were violated by the imposition of an illegal mandatory minimum sentence and appellate counsel was ineffective for failing to assert such a claim during Petitioner’s reinstated direct appeal.

To avoid hybrid representation, the court will only address the issues asserted in the amended petition filed by counsel. See *Commonwealth v. Pursell*, 724 A.2d 293, 302 (Pa. 1999)(“We will not require courts considering PCRA petitions to struggle through pro se filings of defendants when qualified counsel represent those defendants”).¹

After a review of the record and the mandatory statute in effect as of the date of the commission of the offense, the court finds that Petitioner’s PCRA petition lacks merit and he is not entitled to relief as a matter of law.

First and foremost, Petitioner’s claims lack merit because no mandatory minimum sentence was imposed in this case. Although Petitioner was sentenced on August

¹ In the alternative, the court would reject the pro se claims that counsel did not assert. Even though counsel did not poll the jury, the judge asked if there was anyone on the jury panel who did not agree with the verdict as it was read by the foreperson and if so, to please stand up and identify yourself. No one did. N.T., May 6, 2009, at 57. Therefore, Petitioner was not prejudiced by counsel’s failure to poll the jury.

Petitioner would not be entitled to relief on his claim of prosecutorial misconduct because it was waived by the failure to raise the issue at trial or on direct appeal. 42 Pa.C.S.A. §9544(b). Furthermore, the jury acquitted Petitioner of the offenses for which K.T. was the victim. Therefore, the prosecutor’s use of the term “child molester” did not form a fixed bias or hostility toward the Petitioner in the juror’s minds, such that they could not weigh the evidence objectively and render a true verdict.

11, 2009, the aggravated indecent assault against A.T. occurred in 2000. At sentencing, the Commonwealth argued that the mandatory minimum for this offense was five years. The court disagreed, finding that the mandatory minimum at the time of the commission of the offense was two and one-half (2 ½ years) or thirty (30) months. The offense gravity score for this offense was ten (10) and Petitioner's prior record score was zero (0); thus, the standard guideline range for Petitioner's sentence was twenty-two (22) to thirty-six (36) months. The court imposed a minimum sentence of thirty-six (36) months or three (3) years and a maximum of one hundred twenty (120) months or ten (10) years. Therefore, the court imposed a standard range sentence and not a mandatory minimum on Count 3, aggravated indecent assault of a complainant less than 13 years of age.² Furthermore, to this court's knowledge, there has never been a mandatory minimum of three (3) years for aggravated indecent assault.

² Due to the age of this offense, it appears that there was some confusion regarding the correct subsection, grading and applicable mandatory minimum for Count 3. After a thorough review of the amendments to both 18 Pa.C.S.A. §3125 and 42 Pa.C.S.A. §9718, the court believes Petitioner was incorrectly charged with aggravated indecent assault of a child pursuant to 18 Pa.C.S.A. §3125(B), because the offense was alleged to have occurred in 2000 and section (B) was not added until December 2002 and became effective in February 2003. See Act 162 of 2002, approved December 9, 2002, effective in 60 days; Act 226 of 2002 approved December 15, 2002, effective in 60 days. Prior to the amendments that occurred in 2002, all subsections of aggravated indecent assault were graded as a felony of the second degree. Therefore, Petitioner's conviction was actually for a violation of 18 Pa.C.S.A. §3125(7), a felony of the second degree.

Subsection (7) was added in 1995. Act 10 of 1995 (Spec. Sess.), approved March 31, 1995, effective in 60 days. The Act also added a mandatory minimum of two and one half (2 ½) years for aggravated indecent assault, but only did so for section 3125(1) through (6); no mandatory was provided for subsections (7) or (8), which related to age of the complainant. In 2002, section 3125(7) became Section 3125(A)(7). A two and one-half (2 ½) year mandatory minimum sentence for Section 3125(A)(7) was added to 42 Pa.C.S.A. §9718 in 2004. See Act 217 of 2004, approved November 30, 2004, effective immediately.

Petitioner was not prejudiced by any of this confusion, however, because his maximum sentence did not exceed the ten (10) year maximum for a felony of the second degree and the court did not impose a mandatory minimum sentence.

Second, the provisions of section 9718 that the Pennsylvania Supreme Court found unconstitutional in *Hopkins* were not added until Act 178 of 2006 (approved November 29, 2006, effective January 1, 2007). The provisions of that Act could not be applied to Petitioner because it increased the mandatory minimum applicable to his crime after he committed it and arguably lowered the Commonwealth's burden of proof to a preponderance standard, which would create an ex post facto problem. Similarly, the amendment to section 9718 that was passed in 2004 could not apply to Count 3 of Petitioner's case, because that amendment also changed the mandatory minimums for aggravated indecent assault; it added a two and one-half (2 ½) year minimum for section 3125(A)(7) and a five (5) year minimum for section 3125(B). Therefore, the statute that would govern Count 3 was Act 10 of 1995 (Special Session). That Act did not contain any of the provisions that *Hopkins* found unconstitutional.

Third, in this case, the jury found beyond a reasonable doubt that A.T. was less than 13 years of age, because that was an element of the offense. Therefore, even if a mandatory minimum had been imposed in this case, such would not have violated the principles announced in *Alleyne*.

ORDER

AND NOW, this 9 day of May 2016, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court finds that there are no genuine issues of material fact and Petitioner Wayne Showers is not entitled to

relief as a matter of law on the claims presented in his amended PCRA petition.

As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of the court's intent to dismiss the petition without holding an evidentiary hearing. Petitioner, through his counsel, 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,



Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Donald Martino, Esquire
Wayne Showers, JF0015
SCI Rockview, Box A, Bellefonte PA 16823
Gary Weber, Esquire (Lycoming Reporter)