NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JUAN DANIEL ORTIZ-MEDINA, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 822 MDA 2015

Appeal from the Order Entered April 21, 2015
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s):
CP-36-CR-0000042-2012
CP-36-CR-0000280-2011
CP-36-CR-0000284-2011
CP-36-CR-0000286-2011
CP-36-CR-0000289-2011
CP-36-CR-0000291-2011
CP-36-CR-0000292-2011
CP-36-CR-0000293-2011
CP-36-CR-0000295-2011

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

MEMORANDUM BY BENDER, P.J.E.: **FILED FEBRUARY 01, 2016**

Appellant, Juan Daniel Ortiz-Medina, appeals *pro se* from the post-conviction court's April 21, 2015 order denying, as untimely, his second petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm.

---

* Retired Senior Judge assigned to the Superior Court.

In a prior decision, this Court briefly summarized the facts and procedural history of Appellant's case, as follows:

> In January 2010, the police arrested [Appellant], after having observed him make numerous sales of cocaine to a confidential police informant. The Commonwealth charged [Appellant] with nine counts of possession with intent to deliver ("PWID"). Subsequently, [Appellant] entered into a negotiated guilty plea, in which he agreed to plead guilty to the nine counts of PWID in exchange for the Commonwealth's agreement to request that the sentencing court impose the statutory mandatory minimum sentence of five to ten years in prison [pursuant to 18 Pa.C.S. § 7508]. … In accordance with the terms of the plea agreement, on June 20, 2012, the trial court sentenced [Appellant] to serve an aggregate prison term of five to ten years. [Appellant] did not file timely post-sentence motions, nor did he file a direct appeal.

Commonwealth v. Ortiz-Medina, No. 2036 MDA 2013, unpublished memorandum at 1-2 (Pa. Super. filed May 12, 2014).

Appellant filed a timely, *pro se* PCRA petition on April 12, 2013. Counsel was appointed, but petitioned to withdraw, which the PCRA court granted. After providing Appellant with a Pa.R.Crim.P. 907 notice of its intent to dismiss his petition without a hearing, the court did so on October 15, 2013. Appellant filed a timely appeal to this Court, and on May 12, 2014, we affirmed the order denying his first PCRA petition. ***See id.*** Appellant did not petition for allowance of appeal with our Supreme Court.

On April 2, 2015, Appellant filed a second, *pro se* PCRA petition, which underlies the present appeal. On April 6, 2015, the PCRA court issued a Rule 907 notice of its intent to dismiss Appellant's petition without a hearing on the basis that it was untimely filed. Appellant filed a timely, *pro se*

response, but the PCRA court dismissed his petition on April 21, 2015. Appellant filed a timely notice of appeal, as well as a timely concise statement of errors complained of on appeal. Herein, he presents two questions for our review:

> (A) Did the [PCRA] [c]ourt … error [*sic*] in denying Appellant's PCRA, because [***A***]***lleyne*** [***v. U.S.***, 133 S.Ct. 2151 (2013),] applies to [A]ppellant as a Substantive Rule?
>
> (B) Does a Trial Court ever relinquish their jurisdiction to correct an illegal sentence?

Appellant's Brief at 7.

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 July 20, 2012, 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 July 20, 2013, to file a timely PCRA petition, making his instant petition filed on April 2, 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 brief to this Court, 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.

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

Appellant primarily relies on ***Alleyne*** in attempting to satisfy the exception set forth in section 9545(b)(1)(iii). In ***Alleyne***, 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. ***Alleyne***, 133 S.Ct. at 2163. Appellant contends that his mandatory minimum sentence is illegal in light of ***Alleyne***, and the progeny of decisions by this Court and our Supreme Court applying ***Alleyne*** to invalidate mandatory minimum sentencing schemes in this Commonwealth.

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

We note that in Appellant's reply brief, he adds a claim that his sentence is illegal in light of our Supreme Court's decision in ***Commonwealth v. Hopkins***, 117 A.3d 247 (Pa. 2015). In that case, our Supreme Court held that under ***Alleyne***, the mandatory minimum sentencing scheme set forth in 18 Pa.C.S. § 6317 ("Drug-free school zones") is unconstitutional in its entirety, as certain provisions of that statute do not adhere to ***Alleyne's*** rule and are not severable from the remaining portions of the statute. ***See Hopkins***, 117 A.3d at 262. However, the ***Hopkins*** decision did not announce a 'new rule'; rather, the Court simply assessed the validity of section 6317 under ***Alleyne*** and subsequent decisions by the Courts of this Commonwealth, and concluded that that mandatory minimum sentencing statute is unconstitutional. Nevertheless, even if ***Hopkins*** did announce a new rule, no decision by our Supreme Court or the United States

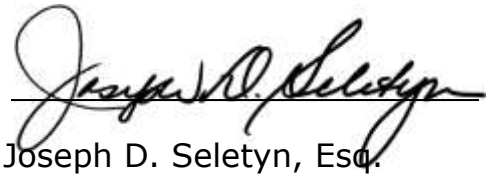
Supreme Court has held that ***Hopkins*** applies retroactively to post-conviction petitioners such as Appellant. Consequently, Appellant's reliance on ***Hopkins*** also does not satisfy the timeliness exception of section 9545(b)(1)(iii).

Finally, Appellant maintains that his sentence should be vacated, regardless of the untimeliness of his petition, because "[a]n unconstitutional statute is ineffective for any purpose [as] it's [*sic*] unconstitutionality dates from the time of its enactment and not merely the date of the decision holding it so." Appellant's Brief at 28 (quoting ***Commonwealth v. Muhammed***, 992 A.2d 897, 903 (Pa. Super. 2010)). However, as we stressed in ***Miller***, "in order for this Court to review a legality of sentence claim, there must be a basis for our jurisdiction to engage in such review." ***Miller***, 102 A.3d at 995 (citing ***Commonwealth v. Borovichka***, 18 A.3d 1242, 1254 (Pa. Super. 2011) (stating, "[a] challenge to the legality of a sentence … may be entertained as long as the reviewing court has jurisdiction[]") (citation omitted)). Here, even if Appellant's sentence was illegal from its inception, and not just from the date of the decisions rendered in ***Alleyne*** and/or ***Hopkins***, he must prove the applicability of one of the above-stated timeliness exceptions in order for this Court to have jurisdiction to correct that illegal sentence. ***See Miller***, 102 A.3d at 992 ("Pennsylvania law makes clear that when a PCRA petition is untimely, neither this Court nor the trial court has jurisdiction over the petition.") (citations and internal quotation marks omitted). Because we conclude, for

the reasons stated *supra*, that Appellant has not proven the applicability of any timeliness exception, we are without jurisdiction to afford him the requested relief of vacating his sentence. Accordingly, we affirm the PCRA court's order denying his untimely petition.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016