

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JAMES HENRY GREEN

Appellant

No. 1949 MDA 2013

Appeal from the PCRA Order October 3, 2013
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0002414-2003

BEFORE: PANELLA, J., DONOHUE, J., and MUNDY, J.

MEMORANDUM BY MUNDY, J.:

FILED APRIL 14, 2014

Appellant, James Henry Green, appeals *pro se* from the October 3, 2013 order dismissing as untimely his fourth petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

The relevant facts of this case were summarized in a prior memorandum of this Court, and need not be reiterated here. **See *Commonwealth v. Green***, 918 A.2d 786 (Pa. Super 2006) (unpublished memorandum at 1-2), *appeal denied*, 923 A.2d 1173 (Pa. 2007). Following a jury trial, Appellant was found guilty on March 11, 2004 of third-degree murder, simple assault, firearms not to be carried without a license,

possessing instruments of crime, and two counts each of aggravated assault and recklessly endangering another person.¹ Thereafter, on April 1, 2004, Appellant was sentenced to an aggregate term of 27 to 54 years' imprisonment.

The PCRA court summarized the remaining procedural history of this case as follows.

After his conviction, [Appellant] did not file a timely post-sentence motion or direct appeal. On April 22, 2004, [Appellant] filed an untimely *pro se* motion to modify and reduce sentence, which the [PCRA c]ourt treated as a timely first PCRA Petition. The [PCRA c]ourt appointed counsel for [Appellant]. On July 18, 2005, [Appellant]'s PCRA Counsel filed 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). On August 22, 2005, the [PCRA c]ourt entered its Notice of Intent to Dismiss [Appellant]'s PCRA petition. The [PCRA c]ourt dismissed the petition on September 19, 2005.

[Appellant] filed a *pro se* notice of appeal from the PCRA [c]ourt's dismissal. On December 7, 2006, th[is] Court affirmed the PCRA [c]ourt's dismissal. The Pennsylvania Supreme Court denied allowance of appeal on May 15, 2007.

[Appellant] filed a second PCRA petition on June 5, 2007. The [PCRA c]ourt dismissed [Appellant's] petition as untimely on July 17, 2007. [Appellant] then filed a notice of appeal with th[is] Court. On April 21, 2008, th[is] Court affirmed the PCRA [c]ourt's dismissal of [Appellant]'s second

¹ 18 Pa.C.S.A. §§ 2502(c), 2701, 6106, 907, 2702, and 2705, respectively.

PCRA petition. The Pennsylvania Supreme Court denied allowance of appeal on October 6, 2008.

On October 4, 2011, [Appellant] filed his third PCRA petition. The [PCRA c]ourt dismissed the petition as untimely on January 3, 2012. [Appellant] filed a notice of appeal to th[is] Court. Th[is] Court affirmed the PCRA [c]ourt's dismissal on August 28, 2012.

On August 9, 2013, [Appellant] filed the instant petition, his fourth PCRA petition. On September 6, 2013, the [PCRA c]ourt filed a Notice of Intent to Dismiss. On September 30, 2013, [Appellant] responded to the [PCRA c]ourt's Notice of Intent to Dismiss. On October 4, 2013, upon consideration of [Appellant]'s response, the [PCRA c]ourt dismissed [Appellant's] petition. [Appellant] filed his notice of appeal on October 29, 2013.

PCRA Court Opinion, 11/26/13, at 2-3.

On appeal, Appellant raises the following issue for our review.

- [1.] Whether the jury-trial guarantee in ***Alleyne v. United States***, 133 S. Ct. 2151 (2013), which bars judicial fact-finding that gives rise to a harsher range of punishment than the range for the substantive offense established by the jury's verdict under the Sixth Amendment, applies retroactively to Appellant's case?

Appellant's Brief at 4.

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Edmiston***, 65 A.3d 339, 345 (Pa. 2013) (citation omitted), *cert. denied*, ***Edmiston v. Pennsylvania***, 134 S. Ct. 639 (2013). "[Our] scope of 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 PCRA court level.” **Commonwealth v. Koehler**, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). In order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). These issues must be neither previously litigated nor waived. 42 Pa.C.S.A. § 9543(a)(3). “[T]his Court applies a *de novo* standard of review to the PCRA court’s legal conclusions.” **Commonwealth v. Spatz**, 18 A.3d 244, 259 (Pa. 2011) (citation omitted).

Before we may address the merits of a PCRA petition, we must first consider the petition’s timeliness because it implicates the jurisdiction of both this Court and the PCRA court. **Commonwealth v. Williams**, 35 A.3d 44, 52 (Pa. Super. 2011) (citation omitted), *appeal denied*, 50 A.3d 121 (Pa. 2012). We may raise issues concerning our appellate jurisdiction *sua sponte*. **Commonwealth v. Patterson**, 940 A.2d 493, 497 (Pa. Super. 2007), *appeal denied*, 960 A.2d 838 (Pa. 2008). “Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition.” **Id.** The PCRA “confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar[.]” **Commonwealth v. Watts**, 23 A.3d 980, 983 (Pa. 2011) (citation omitted). This is to “accord finality to the collateral review process.” **Id.** “A petition for relief under the PCRA,

including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), is met.” ***Commonwealth v. Harris***, 972 A.2d 1196, 1199-1200 (Pa. Super. 2009), *appeal denied*, 982 A.2d 1227 (Pa. 2009).

Section 9545 provides, in relevant part, as follows.

(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.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

...

42 Pa.C.S.A. § 9545(b).

In the instant matter, Appellant was sentenced to an aggregate term of 27 to 54 years' imprisonment on April 1, 2004. As noted, Appellant did not file a direct appeal with this Court. Thus, Appellant's judgment of sentence became final on May 1, 2004, when the 30-day period for Appellant to file a direct appeal in this Court expired. **See id.** § 9545(b)(3). Therefore, in order to be timely, Appellant's PCRA petition had to be filed by May 1, 2005. Appellant filed the instant *pro se* PCRA petition, his fourth, on August 9, 2013, over eight years after the deadline. Accordingly, Appellant's petition is patently untimely, and Appellant must plead and prove one of the three enumerated statutory exceptions to the time-bar.²

Appellant acknowledges that his PCRA petition is facially untimely, but alleges an exception to the time-bar. Appellant's Brief at 8-9. Specifically,

² The 1995 amendments to the PCRA initiated the current one-year time-bar. The 1995 amendments also granted prisoners whose judgment of sentence had become final more than one year before the implementation of the time-bar, one year from the effective date of the amendments to file their first PCRA petition. Act of November 17, 1995, P.L. 1118, No. 32 (Spec. Sess. No. 1), § 3(1). Under this provision "a petitioner's first PCRA petition, that would otherwise be considered untimely because it was filed more than one year after the judgment of sentence became final, would be deemed timely if it was filed by January 16, 1997." **Commonwealth v. Thomas**, 718 A.2d 326, 329 (Pa. Super. 1998) (*en banc*). Our Supreme Court has noted this grace period does not apply to second or subsequent PCRA petitions. **Commonwealth v. Crews**, 863 A.2d 498, 501 (Pa. 2004).

Appellant contends that the United States Supreme Court's decision in ***Alleyne v. United States***, 133 S. Ct. 2151 (2013), constitutes a newly-recognized constitutional right exception to the PCRA time-bar, pursuant to Section 9545(b)(1)(iii). Appellant's Brief at 11-13.

This Court has recently explained a petitioner's burden under this exception as follows.

Subsection (iii) of [S]ection 9545 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 th[e Pennsylvania] Supreme Court 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. Garcia, 23 A.3d 1059, 1063 (Pa. Super. 2011) (citations omitted; emphasis added), *appeal denied*, 38 A.3d 823 (Pa. 2012).

Additionally, as this Court has often explained, all of the PCRA time-bar exceptions are subject to a separate deadline.

The statutory exceptions to the timeliness requirements of the PCRA are also subject to a

separate time limitation and must be filed within sixty (60) days of the time the claim could first have been presented. **See** 42 Pa.C.S.A. § 9545(b)(2). The sixty (60) day time limit ... runs from the date the petitioner first learned of the alleged after-discovered facts. A petitioner must explain when he first learned of the facts underlying his PCRA claims and show that he brought his claim within sixty (60) days thereafter.

Williams, supra at 53 (citation omitted).

Instantly, Appellant avers that the **Alleyne** decision announced a new constitutional right that is to be applied retroactively.³ Appellant's Brief at 9-10. In **Alleyne**, the United States Supreme Court recently overruled **Harris v. United States**, 536 U.S. 545 (2002), and held "that any fact that increases the mandatory minimum is an element [of the crime] that must be submitted to the jury." **Alleyne, supra** at 2155 (internal quotation marks omitted). Appellant maintains that,

[t]he trial court imposed sentences beyond the aggravated range based not on the jury's verdict, but on the judge's own finding of facts that it was an intentional killing, caused by the use of a deadly weapon upon a vital part of the body, that was pre-meditated in that it took time -- facts the jury found lacking in this case and found Appellant not guilty of. The sentencing range supported by the jury's verdict was 10 years to 20 years, but the judge, rather than the jury, found facts that constitute elements of the

³ As noted above, Appellant filed the instant PCRA petition on August 9, 2013. Because the Supreme Court decided **Alleyne** on June 17, 2013, Appellant did file the instant PCRA petition within 60 days of the Supreme Court's decision. **See** 42 Pa.C.S.A. § 9545(b)(2).

crime that resulted in a sentence beyond the aggravated range. This increased the penalty to which Appellant was subjected, resulted in an aggregated term of incarceration of 27 years to 54 years, and violated his Sixth Amendment right to trial by jury.

Id. at 10.

Upon review of the record in this matter, we conclude that Appellant has failed to demonstrate a cognizable time-bar exception under Section 9545(b)(1)(iii). As noted, Appellant contends ***Alleyn*** announced a new constitutional right that should be applied retroactively. ***See*** Appellant's Brief at 10. However, the ***Alleyn*** decision is silent with regard to whether it applies retroactively to cases pending on collateral review, and Appellant has failed to cite to any authority that held as much at the time his fourth PCRA petition was filed. This Court has recognized that a new rule of constitutional law is applied retroactively to cases on collateral review only if the United States Supreme Court specifically holds it to be retroactively applicable to those cases. ***Commonwealth v. Phillips***, 31 A.3d 317, 320 (Pa. Super. 2011), *citing Tyler v. Cain*, 533 U.S. 656, 663 (2001); ***see also Garcia, supra***. Accordingly, without a pled and successfully proven exception to the time-bar, we are without jurisdiction to address the merits of the arguments raised. ***Commonwealth v. Perrin***, 947 A.2d 1284, 1285 (Pa. Super. 2008).

Accordingly, having concluded that Appellant's fourth PCRA petition was untimely filed and that no cognizable exception to the time-bar applies,

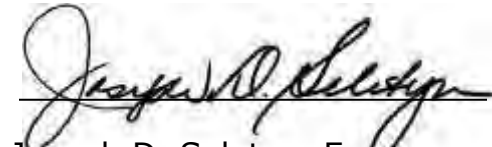
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we discern no error on the part of the PCRA court in dismissing said petition as untimely. Therefore, we affirm the October 3, 2013 order of the PCRA court.

Order affirmed.

Judge Donohue concurs in the result.

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: 4/14/2014