

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
FRANK LEE,	:	
	:	
Appellant	:	No. 148 EDA 2011

Appeal from the PCRA Order entered December 27, 2010
in the Court of Common Pleas of Philadelphia County Criminal Division
at No. CP-51-CR-0622701-1970

BEFORE: STEVENS, P.J.* , SHOGAN, and MUNDY, JJ.

MEMORANDUM BY MUNDY, J.:

FILED DECEMBER 02, 2013

Appellant, Frank Lee, appeals *pro se* from the December 27, 2010 order denying his sixth 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 and procedural history as set forth by a prior panel of this Court follows.

On May 6, 1970, [Appellant], and three of his cohorts brutally robbed and murdered sixty-year-old Isadore Selez, a local Philadelphia junk dealer. Appellant, only fifteen years old at the time of the slaying, was then certified to stand trial as an adult and, in November of 1974, was convicted of first-degree murder, robbery and criminal conspiracy.

* President Judge Stevens did not participate in the consideration or decision of this case.

Post-verdict motions, alleging, *inter alia*, a violation of [A]ppellant's constitutional right to a speedy trial and trial court error in refusing to suppress [A]ppellant's initial confession to police, were filed by [A]ppellant's trial counsel, Edward Nichols, Esquire. Said motions were subsequently denied by an *en banc* panel of the Philadelphia Court of Common Pleas and, thereafter, [A]ppellant was sentenced to a term of life imprisonment. On direct appeal, our Supreme Court held that [A]ppellant's initial confession while in police custody violated the juvenile confession rule because [A]ppellant was not permitted to consult with his parents until after the initial interrogation and confession. Accordingly, [A]ppellant's judgment of sentence was reversed and his case remanded for a new trial. **Commonwealth v. Lee**, 470 Pa. 401, 368 A.2d 690 (1977).

Commonwealth v. Lee, 700 A.2d 1026 (Pa. Super. 1997) (unpublished memorandum), *appeal denied*, 705 A.2d 1306 (Pa. 1997).

Following a retrial, Appellant was again convicted of all charges on May 9, 1977. On October 17, 1977, the trial court sentenced Appellant to life in prison for the murder conviction, "as well as concurrent prison sentences of ten-to-twenty years and one-to-two years, respectively, for the robbery and conspiracy convictions." **Id.** Appellant filed a direct appeal and his judgment of sentence was affirmed by this Court on November 9, 1979. **Commonwealth v. Lee**, 414 A.2d 367 (Pa. Super. 1979). Appellant did not file a petition for allowance of appeal with our Supreme Court. Over the next two decades, Appellant filed five PCRA petitions. Specifically, Appellant filed PCRA petitions in 1991, 1998, 2002, 2003, and 2005, respectively, none of which garnered him relief.

On July 15, 2010, Appellant filed the instant PCRA petition, his sixth. On December 27, 2010, the PCRA court found Appellant's petition was untimely and denied it without a hearing. On January 13, 2011, Appellant filed a timely notice of appeal.¹

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

[I.] Does not the recent decision of the United States Supreme Court in **Graham v. Florida**, [] 130 S. Ct. 2011, 176 L.Ed. 2d 825 (2010), which held that it was unconstitutional to give an adult sentence to a child (Life Without the Possibility of Parole) (LWOP), and in **Roper v. Simmons**, Impose a Death Sentence, upon a child?

Petitioner[,] a child at the time of the offense, states, because it was the Government Intent in providing a LWOP sentence their intent for him to die, and as such, the imposition of a Death Sentence is Unconditional, particularly where no opportunity exist[s] to demonstrative [sic] amenability toward illustrating a Life Potential.

The Imposition for LWOP under **Graham v. Florida, Supra.**, is precluded from imposition where petitioner was convicted of Accomplice-liability, and no specific act of homicide was contributed to him, that warranted under **Graham**, the imposition of LWOP.

Petitioner should have had his PCRA petition considered under Newly Discovered Evidence, as applied through 42 Pa.C.S.A. 9545 (b)(1)(iii).

Appellant's Brief at 3.

¹ Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

Our standard when reviewing a denial of a PCRA petition is limited to the determination of whether the PCRA court's findings are supported by the record and whether the order is free of legal error. ***Commonwealth v. Reaves***, 923 A.2d 1119, 1124 (Pa. 2007), *appeal denied*, 959 A.2d 929 (Pa. 2008). "This Court grants great deference to the findings of the PCRA court, and we will not disturb those findings merely because the record could support a contrary holding." ***Commonwealth v. Alderman***, 811 A.2d 592, 594 (Pa. Super. 2002), *appeal denied*, 825 A.2d 1259 (Pa. 2003) (citations omitted). The timeliness of a PCRA petition is a jurisdictional requisite. ***Commonwealth v. Burton***, 936 A.2d 521, 527 (Pa. Super. 2007), *appeal denied*, 959 A.2d 927 (Pa. 2008). "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[.]" ***Commonwealth v. Harris***, 972 A.2d 1196, 1199-1200 (Pa. Super. 2009), *appeal denied*, 982 A.2d 1227 (Pa. 2009).

While a petition for relief under the PCRA must be filed within one year of the date the judgment of sentence became final, the petition may be addressed if the petition alleges, and the petitioner proves, one of three statutory exceptions set forth at 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). ***Commonwealth v. Gamboa-Taylor***, 753 A.2d 780, 783 (Pa. 2000); 42 Pa.C.S.A. § 9545. The three statutory exceptions are: (1) interference by government officials in attempting to present a claim, (2) after-discovered

facts or evidence, and (3) an after-recognized constitutional right. 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). “[I]t is now well settled that there is no generalized equitable exception to the jurisdictional one year time bar pertaining to post-conviction petitions.” **Commonwealth v. Brown**, 943 A.2d 264, 267 (Pa. 2008).

A PCRA petition invoking one of these statutory exceptions must “be filed within 60 days of the date the claims could have been presented.” **See Gamboa-Taylor, supra** at 783; **see also** 42 Pa.C.S.A. § 9545(b)(2). “[I]t is the burden of a petitioner to plead in the PCRA petition exceptions to the time bar and that burden necessarily entails an acknowledgement by the petitioner that the PCRA petition under review is untimely but that one or more of the exceptions apply.” **Commonwealth v. Wharton**, 886 A.2d 1120, 1126 (Pa. 2005) (citations omitted). “If the petition is determined to be untimely, and no exception has been pled and proven, the petition must be dismissed without a hearing because Pennsylvania courts are without jurisdiction to consider the merits of the petition.” **Commonwealth v. Perrin**, 947 A.2d 1284, 1285 (Pa. Super. 2008).

As previously noted, Appellant was sentenced on October 17, 1977, and this Court affirmed his judgment of sentence on November 9, 1979. **Commonwealth v. Lee**, 414 A.2d 367 (Pa. Super. 1979). Therefore, Appellant’s judgment of sentence became final on December 9, 1979, 30 days after the period of time to file a petition for allowance of appeal with

our Supreme Court expired. **See** 42 Pa.C.S.A. § 9545(b)(3); Pa.R.A.P. 1113(a). As the instant petition was not filed until July 15, 2010, it is patently untimely. Herein, Appellant acknowledges his PCRA petition is untimely and avers an after-recognized constitutional right pursuant to 42 Pa.C.S.A. § 9545(b)(1)(iii) applies. Appellant's Brief at 4. Appellant argues that the Supreme Court's decision in **Graham v. Florida**, 560 U.S. 48 (2010), renders "life without parole unconstitutional as applied to a juvenile." Appellant's Brief at 7. Appellant spends the majority of his 39-page brief trying to persuade this Court that his life without parole sentence for first-degree murder is unconstitutional because he was a juvenile at the time he committed the crime.

In **Commonwealth v. Ortiz**, 17 A.3d 417 (Pa. Super. 2011), *appeal denied*, 29 A.3d 796 (Pa. 2011), this Court held that **Graham** applies only to life sentences imposed for non-homicide offenses. However, while this appeal was pending before this Court, the United States Supreme Court issued its decision in **Miller v. Alabama**, 132 S. Ct. 2455 (2012). **Miller** extended **Graham** and concluded that, "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile [homicide] offenders." **Id.** at 2469.

Following the United States Supreme Court's decision, our Supreme Court, in **Commonwealth v. Cunningham**, --- A.3d ---, 2013 WL 5814388 (Pa. 2013), agreed to consider whether the holding in **Miller** applied

retroactively to judgments of sentence that became final prior to the filing of the **Miller** decision. In **Cunningham**, our Supreme Court held that **Miller** did not apply retroactively to cases on collateral review. **Id.** at *7 (specifically concluding that “nothing in [Cunningham’s] arguments persuades us that **Miller’s** proscription of the imposition of mandatory life-without-parole sentences upon [homicide] offenders under the age of eighteen at the time their crimes were committed must be extended to those whose judgments of sentence were final as of the time of **Miller’s** announcement[]”).

Herein, Appellant’s judgment of sentence became final over 30 years before the announcement of **Miller**. Therefore, based on our Supreme Court’s decision in **Cunningham**, we conclude Appellant’s PCRA petition is facially untimely, and he has failed to meet his burden of proof with regard to any of the enumerated exceptions to the timeliness requirement. **See Reaves, supra; Harris, supra.** Therefore, we conclude the PCRA court properly dismissed Appellant’s sixth PCRA petition.

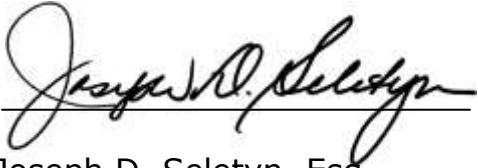
Accordingly, we affirm the PCRA court’s December 27, 2010 order dismissing Appellant’s PCRA petition.

Order affirmed.

President Judge Stevens did not participate in the consideration or decision of this case.

J. S44037/11

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: 12/2/2013