NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. LUIS RIVERA, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 768 MDA 2013

Appeal from the PCRA Order March 27, 2013
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0000713-1994

BEFORE: PANELLA, J., MUNDY, J., and PLATT, J.*

MEMORANDUM BY MUNDY, J.: **FILED DECEMBER 12, 2013**

Appellant, Luis Rivera, Jr., appeals *pro se* from the March 27, 2013 order, dismissing 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.

On October 12, 1994, Appellant pled guilty to first-degree murder and aggravated assault.[1] The trial court imposed an aggregate sentence of life without the possibility of parole on December 5, 1994. Appellant did not file a direct appeal with this Court. Thereafter, Appellant filed five unsuccessful PCRA petitions in 1995, 1996, 1997, 2006, and 2011.

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. § 2502(a) and 2702(a)(1), respectively.

On November 5, 2012, Appellant filed the instant *pro se* PCRA petition. The Commonwealth filed its answer on February 7, 2013. On March 8, 2013, the PCRA court entered an order notifying Appellant of its intention to dismiss his PCRA petition without a hearing pursuant to Pennsylvania Rule of Criminal Procedure 907. Appellant filed a response to the PCRA court's Rule 907 notice on March 25, 2013. The PCRA court dismissed the petition as untimely on March 27, 2013. Appellant filed a timely notice of appeal on April 25, 2013.[2]

On appeal, Appellant raises one issue for our review.

> I. Did the [PCRA] court commit legal error in finding that it was without jurisdiction to consider Appellant's [PCRA] claims?

Appellant's Brief at 3.

We begin by noting our well-settled standard of review. "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). "[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

[2] Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

omitted). "The PCRA court's credibility determinations, when supported by the record, are binding on this Court." ***Commonwealth v. Spotz***, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). "However, this Court applies a *de novo* standard of review to the PCRA court's legal conclusions." ***Id.***

Before we may address the merits of Appellant's claims, we must first consider the timeliness of his PCRA petition because it implicates the jurisdiction of 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). "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). The act provides, in relevant part, as follows.

> **§ 9545. Jurisdiction and proceedings**
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> …
>
> (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 case *sub judice*, Appellant was sentenced on December 5, 1994 and he did not file a direct appeal with this Court. As a result, his judgment of sentence became final on January 5, 1995, when the appeal period

expired. ***See*** 42 Pa.C.S.A. § 9545(b)(3); Pa.R.A.P. 903(a). Since Appellant did not file the instant PCRA petition until November 5, 2012, it is patently untimely as it was not filed within a year of his judgment of sentence becoming final. ***See*** 42 Pa.C.S.A. § 9545(b)(1). However, Appellant makes two arguments with regard to the timeliness of the instant petition.

First, Appellant avers that he should be permitted to seek relief outside the PCRA. Appellant's Brief at 8. Our Supreme Court has held that the PCRA "subsumes the writ of *habeas corpus* in circumstances where the PCRA provides a remedy for the claim." ***Commonwealth v. Hackett***, 956 A.2d 978, 985 (Pa. 2008) (emphasis added), *cert. denied*, ***Hackett v. Pennyslvania***, 528 U.S. 1163 (2009). The PCRA by its own language states that it is the sole vehicle for collaterally attacking a conviction or sentence.

> This subchapter provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief. The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, **including *habeas corpus* and *coram nobis***. This subchapter is not intended to limit the availability of remedies in the trial court or on direct appeal from the judgment of sentence, to provide a means for raising issues waived in prior proceedings or to provide relief from collateral consequences of a criminal conviction. Except as specifically provided otherwise, all provisions of this subchapter shall apply to capital and noncapital cases.

42 Pa.C.S.A. § 9542 (emphasis and italics added). We also observe that the *habeas corpus* statute provides that "[w]here a person is restrained by virtue of sentence after conviction for a criminal offense, the writ of *habeas corpus* shall not be available if a remedy may be had by post-conviction hearing proceedings authorized by law." ***Id.*** § 6503(b) (italics added). The PCRA allows numerous grounds for collateral relief, including the following.

> **§ 9543. Eligibility for relief**
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> **(a) General rule.--**To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:
>
> (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
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> (i) currently serving a sentence of imprisonment, probation or parole for the crime;
>
> …
>
> (2) That the conviction or sentence resulted from one or more of the following:
>
> …
>
> (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> …

> (vii) The imposition of a sentence greater than the lawful maximum.
>
> …

42 Pa.C.S.A. § 9543(a).

In the case *sub judice*, "[Appellant] is claiming that his sentence violates his constitutional rights, and neither the General Assembly in enacting the PCRA nor the [PCRA] court has the authority to deny federal constitutional rights, [Appellant] is entitled to a review of his claims outside of the PCRA." Appellant's Brief at 9. However, as this Court has often held, "[a]n appellant who challenges the constitutionality of his sentence of imprisonment on a claim that it violates his right to be free from cruel and unusual punishment raises a legality of the sentencing claim." ***Commonwealth v. Knox***, 50 A.3d 732, 741 (Pa. Super. 2012) (citation omitted)*, appeal denied*, 69 A.3d 601 (Pa. 2013). It is also axiomatic that legality of sentence claims are cognizable under the PCRA. ***See Commonwealth v. Infante***, 63 A.3d 358, 365 (Pa. Super. 2013) (stating, "[a]lthough legality of sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA's time limits or one of the exceptions thereto[]"). Based on these considerations, we conclude the PCRA court did not err in analyzing Appellant's claims under the framework of the PCRA.

Appellant's second argument, set forth for the first time in his brief on appeal, asserts that the newly-discovered fact exception to the time-bar

applies based on the United States Supreme Court's decision in ***Miller v. Alabama***, 132 S. Ct. 2455 (2012). Appellant's Brief at 10; ***see also*** 42 Pa.C.S.A. § 9545(b)(1)(ii). Our Supreme Court has held that the PCRA "makes clear that where … the petition is untimely, it is the petitioner's burden to plead in the petition and prove that one of the exceptions applies." ***Commonwealth v. Beasley***, 741 A.2d 1258, 1261 (Pa. 1999); ***accord Edmiston***, ***supra*** at 346. Furthermore, "[t]hese exceptions must be specifically pleaded or they may not be invoked." ***Commonwealth v. Liebensperger***, 904 A.2d 40, 46 (Pa. Super. 2006), *citing* ***Beasley***, ***supra***. We have also stated that generally "[a] new and different theory of relief may not be successfully advanced for the first time on appeal." ***Commonwealth v. Santiago***, 980 A.2d 659, 666 n.6 (Pa. Super. 2009) (citation omitted), *appeal denied*, 991 A.2d 312 (Pa. 2010), *cert. denied*, ***Santiago v. Pennsylvania***, 131 S. Ct. 155 (2010); ***see also*** Pa.R.A.P. 302(a) (stating, "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal[]").

In the case *sub judice*, Appellant's PCRA petition "assert[ed that] a constitutional right … was recognized by the Supreme Court of the United States on June 25, 2012." Appellant's PCRA Petition, 11/5/12, at ¶ 2. Appellant also invoked Section 9545(b)(1)(iii) in his petition, the subsection where the new constitutional right exception to the time-bar is enumerated. ***Id.*** at ¶ 1. However, his brief on appeal explicitly states that his petition "is

not rooted in a newly recognized constitutional right, but rather after discovered evidence stemming from the ***Miller*** decision." Appellant's Brief at 10. As Appellant is not permitted to switch time-bar exceptions between proceedings in the PCRA court and this Court, we deem his second time-bar exception argument waived.[3] ***See Santiago***, ***supra***.

Based on the foregoing, we conclude the PCRA court properly dismissed Appellant's sixth PCRA petition as untimely. ***See Edmiston***, ***supra*** at 345. Accordingly, the PCRA court's March 27, 2013 order is affirmed.

Order affirmed.

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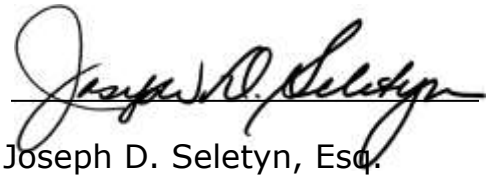
[3] Even if the time-bar exception argument were not waived, it would still garner no relief for Appellant. Our Supreme Court has consistently held that judicial opinions are not "facts" for the purposes of Section 9545(b)(1)(ii). ***Watts***, ***supra*** at 986-987. Additionally, even if Appellant had consistently argued the new constitutional right exception applies, we note that Appellant acknowledges that he was 18 years old at the time of his crimes; therefore, ***Miller*** does not apply to him. Appellant's Brief at 4; ***see also Commonwealth v. Cintora***, 69 A.3d 759, 764 (Pa. Super. 2013) (holding claims, made by those over 18 at the time of their offenses, that ***Miller*** **should** extend to "those whose brains were not fully developed at the time of their crimes," is not an exception under Section 9545(b)(1)(iii)). Also, even if ***Miller*** did apply to Appellant, our Supreme Court recently held that ***Miller*** does not apply retroactively to those whose judgments of sentence were final at the time ***Miller*** was decided. ***Commonwealth v. Cunningham***, --- A.3d ---, 2013 WL 5814388, *7 (Pa. 2013).

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/12/2013