[J-25-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, FITZGERALD, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 375 CAP
	:	
Appellee	:	Appeal from the Order entered on 4-8-2002 in the Court of Common Pleas, Criminal Division of Erie County denying the PCRA relief at No. 1325 A & B 1988
v.	:	
	:	
DAVID COPENHEFER,	:	
	:	
Appellant	:	SUBMITTED: January 24, 2006

OPINION

MR. JUSTICE EAKIN **DECIDED: December 28, 2007**

Appellant appeals from the order denying his petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546, as untimely. We affirm.

Appellant was convicted of first degree murder and sentenced to death.[1] On direct appeal, he claimed the trial court erred by failing to instruct the jury at the penalty phase that his lack of prior record constituted a mitigating circumstance. The prosecution and defense stipulated appellant had no prior record, and defense counsel requested a jury instruction indicating this fact must be found as a mitigating factor. The trial court did not

[1] The underlying facts are set forth in Commonwealth v. Copenhefer, 587 A.2d 1353 (Pa. 1991) (Copenhefer I), the direct appeal where this Court affirmed the conviction and sentence.

give the instruction; the jury found no mitigating circumstances and two aggravating circumstances. Copenhefer I, at 1358.

This Court found no error because the verdict slip clearly indicated the jury considered mitigating evidence based on the lack of prior record. Id., at 1360. On a line of the verdict slip where jurors were to indicate any mitigating circumstances found, the jury wrote "first offense" but later crossed it out because of confusion surrounding the verdict slip instructions. Id., at 1364 (Appendix A). It was clear from the record the jury was confused regarding the verdict form itself, but not regarding the absence of mitigating circumstances. This Court did not find any support in the record suggesting the death verdict was the product of passion, prejudice, or any arbitrary factor. Id., at 1360. The only lack of certainty was regarding how the "complicated verdict slip was to be marked." Id.[2]

Appellant did not seek review by the United States Supreme Court. He did petition for relief under the PCRA. While this petition was pending, he filed a pro se petition for a writ of habeas corpus with the United States District Court, which was dismissed without prejudice. See Copenhefer v. Horn, Civil Action No. 99-5E, unpublished memorandum at 12 (U.S. Dist. Ct. filed August 15, 2002) (citing Copenhefer v. Domonovich, Civil Action No. 92-49E, unpublished memorandum (U.S. Dist. Ct. filed February 11, 1992)). The PCRA court subsequently denied appellant's PCRA petition; this Court affirmed, see Commonwealth v. Copenhefer, 719 A.2d 242 (Pa. 1998) (Copenhefer II), and the United

[2] Chief Justice (then-Justice) Cappy dissented, stating the jury should have been instructed it was bound to find at least one mitigating circumstance, based on 42 Pa.C.S. § 9711(e)(1), which provides "[m]itigating circumstances shall include the following: (1) [t]he defendant has no significant history of prior criminal convictions." Copenhefer I, at 1366 (Cappy, J., dissenting) (citing 42 Pa.C.S. § 9711(e)(1)) (emphasis in original). The dissent indicated the trial court erred when it failed to instruct the jury it was required to conclude there was no prior record based on the parties' stipulation. Id.

States Supreme Court denied certiorari. See Copenhefer v. Pennsylvania, 528 U.S. 830 (1999).

Appellant filed a second PCRA petition, but later withdrew it. He filed a second habeas corpus petition with the United States District Court. The petition was referred for initial review to a magistrate judge, who recommended granting it because appellant's penalty phase was constitutionally defective based on the issues raised on direct appeal. See Copenhefer v. Horn, Civil Action No. 99-5E, unpublished memorandum at 114 (U.S. Dist. Ct. filed August 15, 2002). The magistrate judge recommended denying relief regarding alleged error in the guilt phase of appellant's trial; appellant does not raise those issues here. Id., at 115. A district judge accepted the magistrate judge's recommendations; appellant and the Commonwealth appealed to the Court of Appeals for the Third Circuit, which stayed the appeal pending this Court's ruling here. Id.

On October 17, 2001, appellant filed a third PCRA petition based on this Court's decision in Commonwealth v. Rizzuto, 777 A.2d 1069 (Pa. 2001) (where mitigating circumstance is presented to jury by stipulation, jury is required to find that mitigating factor) (abrogated on other grounds by Commonwealth v. Freeman, 827 A.2d 385, 400 (Pa. 2003)). The PCRA court gave notice of its intention to dismiss the petition as untimely; appellant argued the time-bar exception in 42 Pa.C.S. § 9545(b)(1)(iii)[3] applied, and that he had filed his petition within 60 days after Rizzuto was decided, as required by 42 Pa.C.S. § 9545(b)(2).[4] The PCRA court dismissed the petition, holding Rizzuto neither recognized a

[3] "[T]he 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." Id.

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

new constitutional right nor directed its holding should be applied retroactively; thus, § 9545(b)(1)(iii) did not apply. See PCRA Court Notice of Intent to Dismiss, 2/13/02, at 3. Appellant now appeals the denial of PCRA relief.

Our standard of review is whether the PCRA court's order is supported by the record and free of legal error. Commonwealth v. Abu-Jamal, 833 A.2d 719, 723 (Pa. 2003). We must first determine the propriety of the PCRA court's dismissal of appellant's petition as untimely. Id. A PCRA petition, including a second or subsequent one, must normally be filed within one year of the date the judgment becomes final, 42 Pa.C.S. § 9545(b)(1), [5] unless one of the exceptions in § 9545(b)(1)(i)-(iii) applies and the petition is filed within 60 days of the date the claim could have been presented. Id., § 9545(b)(2). The PCRA's timeliness requirements are jurisdictional in nature, and a court may not address the merits of the issues raised if the PCRA petition was not timely filed. Abu-Jamal, at 723-24 (citations omitted).

Appellant argues Rizzuto created a new constitutional right and should be applied retroactively, bringing his PCRA petition within § 9545(b)(1)(iii). Rizzuto involved circumstances similar to the present case. During the penalty phase of Rizzuto's trial, the parties stipulated Rizzuto had no previous criminal history. Rizzuto, at 1088. At the time the stipulation was entered, the trial court instructed the jury it must accept the stipulation as fact; the court did not repeat the instruction during the final jury instructions at the end of the penalty phase, and the jury failed to find the lack of previous criminal history as a mitigating factor and sentenced Rizzuto to death. Id. Rizzuto claimed the jury was required to find a mitigating circumstance under 42 Pa.C.S. § 9711(e)(1), which states mitigating circumstances shall include a defendant having no prior criminal convictions.

[5] A judgment becomes final at the conclusion of direct review, including discretionary review, or at the expiration of time for seeking such review. Id., § 9545(b)(3).

This Court recognized under Copenhefer I, no error would be found where it was clear the jury considered the lack of criminal record during its deliberations. Rizzuto, at 1088. However, after reevaluating the impact of Copenhefer I, we were convinced the more prudent course of action was to overrule Copenhefer I and to adopt its dissent. Id., at 1089. Thus, under Rizzuto, where a mitigating circumstance is presented to the jury by stipulation, the jury is required by law to find that mitigating factor. Id. We explained:

> [W]here the absence of a prior record is not in dispute, as in this case, the sentencing jury has no discretion whether or not to find the existence of this fact as a mitigating factor. If we would grant the jury discretion to ignore stipulations of fact, we would be granting the right to arrive at a sentencing verdict in an arbitrary and capricious fashion. Such a conclusion would undercut the very purpose of the death penalty sentencing scheme as developed by our General Assembly. A sentence of death cannot be "the product of passion, prejudice or any other arbitrary factor." 42 Pa.C.S. § 9711(h)(3)(i).
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> Accordingly, where a mitigating circumstance is presented to the jury by stipulation, the jury is required by law to find that mitigating factor. In the instant case, the jury was not directed to find the existence of (e)(1); nor did the jury herein find that (e)(1) had been proven by a preponderance of the evidence, despite the stipulation.

Id. Accordingly, we vacated Rizzuto's sentence and remanded for a new sentencing hearing. Appellant asserts this holding brings his petition within the ambit of the time-bar exception in § 9545(b)(1)(iii).

This Court examined this exception in Commonwealth v. Abdul-Salaam, 812 A.2d 497 (Pa. 2002), noting:

> 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 this 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.

Id., at 501.

This Court has recognized Rizzuto created a new rule of law. See Commonwealth v. Marinelli, 910 A.2d 672, 681-82 (Pa. 2006) (Opinion Announcing the Judgment of the Court);[6] Commonwealth v. Johnson, 815 A.2d 563, 581-82 (Pa. 2002). However, we have not held that new rule to be constitutional in nature,[7] and clearly the ruling is based on interpretation of the statute. Neither have we held Rizzuto applies retroactively.

Appellant's direct appeal was exhausted 30 days after it was decided March 18, 1991, the time within which he could have filed a certiorari petition, and thus was not pending when Rizzuto was decided in 2001. Thus, he is not entitled to retroactive application of Rizzuto.

Because appellant has failed to demonstrate he met the requirements of § 9545(b)(1)(iii), his PCRA petition was properly dismissed as untimely, and we affirm the order of the PCRA court.

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[6] Although Marinelli was not a majority decision, this Court was in agreement that Rizzuto created a new rule; the concurring opinions were concerned with issue preservation and waiver in the context of layered ineffectiveness claims. See Marinelli, at 689-90 (Cappy, C.J., concurring); id., at 690-91 (Saylor, J., concurring).

[7] The constitutional issue, according to appellant, is raised because we determined the jury is able to arrive at an arbitrary and capricious sentence if it is given discretion to ignore stipulations of fact. Rizzuto, at 1089. Appellant cites a litany of cases from this Court and the United States Supreme Court holding sentences which are "arbitrary and capricious" violate the Eighth Amendment to the United States Constitution. See Appellant's Brief, at 9 n.6 & 7 (collecting cases). However, we used the "arbitrary and capricious" language in Rizzuto to indicate the danger of "undercut[ting] the very purpose of the death penalty sentencing scheme as developed by our General Assembly." Rizzuto, at 1089. We did not expressly discuss the United States Constitution or any constitutional rights.

The Prothonotary of this Court is directed to transmit the complete record of this case to the Governor pursuant to 42 Pa.C.S. § 9711(i).

Order affirmed. Jurisdiction relinquished.

Mr. Chief Justice Cappy and Mr. Justice Castille join the opinion.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Baer files a dissenting opinion in which Madame Justice Baldwin and Mr. Justice Fitzgerald join.