

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
| Appellee | : | |
| | : | |
| v. | : | |
| | : | |
| RICHARD BRINSON, | : | |
| | : | |
| Appellant | : | No. 1077 EDA 2013 |

Appeal from the PCRA Order March 21, 2013,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-1223061-1983

BEFORE: GANTMAN, DONOHUE and OLSON, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED DECEMBER 13, 2013

Richard Brinson (“Brinson”) appeals from the March 21, 2013 order entered by the Court of Common Pleas, Philadelphia County, dismissing his petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 (“PCRA”), as untimely. We affirm.

We previously summarized the facts of this case when deciding a prior appeal as follows:

On November 22, 1983, Brinson stabbed the victim to death at a motorcycle club. The victim entered the club unarmed, and several members, including Brinson, converged upon him. Brinson then stabbed the victim three times in the chest. Brinson was convicted by [a] jury of first[-]degree murder and of possessing an instrument of crime and was sentenced [on September 21, 1984] to life imprisonment for the murder conviction and to a concurrent sentence of two and one-half to five years’ imprisonment for the possession conviction.

Commonwealth v. Brinson, 516 Philadelphia 1989, 1 (Pa. Super. Nov. 13, 1989) (unpublished memorandum).

Brinson appealed from his judgment of sentence to this Court, and we affirmed his convictions on August 18, 1986. The Pennsylvania Supreme Court denied his petition for allowance of appeal on February 10, 1987. Brinson filed his first petition for post conviction relief on November 20, 1987, which the lower court denied without a hearing on January 20, 1989. We affirmed the dismissal on November 13, 1989. The Pennsylvania Supreme Court denied his request for allowance of appeal on April 18, 1990.

Brinson filed several additional PCRA petitions between 1990 and 2012, none of which afforded him any relief. On April 20, 2012, Brinson filed the instant *pro se* PCRA petition, his sixth. Therein, he alleged trial counsel's ineffectiveness for advising him to reject a plea offer that would have exposed him to a 20-year maximum term of imprisonment based upon trial counsel's assessment that the Commonwealth could not prove that he acted with the requisite intent for a first-degree murder conviction. Acknowledging that his PCRA petition was facially untimely,¹ Brinson

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[.]" 42 Pa.C.S.A. § 9545(b)(1). "[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S.A. § 9545(b)(3).

asserted an exception to the PCRA's time bar²: that the United States Supreme Court in ***Lafler v. Cooper***, __ U.S. __, 132 S.Ct. 1376 (2012), and ***Missouri v. Frye***, __ U.S. __, 132 S.Ct. 1399 (2012), created a new constitutional right that applies retroactively to his case.

On March 1, 2013, the PCRA court issued notice of its intention to dismiss the petition without a hearing pursuant to Pa.R.Crim.P. 907 based upon its assessment that the issues raised were meritless and the serial petition was untimely. Brinson filed an objection to the PCRA court's Rule 907 notice on March 12, 2013. Thereafter, on March 21, 2013, the PCRA court dismissed his PCRA petition.

² The three exceptions to the PCRA's time bar are:

(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.A. § 9545(b)(1). Any petition invoking one of the above exceptions must be filed within 60 days of the availability of the claim. 42 Pa.C.S.A. § 9545(b)(2).

This timely *pro se* appeal follows, wherein Brinson raises three issues for our review:

I. Is [Brinson] entitled to [PCRA] relief as [a] result of trial counsel[’s] ill-advised [*sic*] to him to reject a[] plea offer that would have had him spend less[] time imprisoned than the eventual life sentence imposed as a[] result of standing trial[?]

II. Is [Brinson] entitled to [PCRA] relief as a[] result of the PCRA court had [*sic*] jurisdiction to grant subsequent [PCRA] relief pursuant to the statutory provision of 42 Pa.C.S.A. §9545(b)(1)(iii) and §9545(b)(2)[?]

III. Is [Brinson] entitled to [PCRA] relief as a[] result of the retroactive effect of the United States Supreme Court new rule of law announced in the ***Lafler/Frye*** decisions[?]

Brinson’s Brief at 4. As all three of Brinson’s issues are interrelated, we consider them together.

We review the denial of a PCRA petition on timeliness grounds according to the following standard:

In reviewing the denial of PCRA relief, we examine whether the PCRA court’s determination is supported by the record and free of legal error. The PCRA timeliness requirement, however, is mandatory and jurisdictional in nature. The court cannot ignore a petition’s untimeliness and reach the merits of the petition. Section 9545(b)(1) requires a petitioner to file a PCRA petition within one year of the date the judgment [became] final.

Commonwealth v. Taylor, ___ Pa. ___, 67 A.3d 1245, 1248 (2013) (internal citations and quotations omitted).

It is uncontested that the PCRA petition at issue before us is facially untimely. **See** Brinson's Brief at 9-10. Brinson asserts, as he did below, that he satisfies one of the exceptions to the timeliness requirements, *to wit*, that the United States Supreme Court in **Lafler** and **Frye** created a new constitutional right that applies retroactively to his case, and that he filed the instant PCRA petition within 60 days of the date of those decisions. **See** Brinson's Brief at 9-15; 42 Pa.C.S.A. § 9545(b)(1)(iii), (2).

This Court recently decided this precise issue in **Commonwealth v. Feliciano**, 69 A.3d 1270 (Pa. Super. 2013). In that case, we explained:

In **Frye**, the United State Supreme Court merely clarified that this well-established right '*extends to the negotiation and consideration of plea offers that lapse or are rejected.*' **Frye**, 132 S.Ct. at 1404 (emphasis added). In other words, the **Frye** Court held '*that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.*' **Id.** at 1408. In determining whether counsel has satisfied this obligation, the two-part test set forth in **Strickland** applies.^{[FN]3} **See id.** at 1409. In **Lafler**, the Court explained that to meet the prejudice prong of the **Strickland** test where the alleged ineffectiveness of counsel involves the defendant's rejection of a plea offer, the defendant must show,

that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms

would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 132 S.Ct. at 1385.

It is apparent that neither **Frye** nor **Lafler** created a new constitutional right. Instead, these decisions simply applied the Sixth Amendment right to counsel, and the **Strickland** test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand, *i.e.* where counsel's conduct resulted in a plea offer lapsing or being rejected to the defendant's detriment.

^{[FN]3} [The **Strickland**] test requires that a defendant show that counsel (1) had no reasonable basis for their actions or inactions, and (2) the defendant suffered prejudice as a result of counsel's conduct. In Pennsylvania, our Supreme Court has added one additional component to the **Strickland** test, requiring that a defendant also prove that the underlying claim has arguable merit. **See Commonwealth v. Bennett**, 57 A.3d 1185, 1195 (Pa. 2012).

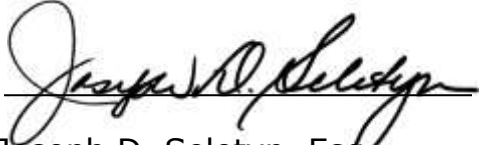
Feliciano, 69 A.3d at 1276-77 (footnote 4 omitted).

We are bound by the **Feliciano** Court's decision that the United States Supreme Court in **Lafler** and **Frye** did not create a new constitutional right, and thus conclude that Brinson failed to satisfy any of the time bar exceptions to the PCRA. As such, neither the PCRA court nor this Court has jurisdiction to entertain his substantive claim of trial counsel's ineffectiveness. **Taylor**, ___ Pa. at ___, 67 A.3d at 1248. We therefore find no error in the PCRA court's dismissal of Brinson's PCRA petition as untimely.

Order affirmed.

J-S64028-13

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/13/2013