NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DANIEL C. WYANT, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1557 WDA 2012

Appeal from the PCRA Order September 18, 2012
In the Court of Common Pleas of Erie County
Criminal Division at No(s): CP-25-CR-0000249-1992, CP-25-CR-0000307-1992

BEFORE: STEVENS, P.J., BOWES, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.: FILED: May 8, 2013

Daniel C. Wyant appeals from the order denying his serial PCRA petition as untimely. After careful review, we affirm.

This Court previously delineated the relevant facts as follows.

> Appellant and Robert Grinnell (Grinnell) met J.J. Acosta (J.J.) along State Street in Erie, Pennsylvania, an area frequented by homosexuals. J.J. told Appellant that he was in the area "yanking" people. At this time, Appellant was in possession of a .25 caliber, semi-automatic pistol. Appellant and Grinnell entered into an agreement to rob any homosexual who tried to pick one of them up. Thereafter, the victim, driving a green car, approached the three men, waiving for them to come over to the car. Appellant entered the car and instructed the victim to drive over to the train station. Appellant was to act as a decoy and then all three men would "overpower [the victim] and take the money and we were going to split it three ways." N.T., 5/13/92, at p. 92. It was during the events that transpired in the car that Appellant admittingly [sic] shot the victim. In a statement taken by police, Appellant claimed that the victim tried to grab him and, as he was trying to get away, the gun fired.

Commonwealth v. Wyant, 647 A.2d 268 (Pa.Super. 1994) (unpublished memorandum at 2).

The victim died from blood loss as a result of the gunshot wound, which was fired at close range through his heart. At the joint trial of Appellant and Mr. Grinnell, the Commonwealth played a tape of the confessions by Mr. Grinnell and Appellant, both of whom did not testify. Despite Mr. Grinnell's confession implicating Appellant, and Mr. Grinnell not testifying, Appellant's name was not completely redacted. A jury convicted Appellant of second-degree (felony) murder, robbery, conspiracy to commit robbery, recklessly endangering another person (REAP), and terroristic threats. Appellant filed post-verdict motions, which were denied. The court then sentenced him to life imprisonment without parole for the second-degree murder charge as well as sentences of five to ten years each for robbery and conspiracy, two to five years for terroristic threats and one to two years for REAP, all to run consecutively. Appellant filed a motion for reconsideration of sentence on July 10, 1992, which the court denied by order on July 16, 1992. Appellant failed to file a timely direct appeal, but his direct appeal rights were restored *nunc pro tunc* after he filed a PCRA petition.

On direct appeal, Appellant raised four ineffective assistance of counsel claims in addition to a challenge to the trial court's response to a jury

question.[1] This Court addressed the merits of each of Appellant's positions and determined that his claim that counsel was ineffective for failing to object to his consecutive robbery sentence was meritorious. The Court rejected his remaining issues. Accordingly, we affirmed his convictions, but vacated his robbery sentence. Since the robbery merged with the felony murder charge, no re-sentencing was necessary.

Appellant filed a timely *pro se* PCRA petition on February 7, 1996.[2] The PCRA court appointed counsel, who amended the petition to raise solely legality of sentence questions. The PCRA court denied the petition. This Court affirmed based on the PCRA court opinion, and our Supreme Court denied allowance of appeal. ***Commonwealth v. Wyant***, 698 A.2d 673 (Pa.Super. 1997) (unpublished memorandum), *appeal denied*, 716 A.2d 1248 (Pa. 1998). Appellant filed a subsequent petition on December 16, 2008. Therein, he alleged that ***Crawford v. Washington***, 541 U.S. 36

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[1] Appellant's direct appeal occurred prior to the decision in ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), and he was represented by new counsel. Thus, he was required to raise his ineffectiveness claims on direct appeal. ***Commonwealth v. Hubbard***, 372 A.2d 687 (Pa. 1977), *abrogated by* ***Grant***, ***supra***.

[2] Defendants convicted prior to the effective date of the 1995 amendments to the PCRA, which instituted the one-year time bar, could timely file a first PCRA petition by January 16, 1997. ***Commonwealth v. Sneed***, 45 A.3d 1096, 1102 n.5 (Pa. 2012); ***Commonwealth v. Thomas***, 718 A.2d 326 (Pa.Super. 1998) (*en banc*). Petitions filed after the reinstatement of a defendant's direct appeal rights are considered first time petitions. ***See Commonwealth v. Figueroa***, 29 A.3d 1177 (Pa.Super. 2011) (collecting cases).

(2004), established a new constitutional right regarding testimonial statements. He asserted that the Commonwealth improperly admitted non-redacted statements from his co-defendant Mr. Grinnell, who did not testify, that implicated Appellant, violating his confrontation rights.[3] Appellant then pointed out that our Supreme Court in ***Commonwealth v. Markman***, 916 A.2d 586 (Pa. 2007), applying ***Bruton v. United States***, 391 U.S. 123 (1968) and its progeny, held that it was improper to allow a co-defendant's confession to be admitted in a joint trial with insufficient or inadequate redactions. Finally, Appellant noted that ***Danforth v. Minnesota***, 552 U.S. 264 (2008), held that a new constitutional procedural rule could be applied retroactively by a state court, even if the Supreme Court ruled differently.

In summary, to establish the timeliness of his 2008 petition, Appellant argued that ***Crawford*** should apply retroactively and that ***Danforth*** allowed the PCRA court to conclude that ***Crawford*** was retroactive, regardless of

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[3] The prosecutor indicated that Appellant's own statement and the videotape of his statement were redacted. N.T., 5/13/92, at 84-85. The court then provided an instruction that a defendant's statement could not be used as evidence against a co-defendant. ***Id***. at 86-87. However, Appellant's co-defendant's name was not redacted throughout. ***Id***. at 89, 91-92. The reading of Mr. Grinnell's statement also failed to redact Appellant's name, which was littered throughout the statement. ***Id***. at 106-110. Neither counsel objected to the insufficient redactions.

A videotape of both Appellant and Mr. Grinnell's statements to police were also played for the jury. The transcript does not contain what was said on the tape. However, there does not appear to be any dispute that the tape was not properly redacted.

any pronouncement from the United States Supreme Court. ***See Whorton v. Bockting***, 549 U.S. 406 (2007) (holding ***Crawford*** does not apply retroactively); ***see also Commonwealth v. Brooks***, 875 A.2d 1141 (Pa.Super. 2005).

The PCRA court appointed counsel who thoroughly briefed and argued Appellant's claims. Appellant established that he filed his PCRA petition within sixty days of when the ***Danforth*** decision became available at the prison law library and that prisoners did not have internet access for legal research. The PCRA court, after a hearing, dismissed his petition as untimely.[4] [5] This Court affirmed, with two judges concurring in result

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[4] We are cognizant that Mr. Grinnell was afforded PCRA relief by the PCRA court as to the murder charge in 2008 and the Commonwealth elected not to re-try him or appeal. Mr. Grinnell's petition contained the identical legal arguments that Appellant advanced in his prior PCRA. Of course, any relief achieved by Mr. Grinnell would not automatically entitle Appellant to relief. ***See Commonwealth v. Bennett***, 57 A.3d 1185, 1204 (Pa. 2012).

We add that ***Danforth v. Minnesota***, 552 U.S. 264 (2008), did not announce a new constitutional rule, it discussed the ability of a state court to apply a previously-announced "new constitutional rule" retroactively where the United States Supreme Court does not. Retroactive application of a case is not a constitutional rule; hence, ***Danforth*** cannot give rise to a newly-recognized constitutional right timeliness exception. ***See id***. at 284 (citing ***Commonwealth v. McCormick***, 519 A.2d 442, 447 (Pa.Super. 1986)). Further, while a state court may apply a federal constitutional ruling retroactively when the United States Supreme Court has not, only the Pennsylvania Supreme Court or the United States Supreme Court's announcement of retroactive application of a new constitutional rule triggers the PCRA timeliness exception. 42 Pa.C.S. § 9545(b)(1)(iii).

[5] The Commonwealth and PCRA court, during Appellant's prior PCRA matter, conceded that there was arguable merit to the ***Bruton*** claim. ***See*** N.T.,

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without opinion. ***Commonwealth v. Wyant***, 29 A.3d 831 (Pa.Super. 2011) (unpublished memorandum). The Pennsylvania Supreme Court denied allowance of appeal. ***Commonwealth v. Wyant***, 31 A.3d 292 (Pa. 2011).

Appellant filed the instant petition on May 18, 2012,[6] asserting that his petition was timely based on ***Martinez v. Ryan***, 132 S.Ct. 1309 (2012), and that ***Martinez*** could allow him to argue that prior counsel were ineffective in not arguing a ***Bruton*** violation. The ***Martinez*** decision was decided on March 20, 2012. The PCRA court issued a notice of intent to dismiss and opinion on July 6, 2012, in which it found that Appellant's petition was untimely and that the allegations of trial counsel ineffectiveness related to the confrontation clause were previously litigated. It then filed a final order on September 18, 2012. This timely appeal ensued. The court directed Appellant to file but not serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the PCRA court issued a Pa.R.A.P. 1925(a) order indicating that the reasons for its decision

(Footnote Continued) ––––––––––––––––––––

4/2/09, at 41. However, the Commonwealth argued that the admission of Mr. Grinnell's un-redacted statement was harmless error and the PCRA court found, in the alternative to its untimeliness holding, that Appellant could not establish prejudice.

[6] The petition was docketed on May 21, 2012. However, Appellant was proceeding *pro se* and his petition is subject to the prisoner mailbox rule. ***Commonwealth v. Castro***, 766 A.2d 1283 (Pa.Super. 2001). According to Appellant, he submitted his petition to prison authorities on May 18, 2012. The Commonwealth does not dispute this assertion.

could be found in its July 6, 2012 notice and opinion.[7] Appellant raises three issues for our review.

1. Whether the PCRA court erred in denying Appellant's PCRA petition as untimely?

2. The PCRA Court erred when it determined [the] claims presented had been previously litigated[.]

3. The PCRA court erred in not addressing claims presented for review[.]

Appellant's brief at 3.

In reviewing a PCRA court's decision, we are guided by the following well-established edicts.

> We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. ***Commonwealth v. Burkett***, 5 A.3d 1260, 1267 (Pa.Super. 2010). This review is limited to the findings of the PCRA court and the evidence of record. ***Id.*** We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. ***Id.*** This Court may affirm a PCRA court's decision on any grounds if the record supports it. ***Id.*** Further, we grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. ***Commonwealth v. Carter***, 21 A.3d 680, 682 (Pa.Super. 2011). However, we afford no such deference to

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[7] We acknowledge that before the PCRA court issued its final order in this matter, Appellant filed an additional serial PCRA petition asserting that he is illegally serving a sentence of life imprisonment without parole based on ***Miller v. Alabama***, 132 S.Ct. 2455 (2012). In that petition, Appellant, who was eighteen at the time he committed the murder herein, alleged that the term "juvenile" included those eighteen to twenty years of age. The PCRA court appointed counsel, who filed a ***Turner/Finley*** no-merit letter. In light of ***Commonwealth v. Porter***, 35 A.3d 4 (Pa. 2012), this additional filing was not an amendment to the current petition.

> its legal conclusions. ***Commonwealth v. Paddy****,* 609 Pa. 272, 15 A.3d 431, 442 (2011); ***Commonwealth v. Reaves****,* 592 Pa. 134, 923 A.2d 1119, 1124 (2007). Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary. ***Commonwealth v. Colavita****,* 606 Pa. 1, 993 A.2d 874, 886 (2010).

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa.Super. 2012).

The question of whether a petition is timely raises a question of law. ***See Commonwealth v. Fahy***, 959 A.2d 312, 316 (Pa. 2008). An untimely petition renders this Court without jurisdiction to afford relief. ***Commonwealth v. Gandy***, 38 A.3d 899 (Pa.Super. 2012). Since the filing mandates of the PCRA are jurisdictional in nature, they are strictly construed. ***Commonwealth v. Stokes***, 959 A.2d 306, 309 (Pa. 2008). A petition for relief under the PCRA must be filed within one year of the date the PCRA petitioner's judgment of sentence becomes final unless the petitioner alleges and proves that an exception to the one-year time-bar is met. 42 Pa.C.S. § 9545.

Instantly, Appellant alleges in his first issue that ***Martinez*** is a new constitutional rule of law that the United States Supreme Court held applied retroactively. Under ***Martinez***, a federal *habeas* petitioner can now overcome procedural default if state law provides that a petitioner can only raise ineffective assistance of counsel claims during collateral review and, during that initial state collateral review process, state post-conviction counsel arguably performed ineffectively. Procedural default precludes a federal court from reviewing the merits of a state court decision during

federal *habeas* review where the state court has provided an adequate and independent state law ground for denying a federal constitutional claim. ***Coleman v. Thompson***, 501 U.S. 722, 729-732 (1991). Appellant continues that PCRA counsel was ineffective in failing to allege a layered claim of ineffectiveness as to appellate and trial counsel for not raising a ***Bruton*** objection. Thus, the underlying merits of Appellant's claim rely on the United States Supreme Court decision in ***Bruton***. Appellant's timeliness issue fails.

This Court in ***Commonwealth v. Saunders***, 60 A.3d 162 (Pa.Super. 2013), recently held that ***Martinez*** did not constitute a timeliness exception to the PCRA. Indeed, as the ***Saunders*** Court pointed out, ***Martinez*** announced a new federal *habeas* procedural rule, allowing federal *habeas* petitioners to overcome the federal *habeas* doctrine of procedural default. The pronouncement in ***Martinez*** did not announce a new constitutional rule and therefore could not have applied such a rule retroactively. Since Appellant's petition is untimely, we need not reach his remaining questions and affirm.

Order affirmed.

Judgment Entered.

Nicholas V. Cusatis

Deputy Prothonotary

Date: 5/8/2013