

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CLARENCE L. SAUNDERS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1597 EDA 2011

Appeal from the PCRA Order June 1, 2011
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0005333-2005

BEFORE: BOWES, LAZARUS, and WECHT, JJ.

MEMORANDUM BY BOWES, J.:

FILED DECEMBER 03, 2013

Clarence L. Saunders appeals from the June 1, 2011 order dismissing his PCRA petition as untimely. Counsel filed a motion to withdraw and **Anders** brief.¹ This appeal is governed by our Pennsylvania Supreme Court's recent decision in **Commonwealth v. Cunningham**, 2013 Pa. LEXIS 2546, which held that the United States Supreme Court's decision in **Miller v. Alabama**, 132 S.Ct. 2455 (2012) was not retroactive and did not

¹ In a petition to withdraw from representation in a PCRA action, counsel is to follow the mandates of **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988) and **Commonwealth v. Finley**, 550 A.2d 213 (Pa.Super. 1988), not the requirements of **Anders v. California**, 386 U.S. 738 (1967) and **Commonwealth v. Santiago**, 978 A.2d 349 (Pa. 2009), which govern withdrawals from representation on direct appeal. However, since the brief meets the more stringent requirements of **Anders**, we overlook the improper styling. **Commonwealth v. Fusselman**, 866 A.2d 1109, 1111 n.3 (Pa.Super. 2004).

apply to judgments of sentence that were final prior to **Miller**. **Cunningham** renders the within PCRA petition untimely. Thus, we grant counsel's motion to withdraw and affirm.

The relevant facts are as follows. On August 31, 2005, Chester City police responded to a call of shots fired in the area of the 100 block of East 21st Street. Upon arrival, they found the body of Brian Dickerson, who was shot eight times, including three times to the head. Several witnesses identified Appellant as the shooter. One witness saw the victim exit a mini-van with Appellant in pursuit. As the victim ran into the alley, the witness watched Appellant fire five to six shots into the alley. He heard one more shot and then Appellant fled. Two other witnesses testified that they heard gunshots and saw Appellant chasing the unarmed victim down the alleyway adjacent to their home and firing a silver revolver at him.

At the time of the shooting, Appellant was sixteen years old. With his mother present, he gave a statement to police admitting that he shot the victim. As police were preparing to conduct a gun residue test, Appellant held out his left hand and told police that this was the hand he used to fire the weapon. Appellant also led police to a garage near the scene where the murder weapon was recovered.

A jury convicted Appellant of first-degree murder and possession of a firearm without a license in the fatal shooting of Mr. Dickerson. The court sentenced him to a term of life imprisonment without parole on the first-

degree murder charge and a consecutive three and one-half-to-seven-year term for possession of the firearm.

Appellant filed an appeal to this Court challenging the sufficiency of the evidence underlying his conviction. This Court found overwhelming evidence of an intentional killing and denied relief on July 23, 2008. ***Commonwealth v. Saunders***, 959 A.2d 973 (Pa.Super. 2008) (unpublished memorandum). Appellant did not seek review in the Supreme Court. Thus, Appellant's judgment of sentence became final on August 22, 2008, and Appellant had one year from that date, August 22, 2009, in which to seek relief under the Post-Conviction Relief Act ("PCRA"). 42 Pa.C.S. § 9545(a).

Appellant filed the present PCRA petition, his first, on July 7, 2010, and argued that appellate counsel was ineffective in failing to pursue an appeal to the Supreme Court on his behalf. In addition, he contended that under ***Graham v. Florida***, 560 U.S. 48 (2010), his sentence of life imprisonment without parole was unconstitutional and must be vacated. He filed this petition within sixty days of the ***Graham*** decision, averred that it created a new constitutional right, and that it applied retroactively. Current counsel was appointed. The trial court indicates that on February 7, 2011, rather than file an amended PCRA petition, counsel filed an application to withdraw and no-merit letter pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988). The PCRA court, on February 11, 2011, after reviewing

Appellant's PCRA petition, counsel's **Turner/Finley** no-merit letter, July 28, 2008 correspondence to the court, and after conducting an independent review of the record, concluded that Appellant was not entitled to relief and that "no useful purpose would be served by further proceedings." Notice of Intent to Dismiss, 2/11/11, at 1. Pursuant to Pa.R.Crim.P. 907, it notified Appellant that it intended to dismiss the petition without a hearing and advised him that he could respond to the notice within twenty days. **Id.** Appellant filed what he styled an "Appeal of Notice to Dismiss Appellant's Post Conviction Relief Act Petition," in which he represented that he had advised his counsel of several issues he wished to pursue. These included reinstatement of his direct appeal rights due to abandonment of counsel during the period when he sought to seek allowance of appeal to the Supreme Court, denial of access to discovery and trial transcripts, and the unconstitutionality of sentencing a juvenile to a life sentence without parole. On June 1, 2011, the PCRA court ordered dismissal of the petition.

Appellant timely filed a *pro se* notice of appeal on June 13, 2011, and a *pro se* Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal on September 15, 2011.² On January 20, 2012, the court denied

² Appellant's *pro se* Rule 1925(b) statement is a nullity because he was represented at the time by PCRA counsel. **See Commonwealth v. Ali**, 10 A.3d 282 (Pa. 2010). Ordinarily, we would remand to permit counsel to file a Rule 1925(b) statement on Appellant's behalf. **See Commonwealth v. Scott**, 952 A.2d 1190, 1192 (Pa.Super. 2008). However, since PCRA
(Footnote Continued Next Page)

PCRA counsel's application to withdraw and confirmed in the order that counsel must continue to represent Appellant on appeal. The PCRA court issued its Pa.R.A.P. 1925(a) opinion on February 6, 2012.

Subsequently, PCRA counsel filed a motion to withdraw and brief with this Court pursuant to ***Anders v. California***, 386 U.S. 738 (1967). In response, Appellant filed a *pro se* petition for remand. Two questions are presented by counsel for our review in his ***Anders*** brief:

1. Whether the PCRA court erred in its Order dated June 1, 2011, in dismissing Appellant's PCRA, *without an evidentiary hearing*, by finding that Appellant's PCRA petition, alleging that his former appellate counsel was ineffective for failing to pursue an appeal to the Pennsylvania Supreme Court, was not timely where it was filed over one year late?
2. Whether the PCRA court erred in its Order dated June 1, 2011, in dismissing Appellant's PCRA, *without an evidentiary hearing*, by finding that Appellant's PCRA petition, alleging that his sentence was unconstitutional and illegal pursuant to ***Graham v. Florida***, was without merit?

Appellant's ***Anders*** brief at 5 (*italics in original*).

This Court's standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Halley***, 582 Pa. 164, 169 n.2, 870 A.2d 795, 799 n.2 (2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 2001 PA Super 54, 768 A.2d 1164, 1166 (Pa.Super. 2001).

(Footnote Continued) _____

counsel filed an ***Anders*** brief in lieu of a Rule 1925(b) statement as authorized by Rule 1925(c)(4), we will consider the issues raised in that brief and proceed accordingly. We have the benefit of the trial court's Rule 1925(a) opinion that addresses these issues.

Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence. ***Commonwealth v. Jordan***, 2001 PA Super 111, 772 A.2d 1011 (Pa.Super. 2001).

Commonwealth v. Ortiz, 17 A.3d 417, 420 (Pa.Super. 2011).

Before we can reach the issues raised by Appellant, we must address PCRA counsel's "no merit" brief and application to withdraw. ***Commonwealth v. Rojas***, 874 A.2d 638, 639 (Pa.Super. 2005). Our Supreme Court explained in ***Commonwealth v. Pitts***, 981 A.2d 875, 876 n.1 (Pa. 2009), that in seeking permission to withdraw from representation, appointed counsel must 1) include a no-merit letter detailing the nature and extent of his review; 2) list therein, each issue the petitioner wished to have reviewed; and 3) explain in the no-merit letter why the petitioner's issues were meritless.

PCRA counsel's application delineated the issues Appellant wished to raise on appeal and averred that, after a thorough review of Appellant's case, he found no issues that warranted relief. In his brief, counsel discussed each issue raised in Appellant's petition and briefly explained why each issue was without merit. Counsel averred that he served Appellant with copies of the motion to withdraw, the brief, and a letter advising Appellant of his right to retain substitute counsel or proceed *pro se*, or to raise any issues that he deemed worthy of merit.

We find that counsel's application to withdraw and "**Anders**" brief, though improperly styled, is compliant with the procedural mandates of **Turner** and **Finley**. However, withdrawal is permitted only if, after independent review, we conclude that the issues raised by Appellant lack merit. **See Commonwealth v. Schultz**, 707 A.2d 513, 516 (Pa.Super. 1997).

Appellant maintains that the delay in filing a PCRA petition is excused under two exceptions to the time bar. First, he alleges that the exception for after-discovered facts renders his petition timely. He avers that he only learned that direct appeal counsel, Eugene P. Tinari, failed to file a requested petition for allowance of appeal on November 17, 2010, in response to an inquiry he made to the Supreme Court on November 5, 2010. **See** Appellant's Motion for Removal of Retained Counsel of Record, 1/4/11, at ¶4. Second, he maintains that the exception for newly-recognized constitutional rights applies because he filed his petition within sixty days of the United States Supreme Court's decision in **Graham v. Florida, supra**.

Appellant's PCRA petition is facially untimely as it was not filed within one year of the date judgment became final pursuant to 42 Pa.C.S. §9545(b)(1). The timeliness requirements of the PCRA are jurisdictional in nature. **Commonwealth v. Edmiston**, 65 A.3d 339 (Pa. 2013). Generally, a petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment is final

unless the petitioner alleges and proves that one of the exceptions to the time for filing the petition, as set forth in 42 Pa.C.S. § 9545(b)(1)(i), (ii), and (iii), is met. **See Commonwealth v. Gamboa-Taylor**, 753 A.2d 780, 783 (Pa. 2000). A PCRA petition invoking one of these statutory exceptions must "be filed within 60 days of the date the claims could have been presented." **Id.** at 76, 753 A.2d at 783. The issue herein is whether any exceptions to the time-bar apply.

The PCRA court concluded that there was no evidence that Appellant retained or paid appellate counsel to file a petition for allowance of appeal. The July 31, 2008 letter of privately retained appellate counsel, which was attached to Appellant's response to the court's Rule 907 notice of intent to dismiss, advised Appellant that if he wished to retain his services for purposes of filing a petition for allowance of appeal, he would have to notify counsel and pay the sum of \$3500. **See** Appeal of Notice to Dismiss Appellant's Post-Conviction Petition, Exhibit C. While Appellant claims that funds were transferred to counsel for this purpose, and offered documentation showing payment to counsel, the court noted that the funds were transferred from August 14, 2007 through April 8, 2008, during the pendency of the appeal in the Superior Court. There was no evidence in support of Appellant's contention that he tendered payment for services after July 31, 2008. Appellant also failed to identify persons who could

testify that payment was made or supply certifications from appellate counsel. 42 Pa.C.S. § 9545(d)(1).

The PCRA court dismissed the petition without a hearing, finding no genuine issues of fact. Moreover, the PCRA court found that, even if Appellant had proffered sufficient proof to raise a genuine issue of fact, he failed to demonstrate that, with reasonable diligence, he could not have discovered counsel's failure to file a petition for allowance of appeal much earlier. The court concluded that "the absence of payment is a matter of which [Appellant] would or should have been aware contemporaneous with the events surrounding the appellate process." Trial Court Opinion, 2/6/12, at 4 n.1. Furthermore, the court found a lack of due diligence in the fact that Appellant's first letter to the Supreme Court was dated more than twenty-seven months after Mr. Tinari's correspondence and four months after the filing of the within PCRA.

We agree with the PCRA court that as to this issue, Appellant's petition failed to set forth genuine issues of fact that would necessitate an evidentiary hearing. Appellant's documentation does not support a finding that he or any member of his family retained or paid Mr. Tinari to file a petition for allowance of appeal. Thus, he did not establish a factual basis for any claim that he was abandoned by appellate counsel. **See *Commonwealth v. Watts*, 23 A.3d 980, 986 (Pa. 2011).** Had he done so, he then would have been required to establish that the fact upon which the

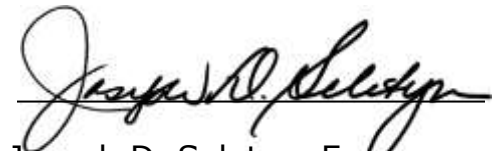
claim was predicated, *i.e.*, that counsel did not file the appeal, was "unknown" to him and that he could not have discovered that fact even with the exercise of due diligence. We held in ***Commonwealth v. Williams***, 35 A.3d 44, 52 (Pa.Super. 2011), that, "[d]ue diligence demands that the petitioner take reasonable steps to protect his own interests," ***Commonwealth v. Carr***, 768 A.2d 1164, 1168 (Pa.Super. 2001), and he must substantiate "why he could not have learned the new fact(s) earlier with the exercise of due diligence." ***Commonwealth v. Breakiron***, 781 A.2d 94, 98 (Pa. 2001). We see no abuse of discretion in the PCRA court's finding that the failure to inquire as to the status of an alleged petition for twenty-seven months indicated a lack of reasonable diligence on Appellant's part.

Appellant, in his PCRA petition, and again in a *pro se* petition for remand, contends that it is unconstitutional to sentence a juvenile to life in prison without the possibility of parole for homicide offenses after ***Graham***. According to Appellant, the PCRA's exception to the one-year time-bar for new constitutional rights that have been recognized by the United States Supreme Court and held to apply retroactively, renders the within petition timely. ***See*** 42 Pa.C.S. § 9545(b)(1)(iii); ***see also Commonwealth v. Abdul-Salaam***, 812 A.2d 497, 501 (Pa. 2002). He avers that he raised this issue in a timely manner, *i.e.*, within sixty days of the May 17, 2010 decision in ***Graham***.

Graham held unconstitutional life without parole for juveniles convicted of non-homicide offenses. In **Miller**, applying the **Graham** rationale, the Court held that mandatory life sentences without possibility of parole for juveniles convicted of homicide offenses were unconstitutional. However, since the Supreme Court of Pennsylvania recently held in **Cunningham, supra**, that the United States Supreme Court's decision in **Miller** does not apply retroactively to "judgments of sentence for prisoners, such as Appellant, which already were final as of the time of" that decision, **id.** at *8, the exception to the PCRA time bar for newly-recognized constitutional rights does not apply. Thus, the within petition is untimely. For these reasons, Appellant's issues are wholly lacking in merit.

Application to withdraw as counsel filed by Stephen D. Molineux, Esquire is granted. Appellant's *pro se* request for list of record documents and two petitions for remand are denied. Appellant's motion to have counsel of record removed and to officially appoint PCRA counsel is denied. Order affirmed.

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: 12/3/2013