

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

DAMIEN PHILLIPS

Appellant

No. 1597 EDA 2013

Appeal from the PCRA Order May 8, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1100411-1994

BEFORE: GANTMAN, J., OLSON, J., and WECHT, J.

MEMORANDUM BY GANTMAN, J.:

FILED DECEMBER 13, 2013

Appellant, Damien Phillips, appeals from the order entered in the Philadelphia County Court of Common Pleas, dismissing his fifth petition pursuant to the Post Conviction Relief Act ("PCRA").¹ We vacate and remand with instructions.

The relevant facts and procedural history of this appeal are as follows. A jury convicted Appellant of three (3) counts each of first degree murder and robbery and one (1) count each of criminal conspiracy and possessing instruments of crime. On July 27, 1995, the court sentenced Appellant to three (3) consecutive terms of life imprisonment for the murder convictions, plus a consecutive term of thirty-seven and one-half (37½) to seventy-five

¹ 42 Pa.C.S.A. §§ 9541-9546.

(75) years' imprisonment for the remaining offenses. This Court affirmed the judgment of sentence on May 30, 1996, and our Supreme Court denied Appellant's petition for allowance of appeal on November 1, 1996. Appellant did not seek further review with the United States Supreme Court.

Appellant timely filed a *pro se* PCRA petition on October 31, 1997. The court appointed counsel, who filed a "no-merit" letter. On December 7, 1998, the court denied PCRA relief and permitted counsel to withdraw. This Court affirmed the order denying PCRA relief on March 9, 2000, and our Supreme Court denied Appellant's petition for allowance of appeal on September 19, 2000.

Appellant filed a second *pro se* PCRA petition on March 18, 2004. On June 8, 2004, the court denied PCRA relief. This Court affirmed the order denying PCRA relief on June 14, 2005, and our Supreme Court denied Appellant's petition for allowance of appeal on December 21, 2005.

Appellant filed a third *pro se* PCRA petition on February 3, 2006. On July 25, 2007, the court denied PCRA relief. This Court affirmed the order denying PCRA relief on March 11, 2009, and Appellant did not seek further review with our Supreme Court.

Appellant filed a fourth *pro se* PCRA petition on April 14, 2009. In it, Appellant claimed to have discovered previously unavailable exculpatory evidence. Specifically, Appellant received an affidavit from his co-defendant, in which he recanted certain trial testimony. On November 9, 2010, the

court provided notice of its intent to dismiss the petition without a hearing, pursuant to Pa.R.Crim.P. 907. Appellant filed a *pro se* response to the Rule 907 notice on November 29, 2010. Nevertheless, the court denied PCRA relief on December 7, 2010. Appellant did not file a notice of appeal.

Appellant filed the current *pro se* PCRA petition on March 10, 2011.² In it, Appellant argued that the PCRA court did not provide notice of the order dismissing his fourth PCRA petition, which denied him the opportunity to pursue an appeal. Appellant filed a *pro se* supplemental petition and memorandum of law on April 27, 2011. On July 5, 2012, Appellant filed a *pro se* amended petition, raising additional claims related to the United States Supreme Court's decision in ***Miller v. Alabama***, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). On July 8, 2012, the court provided Rule 907 notice. The court denied PCRA relief on May 8, 2013. On May 28, 2013, Appellant timely filed a *pro se* notice of appeal and concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

As a preliminary matter, we must determine whether Appellant timely filed his current PCRA petition. ***Commonwealth v. Harris***, 972 A.2d 1196 (Pa.Super. 2009), *appeal denied*, 603 Pa. 684, 982 A.2d 1227 (2009). Pennsylvania law makes clear no court has jurisdiction to hear an untimely

² Pursuant to the prisoner mailbox rule, a document is considered filed on the date the appellant delivered it to prison authorities for mailing. ***Commonwealth v. Castro***, 766 A.2d 1283 (Pa.Super. 2001). Here, the postmark attached to the current PCRA petition is dated March 10, 2011.

PCRA petition. **Commonwealth v. Robinson**, 575 Pa. 500, 837 A.2d 1157 (2003). The most recent amendments to the PCRA, effective January 16, 1996, provide that a PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1); **Commonwealth v. Bretz**, 830 A.2d 1273 (Pa.Super. 2003). A judgment is deemed 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).

The three statutory exceptions to the timeliness provisions in the PCRA allow for very limited circumstances under which the late filing of a petition will be excused. 42 Pa.C.S.A. § 9545(b)(1). To invoke an exception, a petition must allege and the petitioner must prove:

- (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)(i)-(iii). “As such, when a PCRA petition is not

filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." **Commonwealth v. Gamboa-Taylor**, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000).

Instantly, the court sentenced Appellant on July 27, 1995. This Court affirmed the judgment of sentence on May 30, 1996. Our Supreme Court denied Appellant's petition for allowance of appeal on November 1, 1996, and Appellant did not seek further review. Thus, Appellant's judgment of sentence became final ninety days later, on January 30, 1997, upon expiration of the time to file a petition for writ of *certiorari* with the United States Supreme Court. **See** 42 Pa.C.S.A. § 9545(b)(3); U.S.Sup.Ct.R. 13. Appellant filed his current PCRA petition on March 10, 2011, over fourteen years after his judgment of sentence became final. Accordingly, Appellant's prayer for relief was patently untimely.

Appellant attempts to invoke an exception to the time restrictions of the PCRA, arguing the failure to raise his claim previously was the result of interference by government officials. **See** 42 Pa.C.S.A. § 9545(b)(1)(i). Appellant also argues the facts upon which his claim is based were unknown to him and could not have been ascertained by the exercise of due diligence. **See** 42 Pa.C.S.A. § 9545(b)(1)(ii). Appellant contends the court failed to

notify him of the December 7, 2010 order dismissing his fourth PCRA petition. Appellant insists the court's failure to provide notice resulted in the improper obstruction of his right to pursue an appeal. Appellant maintains he first learned of the order denying PCRA relief on February 17, 2011, after contacting the clerk of courts, and he filed the current petition within sixty days of hearing from the clerk of courts. Appellant concludes this Court must remand the matter for the reinstatement of his right to appeal from the December 7, 2010 order *nunc pro tunc*. For the following reasons, we vacate and remand as Appellant requests.

"Generally, an appellate court cannot extend the time for filing an appeal." ***Commonwealth v. Patterson***, 940 A.2d 493, 498 (Pa.Super. 2007), *appeal denied*, 599 Pa. 691, 960 A.2d 838 (2008). "Nonetheless, this general rule does not affect the power of the courts to grant relief in the case of fraud or breakdown in the processes of the court." ***Id.*** A "breakdown" can occur when the trial court departs from the obligations specified in the Pennsylvania Rules of Criminal Procedure. ***Id.*** Additionally, our rules of criminal procedure govern the denial of PCRA relief as follows:

Rule 907. Disposition Without Hearing

* * *

(4) When the petition is dismissed without a hearing, the judge promptly shall issue an order to that effect and shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the petition and of the time limits within which

the appeal must be filed. The order shall be filed and served as provided in Rule 114.

Pa.R.Crim.P. 907(4). Pursuant to Rule 114, service shall be in writing by “sending a copy to an unrepresented party by certified, registered, or first class mail addressed to the party’s place of residence, business, or confinement.” Pa.R.Crim.P. 114(B)(3)(a)(v). The docket entries shall contain the date of receipt in the clerk’s office of the order, the date appearing on the order, and the date of service. Pa.R.Crim.P. 114(C).

Instantly, the certified record confirms that the clerk of courts docketed the order dismissing Appellant’s fourth PCRA petition on December 7, 2010. Nevertheless, the docket entries do not indicate the date of service of the order. **See** Pa.R.Crim.P. 114(C). The certified record does not reveal whether the clerk of courts complied with Rule 114(B), as there is no evidence of any method of service. Further, the actual order is missing from the certified record. Appellant’s current PCRA petition indicates he did not learn about the December 7, 2010 order until February 2011, upon receiving a letter from the clerk of courts.³ Thereafter, Appellant filed the current petition within sixty days. **See Gamboa-Taylor, supra. See also Commonwealth v. Blackwell**, 936 A.2d 497 (Pa.Super. 2007) (holding PCRA court’s erroneous notice to petitioner amounted to governmental interference that excused untimely filing of subsequent PCRA petition). On

³ Appellant attached a copy of the letter to the current PCRA petition.

this record, a breakdown in the operations of the court prevented Appellant from pursuing an appeal from the order dismissing his fourth PCRA petition.

See Patterson, supra.

Under these circumstances, the best resolution of the matter is to vacate the order dismissing Appellant's current PCRA petition and remand for further proceedings.⁴ Upon remand, the PCRA court shall reinstate Appellant's right to file a notice of appeal *nunc pro tunc* from the December 7, 2010 order dismissing his fourth PCRA petition. Accordingly, we vacate and remand with instructions.⁵

Order vacated; case remanded with instructions. Jurisdiction is relinquished.

⁴ The Commonwealth and the PCRA court do not object to a remand. (***See*** Commonwealth's Brief at 6; PCRA Court Opinion, filed June 13, 2013, at 1.)

⁵ Appellant also requests re-sentencing in light of the holding in ***Miller, supra.*** Here, Appellant was born on April 6, 1974, and he committed the underlying offenses on February 28, 1994, when he was nineteen (19) years' old. Therefore, the holding in ***Miller*** does not create a newly recognized constitutional right for Appellant that rendered his July 5, 2012 *pro se* amended petition timely, pursuant to 42 Pa.C.S.A. § 9545(b)(1)(iii). ***See Commonwealth v. Cintora***, 69 A.3d 759, 764 (Pa.Super. 2013) (explaining ***Miller*** did not create newly-recognized constitutional right that serves as exception to PCRA time restrictions, where petitioners were twenty-one and nineteen years' old when they committed underlying crimes). Moreover, our Supreme Court has decided that ***Miller*** does not apply retroactively to judgments of sentence that became final before the filing date of ***Miller*** (June 25, 2012). ***See Commonwealth v. Cunningham***, ___ Pa. ___, ___ A.3d ___ (filed October 30, 2013). Accordingly, Appellant is not entitled to relief on these bases.

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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