

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF
		PENNSYLVANIA
Appellee		
v.		
BRIAN O'TOOLE,		
Appellant		No. 1632 WDA 2012

Appeal from the PCRA Order September 20, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0010578-1997

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

MEMORANDUM BY BOWES, J.: FILED: MAY 10, 2013

Brian O'Toole appeals the order entered on September 20, 2012, dismissing his serial PCRA petition. We affirm.

On March 24, 1999, Appellant was found guilty of first-degree murder [in relation to the stabbing death of his estranged wife.] . . . Appellant[, who was thirty-four when he committed the murder,] was sentenced to life imprisonment. This Court denied Appellant's direct appeal on July 20, 2000. Appellant filed a petition for leave to appeal to the Pennsylvania Supreme Court, which was denied on March 14, 2001.

On January 7, 2002, Appellant filed his first petition pursuant to the PCRA. Counsel was subsequently appointed. The petition was dismissed, without a hearing, on December 23, 2003. On October 1, 2004, this Court affirmed the dismissal of the petition. Appellant did not seek leave to appeal to the Pennsylvania Supreme Court.

On August 17, 2009, Appellant, acting *pro se*, filed [his] . . . second PCRA petition. The PCRA court dismissed the petition as untimely on September 29, 2009. Appellant filed a timely notice of appeal. [We affirmed].

Commonwealth v. O'Toole, 998 A.2d 1029 (Pa.Super. 2010) (unpublished memorandum at 1-2).

Thereafter, acting *pro se*, Appellant filed the instant PCRA petition on August 9, 2012, his third. Appellant sought to invoke the United States Supreme Court's holding in **Miller v. Alabama**, 132 S.Ct. 2455 (2012), as a basis to circumvent the PCRA time bar. Following proper notice pursuant to Pa.R.Crim.P. 907, the PCRA court dismissed the petition summarily as untimely filed. This appeal followed. Appellant complied with the PCRA court's directive to file a concise statement of errors complained of on appeal, and the PCRA authored its Rule 1925(a) opinion.

Appellant presents the following questions for our review:

Did the [PCRA] court err in dismissing [Appellant's] [a]pplication for Post-Conviction Relief as patently frivolous where his "equal protection" argument was fully supported by the record?

And did the [PCRA] court commit an error of law where it failed to conclude that [Appellant's] mandatory sentence of [l]ife [w]ithout [p]arole is unconstitutional under the 8th Amendment to the United States Constitution, as expressed in **Miller v. Alabama**, [132 S.Ct. 2455 (2012)].

Appellant's brief at 7.

Appellant filed the instant petition on August 9, 2012; thus, it is governed by the 1995 amendments to the PCRA. Under those amendments to the PCRA, any petition for post-conviction relief, including a second or subsequent one, must be filed within one year of the date the judgment of sentence becomes final, unless one of the exceptions set forth in 42 Pa.C.S.

§ 9545(b)(1)(i)-(iii) apply. The time limitations imposed by the PCRA implicate our jurisdiction; therefore, they may not be altered or disregarded in order to address the merits of a petition. **Commonwealth v. Jones**, 54 A.3d 14, 17 (Pa. 2012). We previously determined that Appellant's judgment became final on June 12, 2001. **See O'Toole, supra** (unpublished memorandum at 3). Hence, Appellant had until June 12, 2002, to comply with the PCRA's time requirements. As the instant petition was not filed until August 9, 2012, it is patently untimely.

As noted, section 9545 also provides the following three exceptions that allow for review of an untimely PCRA petition: (1) petitioner's inability to raise a claim as a result of governmental interference; (2) the discovery of previously unknown facts that could not have been ascertained by the exercise of due diligence; and (3) a newly-recognized constitutional right. 42 Pa.C.S. § 9545 (b)(1)(i)-(iii). To invoke an exception, the petitioner must plead it and satisfy the burden of proof. **Commonwealth v. Beasley**, 741 A.2d 1258, 1261-62 (Pa. 1999). In addition, any exception must be raised within sixty days of the date the claim could have been presented. 42 Pa.C.S. § 9545(b)(2).

Herein, Appellant relies upon **Miller, supra** to invoke the newly-recognized-constitutional-right exception to the time bar pursuant to 42

Pa.C.S. § 9545 (b)(1)(iii).¹ In **Miller**, the Supreme Court confronted the constitutionality of a mandatory term of life imprisonment without the possibility of parole for a murder committed when the defendant was under the age of eighteen. The majority of the highly-divided court reasoned, in pertinent part, “that children are constitutionally different from adults for purposes of sentencing. [And] [b]ecause juveniles have diminished culpability and greater prospects for reform, . . . ‘they are less deserving of the most severe punishments.’” **Id.** at 2464 (quoting **Graham v. Florida**, 130 S.Ct. 2011, 2026 (2010)). Ultimately, the Court concluded “that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” **Id.** at 2460; **see also Commonwealth v. Batts**, __ A.3d__, 2013 WL 1200252 (Pa. March 26, 2013) (determining appropriate remedy to correct unconstitutional imposition of mandatory sentence of life without parole on defendant convicted of first-degree murder, who was under eighteen at time of offense).

Without deciding whether the **Miller** Court’s holding applies retroactively, we can easily conclude that **Miller** does not apply herein because Appellant was not a juvenile offender. Undeniably, he was thirty-

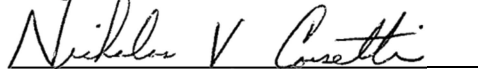
¹ As Appellant filed the instant PCRA petition within sixty days of the June 25, 2012 decision in **Miller v. Alabama**, 132 S.Ct. 2455 (2012), he satisfied the threshold requirement of 42 Pa.C.S. § 9545(b)(2).

four when he stabbed his wife to death with a pocket knife. In fact, Appellant's substantive assertion, which we do not have jurisdiction to address in this untimely PCRA petition, concedes that **Miller** is facially inapt due to Appellant's age when he committed the murder. Indeed, the crux of Appellant's argument is that **Miller's** inapplicability to adult offenders violates, *ipso facto*, his right to equal protection under the law. However, this contention that a newly-recognized constitutional right **should** be extended to others does not render his petition timely pursuant to § 9545(b)(1)(iii). Stated simply, since **Miller** is patently inapplicable to this case, Appellant cannot rely upon the new constitutional right recognized therein to circumvent the PCRA time bar.

Having found that Appellant's PCRA petition was untimely and that no exceptions to the time bar apply, we affirm the order dismissing his petition.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casetta", is written over a horizontal line.

Deputy Prothonotary

Date: May 10, 2013