

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
DANIEL SCOTT PETRICHKO,	:	
	:	
Appellant	:	No. 1901 MDA 2012

Appeal from the PCRA Order September 27, 2012  
In the Court of Common Pleas of Schuylkill County  
Criminal Division No(s).: CP-54-CR-0000803-1996

BEFORE: BOWES, OTT, and FITZGERALD,\* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED SEPTEMBER 04, 2013**

*Pro se* Appellant, Daniel Scott Petrichko, appeals from the order entered in the Schuylkill County Court of Common Pleas dismissing his second Post Conviction Relief Act<sup>1</sup> (“PCRA”) petition for untimeliness. Appellant, who was twenty years old when he committed the underlying murder in the first degree,<sup>2</sup> avers that his mandatory sentence of life imprisonment violates the recent United States Supreme Court decision of **Miller v. Alabama**, 132 S. Ct. 2455 (2012). He also raises, for the first

---

\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 42 Pa.C.S. §§ 9541-9546.

<sup>2</sup> 18 Pa.C.S. § 2502.

time, a claim of PCRA counsel's ineffectiveness. We affirm.

In September of 1996, when Appellant was twenty-years old, he was charged, along with two co-defendants, with homicide and related offenses for the killing of Appellant's uncle. On July 16, 1997, Appellant pleaded guilty to homicide generally and related offenses.<sup>3</sup> On August 21st, the trial court found him guilty of first-degree murder and imposed sentences of life imprisonment and a consecutive ten to twenty years' imprisonment.

Appellant took a direct appeal, and this Court affirmed the judgment of sentence on April 20, 1998. ***Commonwealth v. Petrichko***, 3972 PHL 1997 (unpublished memorandum) (Pa. Super. Apr. 20, 1998). In March of 1999, Appellant filed a timely PCRA petition, which was denied. This Court affirmed on November 15, 2000. ***Commonwealth v. Petrichko***, 1552 MDA 1999 (unpublished memorandum) (Pa. Super. Nov. 15, 2000).

Eleven years later, on August 17, 2012, Appellant filed the instant, *pro se* PCRA petition citing a new constitutional right under ***Miller*** and invoking the PCRA timeliness exception at 42 Pa.C.S. § 9545(b)(1)(iii). Appellant asserted an Equal Protection Clause claim, arguing that his age of twenty "at the time of the offenses is of no moment" and that he and juvenile offenders should be treated similarly. Appellant's Pet. for Post Conviction Collateral

---

<sup>3</sup> Appellant also pleaded guilty to two counts of conspiracy and one count each of aggravated assault/serious bodily injury and aggravated assault/bodily injury with a deadly weapon. 18 Pa.C.S. §§ 903, 2702(a).

J. S31035/13

Relief, 8/17/12, at 3-B. The PCRA court appointed Michael J. Stine, Esq., an assistant public defender, to represent Appellant.

On September 6, 2012, the PCRA court issued notice under Pa.R.Crim.P. 907(1) of its intent to dismiss Appellant's petition, along with an opinion, reasoning that **Miller** did not extend to offenders over the age of eighteen. Appellant filed a *pro se* response, and the court dismissed the PCRA petition on September 27th on the ground of untimeliness. On October 9th, another assistant public defender, Lora J. McDonald, Esq., entered her appearance on Appellant's behalf. The following day, October 10th, Appellant filed a *pro se* notice of appeal, which stated he "was proceeding *pro se* in this matter," and a letter to the clerk of courts, which stated Attorney Stine did not respond to his letters. Appellant's Notice of Appeal, 10/10/12; Letter, 10/10/12. Attorney McDonald did not seek, and was not granted, permission to withdraw until October 24th. On October 26th, Appellant filed a second *pro se* notice of appeal. No counseled notice of appeal was filed.<sup>4</sup>

Preliminarily, we consider the propriety of Appellant's *pro se* notice of appeal, filed while he was represented by Attorney McDonald. A "criminal defendant has no right to hybrid representation in either [the] trial or appellate courts." **Commonwealth v. Cooper**, 27 A.3d 994, 1000 n.9 (Pa.

---

<sup>4</sup> The PCRA court did not require a Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

2011) (citation omitted). “When counsel is appointed . . . the appointment of counsel shall be effective throughout the post-conviction collateral proceedings, including any appeal from disposition of the petition for post-conviction collateral relief.” Pa.R.Crim.P. 120(F)(2). If a counseled defendant attempts to file a *pro se* document with the court, “the clerk of courts shall accept it for filing, time stamp it with the date of receipt and make a docket entry reflecting the date of receipt, . . . place the document in the criminal case file,” and forward “[a] copy of the time stamped document . . . to the defendant’s attorney and . . . the Commonwealth within [ten] days of receipt.” Pa.R.Crim.P. 576(A)(4).

In the instant matter, it was improper for Appellant to file a *pro se* notice of appeal, as well as a *pro se* response to the PCRA court’s Rule 907 notice, while he was represented by Attorneys Stine and McDonald. **See Cooper**, 27 A.3d at 1000 n.9. Nevertheless, the docket entry for the first, October 10, 2012, notice of appeal indicates that the “*pro se* correspondence” was hand-delivered to the Public Defender’s Office and the Commonwealth, which was consistent procedure under Rule 576(A)(4). **See** Pa.R.Crim.P. 576(A)(4). Attorney McDonald then sought, and was granted, permission to withdraw from representation. Appellant then filed a second *pro se* notice of appeal, which was timely under Pa.R.A.P. 903(a). **See** Pa.R.A.P. 903(a) (“[T]he notice of appeal . . . shall be filed within 30 days after the entry of the order from which the appeal is taken.”). In light of the

foregoing, we deem Appellant's second notice of appeal as properly filed and timely.

In his *pro se* brief, Appellant's first three questions presented all allege the PCRA court erred in failing to hold his sentence was unconstitutional under **Miller**. Appellant's Brief at v. Appellant invokes the newly-recognized constitutional-right PCRA timeliness exception. In support, he reasons that although he "had just turned 20 years old at the time of the crimes, [he fit] within the criteria and parameters relied upon by the" United States Supreme Court in **Miller, Graham v. Florida**, 560 U.S. 48 (2010), and **Roper v. Simmons**, 543 U.S. 551 (2005). Appellant cites the discussions in these cases on studies concerning the "lack of maturity and . . . undeveloped sense of responsibility" prevalent in persons less than eighteen years of age. Appellant's Brief at 1. He then avers "that the mitigating factor of age at the time of the crime should be given considerable weight be in 17 years old or 20 years old." **Id.** at 5. Appellant raises a fourth claim, that PCRA counsel was ineffective for not properly representing him. We find no relief is due.

This Court has stated:

Our standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of the record and is free of legal error. . . .

Before addressing the issues presented on appeal, we must determine whether Appellant's instant PCRA petition was timely filed. Our Supreme Court has stressed that

“[t]he PCRA’s timeliness requirements are jurisdictional in nature and must be strictly construed; courts may not address the merits of the issues raised in a petition if it is not timely filed.”<sup>[ ]</sup> It is well settled that “[a]ny and all PCRA petitions must be filed within one year of the date on which the petitioner’s judgment became final, unless one of the three statutory exceptions applies.” “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).

***Commonwealth v. Garcia***, 23 A.3d 1059, 1061-62 (Pa. Super. 2011) (some citations omitted), *appeal denied*, 38 A.3d 823 (Pa. 2012).

Subsection 9545(b)(1)(iii) of the PCRA provides, however, that a petition may be filed beyond the general one-year period if “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. § 9545(b)(1)(ii). “The petitioner bears the burden to allege and prove [that] one of the timeliness exceptions applies.’ A PCRA petition invoking one of these statutory exceptions must be filed within 60 days of the date the claims could have been presented. 42 Pa.C.S.A. § 9545(b)(2).” ***Garcia***, 23 A.3d at 1062-63 (some citations omitted).

As stated above, this Court affirmed Appellant’s judgment of sentence on November 15, 2000. Appellant had thirty days, or until December 15, 2000, to seek allowance of appeal with the Pennsylvania Supreme Court.

**See** Pa.R.A.P. 1113(a). He did not, and thus his judgment of sentence became final on that day. **See** 42 Pa.C.S.A. § 9545(b)(3). Appellant then generally had one year, until December 15, 2000, to file a PCRA petition. **See** 42 Pa.C.S.A. § 9545(b)(1). Because the instant petition was not filed until August 17, 2012, we consider whether, as Appellant avers, he is entitled to relief under the newly-recognized constitutional right timeliness exception at subsection 9545(b)(1)(iii).

In **Commonwealth v. Cintora**, \_\_\_ A.3d \_\_\_, 2013 WL 3270857 (Pa. Super. June 28, 2013), this Court stated:

In **Miller**, the Supreme Court of the United States recognized a constitutional right for juveniles under the age of eighteen, holding that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition against ‘cruel and unusual punishments.’” **Miller, supra** at 2460.

**Cintora**, 2013 WL 3270857 at \*4. This Court held that **Miller’s** holding did not apply to the PCRA petitioners, who were nineteen and twenty-one years old at the time they committed their crimes: “[T]he holding in **Miller** does not create a newly-recognized constitutional right that can serve as the basis for relief[.]”<sup>5</sup> **Id.**

Because Appellant was twenty years old at the time he committed his

---

<sup>5</sup> The Pennsylvania Supreme Court has granted allowance of appeal on the issue of whether the holding of **Miller** is retroactive under the PCRA. **Commonwealth v. Cunningham**, 51 A.3d 178 (Pa. 2012). Nevertheless, the Court did not accept review on the question of whether **Miller’s** holding applies to nineteen and twenty-one year olds.

offense, **Miller's** holding does not apply to him. We thus agree with the PCRA court that he cannot invoke the newly established constitutional right timeliness exception. **See id.**

Appellant's last claim on appeal is that PCRA "counsel was ineffective for not properly representing [him and going] A.W.O.L. until after the denial of P.C.R.A. petition." Appellant's Brief at v. He asserts that he "requested an evidentiary hearing and with the assistance of counsel would [have] called witnesses and presented expert testimony" establishing that he "fits within the Social Science Research that the United States Supreme Court re[ ]lied upon in making their decisions." **Id.** at 13. We find this issue waived.

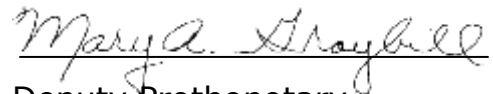
As stated above, the PCRA court issued Rule 907 notice of intent to dismiss Appellant's petition while he was represented by Attorney Stine. Subsequent counsel, Attorney McDonald, did not seek withdrawal from representation until after the PCRA court had dismissed Appellant's petition. Nevertheless, Appellant did not raise any claim of PCRA counsel's ineffectiveness before the PCRA court. Accordingly, we find this issue waived. **See Commonwealth v. Knighten**, 742 A.2d 679, 683 (Pa. Super. 1999) ("If an issue is not raised in the first instance in a PCRA Petition, we cannot consider it on appeal."). For the foregoing reasons, we affirm the order dismissing Appellant's PCRA petition.

Order affirmed.



J. S31035/13

Judgment Entered.

  
Deputy Prothonotary

Date: 9/4/2013