

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

LARRY JAMES DURR,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1986 MDA 2012

Appeal from the PCRA Order September 27, 2012
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-968-1981

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

MEMORANDUM BY BOWES, J.:

FILED JUNE 05, 2013

Larry James Durr appeals *pro se* from the September 27, 2012 order dismissing his second petition for post-conviction relief as untimely. We note that, for unknown reasons, Appellant spells his last name as "Durr," even though its spelling throughout these proceedings previously was "Derr," including in other *pro se* filings. We affirm the order in question.

On October 20, 1981, a jury convicted Appellant of second-degree murder, attempted rape, aggravated assault, and indecent assault in connection with the May 2, 1981 death of Shirley Marie Albright. Witnesses viewed Appellant talking to the victim at a bar on the night of May 1, 1981, and also observed him follow her when she left that establishment between

* Former Justice specially assigned to the Superior Court.

1:30 a.m. and 2:00 a.m. on May 2, 1981. The victim's body was discovered at 8:00 a.m. that day; she died of strangulation, head injuries, and extensive bleeding from rectal, vaginal and nasal injuries. Appellant was arrested on May 2, 1981, and made inculpatory statements to police. Appellant was sentenced on October 7, 1982, to life imprisonment. We affirmed, ***Commonwealth v. Derr***, 479 A.2d 1097 (Pa.Super. 1984), and the record indicates that our Supreme Court denied allowance of appeal on May 20, 1985.

On December 8, 1986, Appellant filed a petition under the former Post-Conviction Hearing Act, which was re-enacted as the Post-Conviction Relief Act in 1988. Counsel was appointed, and counsel filed an amended petition raising numerous allegations of trial counsel's ineffectiveness. A hearing was held on the petition on March 27, 1987, but the PCHA court never rendered a ruling as to whether Appellant was entitled to relief.

This fact eventually was brought to the attention of another judge, and on August 31, 1994, that jurist ordered that briefs be filed on any outstanding issues. Neither the Commonwealth nor PCHA counsel responded to that order. Instead, the next document of record is a *pro se habeas corpus* petition, which was filed on August 7, 1997. At that time, the issues raised in the 1987 PCHA petition were briefed. On March 18, 1998, relief was denied, and on appeal, we affirmed. ***Commonwealth v. Derr***, 734 A.2d 433 (Pa.Super. 1998) (unpublished memorandum).

On August 13, 2012, Appellant filed his second post-conviction petition. In that document, he admitted that he was twenty-one years old when he committed the offenses in question. To establish the timeliness of that document, Appellant invoked **Miller v. Alabama**, 132 S.Ct. 2455 (2012), which is discussed in more detail *infra*. Following issuance of notice under Pa.R.Crim.P. 907, the August 13, 2012 petition was dismissed without a hearing. In this ensuing appeal, Appellant raises these questions:

Did the lower court err in dismissing Petitioner's Application for Post-Conviction Relief as patently frivolous where his "equal protection" argument was fully supported by the record?

And did the lower court commit an error of law where it failed to conclude that Petitioner's mandatory sentence of Life Without Parole is unconstitutional under the 8th Amendment to the United States Constitution, as expressed in **Miller v. Alabama**, __ Sct __ 2012 WL 236859 (U.S. Ala. 2012).

Appellant's brief at 7.

The following principles apply herein. "This Court's standard of review regarding an order dismissing a PCRA petition is whether the determination of the PCRA court is supported by evidence of record and is free of legal error. In evaluating a PCRA court's decision, our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level." **Commonwealth v. Brandon**, 51 A.3d 231, 233 (Pa.Super. 2012) (citation and quotation marks omitted).

In this case, Appellant's present PCRA petition was filed after the effective date of the 1995 amendments to the PCRA and must be evaluated under those alterations. **Commonwealth v. Jones**, 54 A.3d 14, 17 (Pa. 2012). As provided in 42 Pa.C.S. § 9545, all PCRA petitions must be filed within one year after the defendant's judgment of sentence becomes final. 42 Pa.C.S. § 9545(b)(1). In this case, on May 20, 1985, our Supreme Court denied allowance of appeal of our decision affirming Appellant's judgment of sentence. Therefore, Appellant's judgment of sentence became final ninety days thereafter, or on August 18, 1985. 42 Pa.C.S. § 9545(b)(3) ("For purposes of this subchapter, 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"). Appellant thus had until August 18, 1986,¹ to file a timely PCRA petition, and his August 13, 2012 PCRA petition is patently untimely.

¹ We note that the 1995 amendments also provided that a PCRA petitioner whose judgment of sentence became final on or before January 16, 1996, had a one-year grace period from the effective date of the 1995 amendments to file a first-time PCRA petition. **Commonwealth v. Sneed**, 45 A.3d 1096, 1102 n.5 (Pa. 2012) (citing **Commonwealth v. Fenati**, 748 A.2d 205 (Pa. 2000) ("exception exists to PCRA's one-year time requirement for those petitioners whose judgments had become final before 1995 amendments to the PCRA and who were filing their first PCRA petition, so long as petition was filed by January 16, 1997, *i.e.*, within one year of effective date of amendments"). Appellant is not entitled to relief under this *proviso* because the present petition was not filed by January 16, 1997. **Commonwealth v. Crider**, 735 A.2d 730 (Pa.Super. 1999).

“There are three exceptions to this [one-year] time requirement: (1) interference by government officials in the presentation of the claim; (2) newly discovered facts; and (3) an after-recognized constitutional right.” **Brandon, supra** at 233-34; 42 Pa.C.S. § 9545(b)(1)(i-iii). “The PCRA’s timeliness requirements are jurisdictional; therefore, a court may not address the merits of the issues raised if the petition was not timely filed.” **Jones, supra** at 17; **accord Brandon, supra** at 234 (citing **Commonwealth v. Robinson**, 837 A.2d 1157, 1161 (Pa. 2003)) (“The timeliness requirements of the PCRA are jurisdictional in nature and, accordingly, a PCRA court cannot hear untimely petitions.”). “The PCRA squarely places upon the petitioner the burden of proving an untimely petition fits within one of the three exceptions.” **Jones, supra** at 17.

Herein, Appellant relies upon **Miller, supra**, and invokes the newly-recognized-constitutional-right exception to the time bar.² In **Miller**, the United States Supreme Court held that it was unconstitutional to impose a mandatory term of life imprisonment without the possibility of parole for a murder committed by a defendant who was under the age of eighteen when the crime occurred. The Court reasoned, in pertinent part, “that children are

² 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) (PCRA petition must be filed within sixty days of when issue first could have been presented).

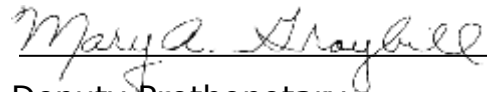
constitutionally different from adults for purposes of sentencing. [And b]ecause juveniles have diminished culpability and greater prospects for reform, . . . they are less deserving of the most severe punishments.” *Id.* at 2464 (citation and quotation marks omitted). The Court concluded “that mandatory 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, who was under eighteen at time of offense, convicted of first-degree murder).

We decline to decide whether the *Miller* Court’s holding falls within the after-recognized constitutional right exception to the one-year filing deadline of § 9545 because *Miller* does not apply, on its face, to Appellant, who was an adult when he murdered Ms. Albright. Since Appellant was not a juvenile offender, he does not falls within the parameters of *Miller*, and *Miller*, in the first instance, does not create a constitutional right applicable to Appellant. In fact, Appellant’s actual assertion concedes that *Miller* is facially inapt since the crux of his argument is that *Miller’s* inapplicability to younger, adult offenders violates his equal protection rights. However, this contention, that a newly-recognized constitutional right should be extended, does not render his petition timely pursuant to § 9545(b)(1)(iii). Since

Miller is inapplicable and did not create a new constitutional right for Appellant, he cannot rely upon it to overcome the PCRA time bar.

Order affirmed.

Judgment Entered.


Deputy Prothonotary

Date: 6/5/2013