

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MACK DJUAN HILL,	:	
	:	
Appellant	:	No. 111 WDA 2014

Appeal from the PCRA Order entered on December 24, 2013
in the Court of Common Pleas of Erie County,
Criminal Division, No. CP-25-CR-0000151-2002

BEFORE: PANELLA, JENKINS and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED JULY 25, 2014

Mack Djuan Hill ("Hill") appeals from the Order dismissing his second Petition for relief pursuant to the Post Conviction Relief Act ("PCRA"). **See** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

In 2002, Hill was convicted of murder of the second degree, attempted homicide, criminal conspiracy to commit robbery, robbery, firearms not to be carried without a license, theft by receiving stolen property, recklessly endangering another person and possessing instruments of a crime.¹ Hill was 17 years and 6 months old at the time he committed these crimes. Hill was sentenced to life plus 11½ to 23 years in prison, followed by 25 years of probation.

¹ 18 Pa.C.S.A. §§ 2502(b), 901, 903, 3701, 6106, 3925, 2705, 907.

This Court affirmed Hill's judgment of sentence on June 24, 2003, and he did not seek further appeal. **See Commonwealth v. Hill**, 830 A.2d 1046 (Pa. Super. 2003) (unpublished memorandum).

In 2010, Hill filed a PCRA Petition claiming that the United States Supreme Court holding in **Graham v. Florida**, 130 S. Ct. 2011 (2010), which prohibited the imposition of life sentences without parole for juveniles who had committed non-homicide offenses, created a newly recognized constitutional right, thereby establishing an exception to the PCRA timeliness requirement. The PCRA court dismissed the Petition as untimely, finding **Graham** to be inapplicable to Hill. This Court affirmed the PCRA court's dismissal of Hill's first PCRA Petition. **See Commonwealth v. Hill**, 31 A.3d 752 (Pa. Super. 2011) (unpublished memorandum).

In 2012, Hill filed the instant PCRA Petition, *pro se*. Hill was appointed PCRA counsel, who filed a Supplemental Petition in July 2013, arguing that **Miller v. Alabama**, 132 S. Ct. 2455 (2012),² should be applied retroactively to Hill's case.

The PCRA court issued a Notice of Intent to Dismiss Hill's PCRA Petition without a hearing. In response, Hill filed a Motion to Stay Decision until the

² In **Miller**, the Supreme Court held that sentencing schemes which mandate life in prison without parole for defendants who committed their crimes while under the age of eighteen violate the Eighth Amendment's prohibition on "cruel and unusual punishments." **Miller**, 132 S. Ct. at 2460. The Supreme Court reasoned that, in light of a juvenile's diminished culpability and heightened capacity for change, mandatory juvenile sentencing schemes pose too great a risk of disproportionate punishment, in contravention of the Eighth Amendment. **Id.** at 2469.

United States Supreme Court decided whether to grant *certiorari* in ***Commonwealth v. Cunningham***, 81 A.3d 1, 11 (Pa. 2013) (wherein the Pennsylvania Supreme Court held that the holding in ***Miller*** does not apply retroactively).³ The PCRA court denied Hill's Motion. Hill also filed an Objection to Notice of Intent to Dismiss.⁴ The PCRA court dismissed Hill's second PCRA Petition on December 24, 2013. Hill filed a timely Notice of Appeal.

On appeal, Hill raises the following questions for our review:

I. Whether the PCRA [c]ourt erred by dismissing [Hill's] PCRA [Petition] despite the recent United States Supreme Court decision[,], ***Miller v. Alabama***, that supports [Hill's] argument that he is eligible to be sentenced to a term of incarceration that provides a meaningful opportunity to obtain release?

II. Whether the PCRA [c]ourt erred when it failed to apply the decision in ***Miller*** as retroactive to [Hill's] case?

III. Whether the PCRA [c]ourt erred when it failed to find that the decision in ***Miller*** is especially applicable to individuals such as [Hill] who are serving a life sentence for felony murder[,], as the conduct lacks the *mens rea* required for first-degree murder?

IV. Whether the PCRA [c]ourt erred by failing to grant [Hill] relief pursuant to Pennsylvania's Habeas Corpus Statute, 42 Pa.C.S.[A.] § 6501 *et seq*[.]?

Brief for Appellant at 3.

We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA

³ The United States Supreme Court denied *certiorari* on June 9, 2014. ***Cunningham v. Pennsylvania***, 2014 U.S. LEXIS 4082 (2014).

⁴ As part of his Notice of Intent to Dismiss, Hill raised various claims, including a claim seeking *habeas corpus* relief.

level. This review is limited to the findings of the PCRA court and the evidence of record. We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error.

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa. Super. 2012) (citations omitted).

In his first claim, Hill asserts that the PCRA court erred in dismissing his Petition, and argues that his sentence of life in prison without parole is prohibited by the Pennsylvania and United States Constitutions. Brief for Appellant at 7.

Initially, under the PCRA, any PCRA petition "*including a second or subsequent petition*, shall be filed within one year of the date the judgment becomes final[.]" 42 Pa.C.S.A. § 9545(b)(1) (emphasis added). A judgment of sentence becomes final "at the conclusion of direct review, including discretionary review in the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." ***Id.*** § 9545(b)(3). The PCRA's timeliness requirements are jurisdictional in nature and a court may not address the merits of the issues raised if the PCRA petition was not timely filed. ***Commonwealth v. Albrecht***, 994 A.2d 1091, 1093 (Pa. 2010).

Here, Hill's judgment of sentence became final in July 2003, when the time for seeking review by the Pennsylvania Supreme Court expired. ***See*** 42 Pa.C.S.A. § 9545(b)(3). Hill had until July 2004 to file the instant PCRA Petition, but he did not do so until 2012. Thus, Hill's PCRA Petition is facially untimely under the PCRA.

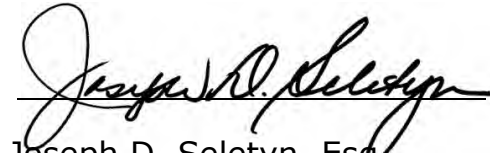
However, Pennsylvania courts may consider an untimely petition if the appellant can explicitly plead and prove one of three exceptions set forth under 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). Any PCRA petition invoking one of these exceptions “shall be filed within 60 days of the date the claim could have been presented.” **Id.** § 9545(b)(2); **Albrecht**, 994 A.2d at 1094.

Here, Hill claims that the United States Supreme Court’s recent decision in **Miller** invokes the newly recognized constitutional right exception at 42 Pa.C.S.A. § 9545(b)(1)(iii).⁵ **See** Brief for Appellant at 7. Hill claims that because he was a juvenile at the time he committed his crimes, he is entitled to a meaningful opportunity to obtain release. **Id.** However, in order to invoke the exception provided by 42 Pa.C.S.A. § 9545(b)(1)(iii), the deciding court must apply the right retroactively. The United States Supreme Court did not address the retroactive application of **Miller** in its holding. However, the Pennsylvania Supreme Court in **Cunningham** ruled that **Miller** does not apply retroactively to juveniles whose judgments of sentence were final at the time **Miller** was decided. **Cunningham**, 81 A.3d at 11, *cert. denied*, 2014 U.S. LEXIS 4082 (2014). Accordingly, Hill has failed to plead and prove the exception provided in 42 Pa.C.S.A. § 9545(b)(1)(iii) to overcome the untimeliness of his Petition.

⁵ We note that Hill properly filed his PCRA Petition invoking the third exception within sixty days of the date the claim could have been presented. **See** 42 Pa.C.S.A. § 9545(b)(2).

We note that Hill has raised numerous other claims, including claims that the PCRA court erred in failing to appropriately apply various aspects of the **Miller** decision to his case.⁶ **See** Brief for Appellant at 8-17. However, Hill has not pled and proven that any of these claims implicate an exception to the timeliness requirements under the PCRA. **See** 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). Thus, we cannot address these claims.

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: 7/25/2014

⁶ As to Hill's *habeas corpus* claim that **Miller** made his sentence illegal, the PCRA court properly found that this claim was subsumed under the PCRA as the sole means of obtaining collateral relief. PCRA Court Opinion, 2/7/14, at 2. As noted above, Hill did not plead or prove any exceptions to the timeliness requirement under the PCRA.