

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JERRY EUGENE WILSON,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1873 MDA 2013

Appeal from the PCRA Order Entered October 3, 2013
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-MD-0001703-1984

BEFORE: BENDER, P.J.E. MUNDY, J., and JENKINS, J.

MEMORANDUM BY BENDER, P.J.E.:

FILED JUNE 24, 2014

Appellant, Jerry Eugene Wilson, appeals from the trial court's October 3, 2013 order denying as untimely his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. On appeal, Appellant contends that the United States Supreme Court created a new constitutional right in *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012) (holding that a defendant's Sixth Amendment right to counsel extends to the plea bargaining process), and, therefore, his PCRA petition is timely under the exception set forth in 42 Pa.C.S. § 9545(b)(1)(iii).¹ After careful review, we affirm.

¹ That section states:

(b) Time for filing petition.--

(Footnote Continued Next Page)

We have examined the certified record, the briefs of the parties, and the applicable law, namely **Lafler** and this Court's recent decision in **Commonwealth v. Feliciano**, 69 A.3d 1270 (Pa. Super. 2013) (holding that Feliciano could not rely on **Lafler** (or its companion case of **Missouri v. Frye**, 132 S.Ct. 1399 (2012)), to satisfy the timeliness exception of section 9545(b)(1)(iii), because "neither **Frye** nor **Lafler** created a new constitutional right[]"). We have also reviewed the thorough and well-reasoned opinion of the Honorable Scott Arthur Evans of the Court of Common Pleas of Dauphin County. We conclude that Judge Evans' opinion accurately disposes of the issue presented by Appellant. Accordingly, we adopt his opinion as our own and affirm the order denying Appellant's PCRA petition on that basis.²

(Footnote Continued) _____

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

...

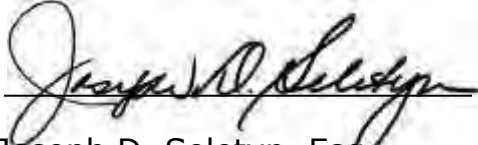
(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1)(iii).

² While Appellant acknowledges our decision in **Feliciano**, he nevertheless asks this Court to revisit the question of whether **Lafler** created a new constitutional right. In support, Appellant argues that certain language in **Feliciano** indicates that Feliciano did not "effectively raise[] the issue or (Footnote Continued Next Page)

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: 6/24/2014

(Footnote Continued) _____

completely argue[] whether or not **Lafler** created a new rule.” Appellant’s Brief at 11 (citing **Feliciano**, 69 A.3d at 1276 (noting that the *pro se* petitioner did not raise below the precise assertion that he satisfied the timeliness exception of section 9545(b)(1)(iii) based on **Frye** and **Lafler**)). However, the language in **Feliciano** cited by Appellant refers to whether Feliciano preserved this claim *before the PCRA court*, not whether he sufficiently argued it on appeal. Moreover, we ultimately concluded that Feliciano had preserved his claim below, relying on the fact that the PCRA court liberally construed Feliciano’s *pro se* filings as asserting the applicability of the exception set forth in section 9545(b)(1)(iii). **Feliciano**, 69 A.3d at 1276. We then addressed the merits of Feliciano’s argument that **Lafler** and **Frye** created a “new constitutional right,” and expressly held that they did not. **Id.** at 1276-1277. Because **Feliciano** is binding precedent, we cannot accept Appellant’s request to re-examine this issue herein.

10-3-13

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
 : DAUPHIN COUNTY, PENNSYLVANIA
 :
 vs. : NO. 1703-CR-1984
 :
 JERRY WILSON :

MEMORANDUM OPINION

A jury trial was held in January of 1985 in the above-captioned case, after which Defendant Jerry Wilson was convicted of first-degree murder. He was sentenced to life imprisonment on June 27, 1985, by the Honorable John C. Dowling. In 1986, following a direct appeal, Defendant's sentence was affirmed by the Pennsylvania Superior Court.

On May 11, 2012, Defendant filed a *pro se* PCRA petition. On May 31, 2012, this Court appointed Attorney Justin McShane to represent the interests of Defendant. On March 25, 2013, Attorney McShane filed an Amended Petition for Post-Conviction Collateral Relief. In the amended petition, Attorney McShane acknowledged that while a PCRA petition must be filed within one year of the date a judgment becomes final (42 Pa.C.S. § 9545(b)),¹ an exception to such time-bar exists in the instant case. Specifically, it is Defendant's position that the United

¹ The PCRA time limitations, and exceptions thereto, are set forth in 42 Pa.C.S. § 9545(b)(1)(i)-(iii) as follows:

(b) Time for filing petition.-

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(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 existence 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.

States Supreme Court case *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), decided on March 21, 2012, announces a new rule regarding Sixth Amendment jurisprudence and ineffective assistance of counsel, and should be applied retroactively. Substantively, Defendant claims that but for trial counsel's ineffective advice, Defendant would have accepted the Commonwealth's deal to plead guilty to third-degree murder with a sentence of seven and a half (7 ½) to fifteen (15) years imprisonment.

On May 9, 2013, the Commonwealth filed an Answer and New Matter to the amended petition. The Commonwealth asserts that Defendant's PCRA is time-barred and, not only did the United States Supreme Court *not* hold that the rule in *Lafler* should be applied retroactively, it also did not announce a new constitutional right.

On July 18, 2013, a PCRA hearing was held before this Court. The only testimony was provided by Defendant, who stated that his attorney never told him that he would face a life sentence if he were convicted of first-degree murder, that Defendant followed counsel's advice to not accept the Commonwealth's deal, and that he was told he was only facing a sentence of 7 ½ to 14 years. [See Notes of Testimony, PCRA Hearing, July 18, 2013, pp. 5-11].

At the hearing, Defendant was given twenty days in which to submit a memorandum of law regarding the issue of timeliness of the PCRA petition. The Commonwealth indicated that it was satisfied with the answer/new matter it filed in response to the amended petition on May 9, 2013. Accordingly, on August 5, 2013, Defendant filed an Answer to the Commonwealth's New Matter and an accompanying memorandum in support of Defendant's PCRA petition.

When Defendant's amended PCRA petition was filed in March of 2013, the issue of whether the *Lafler* case should be applied retroactively appeared to be a question of first

impression in Pennsylvania. However, since then the Pennsylvania Superior Court has addressed this very issue. In *Commonwealth v. Feliciano*, 69 A.3d 1270 (Pa. Super. 2013), the appellant claimed that he met the exception to the PCRA time-bar found in section 9545(b) of the Post-Conviction Relief Act. Appellant specifically maintained that in *Lafler* (and companion case *Missouri v. Frye*, 132 S.Ct. 1399 (2012)), the United States Supreme Court recognized a new constitutional right to effective representation of counsel during the plea negotiation process. Accordingly, the appellant in *Feliciano* maintained that he filed his petition asserting a violation of this novel constitutional right within sixty (60) days of the *Lafler* and *Frye* decisions and, as such, he satisfied the dictates of section 9545(b)(1)(iii) and (b)(2). *Id.*, 69 A.3d at 1275.²

The Superior Court disagreed with the appellant that *Frye* and *Lafler* created a new constitutional right, as the right to effective assistance of counsel during the plea bargaining process has been recognized for decades. *Feliciano*, 69 A.3d at 1276 (Pa. Super. 2013).

In *Frye*, the United States Supreme Court merely clarified that this well-established right ‘extends to the negotiation and consideration of plea offers that lapse or are rejected.’... In other words, the *Frye* Court held ‘that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.’...In determining whether counsel has satisfied this obligation, the two-part test set forth in *Strickland*[*v. Washington*, 466 U.S. 668 (1984)] applies.³ In *Lafler*, the Court explained that to meet the prejudice prong of the *Strickland* test where the alleged ineffectiveness of counsel involves the defendant’s rejection of a plea offer, the defendant must show,

² The *Feliciano* Court acknowledged that Appellant satisfied the 60-day requirement of section 9545(b)(2), as *Frye* and *Lafler* were both decided on March 21, 2012, and the appellant filed his petition on April 26, 2012, however, the Court rejected the constitutional arguments, *infra*.

³ That test requires that a defendant show that counsel (1) had no reasonable basis for their actions or inactions, and (2) the defendant suffered prejudice as a result of counsel’s conduct. In Pennsylvania, our Supreme Court has added one additional component to the *Strickland* test, requiring that a defendant also prove that the underlying claim has arguable merit. *Feliciano*, 69 A.3d at 1276 n.3. (Pa. Super. 2013).

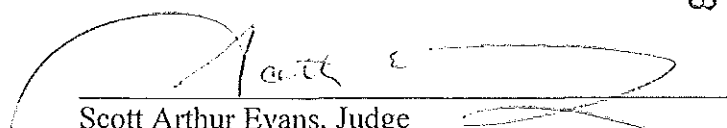
that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court..., that the court would have accepted its terms, and that the conviction, sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. *Lafler*, 132 S.Ct. at 1385.

It is apparent that neither *Frye* nor *Lafler* created a new constitutional right. Instead, these decisions simply applied the Sixth Amendment right to counsel, and the *Strickland* test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand, *i.e.*, where counsel's conduct resulted in a plea offer lapsing or being rejected to the defendant's detriment. Accordingly, **Appellant's reliance on *Frye* and *Lafler* in an attempt to satisfy the timeliness exception of section 9545(b)(1)(iii) is unavailing.**

Feliciano, 69 A.2d at 1276-77 (Pa. Super. 2013) (citations omitted) (footnote omitted (emphasis added)); *see Commonwealth v. Hernandez*, ___ A.3d ___ (Pa. Super. 2013) (2013 WL 4552447, filed August 28, 2013) (citing *Feliciano* for the proposition that neither *Lafler* nor *Frye* created a new constitutional right that would provide defendant/appellant with an exception to the timeliness requirements of the PCRA); *see also Commonwealth v. Johnson*, 803 A.2d 1291, 1294 (Pa. Super. 2002) (a PCRA court lacks jurisdiction to hear untimely petition).

In light of the foregoing, and contrary to Defendant's argument in his amended PCRA petition, Pennsylvania law is clear that the *Lafler* decision did not invoke a "new rule" of constitutional law. It follows that Defendant has not met the timeliness exception under 42 Pa.C.S.A. § 9545(b)(iii), and the amended PCRA petition is dismissed.

BY THE COURT:


Scott Arthur Evans, Judge

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