

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
GEORGE G. ELLIOTT,		
Appellant		No. 2048 WDA 2013

Appeal from the PCRA Order November 26, 2013
in the Court of Common Pleas of Crawford County
Criminal Division at No.: CP-20-CR-0000042-1977

BEFORE: BENDER, P.J.E., WECHT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.:

FILED July 1, 2014

Appellant, George G. Elliott, appeals from the order dismissing his second petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546, as untimely. We affirm.

A previous panel of this Court set forth the factual and procedural history of this case as follows:

On June 16, 1977, a jury convicted Appellant of first-degree murder and arson for crimes he committed when he was seventeen years of age. On March 16, 1978, the trial court sentenced Appellant to life imprisonment for the murder conviction and a five to ten year concurrent sentence for the arson conviction. By *per curiam* order entered June 20, 1979, this Court affirmed Appellant's judgment of sentence. ***Commonwealth v. Elliott***, 417 A.2d 780 (Pa. Super. 1979).

* Retired Senior Judge assigned to the Superior Court.

On October 4, 1979, our Supreme Court denied Appellant's *allocatur* petition.

Over thirty years later, on June 22, 2010, Appellant filed his first PCRA petition, in which he asserted that his life sentence is now unconstitutional in light of the United States Supreme Court's decision in ***Graham v. Florida***, 130 S. Ct. 2011 (2010). The PCRA court appointed counsel, and the PCRA court heard argument on Appellant's petition. On January 4, 2011, the PCRA court dismissed Appellant's petition as untimely.

(***Commonwealth v. Elliott***, No. 177 WDA 2011, unpublished memorandum at 1-2 (Pa. Super. filed Sept. 22, 2011)). Appellant appealed, and this Court affirmed the PCRA court's order on September 22, 2011.

On June 28, 2012, Appellant, acting *pro se*, filed the instant PCRA petition claiming that his life sentence is unconstitutional based on the United States Supreme Court's decision in ***Miller v. Alabama***, 132 S. Ct. 2455 (2012).¹ Appointed counsel filed an amended petition on August 24, 2012. On November 4, 2013, the PCRA court issued notice of its intent to dismiss the petition without a hearing. **See** Pa.R.Crim.P. 907(1). Appellant,

¹ The ***Miller*** Court recognized a constitutional right for juveniles under the age of eighteen, and held 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.'" ***Miller, supra*** at 2460.

In ***Commonwealth v. Cunningham***, 81 A.3d 1 (Pa. 2013), *cert. denied*, 2014 WL 797250 (S. Ct. filed June 9, 2014), the Pennsylvania Supreme Court held that the ***Miller*** holding will not be applied retroactively to cases on collateral review. **See *Cunningham, supra*** at 11.

through counsel, filed a response. On November 26, 2013, the court entered its order dismissing the petition. This timely appeal followed.²

Appellant raises one issue for our review:

Did the [PCRA] court err by dismissing Appellant's petition under the [PCRA] as untimely when the dismissal is based on the ruling of the Pennsylvania Supreme Court in **Cunningham** on the retroactive application of the U.S. Supreme Court's ruling the automatic sentence of juvenile offenders to die in prison cruel and unusual in **Miller v. Alabama** before the U.S. Supreme Court has the opportunity to review **Cunningham**?

(Appellant's Brief, at 4).

Our standard of review of a trial court order granting or denying relief under the PCRA calls upon us to determine whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record.

Commonwealth v. Barndt, 74 A.3d 185, 191-92 (Pa. Super. 2013)
(citations and quotation marks omitted).

Before we may consider the merits of Appellant's claim, we must consider whether this appeal is properly before us.

A PCRA petition, including a second or subsequent one, must be filed within one year of the date the petitioner's judgment of sentence became final, unless he pleads and proves one of the three exceptions outlined in 42 Pa.C.S.[A.] § 9545(b)(1). A judgment becomes final at the conclusion of direct review by this

² The PCRA court ordered Appellant to file a Rule 1925(b) statement of errors, and he timely complied on January 15, 2014. The court filed a Rule 1925(a) opinion on January 16, 2014. **See** Pa.R.A.P. 1925.

Court or the United States Supreme Court, or at the expiration of the time for seeking such review. 42 Pa.C.S.[A.] § 9545(b)(3). 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. The timeliness requirements apply to all PCRA petitions, regardless of the nature of the individual claims raised therein. The PCRA squarely places upon the petitioner the burden of proving an untimely petition fits within one of the three exceptions.

Commonwealth v. Jones, 54 A.3d 14, 16-17 (Pa. 2012) (case citations and footnote omitted).

In this case, Appellant's judgment of sentence became final on January 2, 1980, when his time to file a petition for writ of *certiorari* with the United States Supreme Court expired. **See** U.S. Sup. Ct. R. 13; 42 Pa.C.S.A. § 9545(b)(3). Because Appellant filed the instant petition on June 28, 2012, more than thirty-two years after his judgment of sentence became final, it is untimely on its face, and the PCRA court lacked jurisdiction to review it unless he pleaded and proved one of the statutory exceptions to the time-bar. **See** 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).

Section 9545 of the PCRA provides only three limited exceptions that allow for review of an untimely PCRA petition:

(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 exercise 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.

Id. at § 9545(b)(1)(i)-(iii). “If the [PCRA] petition is determined to be untimely, and no exception has been pled and proven, the petition must be dismissed without a hearing because Pennsylvania courts are without jurisdiction to consider the merits of the petition.” **Commonwealth v. Jackson**, 30 A.3d 516, 519 (Pa. Super. 2011), *appeal denied*, 47 A.3d 845 (Pa. 2012) (citation omitted). In addition, a PCRA petition invoking one of these statutory exceptions must “be filed within 60 days of the date the claim could have been presented.” 42 Pa.C.S.A. at § 9545(b)(2).

Here, Appellant claims the benefit of the exception at 42 Pa.C.S.A. § 9545(b)(1)(iii), alleging a newly-recognized, retroactively-applied constitutional right to relief predicated on the United States Supreme Court’s decision in **Miller, supra**. (**See** Appellant’s Brief, at 5; PCRA Petition, 6/28/12, at 2, 8). Appellant asserts that his petition is timely because he filed it within sixty days of publication of the **Miller** decision.³ (**See** Appellant’s Brief, at 5). Appellant acknowledges that, in **Cunningham, supra**, the Pennsylvania Supreme Court held that the constitutional right announced in **Miller** does not apply retroactively. (**See** Appellant’s Brief, at

³ The Supreme Court decided **Miller** on June 25, 2012, and Appellant filed the instant petition three days later, on June 28, 2012. **See** 42 Pa.C.S.A. § 9545(b)(2).

7). He nonetheless argues that the PCRA court erred by dismissing his PCRA petition as untimely because the United States Supreme Court has not had the opportunity to review the **Cunningham** decision. (**See id.**). We disagree.

First, the United States Supreme Court recently denied the petition for writ of *certiorari* filed in the **Cunningham** case. **See Cunningham, supra.** Second, in **Commonwealth v. Seskey**, 86 A.3d 237 (Pa. Super. 2014), a panel of this Court considered the **Miller** decision in light of **Cunningham** in the context of a facially untimely PCRA petition and explained:

Subsection (iii) of Section 9545[(b)(1)] has two requirements. First, it provides that 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 provided in this section. Second, it provides that the right “has been held” by “that court” to apply retroactively. Thus, a petitioner must prove that there is a “new” constitutional right and that the right “has been held” by that court to apply retroactively. The language “has been held” is in the past tense. These words mean that the action has already occurred, *i.e.*, “that court” has already held the new constitutional right to be retroactive to cases on collateral review. By employing the past tense in writing this provision, the legislature clearly intended that the right was already recognized at the time the petition was filed.

. . . [I]n **Cunningham**, our Supreme Court held that the constitutional right announced by the United States Supreme Court in **Miller** does not apply retroactively. Consequently, [a]ppellant cannot rely upon **Miller** or subsection 9545(b)(iii) to establish jurisdiction over his untimely PCRA petition in any Pennsylvania court.

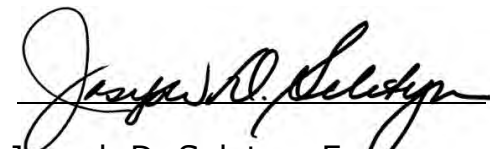
Seskey, supra at 242-43 (some case citations omitted).

Here, Appellant attempts to circumvent the effect of **Cunningham** on this Court's jurisdiction by arguing that the United States Supreme Court has not had the opportunity to review **Cunningham**. (**See** Appellant's Brief, at 7). This argument is now moot. Moreover, Appellant "cannot rely upon **Miller** or subsection 9545(b)(iii) to establish jurisdiction over his untimely PCRA petition in any Pennsylvania court." **Seskey, supra** at 243.

Accordingly, Appellant has not met his burden of proving his untimely petition fits within one of the three exceptions to the PCRA's time-bar. **See Seskey, supra** at 243; **Cunningham, supra** at 11; **Jones, supra** at 17. The PCRA court properly dismissed Appellant's second petition as untimely with no exception to the time-bar pleaded or proven.

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: 7/1/2014

