

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

RAFAEL COLON

Appellant

No. 2374 EDA 2013

Appeal from the Order July 29, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0219741-1987

BEFORE: FORD ELLIOT, DONOHUE, and JENKINS, JJ.

MEMORANDUM BY JENKINS, J.

FILED MAY 09, 2014

Rafael Colon appeals *pro se* from the Order dismissing his third petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. Colon argues his sentence should be vacated pursuant to ***Lafler v. Cooper***, 566 U.S. ----, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), and ***Missouri v. Frye***, 566 U.S. ----, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012). After careful consideration, and for the reasons set forth below, we affirm.

On January 24, 1987, Colon shot and killed Roberto Cruz ("Cruz") while Cruz was in Colon's kitchen. Later that day, Colon confessed to the shooting.

On March 16, 1988, following a bench trial before the Honorable Theodore A. McKee, the trial court found Colon guilty of first degree murder,

voluntary manslaughter, and possession of an instrument of crime (“PIC”).¹ The trial court sentenced Colon to life imprisonment for his first-degree murder conviction,² and a concurrent prison term of one to two years for the PIC conviction. On February 6, 1990, this Court affirmed the judgments of sentence. ***Commonwealth v. Colon***, 573 A.2d 1157 (Pa.Super.1990) (unpublished memorandum). On July 25, 1990, our Supreme Court denied Colon’s petition for allowance of appeal. ***Commonwealth v. Colon***, 581 A.2d 568 (Pa. 1990).

On July 24, 2000, Colon filed his first *pro se* PCRA petition, which the PCRA court denied following the appointment of counsel. On appeal, this Court affirmed. ***Commonwealth v. Colon***, 809 A.2d 954 (Pa.Super.2002) (unpublished decision). Colon did not seek further review with the Pennsylvania Supreme Court.

On February 26, 2003, Colon filed his second *pro se* PCRA petition. On July 28, 2003, the PCRA court dismissed the petition as untimely. On July 30, 2003, Colon appealed to this Court, which affirmed on August 26, 2004.

¹ 18 Pa.C.S.A. §§ 2502, 2503, 907.

² For sentencing purposes, Colon’s conviction of voluntary manslaughter merged with first degree murder – the more serious offense for which Colon was convicted. **See** 42 Pa.C.S.A. § 9765 (“Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense”).

Colon did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

On July 9, 2012, Colon filed the instant *pro se* PCRA petition, his third, claiming counsel ineffectiveness for (1) advising him to reject a guilty plea offer of 9 to 20 years of imprisonment; (2) presenting an intoxication defense; (3) employing an expert witness to develop his intoxication defense; (4) mailing and discussing the guilty plea with Colon in English while aware that Colon was not fluent in English. Appellant's Brief at (iii). Colon claims that the United States Supreme Court decisions relating to the Sixth Amendment right to counsel in ***Lafler v. Cooper***, 566 U.S. ----, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), and ***Missouri v. Frye***, 566 U.S. ----, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012),³ provided newly recognized constitutional rights as contemplated by section 9545(b)(1)(iii) of the PCRA, which allow him to seek PCRA relief despite the petition's untimeliness.⁴

³ In ***Lafler***, the Supreme Court of the United States held that a defendant must receive post-conviction relief "when inadequate assistance of counsel caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome," and where the defendant has shown that "the outcome of the plea process would have been different with competent advice." ***Lafler***, 132 S. Ct. at 1382-85, 1390-91. In ***Frye***, the Supreme Court of the United States held that "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." ***Frye***, 132 S. Ct. at 1408.

⁴ The trial court notes, "[Colon] makes a general claim that government officials obstructed the timely presentation of his claims, but as that allegation is not fleshed out in any detail this court will not address it." (July 29, 2013 Opinion, Woods-Skipper, J., at 2 n. 2). Colon also fails to brief this (Footnote Continued Next Page)

On July 1, 2013, the PCRA court informed Colon of its intent to dismiss the instant PCRA petition as untimely without an evidentiary hearing pursuant to Pa.R.Crim.P. 907. On July 29, 2013, the court properly dismissed the petition.⁵ On August 20, 2013, Colon filed a timely appeal.⁶

Before we may consider the issues presented, we must first determine whether the instant PCRA Petition was timely filed. Pursuant to Pennsylvania law, no court has jurisdiction to hear an untimely PCRA petition. ***Commonwealth v. Monaco***, 996 A.2d 1076, 1079 (Pa.Super.2010) (citing ***Commonwealth v. Robinson***, 575 Pa. 500, 508, 837 A.2d 1157, 1161 (2003)). The PCRA provides that a 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); ***accord Monaco***, 996 A.2d at 1079; ***Commonwealth v. Bretz***, 830 A.2d 1273, 1275 (Pa.Super.2003). Effective January 16, 1996, the PCRA was amended to require that any PCRA

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argument on appeal. Accordingly, he has waived any claim of obstruction by government officials in the timely presentation of his claims. ***See*** Pa.R.A.P. 2119; ***Commonwealth v. Renschenski***, 988 A.2d 699, 703 (Pa.Super.2010); ***accord Commonwealth v. Beshore***, 916 A.2d 1128, 1140 (Pa.Super.2007) (providing that this Court will not develop an argument for an appellant and that the failure to adequately develop an argument in an appellate brief may result in waiver of the claim under Pa.R.A.P. 2119).

⁵ ***See*** Pa.R.Crim.P. 907 (prescribing twenty-day notice period).

⁶ ***See*** Pa.R.A.P. 903 (providing that a petitioner must file an appeal within thirty days of the PCRA court’s decision).

petition, including second and subsequent petitions, be filed within one year of the date the judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). A judgment is 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). Where a petitioner’s judgment of sentence became final on or before the effective date of the amendment, a grace period allowed first PCRA petitions to be filed by January 16, 1997. **See Commonwealth v. Alcorn**, 703 A.2d 1054 (Pa.Super.1997).

Colon’s judgment of sentence became final on or about October 23, 1990, when the 90-day period for seeking review of our Supreme Court’s July 25, 1990 denial of Colon’s petition in the United States Supreme Court expired. **See** 42 Pa.C.S.A. § 9545(b)(3); U.S. Sup. Ct. R. 13. Colon did not file the instant petition until July 9, 2012, more than twenty-one years after his judgment of sentence became final. Although Colon’s judgment of sentence became final prior to the effective date of the PCRA amendments, the instant PCRA petition does not qualify for the grace period, as it was neither Colon’s first PCRA petition, nor was it filed before January 16, 1997.⁷ Accordingly, the instant PCRA petition is untimely on its face.

⁷ For a more comprehensive discussion of the application of the 1996 Amendments’ grace period to Colon’s second and instant PCRA petitions, **see** this Court’s opinion in **Commonwealth v. Colon**, No. 2431 EDA 2003, Memorandum at 2-3 (Pa.Super. Aug. 26, 2004).

Three statutory exceptions to the PCRA's time bar exist. The exceptions allow for very limited circumstances under which a court may excuse the late filing of a PCRA petition. 42 Pa.C.S.A. § 9545(b)(1); **Monaco**, 996 A.2d at 1079. The late filing of a petition will be excused if a petitioner alleges and proves:

(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.

42 Pa.C.S.A. § 9545(b)(1)(i)-(iii); **Commonwealth v. Marshall**, 947 A.2d 714, 720 (2008) (providing that petitioner bears the burden to allege and prove that one of the timeliness exceptions applies). If invoking an exception outlined above, the petition must "be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S.A. § 9545(b)(2).

Initially, we must consider whether Colon's claim of counsel ineffectiveness tolls the PCRA's one-year limitation period. It does not. Our Supreme Court has consistently held that an ineffective assistance of counsel claim does not constitute an exception to the jurisdictional time-bar.

Commonwealth v. Crews, 863 A.2d 498, 503 (Pa. 2004) (“a petitioner’s belief that he has uncovered a colorable claim of ineffectiveness by prior counsel [did not constitute] an exception to the timeliness requirement”) (internal citation omitted); **Commonwealth v. Howard**, 788 A.2d 351, 355 (Pa. 2002) (“The timeliness requirements crafted by the legislature would thus effectively be eviscerated by any petitioner who was willing to file serial PCRA petitions alleging ineffective assistance of counsel”).

Colon asserts his petition is timely pursuant to the after-recognized constitutional right timeliness exception set forth in section 9545(b)(1)(iii). Appellant’s Brief at pp. 2-4, 11, 12. We find no merit to this claim. The after-recognized constitutional right exception only applies when our Supreme Court or the United States Supreme Court recognizes a new constitutional right and declares the right applies retroactively. This Court has repeatedly held that **Lafler** and **Frye** do not recognize a new constitutional right.⁸

⁸ We note that Colon, in his second PCRA petition, asserted that our Supreme Court’s decision in **Commonwealth v. Grant**, 813 A.2d 726 (Pa. 2002), also provided a constitutional right to have his claims of ineffective assistance of trial counsel heard in a PCRA proceeding. **See Commonwealth v. Colon**, No. 2431 EDA 2003, Memorandum at 4 (Pa.Super. Aug. 26, 2004). Unlike **Grant**, which expressly declared a rule of procedure of “non-constitutional dimension,” the United States Supreme Court’s recent rulings in **Lafler** and **Frye** clarified the long-standing constitutional right to effective assistance of counsel in criminal proceedings. For purposes of Colon’s claims, however, the effect of **Grant**, and **Lafler** and **Frye**, are the same; the courts did not recognize a new constitutional right such that the PCRA timeliness exception set forth in section 9545(b)(1)(iii) applies to his circumstances.

Commonwealth v. Hernandez, 79 A.3d 649, 654 (Pa.Super.2013) (citing **Commonwealth v. Feliciano**, 69 A.3d 1270, 1276-77 (Pa.Super.2013)).

As we have explained:

“The right to effective assistance of counsel during the plea bargaining process has been recognized for decades.” **Commonwealth v. Lewis**, 2013 PA Super 62, 63 A.3d 1274, 1280 (Pa.Super.2013) (citing **Hill v. Lockhart**, [*supra*]; **Padilla v. Kentucky**, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) (“Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel”)).

* * *

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 ...

Id. (footnote omitted).

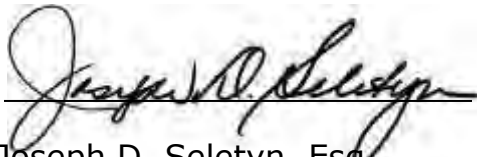
Further, even if **Frye** and **Lafler** recognized a new constitutional right that applied retroactively, Colon’s petition is still untimely because he did not file his petition within sixty days of those United States Supreme Court decisions.⁹

⁹ The United States Supreme Court issued the **Frye** and **Lafler** holdings on March 21, 2012. Therefore, Colon needed to file his PCRA petition on or before May 20, 2012 to be timely. **See** 42 Pa.C.S.A. § 9545(b)(2) (providing that a petitioner must raise the after-recognized constitutional right exception within sixty days of when the claim could have been presented); **Commonwealth v. Boyd**, 923 A.2d 513, 517 (Pa.Super.2007) (explaining the sixty-day period begins to run upon the date on which the Court issued the underlying decision) (citing *Footnote Continued Next Page*)

Simply put, Colon's third PCRA petition is untimely and does not meet any exception to the PCRA's timeliness requirements. Accordingly, the PCRA court lacked jurisdiction and properly dismissed the petition without a hearing.

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: 5/9/2014

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Commonwealth v. Lark, 560 Pa. 487, 494, 746 A.2d 585, 588 (2000) (a petitioner must plead and prove specific facts that demonstrate his claim was raised within the sixty-day time frame)); **accord Commonwealth v. Baldwin**, 789 A.2d 728 (Pa.Super.2001). Colon did not file the instant petition until July 9, 2012, which is fifty days after the timeliness window for **Frye** and **Lafler** had lapsed.