

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
THOMAS SIMONE,	:	
	:	
Appellant	:	No. 2473 EDA 2013

Appeal from the PCRA Order August 9, 2013
In the Court of Common Pleas of Bucks County Criminal Division
at No(s).: CP-09-CR-0003205-2003

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

MEMORANDUM BY FITZGERALD, J.:

FILED JULY 17, 2014

Appellant, Thomas Simone, appeals from the order of the Bucks County Court of Common Pleas that dismissed his second Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546, petition as untimely. Appellant’s appointed counsel has filed a petition to withdraw from representation and an “**Anders**”¹ brief, and Appellant has filed a *pro se* response to counsel’s brief asserting that (1) he is entitled to relief based on **Miller v. Alabama**, 132 S. Ct. 2455 (2012), and (2) appointed counsel provided ineffective representation. We affirm and grant counsel’s petition to withdraw.

* Former Justice specially assigned to the Superior Court.

¹ **Anders v. California**, 386 U.S. 738 (1967).

The PCRA court summarized the factual and procedural history of this appeal as follows:

The facts underlying this case have previously been set forth by our retired colleague, the Honorable Kenneth G. Biehn, in his Memorandum Opinion dated April 9, 2007, which we now excerpt as follows:

[Appellant's] conviction resulted from his shooting and killing of an elderly man whom [Appellant] and his girlfriend, Dawn DALonzo, were attempting to rob. [Appellant] and DALonzo were driven by a friend, Paul Miller, to the home of Paul Kallus, an elderly client of DALonzo. The robbery was to be accomplished through the pretense of Ms. DALonzo providing prostitution services to the victim. When the victim became suspicious because [Appellant] accompanied DALonzo into the victim[s] home, and DALonzo demanded payment before the services were rendered, the victim produced a gun. A struggle ensued, the culmination of which was the victim[s] death by gunshot at the hand of [Appellant].

These offenses were committed on February 28, 2003[, when Appellant was nineteen years old].

Following an investigation and a jury trial, [Appellant] was found guilty on January 22, 2004 of Murder of the Second Degree, Burglary, Robbery, Theft, and Conspiracy to Commit both Burglary and Theft. On this same date, [Appellant] was sentenced to life imprisonment on Murder of the Second Degree, together with a concurrent sentence of not less than ten (10) nor more than twenty (20) years incarceration for the remainder of the charges.

On January 26, 2004, [Appellant] filed a Notice of Appeal to the Superior Court. The Superior Court affirmed [Appellant's] judgment of sentence on September 1, 2004. Thereafter, [Appellant's] Petition for Allowance of Appeal was denied by the Supreme Court on September 29, 2005. Thus, [Appellant's] conviction became final on December 28, 2005, as [Appellant] had ninety (90) days after the

Pennsylvania Supreme Court's denial to file a writ of *certiorari* to the United States Supreme Court.

[Appellant] filed his first PCRA Petition on August 7, 2006, alleging ineffective assistance of counsel. On February 26, 2007, the Commonwealth moved to dismiss the PCRA petition without hearing, contending that the petition was meritless and frivolous. [Appellant] filed an Opposition to the Commonwealth's Answer and Motion on March 6, 2007. A hearing was held on March 30, 2007. On April 9, 2007, the court issued an order and opinion denying [Appellant's] PCRA petition. On April 24, 2007, [Appellant] filed a Notice of Appeal to the Superior Court. [The denial of Appellant's first PCRA petition] was affirmed by the Superior Court on August 1, 2008 and his Petition for Allowance of Appeal to the Supreme Court was denied.

The instant PCRA petition was filed on August 24, 2012[, within sixty days of the June 25, 2012 decision in **Miller**]. Thereafter, [Appellant] filed two [*pro se*] Addendums to his PCRA petition on August 19, 2012 and November 29, 2012, respectively.

On January 14, 2013, Elissa Heinrichs, Esquire, was appointed to represent [Appellant]. We scheduled a hearing for August 15, 2013. Thereafter, the Commonwealth filed a Motion to Dismiss [Appellant's] PCRA Petition Without a Hearing for Lack of jurisdiction on July 3, 2013.

On August 9, 2013, we ordered that [Appellant's] PCRA Petition be dismissed without a hearing pursuant to Pa.R.Cr.P. 907, as the issues raised in [Appellant's] Petition were time barred and we lacked jurisdiction.

[Appellant] filed a Notice of Appeal to the Superior Court on August 26, 2013.

PCRA Ct. Op., 11/20/13, at 1-3 (citation and footnote omitted). This appeal followed.

At the outset, we note that the PCRA court failed to issue a Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's petition and appointed counsel relied on **Anders** when seeking withdrawal from this appeal. For the reasons that follow, however, we are compelled to conclude that these irregularities were waived, did not affect Appellant's ability to preserve his issues and arguments for appeal, did not infringe upon his rule-based right to counsel, and did not prejudice either the PCRA court's or this Court's ultimate determination that the instant petition was untimely filed. Therefore, no appellate relief is due.

Pa.R.Crim.P. 907(1) states:

the [PCRA] judge shall promptly review the petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge **shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the dismissal**. The defendant may respond to the proposed dismissal within 20 days of the date of the notice. The judge thereafter shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings continue.

Pa.R.Crim.P. 907(1) (emphasis added).

The notice procedures and opportunity for response set forth in Rule 907(1) are particularly important because claims of ineffective assistance of PCRA counsel should be raised in the PCRA court and generally cannot be

raised for the first time on appeal. **See Commonwealth v. Pitts**, 981 A.2d 875, 879-80 nn.3-4 (Pa. 2009). Nevertheless, our Court has stated:

Although the notice requirement set forth in Rule 907 has been held to be mandatory, [a petitioner who has] not objected to its omission . . . has waived the issue. Moreover, the Supreme Court has indicated . . . that when a PCRA petition is untimely filed, the failure to provide such notice is not reversible error.

Commonwealth v. Boyd, 923 A.2d 513, 514 n.1 (Pa. Super. 2007); **see also Commonwealth v. Lawson**, 90 A.3d 1, 5 (Pa. Super. 2014).

With respect to appointed counsel's filing of an **Anders** brief, we emphasize that this is a PCRA proceeding and counsel's duties are not grounded in **Anders**, but rather **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). **See Commonwealth v. Wrecks**, 931 A.2d 717, 720-22 (Pa. Super. 2007) (noting that **Anders** and **Turner/Finley** are "close cousins" but have "significant differences"). Under **Turner/Finley**:

Turner/Finley counsel must review the case zealously. **Turner/Finley** counsel must then submit a "no-merit" letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

Counsel must also send to the petitioner: (1) a copy of the "no-merit" letter/brief; (2) a copy of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.

If counsel fails to satisfy the foregoing technical prerequisites of **Turner/Finley**, the court will not reach

the merits of the underlying claims but, rather, will merely deny counsel's request to withdraw. Upon doing so, the court will then take appropriate steps, such as directing counsel to file a proper **Turner/Finley** request or an advocate's brief.

Id. at 721 (citations omitted); **accord Commonwealth v. Widgins**, 29 A.3d 816, 818 (Pa. Super. 2011). Furthermore, once counsel is appointed in a PCRA proceeding, she "may not . . . accept appointment [by the PCRA court], thereby engendering the reliance of both his client and the court, without undertaking of record either to advance [her] client's claims or certify their lack of merit." **Commonwealth v. Hampton**, 718 A.2d 1250, 1254 (Pa. Super. 1988).

However, in an appeal from an order denying PCRA relief, compliance with **Anders** generally suffices to meet the requirement of the **Turner/Finley** procedures for a PCRA. **See Widgins**, 29 A.3d at 817 n.2. This is so because **Anders** is designed to protect a defendant's constitutional right to counsel on direct appeal, while **Turner/Finley** is an extension of a PCRA petitioner's rule-based right to counsel. **See id.; Wrecks**, 931 A.2d at 720-22

Mindful of the forgoing principles, we reiterate that the PCRA court did not issue a Rule 907(1) notice of intent to dismiss the underlying petition, and that appointed counsel has filed an "**Anders**" brief asserting an appeal is frivolous. Moreover, Appellant, acting *pro se*, filed a response in this Court arguing, in part and for the first time on appeal, that appointed

counsel was ineffective in the underlying PCRA proceeding. In support of his claim of ineffective assistance of appointed counsel, Appellant correctly observes that appointed counsel took no actions of record in the PCRA court to advance his claims or certify their lack of merit until this appeal. Lastly, we note that Appellant did not object to the absence of a Rule 907(1) notice.

In light of the unique circumstances of this case, we conclude that Appellant's failure to object to the absence of a Rule 907(1) notice has waived that procedural defect for the purposes of this appeal, and, in any event, was not reversible error. **See Lawson**, 90 A.3d at 5; **Boyd**, 923 A.2d at 514 n.1. However, given the PCRA court's failure to issue a Rule 907(1) notice and appointed counsel's failure to take any actions of record in the PCRA court, Appellant was precluded from properly preserving his *pro se* arguments while this case was in the PCRA court. Moreover, appointed counsel's filing of an "**Anders**" brief was the first opportunity for Appellant to raise his *pro se* arguments. Accordingly, we will address Appellant's *pro se* arguments, including his claims of PCRA counsel's ineffectiveness. In sum, we will consider (1) whether appointed counsel's "**Anders**" brief was an adequate substitute for a **Turner/Finley** letter, (2) whether Appellant is entitled to relief from the PCRA time-bar based on **Miller**, and (3) whether appointed counsel was ineffective for failing to advance his arguments in the PCRA court.

First, our review of appointed counsel's petition to withdraw reveals she asserted that she reviewed the record, found no issues of arguable merit, and believed an appeal to be wholly frivolous. **See** Pet. for Leave to Withdraw as Appellant's Counsel, 2/20/14, at ¶ 2. She also stated that she sent a letter to Appellant and attached a copy of that letter to her petition. **Id.** at ¶ 5, Ex. A. The letter identified the threshold issue in the PCRA court and in this appeal, namely, whether Appellant's instant petition was timely filed. **Id.**, Ex. A. The letter also contained counsel's conclusion that Appellant "cannot rely upon **Miller** to create an exception to the one-year filing requirement" of the PCRA, and informed him of his right to proceed *pro se* or with private counsel. **Id.** Lastly, counsel's "**Anders**" brief provides a more thorough review of **Miller** and our case law considering the import of **Miller** with respect to the PCRA timeliness requirements. Therefore, despite appointed counsel's reliance on **Anders**, we conclude she substantially complied with the procedural requirements of **Turner/Finley**. **See Widgins**, 29 A.3d at 817 n.2, 819.

Second, Appellant identifies several arguments in his *pro se* response to appointed counsel's brief. Specifically, he contends that (1) **Miller** should apply to a defendant who was nineteen years old because Pennsylvania law defines an adult as an individual who is twenty-one years old or older, (2) equal protection demands that those with undeveloped brains similar to an eighteen year old be treated the same as an eighteen year old, and (3) there

are no penological interests in distinguishing between a defendant who is eighteen years old or younger and those older than eighteen years old. Appellant's Resp. to Counsel's Pet. to Withdraw and Br., 4/10/14, at 1-5. Our independent assessment of Appellant's *pro se* arguments and appointed counsel's analysis confirms that no relief is due.

[T]his Court's standard of review regarding an order denying a petition under the PCRA is 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.

. . . Pennsylvania law makes clear that no court has jurisdiction to hear an untimely PCRA petition. Statutory time restrictions are mandatory and jurisdictional in nature, and may not be altered or disregarded to reach the merits of the claims raised in the petition.

Commonwealth v. Cintora, 69 A.3d 759, 762 (Pa. Super. 2013) (citations omitted).

The timeliness provisions of the PCRA are 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 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.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S. § 9545(b)(1),(2).

There is no dispute that Appellant's instant second *pro se* PCRA petition, filed in August of 2012, was untimely on its face because Appellant's conviction became final on December 28, 2005, and he had one year from that date to file a facially timely petition. Moreover, there is no dispute that 42 Pa.C.S. § 9545(b)(1)(iii) provides the sole basis for avoiding the PCRA time bar in this case.² **See *Cintora***, 69 A.3d at 763 (reiterating that judicial decisions are not newly discovered facts under Section 9545(b)(1)(ii)).

The Pennsylvania Supreme Court has noted:

Subsection (iii) of Section 9545 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 this court 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

² It is further undisputed that Appellant filed the instant petition within sixty days of the **Miller** decision. **See** 42 Pa.C.S. § 9545(b)(2).

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.

Commonwealth v. Abdul-Salaam, 812 A.2d 497, 501 (Pa. 2002).

Instantly, appointed counsel correctly identified and applied our case law holding that that ***Miller*** did not create a timeliness exception to the PCRA for petitioners who were over eighteen years old when they committed the underlying crime. ***See Cintora***, 69 A.3d at 764. Moreover, as noted by ***Cintora*** and as dictated by ***Abdul-Salaam***, a “contention that a newly-recognized constitutional right **should** be extended to others does not render their petition timely pursuant to section 9545(b)(1)(iii).” ***Id.*** Accordingly, Appellant’s *pro se* arguments in this appeal that he should be entitled to the benefits of ***Miller*** despite the fact he was nineteen years old at the time of the murder warrants no relief from the PCRA time bar.

Lastly, Appellant raises *pro se* claims of appointed PCRA counsel’s ineffectiveness. He observes that appointed counsel took no actions of record in the PCRA court. No relief is due.

It is well settled that

Appellant will only be entitled to relief if he can show: (1) that his claim has arguable merit; (2) that counsel’s actions or inaction was not the product of a reasonable

strategic decision; and, (3) that he suffered prejudice because of counsel's action or inaction.

Commonwealth v. Pursell, 724 A.2d 293, 304 (Pa. 1999) (citation omitted). "The failure to satisfy any of the above prongs requires rejection of the ineffectiveness claim." **Commonwealth v. Dennis**, 950 A.2d 945, 954 (Pa. 2008) (citation omitted).

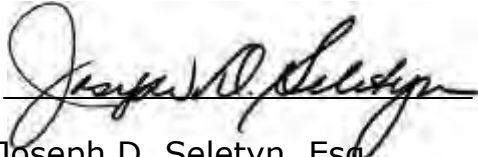
Although we agree that appointed counsel's failure to take any actions of record after her appointment was problematic,³ we have concluded that Appellant was not entitled to relief from the PCRA's time requirements. Therefore, Appellant cannot prove prejudice—*i.e.*, that the outcome of the underlying PCRA proceeding would have been different—and his claims of ineffective assistance of PCRA counsel must fail. **See Dennis**, 950 A.2d at 954. Therefore, we find no basis to conclude that Appellant was entitled to relief based on his claim of PCRA counsel's ineffectiveness. **See Pursell**, 724 A.2d at 303-04 (noting no remand is necessary where it is clear from existing record that ineffectiveness claim is meritless).

Order affirmed.

³ Despite appointed counsel's failure to take action of record, we note that Appellant's own exhibits establish that counsel maintained communication with him, apprised him of the relevant law, and apprised him of her concern that he would not be able to establish an exception to the PCRA's timeliness requirements.

J.S45041-14

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: 7/17/2014