

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

WYATT EVANS

Appellant

No. 2882 EDA 2013

Appeal from the PCRA Order of October 2, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-1023471-1980

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

FILED JUNE 24, 2014

Wyatt Evans appeals from the October 2, 2013 order that dismissed his *pro se* petition for collateral relief pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46. Evans' PCRA petition is untimely by more than twenty years, and he has failed to establish any of the exceptions to the timeliness requirements of the PCRA. Thus, we lack jurisdiction over this case, and we affirm.

The PCRA court aptly has summarized the factual and lengthy procedural history of this case, as follows:

On June 5, 1981, following a jury trial before the Honorable Charles Mirarchi, Jr., [Evans] was found guilty of [second-degree murder], robbery, kidnapping, criminal conspiracy, and possession of a prohibited offensive weapon.¹ On November 17,

¹ 18 Pa.C.S. §§ 2502(b), 3701(a)(1), 2901(a), 903(a), and 908(a).

1981, [Evans] was sentenced to a term of life imprisonment for second[-]degree murder, consecutive prison terms of five to ten years['] and one-half to five years['] for the conspiracy and offensive weapons counts, a concurrent prison term of ten to twenty years for the robbery count, and a prison term of ten to twenty years['] for the kidnapping count to run consecutively to the robbery count, but concurrently to the murder count. [Evans] appealed and [on July 13, 1984], the Pennsylvania Superior Court vacated the sentences for robbery, kidnapping, and prohibited offensive weapons but affirmed the judgment of sentence otherwise. [The Pennsylvania Supreme Court denied Evans' petition for allowance of appeal on October 17, 1984].

On November 1, 1984, [Evans] filed his first *pro se* petition under the [PCRA]. Counsel was appointed, and two [a]mended [p]etitions were filed. After a hearing, [Evans' PCRA] petition was dismissed. The dismissal was affirmed by the Superior Court on August 14, 1987.

On April 13, 1989, [Evans] filed his second PCRA petition. After review, it was dismissed on April 17, 1989. The Superior Court affirmed the dismissal on March 23, 1990. [The Pennsylvania Supreme Court subsequently denied Evans' petition for allowance of appeal].

On July 18, 1996, [Evans] filed his third PCRA petition. After receiving the [PCRA court's notice of intent to dismiss pursuant to Pa.R.Crim.P. 907, Evans] filed a fourth PCRA petition. [Evans'] third [PCRA] petition was dismissed on November 4, 1996. [O]n August 11, 1997, [Evans] filed an appeal, which was dismissed as untimely.

On September 10, 1997, [Evans] filed a fifth PCRA petition. After review, this petition was dismissed [on] October 22, 1997. [Evans] filed an appeal, and the Superior Court affirmed the dismissal on February 1, 1999.

On March 1, 2002, [Evans] filed his sixth PCRA petition. After review, this petition was dismissed on May 22, 2002.

On November 10, 2009, [Evans] filed the instant PCRA petition, his seventh.^[2]

PCRA Court Opinion (“P.C.O.”), 11/6/2013, at 1-2.

On December 27, 2010, and August 13, 2012, Evans filed amended petitions. On August 7, 2013, the PCRA court filed notice of its intent to

² Although Evans filed a “Petition for Writ of *Habeas Corpus*” the PCRA court chose to treat his submission as his seventh PCRA petition. **See** P.C.O. at 1. n.1. We agree with the PCRA court’s treatment of Evans’ appeal. In relevant part, Evans argues that his mandatory life sentence for second-degree murder was rendered illegal by the United States Supreme Court’s ruling in **Miller v. Alabama**, 132 S.Ct. 2455, 2457-58 (2012) (holding that “[t]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders.”). As such, Evans argues that he is serving an illegal sentence. Such a claim is cognizable under the PCRA. **See** 42 Pa.C.S. § 9542 (“This subchapter provides an action by which . . . persons serving illegal sentences may obtain collateral relief.”). We note the following:

It is well-settled that the PCRA is intended to be the sole means of achieving post-conviction relief. 42 Pa.C.S. § 9542; **Commonwealth v. Haun**, 32 A.3d 697, 699-700 (Pa. 2011). Unless the PCRA could not provide for a potential remedy, the PCRA statute subsumes the writ of *habeas corpus*. **Commonwealth v. Fahy**, 737 A.2d 214, 223-224 (Pa. 1999). Issues that are cognizable under the PCRA must be raised in a timely PCRA petition and cannot be raised in a *habeas corpus* petition. **See Commonwealth v. Peterkin**, 722 A.2d 638 (Pa. 1998); **see also Commonwealth v. Deaner**, 779 A.2d 578 (Pa. Super. 2001) (a collateral petition that raises an issue that the PCRA statute could remedy is to be considered a PCRA petition). Phrased differently, a defendant cannot escape the PCRA time-bar by titling his petition or motion as a writ of *habeas corpus*.

Commonwealth v. Taylor, 65 A.3d 462, 465-66 (Pa. Super. 2013) (citations modified or omitted). Therefore, we will consider Evans’ petition in the instant case to be a PCRA petition.

dismiss Evans' petition without a hearing pursuant to Rule 907. On October 2, 2013, the PCRA court filed an order dismissing Evans' petition as untimely.

On October 11, 2013, Evans filed a notice of appeal. The PCRA court did not order Evans to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Evans did not file one. On November 6, 2013, the PCRA court issued its Rule 1925(a) opinion.

Evans raises a single issue for our consideration: "Was [Evans] deprived of equal protection of the law that violated the [Fifth and Fourteenth Amendments to the United States Constitution], where the PCRA court did not apply the juvenile sentencing limitation laws [recognized in **Miller v. Alabama**, 132 S.Ct. 2455 (2012)] to Evans?" Brief for Evans at 5.

Before addressing the merits of Evans' claims, we must assess the timeliness of his PCRA petition. It is well-established that the PCRA time limits are jurisdictional, and are meant to be both mandatory and applied literally by the courts to all PCRA petitions, regardless of the potential merit of the claims asserted.³ **Commonwealth v. Murray**, 753 A.2d 201, 202-03

³ Evans' claim implicates the legality of his sentence. Such claims typically are not waivable. **Commonwealth v. Vasquez**, 744 A.2d 1280, 1284 (Pa. 2000). But, "a legality [of sentence] claim may nevertheless be lost should it be raised for the first time in an untimely PCRA petition for which no time-bar exception applies, thus depriving the court of jurisdiction over the claim." **Commonwealth v. Slotcavage**, 939 A.2d 901, 903 (Pa. Super. 2007).

(Pa. 2000); ***Commonwealth v. Leggett***, 16 A.3d 1144, 1145 (Pa. Super. 2011). “[N]o court may properly disregard or alter [these filing requirements] in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner.” ***Murray***, 753 A.2d at 203; **see also *Commonwealth v. Gamboa-Taylor***, 753 A.2d 780, 783 (Pa. 2000). PCRA petitions, including second or subsequent applications, must be filed within one year of the date that an appellant’s judgment of sentence becomes final. **See** 42 Pa.C.S. § 9545(b)(1). For the purposes of the PCRA, a judgment becomes 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.” **See** 42 Pa.C.S. § 9545(b)(3).

Instantly, Evans was sentenced on November 17, 1981. Evans filed a timely appeal to this Court, which vacated three of his convictions but ultimately affirmed his term of life imprisonment on July 13, 1984. Thereafter, Evans petitioned the Supreme Court of Pennsylvania for allowance of appeal. The Supreme Court of Pennsylvania denied Evans’ petition on or about October 17, 1984. Thereafter, Evans had ninety days in which to file an appeal with the United States Supreme Court. **See** 28 U.S.C. § 2101(c). However, Evans did not seek an appeal to the United States Supreme Court. Consequently, Evans’ sentence became final on January 15, 1985. **See** 42 Pa.C.S. § 9545(b)(3). Evans’ current PCRA

petition was filed on November 10, 2009. As such, it was filed over twenty-four years past the time bar. Thus, Evans' petition for relief is untimely.

Despite such facial untimeliness, a time-barred PCRA petition nonetheless will be considered timely if (but only if) the petitioner pleads and proves one of the following three exceptions to the one-year time limit enumerated in 42 Pa.C.S. §§ 9545(b)(1)(i)-(iii) of the PCRA:

(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. §§ 9545(b)(1)(i)-(iii). "To invoke one of these exceptions, the petitioner must plead it and satisfy the burden of proof. Additionally, any exception must be raised within sixty days of the date that the claim could have been presented." ***See Commonwealth v. Feliciano***, 69 A.3d 1270, 1275 (Pa. Super. 2013). Moreover, a petitioner relying upon a retroactive constitutional right for relief bears a very specific burden of proof:

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.

Commonwealth v. Copenhefer, 941 A.2d 646, 649–50 (Pa. 2007) (quoting ***Commonwealth v. Abdul-Salaam***, 812 A.2d 497, 501 (Pa. 2002)).

Commonwealth v. Seskey, 86 A.3d 237, 242-43 (Pa. Super. 2014).

Evans argues that the United States Supreme Court announced a retroactive constitutional right in ***Miller*** that is applicable in his case. Brief for Evans at 6-7. By his own omission, Evans was at least eighteen years old at the time that he committed the crimes that are the subject of this appeal. Nonetheless, he asserts that the holding of ***Miller*** should apply for the purposes of rendering his instant appeal timely. We disagree.

In ***Commonwealth v. Cunningham***, 81 A.3d 1 (Pa. 2013), the Pennsylvania Supreme Court held that the holding in ***Miller*** would not be applied retroactively in Pennsylvania. 81 A.3d at 10-11. Additionally, Evans is not the first petitioner who has sought to circumvent the timeliness requirements of the PCRA by relying upon ***Miller***. In ***Seskey***, a panel of this Court applied the Pennsylvania Supreme Court’s ruling in ***Cunningham*** to determine that ***Miller*** does **not** provide an exception to timeliness in the PCRA context:

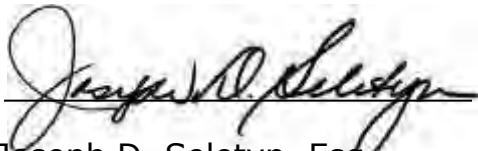
Recently, in **Cunningham**, our Supreme Court held that the constitutional right announced by the United States Supreme Court in **Miller** does not apply retroactively. 81 A.3d at 10. Consequently, [a]ppellant cannot rely upon **Miller** or subsection 9545(b)(iii) to establish jurisdiction over his untimely PCRA petition in any Pennsylvania court. Hence, we lack jurisdiction to review the merits of [a]ppellant's issues

Seskey, 86 A.3d at 243. Evans has failed to establish that the exception to PCRA timeliness at subsection 9545(b)(1)(iii) applies to his case.

Because Evans has failed to establish that his PCRA petition is subject to one of the timeliness exceptions at 42 Pa.C.S. § 9545(b)(1), he has failed to establish our jurisdiction. Consequently, we affirm the PCRA court's order dismissing Evans' seventh PCRA petition as untimely.

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