

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

DANIEL LUGO

Appellant

No. 2954 EDA 2013

Appeal from the PCRA Order October 1, 2013
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0004873-2006,
CP-39-CR-0004022-2006

BEFORE: GANTMAN, P.J., JENKINS, J., and FITZGERALD, J.*

MEMORANDUM BY JENKINS, J.:

FILED JULY 09, 2014

Daniel Lugo ("Appellant") appeals from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. After careful review, we affirm.

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

On December 3, 2007, after a jury trial stemming from a shooting that took place on June 15, 2005, the jury returned a verdict of guilty on the charges of Third Degree Murder and Attempted Criminal Homicide as to the victim, Sondra Yohe, and Attempted Criminal Homicide, Aggravated Assault and Recklessly Endangering Another Person as to her passenger, Aubrey Righter. Additionally, the jury returned a guilty verdict on the charges of Attempted Criminal Homicide, Aggravated Assault and Recklessly Endangering Another Person for shooting at a vehicle

* Former Justice specially assigned to the Superior Court.

occupied by three (3) persons moments before the Yohe murder. At the sentencing hearing on February 1, 2008, the [c]ourt sentenced the Appellant to an aggregate sentence of not less than fifty (50) and no more than one hundred (100) years. The Appellant filed timely post sentence motions and the [c]ourt heard argument on them. On May 30, 2008, the [c]ourt entered an Order and Memorandum Opinion in which it granted the motion as to the Appellant's conviction for the Attempted Homicide of Aubrey Righter and overturned that conviction and denied the rest of the motions. Appellant appealed his sentence and on December 1, 2009, the judgment of sentence was affirmed by the Superior Court of Pennsylvania. Appellant filed a timely Petition under the Post Conviction Collateral Relief Act ("PCRA") which was denied February 4, 2011. The denial of relief under the PCRA was affirmed by the Superior Court of Pennsylvania on August 9, 2012. On July 8, 2013, the Clerk of Courts- Criminal Division of Lehigh County received Petitioner's Pro Se Petition Under The Post-Conviction Relief Act 42 Pa.C.S. § 9545(b)(1)(iii) ("2nd PCRA"), which had a deficiency at that time and was returned to the Appellant, who later refiled it properly on August 6, 2013. It is unclear to the [c]ourt why the 2nd PCRA was not filed when it was first received, for the purpose of this statement the [c]ourt will consider the Petition received on the earlier date of July 8, 2013. On August 28, 2013 the [c]ourt sent a twenty (20) day [n]otice of the [c]ourt's intent to dismiss the 2nd PCRA without argument under Pennsylvania Rule of Criminal Procedure ("Pa.R.Crim.P.") 907. The Appellant timely filed a Response to the twenty day notice which the [c]ourt considered and then dismissed the 2nd PCRA on October 1, 2013 as untimely. On October 18, 2013 the Appellant filed a Notice of Appeal to the Superior Court Docket Number 2954 EDA 2013 of this Court's October 1, 2013 session.

PCRA Court 1925(a) Opinion, November 7, 2013, pp. 1-2.

On appeal, Appellant presents the following issues for our review:

WHETHER THE PCRA COURT COMMITTED AN ERROR OF LAW BY DENYING APPELLANTS PCRA PETITION WHICH WAS TIMELY FILED; AND BUT FOR A CLERICAL ERROR ON THE PART OF THE CLERK OF COURTS OFFICE IN FAILING TO DOCKET AND FILE HIS PCRA WHICH WAS DELIVERED TO THE CLERKS OFFICER-REQUIRED THE LOWER COURT TO CONDUCT AN EVIDENTIARY HEARING TO DETERMINE THE TIMELINESS OF THE PETITION

ENABLING APPELLANT TO INTRODUCE AFFIDAVITS AND TESTIMONY ESTABLISHING THE TIMELINESS OF HIS PETITION; AND WHETHER HE WAS ENTITLED TO THE APPOINTMENT OF COUNSEL TO ASSIST HIM IN HIS PCRA DUE TO HIS LEARNING DISORDER CAUSED BY ORGANIC BRAIN DISEASE/DISORDER.

WHETHER MILLER V. ALABAMA ENTITLES PETITIONER TO FILE A SECOND SUBSEQUENT PCRA BASED UPON THE FACT THAT THE UNITED STATES SUPREME COURT RULED THAT IT IS A VIIIth AMENDMENT VIOLATION TO SENTENCE A JUVENILE TO LIFE (or what amounts to life) IN PRISON WHEN IT RULED THAT THE SCIENTIFIC EVIDENCE INDICATING THAT A HUMAN BRAIN DOES NOT FULLY DEVELOP UNTIL THE AGE OF 24 DEPENDING UPON SUCH FACTORS AS ENVIRONMENT, CHRONIC ABUSE, AND ORGANIC BRAIN DISORDERS, AND DRUG ABUSE ETC... WHICH MAY DELAY FULL DEVELOPMENT UNTIL EVEN LATER. IN LIGHT OF THE CIRCUMSTANCES APPELLANT CONTENDS THAT MILLER AND PROGENY CONTROLS AND APPLIES RETROACTIVELY TO HIS CASE, AND HIS PCRA PETITION SHOULD BE CONSIDERED A FIRST PETITION PER THE VIIIth AMENDMENT AND PETITIONER SHOULD BE RESENTENCED ACCORDINGLY.

WHETHER APPELLANT WAS DENIED HIS RIGHT TO COUNSEL, DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AND IS STILL LANGUISHING UNDER A SENTENCE WHICH AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT, CONTRARY TO THE CONSTITUTION FOR THE UNITED STATES WHEN THE COURT SENTENCED HIM TO WHAT AMOUNTED TO LIFE IN PRISON BY NUMBERS AND FAILED TO APPLY MILLER V. ALABAMA, ___ U.S. ___ TO THE INSTANT CASE AT BAR.

Appellant's Brief, p. iv.

In reviewing an order denying PCRA relief, our well-settled standard of review is "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, 191-192 (Pa.Super.2013) (internal quotations and citations omitted).

“It is undisputed that a PCRA petition must be filed within one year of the date that the judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1).” **Commonwealth v. Hernandez**, 79 A.3d 649, 651 (Pa.Super.2013). “This time requirement is mandatory and jurisdictional in nature, and the court may not ignore it in order to reach the merits of a petition.” **Id.** (citing **Commonwealth v. Murray**, 753 A.2d 201, 203 (Pa.2000)). A judgment of sentence “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.” 42 Pa.C.S. § 9545(b)(3). However, a facially untimely petition may be received where one of the PCRA’s three limited exceptions to the time for filing the petition is met. **Hernandez**, 79 A.3d at 651 (footnote omitted). These exceptions include:

- (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). As our Supreme Court has repeatedly stated, the petitioner maintains the burden of pleading and proving that one of these exceptions applies. ***Commonwealth v. Abu-Jamal***, 941 A.2d 1263, 1268 (Pa.2008), *cert. denied*, 555 U.S. 916 (2008). Further,

[a] petition invoking one of these exceptions must be filed within sixty days of the date the claim could first have been presented. 42 Pa.C.S.A. § 9545(b)(2). In order to be entitled to the exceptions to the PCRA's one-year filing deadline, the petitioner must plead and prove specific facts that demonstrate his claim was raised within the sixty-day time frame under section 9545(b)(2).

Hernandez, 79 A.3d at 651-652 (internal quotations omitted).

On October 27, 2009, our Supreme Court denied Appellant's petition for allowance of appeal from this Court's affirmation of his judgment of sentence on May 1, 2009. Appellant did not file for a writ of certiorari to the Supreme Court of the United States, and his sentence became final at the expiration of his time to seek review ninety days later, on January 25, 2010. **See** 42 Pa.C.S.A. § 9545(b)(3); U.S. Sup.Ct. Rule 13. Accordingly, Appellant had until January 25, 2011 to timely file a PCRA petition. Appellant filed the instant petition on July 8, 2013, over 2 years after the expiration of his PCRA time limitation. Accordingly, Appellant's petition is facially untimely. Thus, he must plead and prove that his petition falls under one of the Section 9545 exceptions set forth in the PCRA. **See** 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).

To overcome the PCRA's time bar, Appellant argues that the Supreme Court of the United States' decision in **Miller v. Alabama**¹ created a new, retroactive constitutional right, which constitutes a timeliness exception pursuant to § 9545(b)(1)(iii). **See generally** Appellant's Brief. Appellant concedes he was 22, and therefore not a minor, when he committed his crimes. **See** Appellant's Brief, at 1. However, he contends that this Court should extend the **Miller** holding to his circumstances because he is effectively serving a life sentence and because scientific studies indicate the human brain continues to develop into an individual's twenties. **See generally** Appellant's Brief; PCRA petition. Appellant's **Miller** arguments fail for multiple reasons.

Initially, Appellant did not file his PCRA petition until July 8, 2013, more than sixty days after June 25, 2012, the date the Supreme Court decided **Miller**. Therefore, Appellant did not satisfy the Section 9545(b)(2) requirement that a petition must invoke a Section 9545(b)(1)(iii) exception within sixty days after the claim first could have been presented.

Further, in **Commonwealth v. Cintora**,² this Court declined to extend **Miller** to defendants under the age of 25. The **Cintora** appellants³ contended:

¹ 132 S.Ct. 2455 (2012).

² 69 A.3d 759 (Pa.Super.2013).

[T]hat because **Miller** created a new Eighth Amendment right, that those whose brains were not fully developed at the time of their crimes are free from mandatory life without parole sentences, and because research indicates that the human mind does not fully develop or mature until the age of 25, it would be a violation of equal protection for the courts to treat them or anyone else with an immature brain, as adults. Thus, they conclude that the holding in **Miller** should be extended to them as they were under the age of 25 at the time of the murder and, as such, had immature brains.

Cintora, 69 A.3d at 764. This Court rejected this argument, concluding that “[a] contention that a newly-recognized constitutional right **should** be extended to others does not render [a] petition timely pursuant to section 9545(b)(1)(iii).” **Id.** (emphasis in original).

Appellant now presents the same argument that the Court rejected in **Cintora**. As in **Cintora**, Appellant’s claim that a newly-recognized constitutional right should be extended to cover his circumstances does not provide him with a § 9545(b)(1)(iii) timeliness exception. Further, even had Appellant actually been a minor at the time he committed these crimes, he would not be entitled to relief, as our Supreme Court has determined that the right recognized in **Miller** does not apply retroactively. **See Commonwealth v. Cunningham**, 81 A.3d 1, 11 (Pa.2013), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 2014 WL 797250 (2014).

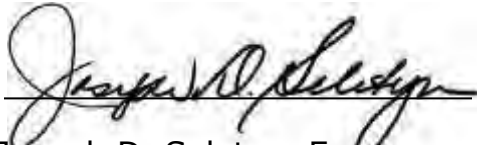
(Footnote Continued) _____

³ **Cintora** involved two defendants, aged 19 and 21 at the time of their underlying crimes.

Finally, **Miller** is wholly inapplicable to Appellant's claims. **Miller** applies to juveniles sentenced to life imprisonment without the possibility of parole. As Appellant concedes, he was 22 and therefore not a minor when his crimes occurred. Further, the trial court imposed a sentence of 50 to 100 years of incarceration, not a sentence of life imprisonment without the possibility of parole, which **Miller** prohibits for minors. Accordingly, the PCRA court did not err in denying this claim.

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: 7/9/2014