

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
BRUCE MURRAY,	:	
	:	
Appellant	:	No. 3039 EDA 2013

Appeal from the PCRA Order entered on October 4, 2013
in the Court of Common Pleas of Philadelphia County,
Criminal Division, No. CP-51-CR-1111091-1982

BEFORE: BOWES, SHOGAN and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED JUNE 19, 2014

Bruce Murray ("Murray") appeals, *pro se*, from the Order dismissing his third Petition filed pursuant to the Post Conviction Relief Act ("PCRA").

See 42 Pa.C.S.A. §§ 9541-9546. We affirm.

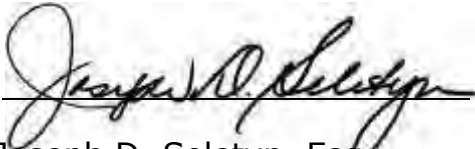
In its Opinion, the PCRA court set forth the relevant procedural history, which we adopt for the purpose of this appeal. **See** PCRA Court Opinion, 11/7/13, at 1-2 (unnumbered).¹ The PCRA court determined that Murray's Petition is untimely, and that he did not properly invoke any exceptions to

¹ We note that the PCRA court's Opinion erroneously stated that the court did not have jurisdiction to consider Murray's "second PCRA" Petition, as the instant PCRA Petition is Murray's third Petition.

the timeliness requirement of the PCRA.² **See id.** at 2-6 (unnumbered). Upon our review of the record, we agree and adopt the sound reasoning of the PCRA court for the purpose of this appeal. **See id.** Thus, the PCRA court properly dismissed Murray's third PCRA Petition.

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: 6/19/2014

² We note that Murray raised an issue of ineffective assistance of counsel. Ineffective assistance of counsel is not a recognized exception to the timeliness requirements of the PCRA. **See Commonwealth v. Wharton**, 886 A.2d 1120, 1127 (Pa. 2005) (stating that "allegations of ineffective assistance of counsel will not overcome the jurisdiction[al] timeliness requirements of the PCRA.").

On December 30, 1986, Petitioner filed his first *pro se* petition under the Post Conviction Hearing Act. Counsel was appointed and a supplemental petition was filed. On December 12, 1988, all but five of Petitioner's allegations were dismissed. Evidentiary hearings were held, and PCHA relief was denied on November 30, 1995. Petitioner appealed, and on November 13, 1996, the Superior Court affirmed the denial of relief except to the judgment of sentence imposed for possession of an instrument of crime, which the Court concluded was illegal and therefore was vacated. On November 10, 1997, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of relief.

On February 3, 2006, Petitioner filed his second *pro se* petition under the Post Conviction Relief Act. Counsel was appointed to represent Petitioner, and a "no merit" letter pursuant to *Turner/Finley* was filed. After careful review, Petitioner's PCRA petition was dismissed on May 13, 2008. On, March 17, 2009, the Superior Court affirmed the dismissal. On September 15, 2009, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of relief.

On July 26, 2011, Petitioner filed the instant *pro se* PCRA petition, his third. Upon receipt of this Court's Notice of Intent to Dismiss, Petitioner filed a Response as well as numerous subsequent filings. After conducting an extensive and exhaustive review of these filings, the record and applicable case law, this Court finds that Petitioner's petition for post conviction collateral relief is untimely filed. Therefore, this Court does not have jurisdiction to consider Petitioner's second PCRA petition.

II. DISCUSSION

Petitioner's conviction became final in 1987. After a conviction becomes final, a petitioner has one year to file a post conviction petition. Therefore, Petitioner's July 26, 2011

petition is patently untimely unless it properly invokes one of the enumerated exceptions to the one-year limitation 42 Pa.C.S.A. § 9545 (b)(1)(i)-(iii).²

Petitioner attempts to invoke the after-discovered exception pursuant to 42 Pa.C.S.A. § 9545 (b)(1)(ii) in the form of an affidavit from Mr. Anthony Smith. Mr. Smith's affidavit states that while confined with one of the co-defendants in this case, Douglas Haughton, the latter admitted to lying at trial and stated he had been coerced by police to implicate Petitioner. Petitioner asserts that this affidavit constitutes newly discovered evidence of his innocence. Petitioner is mistaken. The facts underlying Mr. Smith's affidavit is in essence Douglas Haughton's recantation of his testimony, and Douglas Haughton's recantation has previously been litigated. More specifically, it was litigated in Petitioner's first PCRA petition in which a hearing was held and the claim dismissed. The Superior Court affirmed the dismissal, and our Supreme Court denied *allocatur*; therefore, this claim is not reviewable pursuant to 42 Pa.C.S.A. § 9543(a)(3).

Petitioner attempts to invoke the after-discovered exception with an affidavit by Gregory Strickland. Strickland states that he was present during the shooting in this case, and that Petitioner was not present at the shooting. Petitioner contends that had Strickland been allowed to testify at trial, Petitioner would have been proven innocent. Petitioner is again mistaken. Strickland's testimony as after-discovered evidence has also been previously litigated as it was

² The three exceptions to the one-year limitation are:

- (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.

raised in his second PCRA petition. The court dismissed the claim as waived, and the Superior Court affirmed the dismissal; therefore, this claim is not reviewable.³

In his Amended Petition, Petitioner attempts to invoke the after-recognized constitutional right timeliness exception enumerated in 42 Pa.C.S.A. § 9545 (b)(1)(iii) pursuant to *Lafler v. Cooper*, — U.S. —, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) and *Missouri v. Frye*, — U.S. —, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012). Specifically, Petitioner states that the United States Supreme Court created a constitutional right in *Lafler/Frye* that applies retroactively to his case and affords a basis of relief.

The petitioner bears the burden to allege and prove one of the timeliness exceptions applies.⁴ The PCRA mandates that a petition invoking an exception to the timeliness provision must be pled within sixty days of the date the claim could have been presented.⁵ When a claim is filed pursuant to a court's decision, the sixty days begin to run from the date of the decision. *Lafler* and *Frye* were decided on March 21, 2012, and Petitioner filed his petition raising this claim on August 22, 2012, which is not within 60 days from when the claim could have been presented. Therefore, the Court is unable to review this claim. Accordingly, Petitioner's reliance on *Lafler/Frye* in an attempt to satisfy the after-recognized constitutional right exception is misplaced.

Next, Petitioner attempts to invoke the timeliness exception enumerated in 42 Pa.C.S.A. § 9545 (b)(1)(iii). Specifically, Petitioner states that the United States Supreme Court created a constitutional right in *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) that applies retroactively to his case and affords a basis of relief. Petitioner is mistaken.

³ 2 Pa.C.S. § 9543(a)(3)

⁴ *Commonwealth v. Marshall*, 947 A.2d 714, 720 (2008).

⁵ 42 Pa.C.S.A § 9545(b)(2)

Petitioner's claim fails to satisfy the requirements necessary for invoking the newly-recognized constitutional right exception. In *Miller v. Alabama*, the United States Supreme Court 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 against 'cruel and unusual punishments.'"⁶ It is plain from the holding of the case that it does not apply to Petitioner. The *Miller* holding specifically limited itself to juveniles under eighteen years of age who were sentenced to life without parole for committing the crime of murder. While it is true that Petitioner was sentenced to life without parole for murder, Petitioner fully admits he was twenty years old at the time of the murder, which puts him outside the reach of the Supreme Court's *Miller* decision. Therefore, Petitioner does not adequately invoke an exception to the timeliness provision.

Petitioner also contends that the *Miller* ruling creates a new Eighth Amendment right, whereby those whose brains were not fully developed at the time of their crimes are free from mandatory life without parole sentences. Because the *Miller* court relied on scientific findings that posited the brains of juveniles were not fully developed⁷, Petitioner furnishes claims of his own (without any attribution) that the brain does not fully mature under a person reaches their mid-twenties. Petitioner asserts that life without parole sentences in this context serve no appropriate purposes of punishment and are therefore unconstitutional. Petitioner concludes that the holding in *Miller* should be applicable in this case, as Petitioner claims he was under the age of twenty-five at the time of the murder and, as such, had an immature brain. However, the mere argument that a newly-recognized constitutional right *should* apply does not afford Petitioner an exception to the timeliness requirements of the PCRA.⁸

⁶ *Miller*, 132 S. Ct. at 2460.

⁷ *Id.* at 2464.

⁸ See *Commonwealth v. Cintora*, 2013 PA Super 160 (Pa. Super. Ct. June 28, 2013).

In his May 24, 2012 Amended Petition, Petitioner raises a variety of additional claims. Specifically, Petitioner alleges racial discrimination in jury selection in the use of preemptory challenges, recantation of witness Douglas Haughton, and the prejudicial use of a redacted statement by co-defendant Wesson at trial. All these claims have been previously litigated as Petitioner raised them in his first collateral relief petition. Despite Petitioner's insistence that his claim can be heard, pursuant to 42 Pa.C.S.A § 9544(a)(3), claims that have been previously litigated are not eligible for relief under the PCRA. Moreover, our courts have held that "[a] PCRA Petitioner cannot obtain PCRA review of previously litigated claims decided adversely to him . . . by presenting those claims again in a PCRA Petition and setting forth new theories of relief in support thereof."⁹ Therefore, Petitioner is not eligible for relief on these claims.

Because the instant petition was filed over twenty years after Petitioner's sentence became final, a valid exception to the timeliness requirements must be pled and proven. Upon review, however, the claims raised in Petitioner's petition fail to invoke any such exception. Petitioner fails to demonstrate that government officials obstructed the presentation of his claims; fails to offer after-discovered evidence which was previously unknown to him and could not have been obtained by the exercise of due diligence; and does not allege a violation of a constitutional right recognized after the one-year limitation and held to apply retroactively. Consequently, this Court lacks jurisdiction to consider Petitioner's substantive claims and is required to dismiss Petitioner's petition as untimely.

BY THE COURT,



SHEILA WOODS-SKIPPER, J.

⁹ *Commonwealth v. Hutchins*, 760 A.2d 50, 55 (2000) (citing *Commonwealth v. Morales*, 701 A.2d 516, 521 (1997)).