

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

RICKY MAURICE ROBERTS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3564 EDA 2013

Appeal from the PCRA Order entered November 18, 2013,
in the Court of Common Pleas of Montgomery County,
Criminal Division, at No(s): CP-46-CR-0003899-1993

BEFORE: GANTMAN, P.J., ALLEN, and FITZGERALD*, JJ.:

MEMORANDUM BY ALLEN, J.:

FILED JULY 03, 2014

Ricky Maurice Roberts ("Appellant") appeals the order denying his latest petition for post-conviction relief filed pursuant to the Post Conviction Relief Act ("PCRA"). 42 Pa.C.S.A. §§ 9541-46. We affirm.

The PCRA court summarized the pertinent facts and procedural history as follows:

On November 30, 1993, [Appellant] pleaded guilty but mentally ill to a charge of general homicide in connection with the shooting death of his neighbor, Brenda Rhoades, age twenty-six (26). [Appellant] had stolen a .22 caliber handgun from his grandfather's closet, loaded it, and concealed it in his pants. He then went to the Rhoades' residence with an empty plastic cup and requested sugar from Brenda Rhoades. When Rhoades returned from the kitchen with the requested sugar, [Appellant] shot her in close range in the head. [Appellant] then discarded his blood-soaked jeans in a school bathroom and threw the

*Former Justice specially assigned to the Superior Court.

gun in a nearby creek. [Appellant] was seventeen (17) years old at the time.

After a trial on the degree of homicide, this Court found [Appellant] guilty, but mentally ill, of the offense of first-degree murder. Thereafter, this Court sentenced [Appellant] to life in prison without parole on December 6, 1993. No direct appeal was filed.

On October 12, 1994, [Appellant] filed a timely PCRA petition, which was denied after a hearing on the merits. [Specifically, PCRA counsel] was appointed and, after an evidentiary hearing, this Court denied the motion. Subsequently, two more petitions for PCRA relief were filed and dismissed in 1997 and 2000, respectively. [Appellant] did not appeal the denial of those petitions.

[Appellant] then filed a fourth PCRA petition on June 8, 2010, in which he challenged his life sentence on the basis that sentencing a juvenile to life without the possibility of parole is an illegal sentence under the United States Supreme Court's holding in **Graham v. Florida**, 560 U.S. 48 (2010). However this Court subsequently denied that petition. [**Commonwealth v. Roberts**, 26 A.3d 1191 (Pa. Super. 2011) (unpublished memorandum)]. Appellant did not file a petition for allowance of appeal to the Pennsylvania Supreme Court.]

[Appellant] filed the instant PCRA petition, his fifth, on July 24, 2012. Therein, [Appellant] argues that his sentence of life imprisonment without parole as a juvenile is illegal under the United States Supreme Court's ruling in **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455 (2012). In **Miller**, the Court held that a mandatory sentence of life imprisonment without parole is unconstitutional as applied to offenders under the age of eighteen (18) at the time of their crimes. **Id.** However, the United States Supreme Court was silent as to whether their holding was retroactive.

On November 15, 2012, this Court granted the Commonwealth's Motion to Stay further proceedings on [Appellant's] PCRA petition, pending the disposition in the Pennsylvania Supreme Court of **Commonwealth v. Cunningham**, 81 A.3d 1 (Pa. 2013). The Supreme Court of Pennsylvania in **Cunningham** was to decide whether

the United States Supreme Court's holding in **Miller** was retroactive.

On October 30, 2013, the Pennsylvania Supreme Court ruled in **Cunningham** that the United States Supreme Court's ruling in **Miller** does not retroactively apply to post-conviction petitioners in Pennsylvania. **Cunningham**, 81 A.3d at 11. Accordingly, this Court denied [Appellant's] instant PCRA petition in an Order dated November 18, 2013. [Appellant] timely appealed this Court's determination on December 16, 2013.

On December 13, 2013, twenty-five (25) days after this Court denied his PCRA petition, [Appellant] filed a Motion for Relief to Amend Petition for Habeas Corpus Relief Under Article 1, Section 14 of the Pennsylvania Constitution and for Post-Conviction Relief under the [PCRA]. Thereafter this Court issued an Order on January 17, 2014, denying [Appellant's] Motion[.]

PCRA Court Opinion, 2/25/14, at 1-3 (footnote omitted). The PCRA court did not require Pa.R.A.P. 1925 compliance.

Appellant raises the following issues:

I. DID THE LEARNED [PCRA COURT] ERR IN DISMISSING [APPELLANT'S PCRA] PETITION WITHOUT NOTICE AND HEARING?

II. DID THE LEARNED [PCRA COURT] ERR IN REFUSING TO ALLOW [APPELLANT] TO AMEND HIS [PCRA] PETITION?

III. SHOULD THE UNITED STATES SUPREME COURT'S DECISION IN **MILLER V. ALABAMA** BE APPLIED RETROACTIVELY FOR ALL JUVENILES WHO ARE SENTENCED TO LIFE IN PRISON WITHOUT PAROLE?

IV. SHOULD THIS COURT REMAND THIS MATTER TO ALLOW [APPELLANT] TO REFILE [HIS] MOTION FOR RELIEF TO AMEND PETITION FOR HABEAS CORPUS RELIEF ON ARTICLE 1 SECTION 14 OF THE PENNSYLVANIA CONSTITUTION AND FOR [PCRA] RELIEF UNDER THE [PCRA]?

Appellant's Brief at 3.

This Court's standard of review regarding an order dismissing 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. ***Commonwealth v. Halley***, 870 A.2d 795, 799 n.2 (Pa. 2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001). Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence. ***Commonwealth v. Jordan***, 772 A.2d 1011 (Pa. Super. 2001). Because this is a serial petition for post-conviction relief, Appellant must meet a more stringent standard. "A second or any subsequent post-conviction request for relief will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred." ***Commonwealth v. Burkhardt***, 833 A.2d 233, 236 (Pa. Super. 2003) (*en banc*) (citations omitted). "A petitioner makes a *prima facie* showing if he demonstrates that either the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or that he was innocent of the crimes for which he was charged." ***Id.***

Before addressing the issues Appellant presents on appeal, we must first consider whether the PCRA court properly determined that Appellant's

latest petition for post-conviction relief was untimely. The timeliness of a post-conviction petition is jurisdictional. ***Commonwealth v. Albrecht***, 994 A.2d 1091, 1093 (Pa. 2010) (citation omitted). Thus, if a PCRA petition is untimely, neither an appellate court nor the PCRA court has jurisdiction over the petition. ***Id.*** “Without jurisdiction, we simply do not have the legal authority to address the substantive claims” raised in an untimely petition. ***Id.***

Generally, a petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petition alleges, and the petitioner proves, an exception to the time for filing the petition. ***Commonwealth v. Gamboa-Taylor***, 753 A.2d 780, 783 (Pa. 2000); 42 Pa.C.S.A. § 9545(b)(1). Under these exceptions, the petitioner must plead and prove that: “(1) there has been interference by government officials in the presentation of the claim; or (2) there exists after-discovered facts or evidence; or (3) a new constitutional right has been recognized.” ***Commonwealth v. Fowler***, 930 A.2d 586, 591 (Pa. Super. 2007) (citations omitted). A PCRA petition invoking one of these statutory exceptions must “be filed within sixty days of the date the claim first could have been presented.” ***Gamboa-Taylor***, 753 A.2d at 783. ***See also*** 42 Pa.C.S.A. § 9545(b)(2). Moreover, exceptions to the time restrictions of the PCRA must be pled in the petition, and may not be raised for the first time on appeal. ***Commonwealth v. Burton***, 936 A.2d 521, 525 (Pa. Super. 2007); ***see also*** Pa.R.A.P. 302(a) (“Issues not

raised before the lower court are waived and cannot be raised for the first time on appeal.”).

Appellant’s judgment of sentence became final on or about January 5, 1994, after the thirty-day period for a direct appeal to this Court had expired. 42 Pa.C.S.A. § 9545(b)(3). However, because Appellant’s judgment of sentence became final before the effective date of the 1995 amendments to the PCRA, Appellant had until January 16, 1997 to file a timely PCRA petition. **See Commonwealth v. Baldwin**, 789 A.2d 728, 730 (Pa. Super. 2001). As summarized by the PCRA court, *supra*, Appellant did so in 1997. However, because Appellant filed the instant PCRA petition over fifteen years later, it is patently untimely unless he has satisfied his burden of pleading and proving that one of the enumerated exceptions applies. **See Commonwealth v. Beasley**, 741 A.2d 1258, 1261 (Pa. 1999).

Appellant has failed to prove the applicability of any of the exceptions to the PCRA’s time restrictions. Appellant contends that his PCRA falls under the exception of subsection 9545(b)(1)(iii) because the United States Supreme Court recognized a new constitutional right in **Miller v. Alabama**, 132 S.Ct. 2455 (2012). In **Miller**, the high court held that mandatory sentences of 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 punishment.’” **Miller**, 132 S.Ct. at 2460. Appellant asserts that the **Miller** decision should be applied retroactively to his life sentence.

Our Supreme Court has recently determined that the **Miller** decision should not be applied retroactively. **See generally, Commonwealth v. Cunningham**, 81 A.3d 1 (Pa. 2013). Most recently, on June 9, 2014, the United States Supreme Court denied the petition for *writ of certiorari* in **Cunningham**. **See Cunningham v. Pennsylvania**, 2014 U.S. LEXIS 4082. Therefore, although Appellant was a juvenile at the time he committed the murder, the **Miller** holding does not apply to him, since his judgment of sentence became final over fifteen years ago. Thus, the PCRA court lacked jurisdiction to consider Appellant's substantive issues.

Appellant claims that the PCRA court should have allowed him to amend his PCRA petition to include a claim for state *habeas corpus* relief. Appellant has also filed with this Court a "Motion to Remand to Refile for Relief to Amend Petition for Habeas Corpus Relief Under Article 1, Section 14 of the Pennsylvania Constitution and for Post Conviction Relief Under the [PCRA]." According to Appellant, our Supreme Court's refusal to apply **Miller** retroactively rendered his sentence unconstitutionally disproportionate to those juveniles sentenced after **Miller** as a matter of state constitutional law. We disagree.

As noted by the PCRA court, Appellant filed his motion to amend after the PCRA court has already denied his petition. The PCRA court did not err in denying the motion to amend. Nevertheless, in support of his claim, and within his motion to this Court, Appellant refers to Chief Justice Castille's

concurring opinion in **Cunningham**.¹ Importantly, we first note that, having garnered no joinders, the concurring opinion is not precedent. Moreover, a close reading of Chief Justice Castille's concurring opinion refutes Appellant's assertion that the PCRA is the proper vehicle to pursue further relief. Chief Justice Castille opined:

As noted earlier, I realize that it is not apparent that [a state proportionality] constitutional claim, arising from the effect of a federal decision, is cognizable under the PCRA. To the extent that it is so, there is at least some basis in law for an argument that the claim is cognizable via a petition under Pennsylvania's *habeas corpus* statute, found at 42 Pa.C.S. § 6501 *et seq.* **See, e.g., Commonwealth v. Judge**, 591 Pa. 126, 916 A.2d 511, 518-21 (2007) (since PCRA did not provide remedy for appellant's claim regarding deportation from Canada, which essentially challenged "the continued vitality of his sentence," claim could be raised in a petition for writ of *habeas corpus*). **See also Coady v. Vaughn**, 564 Pa. 604, 770 A.2d 287, 290-94 (2001) (Castille, J., concurring, joined by Newman, J.) (explaining interrelationship of PCRA and traditional *habeas corpus*).

Cunningham, 81 A.3d at 18 (Castille, C.J., concurring) (footnote omitted).

Thus, Chief Justice Castille explained that "juvenile lifers" in Appellant's position could file for *habeas corpus* relief outside the parameters of the

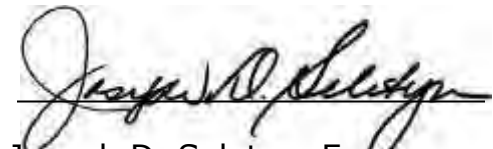
¹ Appellant states that the majority opinion in **Cunningham** "propose[d] new grounds to secure the substantive rights at issue and the retroactive effect of **Miller** in post-conviction proceedings." Appellant's Brief at 16. As Appellant does not specifically identify these statements, we will not consider this claim further.

PCRA.² Accordingly, even if the concurring opinion were precedent, the PCRA court in this case did not err in denying Appellant's motion to amend his PCRA, and Appellant's motion to this Court fails for the same reasons. **See also Commonwealth v. Seskey**, 86 A.2d 237 (Pa. Super. 2004) (concluding that juvenile lifer's undeveloped claim for *habeas corpus* relief was waived).

In sum, Appellant's PCRA petition is facially untimely, and he has failed to meet his burden of proof with regard to any exception to the timeliness requirements of the PCRA. We therefore affirm the PCRA court's denial of Appellant's latest petition for post-conviction relief.

Motion to Remand denied. Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/3/2014

² However, in a footnote, Chief Justice Castille further acknowledged "this Court on many occasions has noted the need to engage in a broad construction of the PCRA so as to avoid tension with the traditional scope of the writ of *habeas corpus*." **See id.**, at 18 n.1 (citations omitted).