

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

DERRICK THOMAS

Appellant

No. 633 EDA 2013

Appeal from the PCRA Order January 28, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1126921-1991

BEFORE: GANTMAN, J., OLSON, J., and PLATT, J.*

MEMORANDUM BY GANTMAN, J.:

FILED APRIL 8, 2014

Appellant, Derrick Thomas, appeals *pro se* from the order entered in the Philadelphia County Court of Common Pleas, dismissing as untimely his serial petition filed per the Post Conviction Relief Act ("PCRA"), at 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The relevant facts and procedural history of this case are as follows. On February 7, 1990, Appellant and co-defendants lured the victim to one of co-defendant's homes. The victim had been a witness to a murder and planned to testify against Appellant's and co-defendants' friend. A short time after arriving at the home, Appellant and co-defendants hit the victim in the head with a baseball bat, tied his hands behind his back, and repeatedly sliced the victim's neck with a machete. A jury trial was held

* Retired Senior Judge assigned to the Superior Court.

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from February 25, 1993 to March 16, 1993. The jury convicted Appellant of first-degree murder, retaliation against a witness, criminal conspiracy, and possessing an instrument of crime. Appellant filed post-trial motions, which the court denied. On April 20, 1994, the court sentenced Appellant to life imprisonment for the murder conviction, and a concurrent sentence of four (4) to fourteen (14) years' imprisonment for the remaining convictions. Appellant did not file a direct appeal. On April 28, 1995, Appellant filed a PCRA petition to reinstate his direct appeal rights *nunc pro tunc*. The court granted Appellant's petition on June 19, 1996. On June 12, 1997, this Court reversed Appellant's judgment of sentence for possessing an instrument of crime and affirmed the remaining judgments of sentence. Appellant filed a petition for allowance of appeal, which the Supreme Court denied on December 9, 1997.

Appellant timely filed *pro se* his first PCRA petition on April 21, 1998. The court appointed counsel, who filed a "no-merit" letter pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (*en banc*). On April 7, 1999, the court issued notice of its intent to dismiss Appellant's petition without a hearing pursuant to Pa.R.Crim.P. 907. After receiving no response from Appellant, the court dismissed the petition on May 20, 1999. On April 27, 2000, this Court determined counsel's "no-merit" letter was defective and vacated the order dismissing Appellant's petition and

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remanded for appointment of new counsel. The PCRA court appointed new counsel, who also filed a “no-merit” letter. The court once again dismissed Appellant’s petition, and this Court affirmed the dismissal on January 22, 2003. On October 3, 2003, Appellant filed a second PCRA petition. The PCRA court dismissed the petition as untimely on November 17, 2003, and this Court affirmed the dismissal on December 10, 2004. Appellant filed a third PCRA petition on January 10, 2008, which the court dismissed as untimely on December 4, 2009. Appellant appealed the dismissal but filed a *praecipe* for discontinuance on March 10, 2010.

Appellant filed *pro se* the current PCRA petition on June 27, 2012, and a *pro se* amended petition on August 20, 2012. The court issued Rule 907 notice on January 3, 2013, and dismissed the petition as untimely on January 28, 2013. Appellant timely filed a notice of appeal on February 21, 2013. A review of the record reveals the court did not order a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant did not file a voluntary Rule 1925(b) statement.

As a preliminary matter, we must determine whether Appellant timely filed his current PCRA petition. ***Commonwealth v. Harris***, 972 A.2d 1196 (Pa.Super. 2009), *appeal denied*, 603 Pa. 684, 982 A.2d 1227 (2009). Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition. ***Commonwealth v. Robinson***, 575 Pa. 500, 837 A.2d 1157 (2003). The most recent amendments to the PCRA, effective January 16,

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1996, provide that a PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1); **Commonwealth v. Bretz**, 830 A.2d 1273 (Pa.Super. 2003). A judgment is deemed 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.A. § 9545(b)(3).

The three statutory exceptions to the timeliness provisions in the PCRA allow for very limited circumstances under which the late filing of a petition will be excused. 42 Pa.C.S.A. § 9545(b)(1). To invoke an exception, a petition must allege and the petitioner must prove:

- (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). Additionally, a petitioner asserting a timeliness exception must file a petition within sixty (60) days of the date the claim could have been presented. 42 Pa.C.S.A. § 9545(b)(2). “As such,

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when a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." **Commonwealth v. Gamboa-Taylor**, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000).

Instantly, Appellant's judgment of sentence became final on or about March 8, 1998, upon expiration of the time to seek *certiorari* with the United States Supreme Court. Appellant filed his current PCRA petition on June 27, 2012, more than fourteen (14) years after his judgment of sentence became final. Accordingly, Appellant's petition is patently untimely. **See** 42 Pa.C.S.A. § 9545(b)(1).

In his current petition, Appellant argues all three exceptions excuse the untimeliness of his PCRA petition. **See** 42 Pa.C.S.A. § 9545(b)(1). Nevertheless, Appellant primarily asserts new constitutional rights recently recognized by the Supreme Court of the United States in **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and **Martinez v. Ryan**, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).¹

¹ In **Miller**, the United States Supreme Court held that a sentence of mandatory life imprisonment without the possibility of parole for those under the age of eighteen (18) at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. **See Miller, supra** at ___, 132 S.Ct. at 2469, 183 L.Ed.2d at ___. In **Martinez**, the
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See 42 Pa.C.S.A. § 9545(b)(1)(iii). Specifically, Appellant contends that, under **Miller**, his life imprisonment sentence is a violation of the Eighth and Fourteenth Amendments of the United States Constitution. Appellant acknowledges he was over eighteen (18) years-old at the time of the offenses, but he claims he is similarly situated to individuals under the age of eighteen (18) because a juvenile's development and maturity are incomplete until the juvenile reaches his mid-twenties.² Appellant also maintains that the ineffective assistance of counsel claims Appellant raised in his current PCRA petition should be addressed because, under **Martinez**, they are an extension of Appellant's direct review. Appellant concludes he should be granted a new trial or resentenced in accordance with **Miller**, and he should be granted the right to appeal his ineffectiveness claims *nunc pro tunc* as part of his direct appeal. We disagree.

In the present case, Appellant filed the current PCRA petition on June 27, 2012, within sixty (60) days of the **Miller** decision on June 25, 2012, but
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United States Supreme Court held that a procedural default will not bar a federal habeas court from hearing ineffective assistance of counsel claims that state law requires be raised in an initial-review collateral proceeding if counsel in that proceeding was ineffective." **Martinez, supra** at ____, 132 S.Ct. at 1320, 182 L.Ed.2d ____.

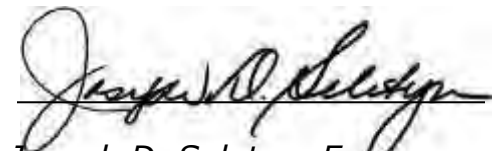
² Appellant cites the United States Supreme Court's decisions in **Roper v. Simmons**, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), and **Graham v. Florida**, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) in further support of this argument. Nevertheless, Appellant did not file his current PCRA petition within sixty (60) days of those decisions. **See** 42 Pa.C.S.A. § 9545(b)(2).

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not of the **Martinez** decision on March 20, 2012. Thus, Appellant has satisfied the PCRA's sixty (60) day rule only for **Miller**. **See** 42 Pa.C.S.A. § 9545(b)(2); **Gamboa-Taylor, supra**. Nevertheless, Appellant was nineteen (19) years-old when he committed the underlying crimes. Therefore, **Miller** does not apply to Appellant. **See** 42 Pa.C.S.A. § 9545(b)(1)(iii); **Commonwealth v. Cintora**, 69 A.3d 759, 764 (Pa.Super. 2013) (explaining **Miller** did not create newly-recognized constitutional right that serves as exception to PCRA time restrictions, where petitioners were twenty-one (21) and nineteen years old (19), respectively, when they committed underlying crimes).³ Accordingly, the PCRA court properly dismissed the petition as untimely.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/8/2014

³ Moreover, on October 30, 2013, our Supreme Court decided that **Miller** does not apply retroactively to judgments of sentence which became final before the filing date of **Miller** (June 25, 2012). **See Commonwealth v. Cunningham**, ___ Pa. ___, 81 A.3d 1 (2013).