

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

MIGUEL A. MORENO

Appellant

No. 2279 EDA 2012

Appeal from the PCRA Order July 11, 2012  
In the Court of Common Pleas of Lehigh County  
Criminal Division at No(s): CP-39-CR-0002012-1995

BEFORE: DONOHUE, J., MUNDY, J., and OLSON, J.

MEMORANDUM BY MUNDY, J.:

**FILED MAY 24, 2013**

Appellant, Miguel A. Moreno, appeals *pro se* from the July 11, 2012 order dismissing his fourth petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

We summarize the relevant factual and procedural history of this case as follows. On May 8, 1996, Appellant pled guilty to one count each of third-degree murder and robbery.<sup>1</sup> On July 19, 1996, the trial court imposed an aggregate sentence of 20 to 40 years' imprisonment.<sup>2</sup> Appellant filed a direct appeal to this Court and we affirmed the judgment of sentence on May

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<sup>1</sup> 18 Pa.C.S.A. §§ 2502(c) and 3701(a)(1)(i), respectively.

<sup>2</sup> The trial court sentenced Appellant to a term of 10 to 20 years' imprisonment on each count, to run consecutively.

16, 1997. **See Commonwealth v. Moreno**, 698 A.2d 1347 (Pa. Super. 1997) (unpublished memorandum). Appellant did not file a petition for allowance of appeal with our Supreme Court.

Subsequently, Appellant filed three PCRA petitions in 2001, 2006 and 2007, none of which have been successful. **See Commonwealth v. Moreno**, 951 A.2d 1215 (Pa. Super. 2008) (unpublished memorandum at 1-2). The docket also reflects that sometime in 2003, Appellant filed a petition for a writ of *habeas corpus* in the United States District Court for the Eastern District of Pennsylvania. On May 22, 2012, Appellant filed his fourth PCRA petition. On June 12, 2012, the PCRA court entered an order giving Appellant notice of its intent to dismiss his PCRA petition without a hearing pursuant to Pennsylvania Rule of Criminal Procedure 907. Appellant filed a response on July 9, 2012 and the PCRA court ultimately dismissed Appellant's petition on July 11, 2012. On August 7, 2012, Appellant filed a timely notice of appeal.<sup>3</sup>

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<sup>3</sup> Although Appellant's notice of appeal is time-stamped August 10, 2012, the certified record contains the envelope it was received in, with a postmark of August 7, 2012. Under the prisoner mailbox rule, "a *pro se* prisoner's document is deemed filed on the date he delivers it to prison authorities for mailing." **Commonwealth v. Chambers**, 35 A.3d 34, 38 (Pa. Super. 2011) (citation omitted), *appeal denied*, 46 A.3d 715 (Pa. 2012). Accordingly, pursuant to the prisoner mailbox rule, we deem the notice of appeal filed on August 7, 2012.

We also observe that the PCRA court did not order Appellant to file a concise statement of errors complained of on appeal pursuant to (Footnote Continued Next Page)

On appeal, Appellant raises two issues for our review.

1. Does [Appellant] deserve to have his appellate rights reinstated because the [Commonwealth] squandered his appeals with an insurmountable prejudice burden?
2. Do the U.S. Supreme Court's decisions in **Frye v. Missouri**[, 132 S. Ct. 1399] (2012) and **Lafler v. Cooper**[, 132 S. Ct. 1376] (2012) provide retroactive application of the correct prejudice burden from **Hill v. Lockhart**[, 474 U.S. 85 (1985)]?

Appellant's Brief at 1.<sup>4</sup>

We begin by noting our well-settled standard of review. "Our review of a PCRA court's decision is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error." **Commonwealth v. Koehler**, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "[Our] scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level." **Id.** "The PCRA court's credibility determinations, when supported by the record, are binding on this Court." **Commonwealth v. Spatz**, 18 A.3d 244, 259 (Pa.

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Pennsylvania Rule of Appellate Procedure 1925(b). The PCRA court filed its Rule 1925(a) opinion on October 11, 2012.

<sup>4</sup> We note that Appellant's brief does not contain pagination. Therefore, we have elected to assign page numbers for ease of reference.

2011) (citation omitted). “However, this Court applies a *de novo* standard of review to the PCRA court’s legal conclusions.” ***Id.***

Before we may address the merits of Appellant’s claim, we must first consider the timeliness of his PCRA petition because it implicates the jurisdiction of both this Court and the PCRA court. ***Commonwealth v. Williams***, 35 A.3d 44, 52 (Pa. Super. 2011) (citation omitted), *appeal denied*, 50 A.3d 121 (Pa. 2012). “Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition.” ***Id.*** The PCRA “confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar[.]” ***Commonwealth v. Watts***, 23 A.3d 980, 983 (Pa. 2011) (citation omitted). This is to “accord finality to the collateral review process.” ***Id.***

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, that an exception to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), is met.

***Commonwealth v. Harris***, 972 A.2d 1196, 1199-1200 (Pa. Super. 2009).

The act provides as follows.

**§ 9545. Jurisdiction and proceedings**

...

(b) Time for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within

one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(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.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

...

42 Pa.C.S.A. § 9545(b).

As noted above, Appellant was sentenced on July 19, 1996, and this Court affirmed Appellant's judgment of sentence on May 16, 1997. Appellant did not seek further appellate review in our Supreme Court. Thus, Appellant's judgment of sentence became final when the 30-day period for him to file a petition for allowance of appeal in our Supreme Court expired

on June 16, 1997.<sup>5</sup> **See** 42 Pa.C.S.A. § 9545(b)(3). As such, Appellant had until June 16, 1998 to timely file his PCRA petition. The instant petition was not filed until May 22, 2012, therefore it is facially untimely. However, Appellant alleges an exception to the time-bar. Appellant's Brief at 2. Specifically, Appellant claims that the new constitutional right exception set forth in section 9545(b)(1)(iii) applies.<sup>6</sup> **Id.** This Court has recently explained a prisoner's burden under this exception.

Subsection (iii) of section 9545 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 th[e Pennsylvania] Supreme Court 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

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<sup>5</sup> We observe that the 30<sup>th</sup> day fell on Sunday, June 15, 1997. When computing the 30-day filing period "[if] the last day of any such period shall fall on Saturday or Sunday ... such day shall be omitted from the computation." 1 Pa.C.S.A. § 1908. Therefore, the 30<sup>th</sup> day for Appellant to file a petition for allowance of appeal actually fell on Monday, June 16, 1997.

<sup>6</sup> The Commonwealth argues that Appellant has waived his argument on appeal. Specifically, the Commonwealth believes Appellant is arguing in his brief that the newly discovered fact exception applies. Commonwealth's Brief at 8. Appellant argued below that the new constitutional right exception applies. **Id.** Therefore, in the Commonwealth's view, Appellant's argument on appeal should be deemed waived for presenting a different theory on appeal than the one he relied on below. **Id.** It is true that Appellant's brief does mention "section 9545(b)(1)(ii)[.]" Appellant's Brief at 2. However, Appellant's brief in its entirety speaks to retroactivity, and the Commonwealth concedes that Appellant is relying on the same cases as he did below. **See** Commonwealth's Brief at 8. We therefore deduce that Appellant made a typographical error and meant to type "section 9545(b)(1)(iii)." Thus, we decline to find waiver on this basis.

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. Garcia***, 23 A.3d 1059, 1063 (Pa. Super. 2011) (citations omitted), *appeal denied*, 38 A.3d 823 (Pa. 2012).

Additionally, as this Court has often explained, all of the PCRA time-bar exceptions are subject to a separate deadline.

The statutory exceptions to the timeliness requirements of the PCRA are also subject to a separate time limitation and must be filed within sixty (60) days of the time the claim could first have been presented. **See** 42 Pa.C.S.A. § 9545(b)(2). The sixty (60) day time limit ... runs from the date the petitioner first learned of the alleged after-discovered facts. A petitioner must explain when he first learned of the facts underlying his PCRA claims and show that he brought his claim within sixty (60) days thereafter.

***Williams, supra*** at 53; **see also *Commonwealth v. Baldwin***, 789 A.2d 728, 731 (Pa. Super. 2001) (stating that when asserting the new constitutional right exception applies, a prisoner must file his or her PCRA petition within 60 days of the date the decision being relied on was issued), *appeal denied*, 863 A.2d 1141 (Pa. 2002).

After careful review, we are compelled to conclude that Appellant’s alleged exception fails to meet the requirements of section 9545(b)(2). In

the case *sub judice*, Appellant avers that the United States Supreme Court's decisions in ***Frye v. Missouri***, 132 S. Ct. 1399 (2012) and ***Lafler v. Cooper***, 132 S. Ct. 1376 (2012) announced a new constitutional right that is to be applied retroactively. The Supreme Court issued both decisions on March 21, 2012. Therefore, the 60-day time period for Appellant to file a PCRA petition asserting this exception expired on May 20, 2012. However, as noted above, because May 20, 2012 was a Sunday, this day is excluded from the calculation of the filing period. **See** 1 Pa.C.S.A. § 1908. Therefore, the last day for Appellant to assert this exception in compliance with section 9545(b)(2) was Monday, May 21, 2012. Appellant's PCRA petition was filed on May 22, 2012, one day past the deadline. As a result, we are constrained to conclude that Appellant cannot avail himself of the new constitutional right exception to the PCRA time-bar.<sup>7</sup> **See Williams, supra; Baldwin, supra.**

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<sup>7</sup> Even if Appellant had filed his petition within 60 days of ***Lafler*** and ***Frye***, he still could not avail himself of the new constitutional right exception. This Court recently concluded that ***Lafler*** does not satisfy the new constitutional right exception to the PCRA time-bar. **See Commonwealth v. Lewis**, --- A.3d ---, 2013 WL 1182093, \*5 (Pa. Super. 2013) (stating that ***Lafler*** does not establish a new constitutional right in Pennsylvania because "the right to effective assistance of counsel during the plea bargaining process has been recognized for decades[]").

In ***Frye***, the Supreme Court held that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." ***Frye, supra*** at 1408. The Court further explained, "[w]hen defense counsel allowed the offer to  
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Based on the foregoing, we conclude the PCRA court properly dismissed Appellant's instant petition as untimely. Accordingly, the PCRA court's July 11, 2012 order is affirmed.

Order affirmed.

Judgment Entered.



Prothonotary

Date: 5/24/2013

(Footnote Continued) \_\_\_\_\_

expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires." **Id.** As with **Lafler**, Pennsylvania has imposed this responsibility on defense counsel for decades. **See Commonwealth v. Napper**, 385 A.2d 521, 524 (Pa. Super. 1980) (stating, "[d]efense counsel has a duty to communicate to his client, not only the terms of a plea bargain offer, but also the relative merits of the offer compared to the defendant's chances at trial[.]"); **accord Commonwealth v. Martinez**, 777 A.2d 1121, 1124 (Pa. Super. 2001), *appeal denied*, 788 A.2d 374 (Pa. 2001). As the principles enunciated in **Frye** and **Lafler** existed in Pennsylvania long before the Supreme Court's decisions, they cannot be considered "new" constitutional rights. As a result, Appellant cannot satisfy the exception to the PCRA time-bar.