

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
DANIEL R. WITUCKI, SR.,	:	
	:	
Appellant	:	No. 633 MDA 2013

Appeal from the PCRA Order March 18, 2013,
Court of Common Pleas, Tioga County,
Criminal Division at No. CP-59-CR-0000033-1998

BEFORE: DONOHUE, SHOGAN and MUSMANNO, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED DECEMBER 24, 2013

Daniel R. Witucki, Sr. (“Witucki”) appeals from the order of court dismissing his second petition filed pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. §§ 9541-9546. His appointed counsel, Richard W. McCoy, Esquire (“Counsel”) has filed an application with this Court seeking permission to withdraw from representation.¹ We affirm the PCRA court’s order and grant Counsel’s request.

Pertinent to the present appeal, we note that in 1998, Witucki was convicted of first-degree murder and sentenced to life imprisonment. His judgment of sentence was affirmed on direct appeal. He filed his first PCRA petition in 2000, which afforded him no relief. Witucki filed the PCRA petition at issue here on May 15, 2012, raising only the claim that trial

¹ As a result of Counsel’s request to withdraw, Witucki has filed a *pro se* appellant’s brief in this matter.

counsel was ineffective for failing to discuss a plea deal with him and citing the United States Supreme Court decisions ***Lafler v. Cooper***, ___ U.S. ___, 132 S.Ct. 1376 (2012) and ***Missouri v. Frye***, ___ U.S. ___, 132 S.Ct. 1399 (2012) in support of his claim. Following a hearing, the PCRA court dismissed his petition on March 18, 2013. This timely appeal followed.

First, we note that Counsel has proceeded under the requirements of ***Anders v. California***, 386 U.S. 738, 87 S. Ct. 1396 (1967). The ***Anders*** procedure is employed when counsel seeks to withdraw from representation on direct appeal. ***Commonwealth v. Wrecks***, 931 A.2d 717, 720 (Pa. Super. 2007). "Counsel petitioning to withdraw from PCRA representation must proceed not under ***Anders*** but under ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988), and ***Commonwealth v. Finley***, 379 Pa.Super. 390, 550 A.2d 213 (1988)." ***Id.*** at 721. The ***Turner/Finley*** requirements are as follows:

[PCRA] counsel must ... submit a 'no-merit' letter to the trial court, or brief on appeal to this Court, [1] detailing the nature and extent of counsel's diligent review of the case, [2] listing the issues which the petitioner wants to have reviewed, [3] explaining why and how those issues lack merit, and [4] requesting permission to withdraw.

Counsel must also send to the petitioner: (1) a copy of the 'no-merit' letter/brief; (2) a copy of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed pro se or by new counsel.

If counsel fails to satisfy the foregoing technical prerequisites of ***Turner/Finley***, the court

will not reach the merits of the underlying claims but, rather, will merely deny counsel's request to withdraw. Upon doing so, the court will then take appropriate steps, such as directing counsel to file a proper **Turner/Finley** request or an advocate's brief.

However, where counsel submits a petition and no-merit letter that do satisfy the technical demands of **Turner/Finley**, the [court] must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief.

Id. (internal citations omitted).

Despite Counsel's misapprehension as to the applicable standard, our review of the record reveals that the documents submitted by Counsel comply with the substantive requirements of **Turner/Finley**. Accordingly, we proceed to conduct our own review.² **See id.**

The PCRA's time restrictions are jurisdictional and no court has jurisdiction to entertain an untimely PCRA petition. **Commonwealth v. Hernandez**, __ A.3d __, 2013 WL 4552447 at * 2 (Pa. Super. Aug. 28, 2013) ("[The PCRA] time requirement is mandatory and jurisdictional in nature, and the court may not ignore it in order to reach the merits of the petition."). For that reason, our review begins with considering the timeliness of Witucki's PCRA petition.

² Perplexingly, Counsel indicates his awareness of the **Turner/Finley** standard and its applicability in the present case. Petition to Withdraw as Counsel, 8/8/13, at 1 n.1. Despite acknowledging this, Counsel elected to proceed under the **Anders** requirements. We urge Counsel to adhere to the **Turner/Finley** requirements in the future.

The PCRA requires that any petition filed under it shall be filed within one year of the date the judgment becomes final unless one of three exceptions applies. **See** 42 Pa.C.S.A. § 9545(b). The relevant PCRA provision provides as follows:

(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.

42 Pa.C.S.A. § 9545(b)(1).

“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.” **Hernandez**, 2013 WL 4552447 at * 2. In this case, the Pennsylvania Supreme Court denied Witucki’s petition for allowance of appeal on April 24, 1999. His judgment of sentence became final at the

expiration of time in which he could have petitioned the Supreme Court of the United States for review, which was on or about July 24, 1999. **See** SUP.CT.R. 13. This petition, filed almost 13 years later, is untimely on its face.

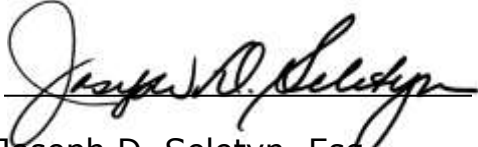
Recognizing the patent untimeliness of this PCRA petition, Witucki argues that he has satisfied the exception contained in § 9545(b)(1)(iii) because the United States Supreme Court's decisions **Lafler** and **Frye** established a new constitutional right that must be applied retroactively. Appellant's *Pro Se* Brief at 10; PCRA Petition, 5/15/12, at 5. Witucki is mistaken. This Court has addressed this precise claim and concluded that **Lafler** and **Frye** do not create a new constitutional right. **Commonwealth v. Feliciano**, 69 A.3d 1270, 1277 (Pa. Super. 2013) ("It is apparent that neither **Frye** nor **Lafler** created a new constitutional right.").

As Witucki has failed to establish an exception to the PCRA's timeliness requirements, no court could properly entertain his PCRA petition. We therefore agree with Counsel that there is no merit to this appeal, grant his petition to withdraw, and affirm the order of the PCRA court.

Order affirmed. Petition to withdraw granted.

J-S72005-13

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: 12/24/2013