

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ROBERTO GONZALEZ, JR.,	:	
	:	
Appellant	:	No. 744 MDA 2012

Appeal from the Order entered on March 27, 2012  
in the Court of Common Pleas of Berks County,  
Criminal Division, No. CP-06-CR-0003107-1989

BEFORE: MUSMANNO, BENDER and COLVILLE\*, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED DECEMBER 13, 2013**

Roberto Gonzalez, Jr. ("Gonzalez"), *pro se*, appeals from the Order denying his eighth Petition for Relief filed pursuant to the Post Conviction Relief Act ("PCRA"). **See** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The PCRA court briefly summarized the facts underlying Gonzalez's Petition as follows:

In the early morning hours of October 8, 1989, Joby Cipolla, the victim, was driving in his vehicle when he took a right turn at the intersection of West Windsor and McKnight Streets and began travelling down McKnight Street in downtown Reading, Pennsylvania. The victim was being followed by his wife in another vehicle[,] when four cars heading the other direction on West Windsor Street made sudden left turns and cut off the victim from his wife. The four vehicles chased the victim, and, ultimately, three of the vehicles, occupied by Gonzalez and three other men, cornered [the victim] in an alleyway. [Gonzalez] at some point procured a wooden pickaxe handle and smashed out the windows of the victim's car. All four men began to kick and punch the victim until [Gonzalez] straddled the victim and beat the victim in the head with the pickaxe handle as if he were

\*Retired Senior Judge assigned to the Superior Court.

“driving a stake into the ground.” N.T., Trial, Vol. II, at 244. After a neighbor repeatedly yelled for the men to stop, the attackers fled. The victim suffered massive injuries including a hole in his skull the size of a tennis ball, numerous broken bones, and severe internal organ injuries. N.T., Trial, Vol. III, at 235-37. The victim died on October 26, 1989, as a result of the injuries he sustained at the hands of [Gonzalez] and his accomplices.

PCRA Court Opinion, 4/25/12, at 4. At the time of the attack, Gonzalez was 17 years old.

On July 25, 1990, a jury found Gonzalez guilty of first-degree murder, aggravated assault, recklessly endangering another person, criminal mischief, possessing instruments of crime and criminal conspiracy.<sup>1</sup> The trial court sentenced Gonzalez to the mandatory sentence of life in prison without parole, plus one to four years. This Court affirmed Gonzalez’s judgment of sentence on February 28, 1992. Since that time, Gonzalez has filed eight petitions for post-conviction collateral relief, including the instant Petition. The PCRA court denied Gonzalez’s instant Petition as untimely filed. PCRA Court Opinion, 4/25/12, at 6. Gonzalez then filed the instant appeal, followed by a court-ordered Pa.R.A.P. 1925(b) Concise Statement of Matters Complained of on Appeal.

In his Amended *pro se* appellate brief, Gonzalez presents the following claim for our review:

Whether [Gonzalez] is entitled to relief pursuant to the United States Supreme Court’s decision in **Miller v. Alabama**, 567 U.S. \_\_\_\_ (2012) ... where the Supreme Court held that it is

---

<sup>1</sup> 18 Pa.C.S.A. §§ 2502, 2702, 2705, 3304, 907, 903.

unconstitutional to impose a mandatory sentence of life without parole on a [j]uvenile convicted of first degree murder, where [Gonzalez] was 17 (seventeen) years old at the time of his crime and conviction, thereby entitling [Gonzalez] to relief and rendering his sentence unconstitutional and illegal[?]

Amended Brief for Appellant at 2 (unnumbered).

Gonzalez claims that in **Miller**, the United States Supreme Court held that it was unconstitutional to sentence a juvenile to a mandatory sentence of life in prison without parole. **Id.** at 4. Because he was 17 years old at the time of the crime, Gonzalez argues, **Miller** applies. **Id.** Further, Gonzalez claims that he timely claimed a newly recognized constitutional right, which constitutes an exception to the PCRA's timeliness requirement. **Id.** at 5. Gonzalez also argues that **Miller** applies retroactively, thereby invalidating his sentence. **Id.**

In **Miller**, the United States Supreme Court concluded that for juveniles convicted of homicide offenses, a statutory scheme imposing a mandatory life sentence without parole violates the Eighth Amendment to the United States Constitution:

[O]ur individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without the possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment...

**Miller**, 132 S. Ct. at 2475. Thus, a mandatory sentencing scheme imposing life in prison for homicide offenses, as applied to juveniles, was rendered unconstitutional by the United States Supreme Court's decision in **Miller**.

Notwithstanding, on October 30, 2013, the Pennsylvania Supreme Court issued its decision in **Commonwealth v. Cunningham**, No. 38 EAP 2012 (Pa. filed October 30, 2013), which addressed whether the United States Supreme Court's pronouncement in **Miller** may be applied retroactively to a juvenile whose judgment of sentence became final prior to the **Miller** decision. In a 4-3 decision, the Pennsylvania Supreme Court held that **Miller** does not apply retroactively to defendants whose judgments of sentence were final at the time of **Miller's** announcement. **Id.**, slip opinion at 17.

In the instant case, Gonzalez's sentence was final at the time of **Miller's** announcement. As we are bound by the Pennsylvania Supreme Court's holding in **Cunningham**, there is no basis upon which to grant Gonzalez relief on his claim. Accordingly, we affirm the Order of the PCRA court.<sup>2</sup>

---

<sup>2</sup> As to the issues raised in Gonzalez's first brief filed with this Court, which he abandoned in his Amended Brief, we would affirm on the basis of the PCRA Court's Opinion. **See** PCRA Court Opinion, 4/25/12, at 5-9 (holding that the United States Supreme Court's decision in **Maples v. Thomas**, \_\_\_ U.S. \_\_\_, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012), did not create a new constitutional right, and is distinguishable, as Gonzalez was notified that his counsel intended to withdraw, and in **Maples**, counsel failed to notify their client, the counsel through whom they were admitted *pro hac vice*, and the court).

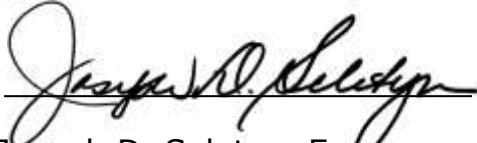
J-S69015-12

Order affirmed.

Bender, P.J., files a concurring memorandum.

Colville, J., concurs in the result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/13/2013