

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

TERRELL CLARY,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 297 EDA 2015

Appeal from the PCRA Order entered January 7, 2015
in the Court of Common Pleas of Montgomery County,
Criminal Division, at No(s): CP-46-CR-0000762-2000,
CP-46-CR-0001873-2000 & CP-46-CR-0008066-1999

BEFORE: ALLEN, MUNDY, and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.:

FILED JULY 31, 2015

Terrell Clary ("Appellant") appeals *pro se* from the order denying his first petition for post-conviction relief filed pursuant to the Post Conviction Relief Act ("PCRA"). 42 Pa.C.S.A. §§ 9541-46. We affirm.¹

The pertinent facts and procedural history are as follows: In 1999, Appellant, then sixteen years of age, shot and killed William Six. Thereafter, a jury convicted him of first-degree murder and related offenses. The trial court sentenced Appellant to life imprisonment without the possibility of

¹ In his *pro se* notice of appeal, Appellant stated that he was appealing from the PCRA court's September 29, 2014 interlocutory order, in which it issued its intent to dismiss Appellant's PCRA petition. Appellant's appeal is properly taken from the final January 7, 2015 order dismissing his PCRA petition. We have corrected the appeal paragraph accordingly.

*Former Justice specially assigned to the Superior Court.

parole. Appellant filed a timely appeal to this Court. In an unpublished memorandum filed on September 17, 2002, we rejected Appellant's claims and affirmed his judgment of sentence. **Commonwealth v. Clary**, 813 A.2d 900 (Pa. Super. 2002). On April 23, 2003, our Supreme Court denied Appellant's petition for allowance of appeal. **Commonwealth v. Clary**, 820 A.2d 702 (Pa. 2003).

Nearly ten years later, on August 15, 2012, Appellant filed a *pro se* PCRA petition. The PCRA court appointed counsel, and PCRA counsel filed an amended petition in which Appellant asserted that his sentence of life imprisonment without parole was unconstitutional in light of the United States Supreme Court's decision in **Miller v. Alabama**, 132 S.Ct. 2455 (2012). While Appellant's petition was pending, the Pennsylvania Supreme Court issued its decision in **Commonwealth v. Cunningham**, 81 A.3d 1 (Pa. 2013), holding that **Miller** did not apply retroactively to juvenile offenders whose judgment of sentence became final prior to the filing of the **Miller** decision. **Cunningham**, 81 A.3d at 10-11.

Accordingly, on December 2, 2013, PCRA counsel filed a "no-merit" letter and petition to withdraw pursuant to **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). On January 2, 2014, Appellant filed *pro se* objections to PCRA counsel's **Turner/Finley** letter. On September 29, 2014, the PCRA court permitted counsel to withdraw, and issued Pa.R.Crim.P. 907 notice of intent to dismiss Appellant's PCRA petition without a hearing

because it was untimely. By order entered January 7, 2015, the PCRA court denied Appellant's amended PCRA petition. This timely *pro se* appeal followed. The PCRA court did not require Pa.R.A.P. 1925 compliance.

Our 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).

Before addressing the issue Appellant raises on appeal, we must first determine whether the PCRA court properly determined that Appellant's PCRA petition is 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.”).

Here, Appellant’s judgment of sentence became final on July 22, 2003, the date on which the time for filing a petition for writ of *certiorari* with the United States Supreme Court expired. 42 Pa.C.S.A. § 9545(b)(3); U.S.Sup.Ct.R. 13. Appellant filed the instant PCRA petition over nine years

later. As a result, his PCRA petition 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).

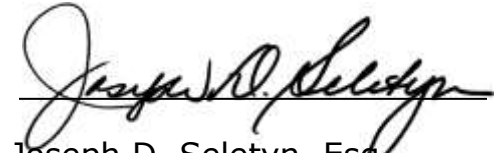
Within his handwritten *pro se* brief, Appellant has failed to acknowledge, let alone prove, the applicability of any of the exceptions to the PCRA's time restrictions. Instead, Appellant asserts that **Miller** "is retroactive on its face," and refers to **Miller's** companion case, **Jackson v. Hobbs**, which involved a collateral challenge. Appellant's Brief at 7. In **Cunningham**, however, our Supreme Court specifically rejected the **Jackson**-based argument, and held that **Jackson** does not compel that the holding in **Miller** be applied retroactively. **Cunningham**, 81 A.3d at 9.²

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 petition for post-conviction relief.

Order affirmed.

² Appellant also cites to the federal court's decision in **Songster v. Beard**, 35 F.Supp.3d 657 (E.D.Pa. 2014), in which the district court held that **Miller** applied retroactively to cases on collateral review. Because federal decisions that construe Pennsylvania law are not binding precedent, **Commonwealth v. Bennett**, 57 A.3d 1185, 1203 (Pa. 2012), this decision does not affect our decision.

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: 7/31/2015