

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
GUY JOSEPH BICKING,	:	
	:	
Appellant	:	No. 1316 MDA 2013

Appeal from the PCRA Order June 18, 2013,  
Court of Common Pleas, Lackawanna County,  
Criminal Division at No. CP-35-CR-0000208-1987

BEFORE: BENDER, P.J.E., DONOHUE and STRASSBURGER\*, JJ.

MEMORANDUM BY DONOHUE, J.:

**FILED APRIL 11, 2014**

Guy Joseph Bicking (“Bicking”) appeals *pro se* from the June 18, 2013 order entered by the Court of Common Pleas, Lackawanna County, dismissing his petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 (“PCRA”), as untimely. We affirm.

On June 18, 1988, the trial court sentenced Bicking to a sentence of life in prison without the possibility of parole for his conviction of first-degree murder. This Court affirmed his judgment of sentence on June 12, 1990. On January 15, 1991, the Pennsylvania Supreme Court denied his request for allowance of appeal.

Bicking filed his first PCRA petition on July 13, 1992. The PCRA court denied his petition and this Court affirmed in an unpublished memorandum

\*Retired Senior Judge assigned to the Superior Court.

on July 1, 1994. The Pennsylvania Supreme Court subsequently denied his request for allowance of appeal on November 18, 1994.

Bicking filed the instant PCRA petition on April 14, 2012. Recognizing the untimeliness of the petition,<sup>1</sup> Bicking asserted that he met the timeliness exception contained in 42 Pa.C.S.A. § 9545(b)(1)(iii).<sup>2</sup> Specifically, he argued that the United States Supreme Court's decisions in **Lafler v. Cooper**, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1376 (2012), and **Missouri v. Frye**, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1399 (2012) created a new constitutional right requiring effective assistance of counsel during the plea bargaining process where a defendant rejected a plea offer and proceeded to trial on the erroneous advice of counsel. He asserted that he rejected the Commonwealth's offer of 20 years of imprisonment for a plea to third-degree murder based on

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<sup>1</sup> "Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final[.]" 42 Pa.C.S.A. § 9545(b)(1). "[A] judgment 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." 42 Pa.C.S.A. § 9545(b)(3).

<sup>2</sup> This exception to the PCRA's time bar states requires that the petitioner plead and prove that

(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)(iii). Any petition invoking one of the exceptions to the PCRA's timeliness requirement must be filed within 60 days of the availability of the claim. 42 Pa.C.S.A. § 9545(b)(2).

counsel's representation that a person convicted of first-degree murder served, on average, 17 years in prison. PCRA Petition, 4/14/12, at ¶ 21. Following argument on the petition on June 11, 2013, the PCRA court dismissed Bicking's petition as untimely. Without deciding whether **Lafler** and **Frye** created a new constitutional right, the PCRA court found that Bicking failed to prove that the United States Supreme Court has held that the decisions apply retroactively, making it unnecessary to decide whether a new constitutional right exists.

Bicking filed a timely *pro se* notice of appeal. He raises one issue for our review:

Whether the PCRA court erred in holding that the petition for PCRA relief was untimely by determining that [Bicking] had not met the requirements that are set forth in 42 Pa.C.S. §9545(b)(1)(iii), one of the exceptions to the one[-]year statute of limitations embodied in the [PCRA]?

Bicking's Brief at 4.

We review the denial of a PCRA petition on timeliness grounds according to the following standard:

In reviewing the denial of PCRA relief, we examine whether the PCRA court's determination is supported by the record and free of legal error. The PCRA timeliness requirement, however, is mandatory and jurisdictional in nature. The court cannot ignore a petition's untimeliness and reach the merits of the petition. Section 9545(b)(1) requires a petitioner to file a PCRA petition within one year of the date the judgment [became] final.

**Commonwealth v. Taylor**, \_\_ Pa. \_\_, 67 A.3d 1245, 1248 (2013) (internal citations and quotations omitted).

It is uncontested that the PCRA petition at issue before us is facially untimely. **See** Bicking's Brief at 8. Bicking asserts, as he did below, that he satisfies one of the exceptions to the timeliness requirements, *to wit*, that the United States Supreme Court in **Lafler** and **Frye** created a new constitutional right that applies retroactively to his case, and that he filed the instant PCRA petition within 60 days of the date of those decisions. **See id.** at 8-12; 42 Pa.C.S.A. § 9545(b)(1)(iii), (2).

This Court recently decided this precise issue in **Commonwealth v. Feliciano**, 69 A.3d 1270 (Pa. Super. 2013). In that case, we explained:

In **Frye**, the United State Supreme Court merely clarified that this well-established right '*extends to the negotiation and consideration of plea offers that lapse or are rejected.*' **Frye**, 132 S.Ct. at 1404 (emphasis added). In other words, the **Frye** Court held 'that, as a general rule, 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.' **Id.** at 1408. In determining whether counsel has satisfied this obligation, the two-part test set forth in **Strickland** applies.<sup>[FN]3</sup> **See id.** at 1409. In **Lafler**, the Court explained that to meet the prejudice prong of the **Strickland** test where the alleged ineffectiveness of counsel involves the defendant's rejection of a plea offer, the defendant must show,

that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted

the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

**Lafler**, 132 S.Ct. at 1385.

It is apparent that neither **Frye** nor **Lafler** created a new constitutional right. Instead, these decisions simply applied the Sixth Amendment right to counsel, and the **Strickland** test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand, *i.e.* where counsel's conduct resulted in a plea offer lapsing or being rejected to the defendant's detriment.

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<sup>[FN]3</sup> [The **Strickland**] test requires that a defendant show that counsel (1) had no reasonable basis for their actions or inactions, and (2) the defendant suffered prejudice as a result of counsel's conduct. In Pennsylvania, our Supreme Court has added one additional component to the **Strickland** test, requiring that a defendant also prove that the underlying claim has arguable merit. **See Commonwealth v. Bennett**, 57 A.3d 1185, 1195 (Pa. 2012).

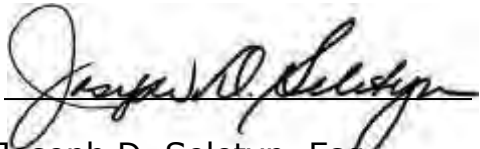
**Feliciano**, 69 A.3d at 1276-77 (footnote 4 omitted).

We are bound by the **Feliciano** Court's decision that the United States Supreme Court in **Lafler** and **Frye** did not create a new constitutional right, and thus conclude that Bicking failed to satisfy any of the time bar

exceptions to the PCRA.<sup>3</sup> We therefore find no error in the PCRA court's dismissal of Bicking's PCRA petition as untimely.

Order affirmed.

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: 4/11/2014

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<sup>3</sup> Although this was not the rationale used by the PCRA court to dismiss Bicking's petition, the law is well settled that we may affirm the lower court on any basis. ***Commonwealth v. Williams***, 73 A.3d 609, 617 n.4 (Pa. Super. 2013).