

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

MARK BENTON

Appellant

No. 2207 EDA 2016

Appeal from the PCRA Order June 14, 2016
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0002928-2005

BEFORE: BOWES, J., OTT, J., AND FORD ELLIOTT, P.J.E.

MEMORANDUM BY BOWES, J.:

FILED APRIL 20, 2017

Mark Benton appeals *pro se* from the June 14, 2016 order denying him PCRA relief. We affirm.

On March 11, 2005, Appellant shot his employer, Wael Refaey, five times at close range in the parking lot of the Knights Inn Motel, Bensalem Township. Mr. Refaey died. The murder was witnessed by an acquaintance, Nancy Alvarez, whom Appellant shot in the abdomen. Ms. Alvarez survived her wound. Appellant escaped the murder scene in Mr. Refaey's car, but was pursued by police and, after a struggle, arrested.

On February 2, 2006, a death-qualified jury convicted Appellant of first-degree murder, attempted homicide, robbery of a motor vehicle, possession of an unlicensed firearm, resisting arrest, and fleeing a police

officer. That same day, the jury sentenced Appellant to life imprisonment, with a consecutive sentence of seven and one-half to fifteen years on the other offenses. We affirmed the judgment of sentence on January 26, 2007. ***Commonwealth v. Benton***, 919 A.2d 967 (Pa.Super. 2007 (unpublished memorandum)). On July 24, 2007, our Supreme Court denied allowance of appeal. ***Commonwealth v. Benton***, 928 A.2d 1288 (Pa. 2007).

Appellant filed a timely counseled PCRA petition, raising thirteen claims of ineffective assistance of trial counsel and three allegations that direct appeal counsel was ineffective. The petition was denied after a hearing. We affirmed the order denying relief. ***Commonwealth v. Benton***, 22 A.3d 1059 (Pa.Super. 2010) (unpublished memorandum), *appeal denied*, 34 A.3d 824 (Pa. 2011). On May 26, 2014, Appellant filed a petition for writ of *habeas corpus* in the civil division of the Court of Common Pleas of Bucks County. That petition was transferred to the present criminal action and was denied. We affirmed on appeal. ***Commonwealth v. Benton***, 131 A.3d 108 (Pa.Super. 2015) (unpublished memorandum).

On February 29, 2016, Appellant filed the present petition for PCRA relief. He alleged therein that he was entitled to relief under ***Miller v. Alabama***, 132 S.Ct. 2455 (2012), wherein the United States Supreme Court held that it was unconstitutional, under the Eighth Amendment's prohibition against cruel and unusual punishment, to sentence a juvenile homicide offender to a mandatory term of life imprisonment without parole.

Appellant averred that, when he committed these crimes at the age of twenty-two, his mind was just as immature as that of a seventeen-year-old. On June 14, 2016, the petition was dismissed as untimely, and this appeal followed.

Appellant's brief does not contain a statement of issues involved, but his position on appeal is identical to the one raised in the PCRA petition. He argues that he is entitled to relief under **Miller** due to his lack of maturity, low intelligence quotient ("I.Q."), and history of physical, mental, alcohol, and drug abuse. In his appellate brief, he characterizes **Miller** as a new constitutional right, and we are aware that it was accorded retroactivity on January 27, 2016, in **Montgomery v. Louisiana**, 136 S.Ct. 718 (2016).

Initially, we note that this Court reviews the "denial of PCRA relief to determine whether the findings of the PCRA court are supported by the record and free of legal error." **Commonwealth v. Roane**, 142 A.3d 79, 86 (Pa.Super. 2016) (quoting **Commonwealth v. Treiber**, 121 A.3d 435, 444 (Pa. 2015)). All PCRA petitions must be filed within one year of the date a defendant's judgment becomes final unless an exception to the one-year time restriction applies. 42 Pa.C.S. § 9545(b)(1). If a PCRA petition is untimely, "neither this Court nor the trial court has jurisdiction over the petition." **Commonwealth v. Miller**, 102 A.3d 988, 992 (Pa.Super. 2014) (citation omitted); **see also Commonwealth v. Chester**, 895 A.2d 520, 522 (Pa. 2006). "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. § 9545(b)(3).

In this case, our Supreme Court denied review of Appellant’s judgment of sentence on July 24, 2007, and it became final ninety days later since Appellant did not seek *certiorari* in the Supreme Court. Thus, Appellant’s judgment of sentence became final on October 22, 2007, and he had until October 22, 2008, to file a timely petition. His 2016 petition was not filed by that date. There are three exceptions to the one-year time bar of § 9545:

(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. § 9545(b)(1)(i-iii).

Appellant appears to invoke the newly recognized constitutional right exception, as he notes that **Miller** did create a new constitutional right. Additionally, the present petition was filed on February 29, 2016, within sixty days from when **Miller** was rendered retroactive on January 27, 2016.

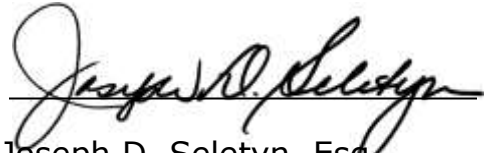
Nevertheless, our case law currently holds that **Miller** is inapplicable to anyone eighteen years of age or older, and we have rejected the position that its holding should be extended, under the equal protection clause, to anyone over eighteen but whose brain was as immature as that of a juvenile when the crime was committed. **Commonwealth v. Cintora**, 69 A.3d 759 (Pa.Super. 2013); **see also Commonwealth v. Furgess**, 149 A.3d 90 (Pa.Super. 2016) (where defendant was nineteen years old when he committed murder, **Miller** was inapplicable).

Appellant's present position is that **Miller** affords him relief in that he shared the characteristics of a juvenile in terms of his brain development due to his low I.Q., history of physical, mental, alcohol, and drug abuse, and relatively young age. This stance was specifically rejected by **Cintora, supra**, and we must affirm the denial of PCRA relief. There is no authority holding that a defendant cannot be sentenced to life imprisonment without parole if he has a low I.Q. or a background of physical, mental, alcohol, and drug abuse.

Order affirmed.

J-S20009-17

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: 4/20/2017