NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DONALD ZOLLER, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1676 WDA 2014

Appeal from the PCRA Order of October 3, 2014
In the Court of Common Pleas of Allegheny County
Criminal Division at No: CP-02-CR-0004839-1986

BEFORE: LAZARUS, STABILE, and JENKINS, JJ.

MEMORANDUM BY STABILE, J.: **FILED AUGUST 21, 2015**

Appellant, Donald Zoller, Jr., appeals from the October 3, 2014 order entered in the Court of Common Pleas of Allegheny County, dismissing his petition for collateral relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. Upon review, we affirm.

The facts and procedural history underlying this appeal are undisputed. On May 12, 1986, at the age of 14, Donald Zoller was charged as an adult with three counts of criminal homicide for the stabbing deaths of his three neighbors, Edward Kalberer, Mary Kalberer, and Ann Jacobs. Following a bench trial, Appellant was convicted of three counts of first degree murder[1] and was sentenced to three concurrent mandatory

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[1] 18 Pa.C.S.A. § 2502(a)

sentences of life without the possibility of parole. On September 26, 1989, this Court affirmed Appellant's sentence, and on March 9, 1990, the Pennsylvania Supreme Court denied Appellant's petition for *allocatur*. ***Commonwealth v. Zoller***, 569 A.2d 1387 (Pa. Super. 1989) (unpublished memorandum), *appeal denied*, 574 A.2d 69 (Pa. 1990). In 1995, Appellant filed a PCRA petition. The PCRA court denied relief, and we affirmed. ***See Commonwealth v. Zoller***, 778 A.2d 1250 (Pa. Super.) (unpublished memorandum), *appeal denied*, 788 A.2d 376 (Pa. 2001). Appellant filed a second PCRA petition in 2010. The PCRA court dismissed it as untimely, and we affirmed. ***See Commonwealth v. Zoller***, 38 A.3d 928 (Pa. Super. 2011) (unpublished memorandum).

Appellant filed a third, *pro se* PCRA petition on July 31, 2012, 36 days after the Supreme Court of the United States issued ***Miller v. Alabama***, 132 S. Ct. 2455 (2012), on June 25, 2012. In ***Miller***, the High Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." ***Id.*** at 2469. Present counsel was appointed, and she filed an amended petition. In his petition, Appellant argued that his sentence is unconstitutional under Article 1, §§ 1, 9, & 13 of the Pennsylvania Constitution and the Eighth and Fourteenth Amendments to the United States Constitution. The Commonwealth filed an answer and a request that the PCRA court stay proceedings pending the Pennsylvania Supreme Court's decision in ***Commonwealth v. Cunningham***, 81 A.3d 1 (Pa. 2013), *cert. denied sub*

nom. ***Cunningham v. Pennsylvania***, 134 S. Ct. 2724 (2014). The PCRA court granted a stay. On October 30, 2013, our Supreme Court issued ***Cunningham***, holding that ***Miller*** does not apply retroactively. The Commonwealth filed an amended answer requesting dismissal of the PCRA petition as untimely. On June 23, 2014, the PCRA court issued a notice of intent to dismiss, and on October 3, 2014, the PCRA court dismissed the PCRA petition as untimely. This appeal followed.

Appellant presents the following question for our review:

> Whether the Appellant's three (3) mandatory sentences of life without parole violates Article 1, §§ 1, 9 & 13 of the Pennsylvania Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

Appellant's Brief at 5.

"On appeal from the denial of PCRA relief, our standard of review is whether the findings of the PCRA court are supported by the record and free of legal error." ***Commonwealth v. Ragan***, 923 A.2d 1169, 1170 (Pa. 2007). As the timeliness of a PCRA petition is a question of law, our standard of review is *de novo* and our scope of review is plenary. ***Commonwealth v. Taylor***, 65 A.3d 462, 468 (Pa. Super. 2013) (citing ***Commonwealth v. Fahy***, 959 A.2d 312, 316 (Pa. 2008)).

Timeliness under the PCRA is jurisdictional. Therefore, we must address it before reaching the merits of Appellant's argument. ***Commonwealth v. Cristina***, 114 A.3d 419, 421 (Pa. Super. 2015). The PCRA contains the following time limits:

> (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:
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> > (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.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.
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> (3) For purposes of this subchapter, 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)(1)-(3) (effective January 16, 1996).

Our Supreme Court denied Appellant's *allocatur* petition on March 9, 1990. Appellant had 90 days to file a petition for writ of *certiorari* to the Supreme Court of the United States.[2] Thus, under § 9545(b)(3) Appellant's

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[2] ***See*** U.S. Sup. Ct. R. 13. Rule 13, effective January 1, 1990, enlarged the time to file a petition for writ of *certiorari* from 60 to 90 days. ***See Commonwealth v. Monaco***, 996 A.2d 1076, 1081 n.2 (Pa. Super. 2010).

judgment of sentence became final on June 7, 1990. Appellant's petition, filed years after the effective date of the PCRA's time limits is therefore facially untimely, and jurisdiction is proper only if he meets one of the three narrow exceptions.[3]

Conceding that he cannot meet the one-year time-bar, Appellant argues that, under ***Miller***, he is entitled to relief under the § 9545(b)(1)(iii) exception. We disagree.

Section 9545(b)(1)(iii) requires that the newly retroactive right be **held to apply retroactively** by our Supreme Court or the Supreme Court of the United States. ***Cunningham*** is dispositive. ***See Cunningham***, 81 A.3d at 10; ***see also Cristina***, 114 A.3d at 423 ("Because the United States Supreme Court has never expressly recognized ***Miller*** to apply retroactively, Cristina cannot avail himself of that exception to the PCRA's time-bar.");

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[3] In its opinion, the PCRA court stated that Appellant's petition was untimely because it was not filed within one year of the effective date of the 1995 amendments to the PCRA that established the above-quoted time limits, or January 16, **1997**. PCRA Court Rule 1925(a) Opinion, 2/10/15, at 3. This statement is incorrect. The one-year tolling period for judgments of sentence that became final before the 1995 amendments applied only to **first** PCRA petitions. ***See*** Act of Nov. 17, 1995, P.L. 1118, No. 32 (Spec. Sess. No. 1), § 3(1). Because the instant PCRA petition is a serial petition, it can be timely only if filed before the time limits became effective—January 16, **1996**—or if one of the three exceptions applies. ***See Commonwealth v. Lesko***, 15 A.3d 345, 366-67 (Pa. 2011) (noting that appellant's serial petition raising claims relating to his 1981 trial could not qualify for the 1995 amendments' one-year tolling period); ***Commonwealth v. Taylor***, 933 A.2d 1035, 1039 n.2 (Pa. Super. 2007) (noting that the one-year grace period in the 1995 amendments did not apply to serial PCRA petitions).

Commonwealth v. Reed, 107 A.3d 137, 144 (Pa. Super. 2014) ("[T]here is no reasonable doubt about our Supreme Court's conclusion in ***Cunningham*** on the non-retroactivity of ***Miller***.").[4]

Appellant argues that the ***Miller*** Court applied its holding retroactively to cases on post-conviction collateral review, because one of the two state court decisions reversed in ***Miller***, ***Jackson v. Norris***, 378 S.W.3d 103 (Ark. 2011), was at the state *habeas corpus* stage. We find this argument unavailing, because the ***Cunningham*** court specifically rejected it. ***See Cunningham***, 81 A.3d 9 ("[W]e reject [a]ppellant's position that the ***Miller*** Court's reversal of the state appellate court decision affirming the denial of post-conviction relief in the ***Jackson*** case compels the conclusion that ***Miller*** is retroactive.").

Appellant also argues that in ***Commonwealth v. Knox***, 50 A.3d 749, 767 (Pa. Super. 2012), *appeal granted on other grounds*, 68 A.3d 323 (Pa. 2013), *and aff'd*, 105 A.3d 1194 (Pa. 2014), this Court explained that ***Miller*** "was available to all juvenile defendants once it was issued[.]" Appellant's

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[4] The Supreme Court of the United States recently granted *certiorari* to consider whether ***Miller*** should be applied retroactively on collateral review. ***See Montgomery v. Louisiana***, 135 S. Ct. 1546 (2015) (*per curiam*). However, the Court also ordered the parties to brief whether it has jurisdiction to hear the issue, presumably based on whether the retroactivity analysis used in federal *habeas corpus* cases is binding on state post-conviction courts. ***See id.***

Brief at 19. Appellant misunderstands ***Knox***, in which we applied ***Miller*** retroactively to a case on direct review when the ***Miller*** decision was handed down. ***See Knox***, 50 A.3d at 762-63. "[T]here is a fundamental difference between retroactivity analysis during a direct appeal and cases on collateral review." ***Commonwealth v. Watley***, 81 A.3d 108, 117 n.5 (Pa. Super. 2013) (*en banc*); ***compare Commonwealth v. Batts***, 66 A.3d 286, 288 (Pa. 2013) (applying ***Miller*** retroactively on direct appeal), ***with Cunningham***, 81 A.3d at 10 (holding ***Miller*** does not apply retroactively on collateral review).

In sum, because neither our Supreme Court nor the Supreme Court of the United States has held that ***Miller*** applies retroactively in collateral relief proceedings, Appellant cannot meet the 42 Pa.C.S.A. § 9545(b)(1)(iii) timeliness exception, and his petition is therefore untimely.[5] For the foregoing reasons, the PCRA court correctly dismissed Appellant's PCRA petition for lack of jurisdiction. We affirm.

Order affirmed.

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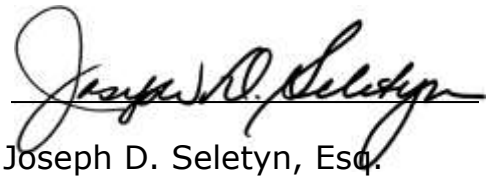
[5] We cannot address Appellant's claim to the extent he relies on the Pennsylvania Constitution. Appellant included no argument, and cited no authority, to support his state constitutional claim. ***See*** Pa.R.A.P. 2119; ***Commonwealth v. Snell***, 811 A.2d 581, 590 (Pa. Super. 2002). In any event, the Cruel Punishments Clause, Pa. Const. art. I, § 13, provides no greater protection than the Eighth Amendment regarding punishment for juveniles. ***Batts***, 66 A.3d at 297-99.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/21/2015