

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

VIRGIL TUTTLE

Appellant

No. 3269 EDA 2012

Appeal from the PCRA Order of October 31, 2012  
In the Court of Common Pleas of Wayne County  
Criminal Division at No.: 320-1995

BEFORE: FORD ELLIOTT, P.J.E., BENDER, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

**FILED JANUARY 09, 2014**

Virgil Tuttle appeals the PCRA court's order dismissing his petition under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46. We affirm.

Tuttle challenges the mandatory imposition of a life sentence without parole upon his guilty plea to first-degree murder for a shooting that occurred in October of 1995, when Tuttle was approximately eighteen and one-half years old. He challenges the trial court's dismissal of his claims on the following bases:

- A. Did the PCRA Court err when it denied [Tuttle's] claim that **Miller v. Alabama**, 132 S.Ct. 2455 (U.S. 2012), should be extended to his mandatory sentence of life without parole?
- B. Did the PCRA Court err in failing to rule upon [Tuttle's] claim that **Miller** applies to him due to [the] logical extrapolation of prior United States Supreme Court precedent?

C. Did the PCRA Court err in failing to rule upon [Tuttle's] claim that all Court proceedings were void for want of jurisdiction, and did said Court also err in failing to rule upon said claim in [Tuttle's] favor?

D. In furtherance of the PCRA Court's errors alleged in headings "A." and "B.", herein, did the Court also err in failing to adjudicate [Tuttle's] claim that his plea was unlawfully induced and he is innocent until proven guilty?

Brief for Tuttle at 5 (citations modified).

In a prior proceeding, we provided the following brief factual history, as well as an account of relevant governing principles that we borrow rather than restate:

On May 20, 1996, Tuttle pleaded guilty to first-degree murder, 18 Pa.C.S. § 2502(a). The [trial court] imposed a mandatory life sentence without parole. The charge stemmed from Tuttle shooting and killing John Mousley during a robbery in October of 1995. Tuttle did not file any petition to withdraw his guilty plea nor did he file a direct appeal from the judgment of sentence.

On November 25, 1998, Tuttle . . . filed [his first] PCRA petition alleging the ineffectiveness of trial counsel and an unlawfully induced guilty plea. On December 31, 1998, the Commonwealth filed a motion to dismiss arguing that the PCRA petition was both untimely and meritless. Tuttle responded, alleging that the delay in filing the petition was attributed to three factors: (1) he was never informed at the guilty plea hearing that he was entitled to counsel for post-conviction purposes; (2) the neuropsychological evaluation report was prepared on December 23, 1997; and (3) prior to filing the petition, PCRA counsel needed to obtain certifications from medical personnel who would be called as witnesses at the evidentiary hearing.

On February 4, 1999, the trial court conducted a hearing to determine whether the PCRA petition was untimely filed. Thereafter, the PCRA court provided Tuttle with notice pursuant to Pa.R.Crim.P. 1507(a) that the petition would be dismissed since it was untimely filed and it lacked merit. Tuttle filed a response to the notice again raising the arguments that he had

made in his PCRA petition. On April 27, 1999, the PCRA court dismissed the petition as both untimely and meritless.

On appeal, Tuttle raises the sole issue that the PCRA court erred in dismissing the PCRA petition. In the argument section of his brief, Tuttle states three reasons to justify his delay in filing the petition: (1) the trial court erred in not advising him at the guilty plea hearing of his right to post-conviction counsel; (2) the one-year time limit under the PCRA was tolled until the December 23, 1997 medical report was prepared; and (3) the filing restrictions in section 9545 are not mandatory.

Pursuant to section 9545, any PCRA petition must be filed within one year of the date the judgment becomes final, except under three very limited circumstances:

**(b) Time for filing petition.--**

(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:

(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.

(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.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

42 Pa.C.S. § 9545(b).

Instantly, Tuttle's judgment of sentence became final 30 days after the trial court imposed sentence on March 20, 1996. The time allowed for filing a direct appeal with this Court had expired on April 19, 1996. **See** Pa.R.A.P. 903(a) (notice of appeal must be filed within 30 days). Consequently, Tuttle's judgment of sentence became final more than two and one-half (2½) years before he filed the current PCRA petition. The petition was untimely filed.

**Commonwealth v. Tuttle**, 1360 EDA 1999, Slip. Op. at 1-4 (Pa. Super. 2000) (unpublished).

After reviewing and rejecting Tuttle's arguments that his PCRA petition qualified for one of the subsection 9545(b) exceptions to the general one-year time limit that applies to PCRA petitions, we concluded as follows:

The time limitations pursuant to the PCRA . . . are jurisdictional, and such limitations are mandatory; thus, the filing period may only be extended through the provisions of the statute. **Commonwealth v. Fahy**, 737 A.2d 214, 222 (Pa. 1999).

\* \* \* \*

We have reviewed the exceptions under § 9545(b)(1), and we find that none are applicable. Consequently, the PCRA court lacked jurisdiction, and its denial of the petition was proper. **See Commonwealth v. Alcorn**, 703 A.2d 1054, 1057 (Pa. Super. 1997).

**Tuttle**, 1360 EDA 1999, Slip Op. at 6-7.

We reproduce our former ruling at length, because, inasmuch as it establishes that we found Tuttle's first PCRA petition untimely in the year 2000, it follows that the petition now before us also is facially untimely. Consequently, to establish this Court's jurisdiction, Appellant must establish that the instant petition satisfies one of the exceptions provided by subsection 9545(b)(1).

This Court's standard of review regarding an order denying a PCRA petition is well-settled. We review whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Ragan***, 923 A.2d 1169, 1170 (Pa. 2007). 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, in general we "may affirm the decision of the trial court if there is any basis on the record to support the trial court's action; this is so even if we rely on a different basis in our decision to affirm." ***Commonwealth v. O'Drain***, 829 A.2d 316, 321 n.7 (Pa. Super. 2003); ***see also Commonwealth v. Hinton***, 409 A.2d 54, 57 (Pa. Super. 1979) ("It is well settled that a judgment may be affirmed by the appellate court on any legal theory, regardless of the rationale or theory employed by the lower court.").

It is well-established that the PCRA's time limits are jurisdictional, and are meant to be both mandatory and applied literally by the courts to all PCRA petitions, regardless of the potential merit of the claims asserted.

**Commonwealth v. Murray**, 753 A.2d 201, 202-03 (Pa. 2000) *abrogated on other grounds*, **Commonwealth v. Brown**, 943 A.2d 264 (Pa. 2008); **Commonwealth v. Leggett**, 16 A.3d 1144, 1145 (Pa. Super. 2011). Of critical importance to the preservation of this clear rule is the corollary principle that “a petitioner raising one of the statutory exceptions to the [PCRA] timeliness requirements **must affirmatively plead and prove the exception.**” **Commonwealth v. Taylor**, 933 A.2d 1035, 1039 (Pa. Super. 2007) (emphasis added). Furthermore, “no court may properly disregard or alter [these filing requirements] in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner.” **Murray**, 753 A.2d at 203; **see also Commonwealth v. Gamboa-Taylor**, 753 A.2d 780, 783 (Pa. 2000).

The PCRA court did not address timeliness in its very brief opinion in support of its Pa.R.Crim.P. 907 notice of intent to dismiss.<sup>1</sup> Instead, it focused upon one aspect of Tuttle’s numerous arguments, to wit, Tuttle’s claim that the line between a “juvenile” and an “adult” drawn in **Miller** at the age of eighteen is a suspect classification, the application of which violated his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. However, timeliness under the PCRA goes to jurisdiction, and this Court may raise jurisdictional issues *sua sponte*.

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<sup>1</sup> The PCRA court did not direct Tuttle to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

***Commonwealth v. Valentine***, 328 A.2d 346, 349 (Pa. Super. 2007) (citing ***Commonwealth v. Coolbaugh***, 770 A.2d 788, 791 (Pa. Super. 2001)).

Tuttle's brief expounds at length upon prior United States Supreme Court jurisprudence. Indeed, Tuttle explains his arguments with a degree of sophistication seldom seen in *pro se* PCRA filings. Tuttle's first two issues are rooted in the United States Supreme Court's decision in ***Miller***, 32 S.Ct. 2455 (2012), in which the Supreme Court held that the imposition of a mandatory life sentence without parole upon an individual who was a juvenile at the time that his crime of conviction was committed violates the Eighth Amendment to the United States Constitution.

Unfortunately for Tuttle, the sophistication of his brief cannot save him from the mandatory timeliness requirements set forth in the PCRA. The contours of those requirements are set forth above, but the particular principle that dictates the result in this case is the necessity that an appellant before this Court must affirmatively plead and prove the timeliness exception he invokes. ***See, e.g., Taylor, supra***. Tuttle fails to do so in his brief before this Court, an omission that is fatal to his appeal.

The only identifiable reference to one of the PCRA timeliness exceptions to be found in the argument section of Tuttle's brief is a cursory allusion to the newly-discovered fact exception:

[T]he fact that mitigating evidence was prohibited by statute from being introduced in favor of a juvenile convicted of homicide, and [the] same has been ruled unconstitutional, should qualify as "facts upon which the claim is predicated [and] were unknown to [Tuttle] and could not have been ascertained

by the exercise of diligence[,]” [42 Pa.C.S. § 9545(b)(1)(ii)], until presentation of such facts was allowed to occur, i.e., after **Miller** was decided. Tuttle’s PCRA [petition was] filed within sixty (60) days of the **Miller** decision and is therefore timely.

Brief for Tuttle at 25 (emphasis in original). Even if we conclude that this passage satisfies Tuttle’s obligation affirmatively to plead an exception to the PCRA timeliness requirements, it is unavailing.

Recently, in **Commonwealth v. Cintora**, 69 A.3d 759 (Pa. Super. 2013), we rejected the appellant’s attempt to characterize the **Miller** decision as a newly-discovered fact under subsection 9545(b)(1)(ii):

Our courts have expressly rejected the notion that judicial decisions can be considered newly-discovered facts which would invoke the protections afforded by section 9545(b)(1)(ii). **See Commonwealth v. Watts**, 23 A.3d 980, 986 (Pa. 2011) (holding[ that] a judicial opinion does not qualify as a previously unknown “fact” capable of triggering the timeliness exception set forth in section 9545(b)(1)(ii) of the PCRA; “section 9545(b)(1)(ii) applies only if the petitioner has uncovered facts that could not have been ascertained through due diligence, and judicial determinations are not facts”); **Commonwealth v. Brandon**, 51 A.3d 231, 235 (Pa. Super. 2012) (same).

**Cintora**, 69 A.3d at 763 (citation modified). Thus, based upon **Cintora**, Tuttle’s invocation of the newly-discovered fact exception, whether brief or thorough, is unavailing inasmuch as he seeks relief under **Miller**.

To be clear, that does not mean that Tuttle lacked recourse *per se* to seek to establish his entitlement to relief in the wake of **Miller**. Indeed, the PCRA timeliness exception described at subsection 9545(b)(1)(iii) was fashioned for circumstances similar to the one that followed the United **Miller** Court’s decision. Specifically, Tuttle might argue that **Miller**



established a new constitutional principle pursuant to which he is entitled to a relief under the PCRA. However, Tuttle has failed in any way even to discuss the applicability of subsection 9545 (b)(1)(iii) to his case, and we will not serve as an advocate in his place on that or any other issue. **See** Pa.R.A.P. 2119(a) (requiring the citation of relevant authorities in support of arguments on appeal); **Commonwealth v. Thompson**, 939 A.2d 371, 376 (Pa. Super. 2007) (deeming waived claim for which no legal support was provided).

Moreover, even had Tuttle properly invoked the new constitutional rule exception, it would fail under the circumstances of this case. Tuttle undisputedly was approximately eighteen and one-half years old when he committed the crime underlying his judgment of sentence in this matter. In **Cintora**, we unequivocally rejected the claim that **Miller** applies to an individual who was eighteen years old or older when he committed his offense:

Appellants' claims also fail to satisfy the requirements necessary for invoking the newly-recognized constitutional right exception, pursuant to [sub]section 9545(b)(1)(iii). In **Miller**, the Supreme Court of the United States recognized a constitutional right for juveniles under the age of eighteen, holding that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition against 'cruel and unusual punishments.'" **Miller**, [132 S.Ct. at 2460]. Here Appellants . . . were twenty-one and nineteen years old, respectively, when they committed the underlying crimes and twenty-two and nineteen years and eleven months old, respectively, when they pled guilty to second-degree murder and the court sentenced them to life imprisonment. Therefore, the holding in **Miller** does not create a newly-recognized

constitutional right that can serve as the basis for relief for Appellants. **See** 42 Pa.C.S. § 9545(b)(1)(iii); **Miller**, *supra* at 2460.

**Cintora**, 69 A.3d at 764 (footnote omitted). Consequently, the new constitutional rule exception, even if duly pleaded, would fail under this Court's binding precedent.<sup>2</sup>

In his third issue, Tuttle appears to argue that he is entitled to review because jurisdictional defects in the procedures employed in his underlying proceeding rendered his judgment of sentence void *ab initio*. Specifically, he challenges the fact that he was tried as an adult in the first instance. On this basis, he contends that, to the extent the PCRA affords him no avenue for relief, he is entitled to *habeas corpus* relief outside the confines of the PCRA. Brief for Tuttle at 33-42.

This claim, too, fails due to Tuttle's failure to plead and prove an applicable exception to the PCRA's time bar. In **Commonwealth v. Dickerson**, 900 A.2d 407 (Pa. Super. 2006), the appellant contended that

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<sup>2</sup> In a supplemental brief filed by permission of this Court, Tuttle invokes our Supreme Court's recent decision in **Commonwealth v. Batts**, 66 A.3d 286 (Pa. 2013). In that case, the Court directed that a case in which a fourteen-year-old juvenile offender for first-degree murder be remanded for resentencing in light of **Miller**. Tuttle once again fails to plead and prove an applicable exception to the one-year PCRA time limit. Moreover, he fails to make any intelligible argument that a ruling specifically pertaining to a fourteen-year-old offender should be extended to an individual who was over eighteen years of age when he committed murder. Consequently, this supplemental filing does not assist his appeal to the extent it is based on **Miller**.

the trial court lacked subject matter jurisdiction to accept his guilty plea. The appellant, a juvenile, contended that he was a juvenile at the time of his plea, and his plea colloquy was defective inasmuch as the court failed to determine whether the appellant's mother consented to the plea. We held that the claim was subject to the same timeliness considerations as other claims under the PCRA, and that the appellant had failed to establish the application any timeliness exception. ***Id.*** at 412.

As in ***Dickerson***, and as we explained above in connection with Tuttle's ***Miller***-based claims addressed above, Appellant has failed entirely to plead and prove the application of a timeliness exception under the PCRA. Consequently, we find that Tuttle's third claim is unavailing.

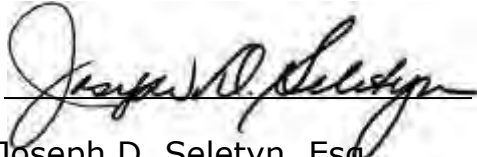
Finally, in his fourth claim, Tuttle claims that his plea was unlawfully induced. ***See*** Brief for Tuttle at 43. He provides no legal authority in support of this argument. Consequently, it is waived. ***See Thompson***, 939 A.2d at 376.

For the foregoing reasons, Tuttle has failed to establish any basis upon which the facial untimeliness of the PCRA petition *sub judice* may be excused. Consequently, the trial court's dismissal of his petition was not in error.

Order affirmed.

J-S26041-13

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: 1/9/2014