NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. BRANDON M. SIMMERS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3151 EDA 2012

Appeal from the PCRA Order of October 22, 2012
In the Court of Common Pleas of Chester County
Criminal Division at No.: CP-15-CR-0001334-1999

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

MEMORANDUM BY WECHT, J.: **FILED NOVEMBER 18, 2013**

Brandon Simmers ("Appellant") appeals *pro se* from the October 22, 2012 order dismissing his second petition for relief under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46, as untimely. We affirm.

On October 27, 1999, following a two-day jury trial, Appellant was convicted of second-degree murder, robbery, and conspiracy.[1] On November 22, 1999, Appellant was sentenced to life imprisonment on the murder count, as well as concurrent eight and one-half to seventeen-year terms of imprisonment on the robbery and conspiracy counts. In our

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[1] 18 Pa.C.S. §§ 2502(b), 3701, and 903(a)(1), respectively.

memorandum affirming Appellant's judgment of sentence, we summarized the pertinent facts underlying Appellant's convictions as follows:

> Appellant's conviction arose from his participation in the robbery and murder of Daniel Hesse, and Exxon motor fuel deliveryman, on February 23, 1999 in Downingtown. The events leading up to the murder began the previous afternoon. Appellant, his girlfriend Tammy Lee Russum, and Charles Linton practiced target shooting with Linton's gun in a wooded area known as the Gates of Hell. Later that evening, the three, along with 17 year old Danny Jones, drove to Pottstown in Russum's car with the intent to rob drug dealers because Appellant needed money for a place to stay and Linton was behind on his rent. Linton brought his gun, a bag of bullets, and two black ski masks with him. As the four drove around the area, Linton and Appellant stole mail from mailboxes in Downingtown. At one point, Linton and Appellant attempted to break into a home, while Russum and Jones remained in the car. They returned, however, unsuccessful. Sometime between 12:30 and 1:00 a.m., Russum was driving towards Coatesville to drop off Jones and Linton when she passed an Exxon station on Lincoln Highway in Downingtown. The victim, Daniel Hesse, was delivering a load of motor fuel to the station. Appellant was the first to point out Hesse as a potential victim; Linton then indicated that he was "a perfect target[.]" The two directed Russum to turn the car around, pull into a nearby lot, turn off the lights, and keep the motor running. Appellant and Linton exited the car with Linton's gun and donned ski masks and gloves, while Russum and Jones remained in the car.
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> Linton approached Hesse, put the gun to his stomach and pulled him to the back of the gas station. When Appellant reached the back of the station, Linton was going through Hesse's pocked searching for money. According to Appellant, Linton then "just snapped," and struck Hesse in the face with the gun, which went off. Appellant testified that he tried to grab the gun from Linton, who pointed it in Appellant's direction. Linton then shot Hesse in the head. Appellant ran back towards the car, and Linton followed. Once in the car, Appellant began yelling at Linton "why the F did you do that. You didn't have to." After fleeing the scene, Russum dropped Jones off at his girlfriend's house, and she, Appellant and Linton rented a motel room in Coatesville with the profits from the robbery. The next afternoon, Appellant

> and Linton disposed of Hesse's credit cards and wallet. They wiped their fingerprints from the murder weapon and sold it to a drug dealer in Coatesville for $150, of which Appellant received $70.

Commonwealth v. Simmers, No. 286 EDA 2000, slip op. at 1-3 (Pa. Super. Feb. 21, 2001) (unpublished memorandum) (footnotes and references to the notes of testimony omitted). After we affirmed Appellant's judgment of sentence, the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal on October 11, 2001. ***Commonwealth v. Simmers***, 788 A.2d 375 (Pa. 2001) (*per curiam*).

On October 9, 2002, Appellant filed his first PCRA petition. Following a hearing, the PCRA court denied the petition. On November 4, 2004, we affirmed the PCRA court's order. ***Commonwealth v. Simmers***, No. 336 EDA 2004, slip op. at 4 (Pa. Super. Nov. 4, 2004) (unpublished memorandum). On September 14, 2005, the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Simmers***, 882 A.2d 1005 (Pa. 2005) (*per curiam*). Thereafter, Appellant unsuccessfully sought federal *habeas corpus* relief.

On August 20, 2012, Appellant filed the instant *pro se* PCRA petition, his second. Finding the petition to be untimely and rendering the court without jurisdiction to grant any form of relief, the PCRA court entered an order on October 1, 2012 notifying Appellant of the court's intent to dismiss the petition without a hearing pursuant to Pa.R.Crim.P. 907. On October 16,

2012, Appellant filed a response to the PCRA court's notice. Nonetheless, on October 22, 2012, the PCRA court dismissed Appellant's petition.

On November 9, 2012, Appellant filed a notice of appeal. The PCRA court did not direct Appellant to file a concise statement of errors complained of on appeal. However, on November 16, 2012, the PCRA court issued a statement pursuant to Pa.R.A.P. 1925(a) directing this Court's attention to the PCRA court's analysis contained in a footnote to its Rule 907 order.

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.").

We first must confront the timeliness of Appellant's petition. 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. Leggett***, 16 A.3d 1144, 1145 (Pa. Super. 2011); ***Commonwealth v. Murray***, 753 A.2d 201, 202-03 (Pa. 2000) *abrogated on other grounds by* ***Commonwealth v. Brown***, 943 A.2d 264 (Pa. 2008). "[N]o 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).

Any PCRA petition, including second or subsequent petitions, must be filed within one year of the date the judgment of sentence becomes final. 42 Pa.C.S. § 9545(b)(1). Here, Appellant's judgment of sentence became final on January 11, 2002, when the ninety-day time period for filing a writ of certiorari with the United States Supreme Court expired. ***See*** 42 Pa.C.S. § 9545(b)(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."); U.S.Sup.Ct.R. 13. Therefore, to be timely, any petition under the PCRA had to have been filed on or before January 11, 2003. The instant petition was filed on August 20, 2012. Thus, the petition is patently untimely unless Appellant has pleaded

and proven one of the following statutory exceptions to the PCRA's strict time limit:

> (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.

42 Pa.C.S. § 9545(b).

In his PCRA petition, Appellant alleged that the United States Supreme Court's decision in ***Miller v. Alabama***, 32 S.Ct. 2455 (2012) created a new constitutional right applicable to him for purposes of subsection 9545(b)(1)(iii). ***See*** PCRA petition, 8/20/2012, at 2. Appellant presents the same argument to this Court in his brief. ***See*** Brief for Appellant at 1. However, Appellant was twenty-one years old at the time that he and his co-defendants planned and perpetrated the robbery that resulted in Mr. Hesse's

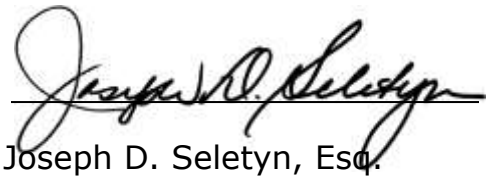
death. In ***Commonwealth v. Cintora***, 69 A.3d 759 (Pa. Super. 2013) we rejected an identical claim that ***Miller*** is applicable to individuals who were eighteen years-old or older at the time of the commission of their offenses. In doing so, we held as follows:

> 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). Because Appellant was not under the age of eighteen at the time of his crimes, ***Miller*** does not apply to his case. Consequently, Appellant has failed to satisfy the requirements of subsection 9545(b)(1)(iii). Consequently, Appellant's PCRA petition is untimely, and the PCRA court lacked jurisdiction to rule on the merits of the petition.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/18/2013