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OPINIONS

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PLJ

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Opinions

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Commonwealth of Pennsylvania v. Joseph Irvin Jackson

Criminal Appeal—VUFA—Sufficiency—Jury Instructions—Concealment

Challenge to the jury instruction regarding the element of concealment for VUFA offense is without merit.

No. CC 201302197, 201316049, 201416652. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Cashman, A.J.—April 11, 2017.

OPINION

On December 16, 2004, following a jury trial, the appellant, Joseph Irvin Jackson, (hereinafter referred to as "Jackson"), was found guilty of the charge of possession of a firearm without a license. Prior to the commencement of that jury trial, this Court granted Jackson's motion to sever the charge of person not to possess a firearm and heard that charge in a non-jury trial which was held in conjunction with his jury trial. Jackson was found guilty of the charge of person not to possess a firearm since it was stipulated between Jackson and the District Attorney's Office that he had two convictions for delivery of a controlled substance and two convictions for the charge of person not to possess a firearm.

A presentence report was ordered and Jackson was sentenced on March 3, 2015, to a period of incarceration of not less than two and one-half nor more than five years, to be followed by a period of probation of two years, during which he was to undergo random drug screening. Jackson filed a motion for a new trial and his trial counsel filed a motion for leave to withdraw. Jackson's current appellate counsel was appointed to represent him in connection with his post-sentence motions which were ultimately denied by operation of law. Jackson filed a petition to reinstate his post-sentence and appellate rights which was granted on February 17, 2016. A hearing was scheduled on his motion for July 22, 2016. Once again, his post-sentence motions were denied by operation of law and Jackson filed the instant appeal.

Jackson was directed pursuant to Pennsylvania rule of Appellate Procedure 1925(b) to file a concise statement of matters complained of on appeal. In filing that statement, Jackson has raised four claims of error. Initially, Jackson maintains that the evidence was insufficient to convict him of the charge of person not to possess a firearm. Jackson next maintains that this Court erred when it told the jury that anyone who owned a gun had to register the gun with the Pennsylvania State Police. Jackson further maintains that the Court erred in giving jury instructions that did not adequately specify that the concealment of a weapon is a material element of the charge of possession of a firearm without a license. Finally, Jackson maintains that the standard jury instructions are fundamentally flawed since they do not adequately specify the concealment as a material element of the offense.

At approximately 2:30 a.m. on October 20, 2012, Officer Adam Quinn, who was then employed by the North Braddock Police Department, was on routine patrol with his partner, Officer Gettig and were travelling along Hawkins Avenue when they noticed two males wearing hoodies who had their hoods up. Officer Quinn stopped his patrol car and then asked these individuals to produce some identification and asked what they were doing out at 2:30 in the morning. Jackson produced identification establishing who he was and told Officer Quinn that they were going home after they had left a bar. During the course of their discussion, Jackson turned and then ran from the police officers. Officer Quinn ran after Jackson and pulled out his taser and fired it at him in an attempt to stop him, however, he did not hit Jackson. Officer Quinn then noticed that Jackson reached into his waist-band and pulled out a gun and discarded that gun. Officer Quinn was able to stop Jackson after he tripped over some railroad tracks. Once Jackson was handcuffed, Officer Quinn went back to the area where he saw the gun and retrieved a nine millimeter semi-automatic.

In *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751-752 (2000), the Pennsylvania Supreme Court set forth the standard to be used in examining a claim that the evidence was insufficient to support the verdict.

> Appellant's remaining claim of error is that the Superior Court misstated the standard of review for a weight of the evidence claim. The standard of review refers to *how* the reviewing court examines the question presented. *Morrison*, 646 A.2d at 570. Appellant asserts that the Superior Court improperly interjected sufficiency of the evidence principles into its analysis and thus adjudicated the trial court's exercise of discretion by an incorrect measure.
>
> In order to address this claim we find it necessary to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *Commonwealth v. Vogel*, 501 Pa. 314, 461 A.2d 604 (1983), whereas a claim challenging the weight of the evidence if granted would permit a second trial. *Id.*
>
> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993). Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. *Commonwealth v. Santana*, 460 Pa. 482, 333 A.2d 876 (1975). When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991).
>
> A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. *Commonwealth v. Whiteman*, 336 Pa.Super. 120, 485 A.2d 459 (1984). Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. *Tibbs*, 457 U.S. at 38 n. 11, 102 S.Ct. 2211.[FN3] An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. *Thompson, supra*. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the

> weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." *Id.*
>
> FN3. In *Tibbs*, the United States Supreme Court found the following explanation of the critical distinction between a weight and sufficiency review noteworthy:
>
> When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different.... The [trial] court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.
>
> *Tibbs* 457 U.S. at 38 n. 11, 102 S.Ct. 2211 *quoting United States v. Lincoln*, 630 F.2d 1313 (Cir. 8 th 1980).

The crime of a person not to possess a firearm is set forth in 18 Pa.C.S.A. §6105(a) as follows:

> **§ 6105. Persons not to possess, use, manufacture, control, sell or transfer firearms**
>
> **(a) Offense defined.--**
>
> (1) A person who has been convicted of an offense enumerated in subsection
>
> (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth.
>
> (2)(i) A person who is prohibited from possessing, using, controlling, selling, transferring or manufacturing a firearm under paragraph (1) or subsection (b) or (c) shall have a reasonable period of time, not to exceed 60 days from the date of the imposition of the disability under this subsection, in which to sell or transfer that person's firearms to another eligible person who is not a member of the prohibited person's household.
>
> (ii) This paragraph shall not apply to any person whose disability is imposed pursuant to subsection (c)(6).
>
> **(a.1) Penalty.--**
>
> (1) Except as provided under paragraph (1.1), a person convicted of a felony enumerated under subsection (b) or a felony under the act of April 14, 1972 (P.L. 233, No. 64),1 known as The Controlled Substance, Drug, Device and Cosmetic Act, or any equivalent Federal statute or equivalent statute of any other state, who violates subsection (a) commits a felony of the second degree.
>
> (1.1) The following shall apply:
>
> (i) A person convicted of a felony enumerated under subsection (b) or a felony under The Controlled Substance, Drug, Device and Cosmetic Act, or any equivalent Federal statute or equivalent statute of any other state, who violates subsection (a) commits a felony of the first degree if:
>
> (A) at the time of the commission of a violation of subsection (a), the person has previously been convicted of an offense under subsection (a); or
>
> (B) At the time of the commission of a violation of subsection (a), the person was in physical possession or control of a firearm, whether visible, concealed about the person or within the person's reach.
>
> (ii) The Pennsylvania Commission on Sentencing, under 42 Pa.C.S. § 2154 (relating to adoption of guidelines for sentencing), shall provide for a sentencing enhancement for a sentence imposed pursuant to this paragraph.

In order for the Commonwealth to sustain its burden, it was required to prove that Jackson was convicted of one of the enumerated offenses set forth in that statute and that he possessed, used or controlled a firearm. In reviewing the record in the instant case in the light most favorable to the Commonwealth and all the reasonable inferences drawn therefrom, it is abundantly clear that the Commonwealth met its burden in establishing all of the elements of this offense. Officer Quinn saw Jackson remove a gun from his waistband and then throw it away. After Officer Quinn had captured Jackson, he went to the spot where he saw Jackson toss the weapon and retrieved a nine-millimeter firearm. The remaining element of this particular offense is if Jackson had been convicted of one of the enumerated crimes set forth in that statute and there was a stipulation that Jackson had two convictions for delivery of a controlled substance, which is one of the enumerated crimes set forth in 18 Pa.C.S.A. §6105(c)(2).[1]

Jackson next maintains that this Court erred when it told the jury that anyone who owns a gun had to register it with the Pennsylvania State Police. This statement was not part of the jury instructions but, rather, was an explanation as to the stipulation reach by the parties that there was a certificate from the Pennsylvania State Police saying that Jackson was not licensed. This is an explanation as to why and how the Pennsylvania State Police acquired the information and what would make that information reliable. If the statement taken in the abstract was in error, it was harmless error.

The final two claims of error deal with the question of whether or not the concealment is a material element of the offense of possession of a firearm without a license. Jackson maintains that this Court's instruction did not adequately state that concealment is a material element of the offense. The Court instructed the jury that there were three elements that had to be established beyond a reasonable doubt in order for the jury to convict Jackson of the charge of possession of a firearm without a license. The first element was that Jackson carried a firearm, concealed on or about his person. The second element is that the defendant was not in his home or place of business and the third element was that the defendant did not have a valid and lawfully issued license for the carrying of such a weapon. It is abundantly clear from the instruction given to the jury that there were three separate elements that had to be established and one of those elements, was the concealment of the weapon on or about his person.

Jackson's final claim of error is that the jury instruction did not adequately specify that concealment is an element of the

offense. As noted in this Court's instruction to the jury, the first element of the offense of carrying a firearm without a license is that the individual possessed a firearm and had it concealed on or about his person. With no special definition for the word concealment other than its ordinary and customary usage, the jury was fully advised of all three elements. The standard jury instructions are not required to be used since the Court has the ability to fashion the instructions as long as the instructions thoroughly, adequately and correctly set forth the law. As with Jackson's other claims of error, this claim is without merit.

BY THE COURT:
/s/Cashman, A.J.

Dated: April 11, 2017

[1] (2) A person who has been convicted of an offense under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or any equivalent Federal statute or equivalent statute of any other state, that may be punishable by a term of imprisonment exceeding two years.

18 Pa. Stat. and Cons. Stat. Ann. § 6105 (West)

Commonwealth of Pennsylvania v. Stephen James Russell

Criminal Appeal—PCRA—Untimely

Life sentence without parole is not unconstitutional when the defendant was 19 at the time of the crime.

No. CC 199414840, 199416481. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Bigley, S.J.—April 3, 2017.

OPINION

On January 11, 2017, the Defendant filed an appeal to the Pennsylvania Superior Court from this Court's Order of December 12, 2016, which dismissed the Defendant's PCRA Petitions that were filed on December 2, 2008, and March 16, 2016. This Court Ordered Defendant to file a 1925(b) Statement of Errors Complained of on Appeal on February 3, 2017. The Defendant's Statement was timely filed on February 24, 2017.

This matter involves the fatal shooting of Eric Bible on October 28, 1994. On February 1, 1996, a jury found the Defendant guilty of second degree homicide and two counts of Robbery, one count of Violation of the Uniform Firearms Act (VUFA), and one count of Recklessly Endangering Another Person. On March 11, 1996, this Court sentenced the Defendant to life incarceration without parole, and a consecutive two to four years for both robbery and for VUFA.

Defendant's judgment of sentence was affirmed by the Superior Court of Pennsylvania on May 3, 2001, and his Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on October 3, 2001. The defendant did not file a petition for *writ of certiorari* to the United States Supreme Court. Judgment of sentence became final on January 1, 2002. Therefore, Defendant had until January 1, 2003, to file a timely PCRA Petition. The Defendant's instant PCRA Petitions were untimely filed in 2008 and in 2016.

This Court appointed the Public Defender's Office to represent the Defendant with his PCRA petitions. Counsel filed an amended PCRA petition on August 25, 2016. The Commonwealth filed an Answer to the PCRA petition on October 14, 2016. This Court entered an Order of Notice of Intention to Dismiss on October 18, 2016. The Defendant's PCRA Petition was denied by this Court on December 12, 2016.

The Defendant's instant PCRA petition was untimely filed over five years after the period for a timely PCRA had expired. Therefore, Defendant must prove that any of the timeliness exceptions under 42 Pa.C.S.9545(b)(i-iii) are applicable to his case. There are three exceptions to the PCRA time-bar: (1) interference by government officials in the presentation of the claim; (2) after-discovered evidence; or (3) a newly recognized and retroactively applied constitutional right. *Commonwealth v. Beasley*, 741 A.2d 1258 (Pa 1999). The after-discovered evidence exception requires Defendant to prove that the facts upon which the claim is based were not previously known to him, and that they could not have been obtained earlier through due diligence. If the Defendant is able to establish one of the above exceptions, a petition must be filed within 60 days of the date that the claim could have been presented. *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa 1998).

In the Defendant's PCRA Petition, Defendant claims that the cases of *Miller v. Alabama*, __U.S.__, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *Montgomery v. Louisiana*, __U.S.__, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), are applicable to his case and satisfy the timeliness exceptions under 42 Pa.C.S.9545(b)(i-iii), as a newly recognized and retroactively applied constitutional right. The United States Supreme Court decision in *Miller* holds that a sentence of life without parole is unconstitutionally cruel and unusual punishment when the defendant was under age 18 at the time he committed the murder. The United States Supreme Court decision in *Montgomery* holds that the determination in *Miller* applies retroactively to cases on state collateral review. The *Miller* decision applies only to perpetrators that are under the age of 18 when they committed the crime.

In the instant case, the Defendant was 19 years old when he committed the homicide, therefore, *Miller* and *Montgomery* do not apply to his case. The Defendant urges this Court to extend the holding in *Miller* to apply to cases where the perpetrator is over the age of 18. This Court has properly declined to apply the *Miller* holding to the defendant who was age 19 at the time he committed the homicide. The *Miller* Court expressly stated that their decision applies only to defendants who were under the age of 18 at the time of their crimes. *Miller*, 132 S.Ct. at 2460. Therefore, *Miller* does not create a newly recognized constitutional right that can provide an exception to the PCRA timebar for Defendant, who was 19 when he killed the victim.

The Defendant argues that the rationale in *Miller* should be applied to him because he possessed characteristics of youth that rendered him categorically less culpable. The appellate courts have declined to accept arguments regarding immature brain development as support to extend *Miller* to offenders that were over the age of 18 when they committed their crimes. *Commonwealth v. Furgess*, 149 A.3d 90 (Pa.Super.2016), *Commonwealth v. Cintora*, 69 A.3d 759 (Pa.Super.2013).

In the Defendant's 1925(b) Statement, Defendant claims that this Court's sentence of life imprisonment without parole violated the Eighth and the Fourteenth Amendment of the United States Constitution and Article 1, §26 of the Pennsylvania Constitution. The Defendant claims he should not have been sentenced to life imprisonment without parole because he was less culpable since he was convicted of second degree murder and was age 19 when he committed the crimes. The Defendant raises *Miller* and *Montgomery* in support of his position. The Defendant has not established that *Miller* and *Montgomery* created a newly recognized and retroactively applied constitutional right that would apply to perpetrators over the age of 18 at the time of their crimes. The Defendant has failed to prove an exception to the PCRA time-bar under 42 Pa.C.S.9545(b)(i-iii). This Court has no jurisdiction to consider the claims raised in in Defendant's untimely PCRA because he did not prove that an exception to timeliness requirement applies.

This Court's Order of December 12, 2016 should be affirmed for the reasons contained herein.

BY THE COURT:
/s/Bigley, S.J.

Commonwealth of Pennsylvania v. Benjamin Jenkins

Criminal Appeal—Suppression—Terry Stop—Investigative Detention

Officer conducted proper Terry stop and frisk on intoxicated and over-age defendant found in a high school.

No. CC 2016-08390. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Williams, J.—April 11, 2017.

OPINION

Mr. Jenkins has appealed from his sentence of 11 ½ to 23 months in jail followed by 4 years of probation. He does not like the Court's ruling on his suppression issue. His *Statement of Errors* is devoted exclusively to the interaction law enforcement had with him at Sto-Rox High School.[1] Jenkins claims he was subjected to a seizure and subsequent search without the required level of suspicion.

The facts are rather simple. Around 7:30 in the morning on a school day, a Sto-Rox police officer is called to the high school. The call was that a former student showed up and he was intoxicated. Officer Nicholas Hryadil responded to the call. He gets to the main office of the high school and see Jenkins talking with a former teacher. Jenkins appeared drowsy and intoxicated, yet jovial. He hugged the former teacher 3 times while Hryadil was there. School personnel did not want him there any longer. Hryadil asked him to leave. It took some more talking. Eventually, Jenkins "walked out the door". Transcript, pg. 10.[2] Jenkins was just a few feet away from the door and Hryadil himself when Hryadil noticed "a bulge sticking in his waistband and it looked like the end of a firearm." *Id.* Based upon his training and 16 years of police experience, Hryadil believed it to be a gun. He told Jenkins to put his hands on his head and he "reached down and felt it". *Id.*, at 11. "[I]t felt like a firearm." *Id.* "[L]ike the handle of a snub nose revolver." *Id.*, at 21. "It's a short handle kind of round a little bit on the top part of it that was facing downward." *Id.*, at 23. Hryadil moved Jenkins' shirt and removed the item from Jenkins' waistband. *Id.*, at 25. He was then arrested and later a small amount of marijuana was found on him. *Id.*, at 28.

The legal issues involved concern the application of *Terry v. Ohio* to our facts. In order to engage in a search of a citizen like that which was done with Mr. Jenkins, the Commonwealth must be able to justify that activity. According to it, the officer engaged in an "investigative detention" with the requisite level of suspicion. That phrase - investigative detention - finds its origin in the preeminent case of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The *Terry* "case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances." *Id.*, at 4. The holding in *Terry* has two parts – one addresses law enforcement's ability to stop a citizen and the other is law enforcement's ability to conduct a limited search.

> "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot
>
> and
>
> that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

Id., 392 U.S. at 30.

Neither part of the *Terry* analysis detains this Court very long. Officer Hryadil had sufficient suspicion that criminal activity *may* be afoot. He has interaction with a former student, over the age of 21, visibly intoxicated, at a public high school within his patrol area. During the escort process of Jenkins off the property, Hryadil noticed, as filtered through his years of experience, what he believed to be a gun in Jenkins' waistband. Considering school is just starting for the day, Hryadil freezes the situation by instructing Jenkins to put his hands on his head and he then touches that area. His tactile sense then confirms for him that it is, indeed, a gun. This then allowed a protective, limited search to take place. In sum, there is simply nothing unreasonable about the officer's interaction with Jenkins. Because the touchstone of reasonableness was demonstrated by the government's proof, this court denied the request to suppress the gun.

Upon seeing that the item was in fact a gun, the circumstances quickly materialized into probable cause to arrest Jenkins for having a weapon on school property. The later search of Jenkins, uncovering the marijuana, was incident to that lawful arrest.

With this opinion now being published, our Department of Court Records shall now forward the certified record to the Superior Court of Pennsylvania in due course.

BY THE COURT:
/s/Williams, J.

[1] The Court will use the spelling the school district uses – Sto-Rox.

[2] The transcript has a tracking number of T17-0005 and was filed on January 4, 2017.

Commonwealth of Pennsylvania v. Benedicto Perez

Criminal Appeal—SVP Determination

Defendant claims the SVP determination is not supported by clear and convincing evidence.

No. CC 2014014260. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—April 12, 2017.

OPINION

On February 22, 2016, a jury convicted Appellant, Benedicto Perez, of two counts of Indecent Assault-Person Less than 13 Years of Age, one count of Indecent Assault-Person less than 16 Years of Age, four counts of Unlawful Contact With a Minor, three counts of Endangering the Welfare of Children, and two counts of Corruption of Minors.[1] This Court sentenced Appellant on May 17, 2016 to an aggregate sentence of four to twelve years of incarceration with six years consecutive probation and lifetime SORNA registration. Appellant did not file a Post-Sentence Motion. Appellant filed a Notice of Appeal on June 13, 2016 and his Statement of Errors Complained of on Appeal on August 11, 2016. This Court filed its Opinion on January 17, 2017 addressing the six issues Appellant raised on appeal.

On August 19, 2016, after a hearing at which the Commonwealth presented expert testimony,[2] this Court found that Appellant met the criteria to be classified as a Sexually Violent Predator ("SVP"). On September 12, 2016, Appellant filed a Notice of Appeal as to this Court's determination of Appellant being a SVP. Appellant filed a separate Statement of Errors Complained of on March 31, 2017.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges two errors on appeal. Appellant alleges that this Court abused its discretion by basing its decision to deem Appellant an SVP on the assessment of Dr. Allan Pass, arguing that Dr. Pass lacked sufficient information to make a reliable assessment. Appellant also asserts this Court erred in finding by clear and convincing evidence that Appellant met the criteria to be classified as an SVP. (Concise Statement of Errors to be Raised on Appeal at 4-5)

DISCUSSION

Appellant's issues may be combined for the purpose of this Opinion. Appellant alleges that the SVP classification was not supported by clear and convincing evidence. Appellant further alleges this Court erred in accepting Dr. Pass' opinion as it was based on insufficient information. The standard for determining that Appellant met the criteria to be designated as an SVP is as follows:

> In order to affirm an SVP designation, we, as a reviewing court, must be able to conclude that the fact-finder found clear and convincing evidence that the individual is an SVP. As with any sufficiency of the evidence claim, we view all evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth. We will reverse a trial court's determination of SVP status only if the Commonwealth has not presented clear and convincing evidence that each element of the statute has been satisfied.

Commonwealth v. Baker, 24 A.3d 1006, 1033 (Pa. Super. 2011), aff'd, 78 A.3d 1044 (Pa. 2013).

Appellant argues that because he did not meet certain enumerated criteria, specifically multiple victims, previous history of sexual offenses, unusual cruelty, or use of weapons or drugs in the commission of the offense, he cannot be designated as an SVP. However, Appellant need not meet every assessment factor to be classified as an SVP.

> [Appellant]'s ... [position is also] that there was no evidence presented to indicate that the offenses involved displayed unusual cruelty and also that there was no evidence presented that [Appellant] exceeded the means necessary to achieve the offense as evidenced by the lack of force, threats, or weapons. In the [Sex Offender Assessment], Dr. Pass wrote, '[T]here is no scientific assignment of weighted values determining that one or all of the Megan's Law assessment factors are more or less important. A[n] [individual] may meet the classification criteria for a sexually violent predator with one or all of the factors.' ([Sex Offender Assessment], p. 2). According to [42] Pa.C.S.A. § 9795(4), an assessment shall include an examination of the list of factors described above. It is not necessary for the offense to display unusual cruelty, nor is it necessary to show that offender exceeded the means necessary to achieve the offense. [Appellant also asserts] that the designation of [him] as a violent predator was inappropriate because he had no prior criminal history and there was only one victim. It is not necessary for an offender to have a prior criminal history, or for the offense to include more than on victim. These factors are simply to be considered in the determination of an offender's sexually violent predator status.... *Askew*, 907 A.2d [at 629–30]. Thus, this claim lacks merit.

Commonwealth v. Whanger, 30 A.3d 1212, 1217 (Pa. Super. 2011).

Appellant stipulated at the SVP hearing to Dr. Pass' qualifications as an expert in violent and psychosexual psychology and to the admission of Dr. Pass' report. (Transcript of SVP hearing Aug. 19, 2016, hereinafter ST 3) Appellant declined to participate in the Sex Offender Assessment Board interview. (ST 4, 9) Despite Appellant's lack of participation, Dr. Pass found that Appellant met the statutory classification criteria through a thorough analysis of a multitude of reports and records. (ST 5) Dr. Pass testified that he considered the statutory list of fourteen factors used to assess an individual to determine SVP status and considered

Appellant's criminal misconduct in relation to those factors. (ST 5-6) Dr. Pass concluded that Appellant suffers from the mental abnormality of pedophilic disorder, (ST 6) and further concluded that because Appellant, the victim's stepfather, utilized his position "within the family constellation to engage in illegal, sexual misconduct over a prolonged course of time over approximately nine years with a victim who was prepubescent, … he did engage in acts with the victim with whom a relationship had been initiated, established, maintained or promoted in whole or in part in order to facilitate that victimization." (ST 7) Dr. Pass opined that Appellant's criminal behavior met the statutory criteria for SVP designation. This Court accepted the uncontradicted expert testimony of Dr. Pass, and found by clear and convincing evidence that Appellant is an SVP.

CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

[1] 18 Pa.C.S. §§ 3126 (a) (7), 3126 (a) (8), 6318 (a) (1), 4304 (a), and 6301 (a) (1), respectively.

[2] Appellant presented no evidence at this hearing.

Commonwealth of Pennsylvania v. Kristopher Heggins

Criminal Appeal—JLWOP—Sentencing (Discretionary Aspects)—Challenge to Maximum Sentence of Life

Former juvenile with homicide conviction is sentenced to 30 years to life in prison.

No. CC 200007504, 200007508. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. McDaniel, J.—May 5, 2017.

OPINION

The Defendant has appealed from the judgment of sentence entered on August 10, 2016 following a re-sentencing hearing and grant of Post-Conviction collateral relief. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, the judgment of sentence should be affirmed.

This case has a long and complex procedural history. The Defendant was charged with Criminal Homicide,[1] Robbery[2] and Criminal Conspiracy[3] in connection with the shooting death of Salvatore Brunsvold. At the time of Mr. Brunsvold's death, the Defendant was 16 years old. Following a jury trial held before this Court in September, 2000, the Defendant was convicted of Second-Degree Murder and the remaining charges. The judgment of sentence was affirmed by the Superior Court on September 18, 2002 and his Petition for Allowance of Appeal was denied by the Pennsylvania Superior Court on June 20, 2003.

On March 17, 2004, the Defendant filed a pro se Post Conviction Relief Act Petition. J. Richard Narvin, Esquire, was appointed to represent the Defendant, and after several delays, an Amended PCRA Petition was filed on July 16, 2007. This Court initially dismissed the Amended Petition, but after reviewing counsel's Motion to Reconsider, this Court vacated the dismissal and scheduled an evidentiary hearing on the Amended Petition. Several changes of counsel and corresponding postponements ensued, and the evidentiary hearing was eventually held on April 21, 2010.

Following the evidentiary hearing, this Court thoroughly reviewed the record and trial transcripts in their entirety. On September 22, 2010, this Court convened a second PCRA hearing at which time it found that trial counsel was ineffective for failing to object to the testimony of the Danville Correctional Institute witnesses regarding the Defendant's supposed gang membership and past criminal activity and also for introducing the Defendant's otherwise inadmissible prior convictions. Consequently, this Court granted collateral relief in the form of a new trial. The Commonwealth appealed the award of a new trial and the Superior Court reversed this Court's Order on May 9, 2012. Reargument was subsequently denied on August 9, 2012. No further action was taken until the Defendant sought, and was granted, leave to file a Petition for Allowance of Appeal Nunc Pro Tunc. The Petition for Allowance of Appeal was filed and was denied on August 27, 2013.

While the appeal of this Court's Order for a new trial was pending, the Defendant filed a counseled Post Conviction Relief Act Petition, his second, on July 10, 2012, raising a claim pursuant to *Miller v. Alabama*, 132 S.Ct. 2455 (U.S. 2012). However, shortly thereafter he filed a Petition to Withdraw the PCRA Petition, and this Court granted that request on July 23, 2012.

On October 24, 2013, the Defendant filed a pro se "Post Conviction Relief Act Continuance/Extension of Original PCRA Petition", which he attempted to characterize as a second amendment to his 2004 PCRA Petition but was, in actuality, his third PCRA Petition. J. Richard Narvin, Esquire, was appointed to represent the Defendant, though the Defendant later sought to have Mr. Narvin removed from the case due to a "personality" difference. That motion was denied. Thereafter, Mr. Narvin filed a *Turner* "No Merit" Letter citing the untimeliness of the Petition and sought permission to withdraw from the representation, which this Court then permitted. After giving appropriate notice of its intent to do so and reviewing the Defendant's response thereto, this Court dismissed the Defendant's third PCRA Petition on August 18, 2014. A direct appeal was taken and remained pending for some time, though it was eventually remanded for resentencing on March 15, 2016 in light of the new decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

However, on February 18, 2016, several weeks after the Montgomery decision but before the Superior Court took action on the prior appeal, the Defendant filed his fourth Post Conviction Relief Act Petition raising another *Miller* claim, this time in conjunction with the retroactivity ruling in *Montgomery*. Counsel was appointed to represent the Defendant and an Amended Petition quickly followed (also before the Superior Court's Remand Order). Thereafter, this Court granted relief in the form of a resentencing hearing.

The resentencing hearing was held on August 10, 2016. After an extensive review of the record and consideration of testimony from the Defendant and his mother, a victim impact statement from Mr. Brunsvold's widow and arguments from counsel, this Court imposed a term of imprisonment of 30 years to life. Timely Post-Sentence Motions were filed and were denied on November 4, 2016. This appeal followed.

On appeal, the Defendant raises eight (8)[4] claims of error all relating in some way to his sentence: that imposition of maximum sentence of life for a minor is unconstitutional; that imposition of a maximum sentence of life for a person who "neither killed nor intended to kill" is unconstitutional; that there is no valid sentencing scheme for juveniles convicted of second-degree murder so the Defendant should simply have been sentenced on the underlying felony; that use of the sentencing scheme of 18 Pa.C.S.A. §1102.1 is illegal; that this Court did not conduct an individualized sentencing hearing; that the sentence of 30 years to life is the functional equivalent of a life sentence without parole; that this Court erred in basing its sentence on the fact that the Defendant was the primary actor in the offense; and that this Court erred in not allowing the Defendant's mother to testify regarding his innocence or consider his objections to the Pre-Sentence Report. This Court will address the Defendant's various challenges to the sentence as follows:

Initially, this court notes that consideration of the Defendant's guilt-based claims of error are not appropriate at this time. The Defendant has been convicted of killing Rev. Brunsvold and though this Court may have at once taken issue with the confession, the appellate courts have both affirmed the judgment of sentence and reversed this Court's Order for a new trial. Thus, the current claims of error which allege an illegal or an excessive sentence based upon the Defendant's not being the primary actor or not having the intent to kill can be dismissed *ab initio*.

In his remaining issues, the Defendant takes issue with this Court's imposition of a maximum term of life imprisonment, which he claims is unconstitutional. His claims are meritless.

In *Miller v. Alabama*, 132 S.Ct. 2455 (June 25, 2012), the United States Supreme Court declared that mandatory life sentences for juveniles convicted of murder were unconstitutional. Life sentences were still permitted however, but they could only be imposed after consideration of a number of factors, including the "juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation." *Commonwealth v. Batts*, 66 A.3d 286, 297 (Pa. 2013). Although the Pennsylvania Courts declined to make *Miller* retroactive [see *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013)], the United States Supreme Court recently held that *Miller's* holding should be applied retroactively in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

The Defendant now argues that the imposition of a maximum term of life is prohibited by *Miller*. However, in interpreting *Miller*, our Superior Court has repeatedly held that *Miller* does not prohibit the imposition of a life sentence on a juvenile, but simply requires that its imposition is not mandatory. It stated:

> Section 1102, which mandates the imposition of a life sentence upon conviction for first-degree murder, see 18 Pa.C.S. §1102(a), does not itself contradict *Miller*; it is only when that mandate becomes a sentence of life-without-parole as applied to a juvenile offender - which occurs as a result of the interaction between Section 1102, the Parole Code, see 61 Pa.C.S. §6317(a)(1), and the Juvenile Act, see 42 Pa.C.S. §6302 - that *Miller's* proscription is squarely triggered. *Miller* neither barred imposition of a life-without-parole sentence on a juvenile categorically nor indicated that a life sentence without the possibility of parole could never be mandatorily imposed on a juvenile. Rather, *Miller* requires only that there be judicial consideration of the appropriate age-related factors set forth in that decision prior to the imposition of a sentence of life imprisonment without the possibility of parole on a juvenile.

Commonwealth v. Hicks, 151 A.3d 216, 229 (Pa.Super. 2016), citing *Commonwealth v. Batts*, 66 A.3d 286, 295-296 (Pa. 2013) ("**Batts II**").

In *Commonwealth v. Batts*, 125 A.3d 33 (Pa.Super. 2015) ("**Batts III**"), our Superior Court also addressed the unique procedural situation for those criminal defendants convicted before *Miller* was decided and the new sentencing scheme of 18 Pa.C.S.A. §1102.1 became effective. In holding that imposition of a life sentence after consideration of the age-related factors was a legal sentence, it stated:

> We decline to read *Batts II* as categorically prohibiting a sentence of life without parole for juveniles sentenced before Miller, which would afford those juveniles greater protection that the United States Supreme Court held was constitutionally necessary in *Miller*, a result that our Supreme Court specifically condemned… It would also subject the juveniles convicted before *Miller* was decided and Section 1102.1 was effective to a lesser sentence than those convicted after *Miller* and subject to Section 1102.1. We decline to interpret *Miller* and *Batts II* as categorically prohibiting a sentence of life without parole for juveniles, such as appellant, convicted of murder before *Miller* was issued.

Commonwealth v. Batts, 125 A.3d 33, 46 (Pa.Super. 2015).

At the re-sentencing hearing, this Court noted that it had reviewed the record, the prior testimony of Mrs. Brunsvold, the Defendant's Memorandum in Aid of Sentencing and the Resentencing Memorandum submitted by the Commonwealth. (Re-Sentencing Hearing Transcript, p. 2). It also considered testimony from the Defendant, his mother Helen Heggins as well as arguments from defense counsel and the Commonwealth. After doing so, this Court placed its reasons for imposing sentence on the record. It stated:

> THE COURT: Mr. Heggins, when I sentenced you the first time it was a really easy decision. I didn't have any problem, it was mandatory, and I truly believed that you needed to be in jail for the rest of your life.
>
> I had some doubts when I reviewed your case as a PCRA. I was not convinced that your confession to this crime was given voluntarily on your part, and therefore I ordered you a new trial. However, the Superior and Supreme Court have reversed me and I respect their decision. So the truth is that you have been convicted and stand convicted. My feelings about the confession apparently were not persuasive.
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> To start off with, you committed an extraordinarily heinous crime, and I do believe you committed this crime. I love that your mother doesn't believe it, but I think you did commit it. You were the perpetrator, and you murdered by shooting in the head a man of God who was married with three little children. There was no reason for this crime. You didn't know each other, you weren't in opposite gangs. You just arbitrarily went up and killed him.
>
> You do have a bad juvenile record, I agree with Mr. Fitzsimmons. However, that was a significant period of time ago. In your behalf, I find that you have continued family support as you did during the trial, and you have indicated your remorse.

> I did notice that you did not do well until about two years ago and do have 22 misconducts at Frackville. Now all of a sudden the *Miller* case came down and you start to be an achiever and start doing things to help making [sic] your life better.
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> I have to believe that there is some hope in this world for juveniles that commit really, really awful crimes, that they will be rehabilitated, and I am hoping that you will be one of those people.
>
> At the count of second degree murder, I am going to sentence you to serve not less than 30 years, nor more than life.
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> You have the right to appeal the decision of this Court within 30 days, the right to have a lawyer represent you. If you cannot afford a lawyer, I would appoint one to represent you free of charge.
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> I would also like the record to reveal that I have been looking into this issue and this case for at least 30 days. I spent an incredible amount of time, an incredible amount of thought. I hope, Mr. Heggins, that you don't let me down when you get out. You will still be young enough to do something with your life.

(Re-Sentencing Hearing Transcript, p. 15-17).

It is well-established that "sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent an abuse of discretion. *Commonwealth v. Hardy*, 939 A.2d 974, 980 (Pa.Super. 2007). "An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias or ill-will. In more expansive terms… an abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness or partiality, prejudice, bias or ill-will, or such lack of support as to be clearly erroneous." *Commonwealth v. Dodge*, 957 A.2d 1198, 1200 (Pa.Super. 2008).

As the record reflects, this Court appropriately considered the Defendant's Memorandum in Aid of Sentencing, his and his mother's testimony, evaluated the *Miller* age-related factors and imposed a sentence which took all of these factors into consideration. Moreover, the record reflects great deliberation and consideration in the formulation of the sentence. Given the facts of this case, the sentence imposed was appropriate, not excessive and well within this Court's discretion. This claim must fail.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on August 10, 2016 following a resentencing hearing must be affirmed.

BY THE COURT:
/s/McDaniel, J.

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[1] 18 Pa.C.S.A. §2501 – CC 200007508

[2] 18 Pa.C.S.A. §3701 – CC 200007504

[3] 18 Pa.C.S.A. §903 – CC 200007504

[4] Reference is made to the oft-cited quote from Judge Aldisert: "With a decade and a half of federal appellate court experience behind me, I can say that even when we reverse a trial court, it is rare that a brief successfully demonstrates that the trial court committed more than one or two reversible errors…When I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to any of them. I do not say that this is an irrebuttable presumption, but it is a presumption nevertheless that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness." Aldisert, The Appellate Bar: Professional Competence and Professional Responsibility – a View from the Jaundiced Eye of One Appellate Judge, 11 Cap.U.L.Rev. 445, 458 (1982).