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PLJ

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Commonwealth of Pennsylvania v. Terrence Ross

Criminal Appeal—PCRA—Ineffective Assistance of Counsel—After Discovered Evidence—Untimely

PCRA counsel's ineffectiveness is not a fact which will impact timeliness requirements.

No. CP-02-CR-15085-2013, CP-02-CR-15091-2013. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Rangos, J.—April 23, 2018.

OPINION

Appellant appeals the dismissal of his untimely filed second PCRA Petition.[1] Appellant filed a *pro se* Post Conviction Relief Act ("PCRA") Petition, his second, on December 11, 2017. This Court dismissed the Petition without a hearing on January 31, 2018. Appellant filed a Notice of Appeal on March 15, 2018 and a Concise Statement of Errors Complained of on Appeal on April 18, 2018.

MATTERS COMPLAINED OF ON APPEAL

Appellant raises four issues on appeal, all of which allege that counsel on his first PCRA Petition rendered ineffective assistance of counsel. (Concise Statement of Errors Complained of on Appeal at 1)

DISCUSSION

Before addressing the merits of the issues raised, Appellant must establish that his PCRA petition is timely filed. 42 Pa.C.S. § 9545(b). "A PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final." *Commonwealth v. Brown*, 111 A.3d 171, 175 (Pa. Super. 2015). The "one-year limitation is a jurisdictional rule that precludes consideration of the merits of any untimely PCRA petition, and it is strictly enforced in all cases, including death penalty appeals." *Whitney v. Horn*, 280 F.3d 240, 251 (3d Cir. 2002). "A judgment is deemed 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." *Commonwealth v. Brown*. 111 A.3d at 175 (*see* 42 Pa.C.S. § 9545 (b) (3)). "The PCRA's time limitations are mandatory and interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits. The period for filing a PCRA petition "is not subject to the doctrine of equitable tolling." *Commonwealth v. Rizvi*, 166 A.3d 344, 347 (Pa. Super. 2017) (citations omitted).

Appellant's judgment became final on January 14, 2015, thirty days after sentencing. Appellant filed this petition over two years later on December 11, 2017. Three statutory exceptions to the timeliness provisions allow for limited circumstances under which the late filing of a petition will be excused. *Commonwealth v. Brown*, 111 A.3d at 175.

> (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) (1-4).

Appellant, in his "Response to the Proposed Dismissal of PCRA," alleged that the facts upon which his claim is based were not available to him until the initial PCRA Petition was amended by counsel. Appellant's appeal of the dismissal of his first PCRA Petition terminated on November 28, 2017, when the Supreme Court of Pennsylvania denied his Petition for Allowance of Appeal. His second PCRA Petition was filed on December 11, 2017, which would make it timely filed if the after-discovered evidence exception applied. *Commonwealth v. Lark*, 746 A.2d 585, 588 (Pa. 2000). However, counsel's alleged ineffectiveness in his first PCRA Petition is not a "fact" for the purpose of this statute.

> [R]eview of previous counsel's representation and a conclusion that previous counsel was ineffective is not a newly discovered "fact" entitling Appellant to the benefit of the exception for after-discovered evidence. In sum, a conclusion that previous counsel was ineffective is not the type of after-discovered evidence encompassed by the exception.

Commonwealth v. Gamboa-Taylor, 753 A.2d 780, 785 (Pa. 2000).

Therefore, the PCRA Petition is untimely, without exception, and this Court did not err in dismissing it.

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] For a factual summary and procedural history through the appeal of his first PCRA Petition, *see Commonwealth v. Ross*, 885 WDA 2016 (Pa. Super., May 18, 2017).

Commonwealth of Pennsylvania v. Richard Krista

Criminal Appeal—Homicide—Double Jeopardy—Fundamental Fairness—Bad Faith of Prosecutor

Homicide defendant, after winning a new trial on appeal, alleges a violation of double jeopardy principles after new conviction.

No. CP-02-CR-07547-2012. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—March 6, 2018.

OPINION

Appellant, Richard Krista, was charged with two counts of homicide regarding a shooting which took place on May 11, 2012. Two jury trials before the Honorable Joseph K. Williams ended in mistrials as the juries were unable to reach a unanimous verdict. On June 5, 2014, a third jury convicted Appellant of two counts of first-degree murder. J. Williams sentenced Appellant on July 29, 2014 to consecutive terms of life imprisonment without the possibility of parole. On August 9, 2016, the Superior Court of Pennsylvania vacated the judgment of sentenced and remanded for a new trial, finding that the prosecutor had made an improper statement with respect to Appellant's decision not to testify. Upon remand, the case was reassigned. Appellant filed a Motion to Bar Retrial which, after a hearing, this Court denied on December 8, 2017.[1] Appellant filed a Notice of Appeal on January 4, 2018 and a Statement of Errors Complained of on Appeal on January 25, 2018.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges that this Court erred in failing to bar retrial and dismiss the charges based on the double jeopardy clauses of the U.S. and Pennsylvania Constitutions. Additionally, Appellant alleges this Court erred by failing to bar retrial and dismiss the charges based upon fundamental fairness. (Concise Statement of Errors alleged on Appeal at 1-2).

DISCUSSION

Appellant's claims regarding the Pennsylvania and Federal Constitutions may be considered together as one claim, as the Pennsylvania Constitution provides no greater double jeopardy protection.

> With respect to appellants' contention that the Pennsylvania Constitution provides greater double jeopardy protection than the Federal Constitution, we likewise find no merit. Appellants neither proffer, nor are we aware, of any caselaw which establishes a higher standard in Pennsylvania.
>
> * * *
>
> Moreover, the double jeopardy provision of the Pennsylvania Constitution is essentially identical to that found in the United States Constitution; and Pennsylvania courts have not given its citizens broader double jeopardy protection than that provided by the United States Supreme Court interpreting the United States Constitution.

Commonwealth v. Breeland, 664 A.2d 1355, 1359 (Pa. Super. 1995).

"The double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. Super. 1992). The standard for the double jeopardy bar following the declaration of a mistrial, when the mistrial is granted on the defendant's request, is "whether the conduct on the part of the judge or prosecutor amounts to overreaching." *Commonwealth v. Clark*, 430 A.2d 655, 659 (Pa. Super. 1981).

> The two basis types of overreaching are as follows:
>
> (1) prosecutorial misconduct intentionally calculated to trigger the declaration of a mistrial in order to secure a more favorable opportunity to convict an accused; and
>
> (2) prosecutorial misconduct undertaken in bad faith to harass an accused by successive prosecutions or prejudice his prospects for an acquittal.

United States v. Dinitz, 424 U.S. 600, 611 (1976), *Lee v. United States*, 432 U.S. 23, 32 (1977). Generally, if there is no overreaching, the barrier for reprosecution is removed and the motion for mistrial is denied. *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). "The circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Id.*

In *Commonwealth v. Clark*, 430 A.2d 655 (Pa. Super. 1981), the Superior Court found the following guidelines relevant to determine whether a prosecutor acted in bad faith:

> (1) the absence of any actions undertaken by the prosecutor to preserve the trial and to enhance the defendant's prospects for a fair trial after the misconduct occurred,
>
> (2) the absence of either abundant or convincing evidence of the defendant's guilt, so that the prosecutor's misconduct might reasonably be perceived as an attempt to rescue an inadequate prosecution,
>
> (3) the absence of misconduct causing serious and incurable prejudice to the defendant,
>
> (4) the absence of any neutral explanations, including inexperience, trial strategy, or inadvertence on the part of the government, to show that it did not, in fact, act purposely,
>
> (5) observations of the trial judge concerning the prosecutor's motives, and
>
> (6) defiance by the prosecutor of any direct order or clear admonition by the trial court to refrain from specific conduct prejudicing the defendant's prospects for acquittal.

Id. at 661.

Following a hearing, this Court found no evidence that the prosecutor's statement, while certainly egregious, was intended to deny a fair trial. (Transcript of the Motion Hearing, Dec. 8, 2017, hereinafter "MT" at 22) This Court further stated:

> And I cite specifically to the guidelines for bad faith that have been set forth in some of the case law. The Superior Court indicated that while the statement was not a fair response to misconduct on the defense counsel's part, it was a single incident, no subsequent attempts by the prosecutor to exploit the Appellant's silence and the comment did arise in the context of a discussion with the Judge and opposing counsel, not a direct address to the jury, such as during opening or closing arguments. That's contained on Page 19 of the Superior Court's opinion.
>
> On Page 21, the Superior Court also states, "Here we have a statement that went well beyond the borderline permissible statement at issue in *Ross*, yet it also does not appear to be calculated to affect the jury, as was the case in *Henderson*."
>
> Then finally, on Page 24, the Superior Court notes that the prosecutor in the *Wesley* case was reacting to the Defendant's impromptu and impermissible outburst, while in the Krista case, this case, the prosecutor was reacting to defense counsel's improper questioning.
>
> So these comments, as well as Judge Williams' comments and my reading of the case law and circumstances in this case, the fact that the jury then did convict, and there is nothing to indicate that the Commonwealth believed that their case was going poorly[.]
>
> * * *
>
> I do think that tensions were high; the parties and counsel were, both of them at that point, let's say, pushing each other's buttons, and while it was not a proper response, it was not calculated to create a mistrial or deny a fair trial, but rather an impromptu statement made out of frustration with defense counsel's questioning.

(MT 22-25)

Lastly, Appellant asserts that "the interests of justice" would not be served by a retrial. As stated above, this Court found, under the circumstances, that the appropriate remedy for prosecutorial misconduct is a retrial, as the statement made by the prosecutor was not intended to deprive Appellant of a fair trial. *See Commonwealth v. Martorano*, 741 A.2d 1221 (Pa. 1999).

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] After denying the merits of the Motion, this Court found pursuant to Pa. R.C.P. 587 (b) (4) that the Motion was not frivolous.

Commonwealth of Pennsylvania v. Aaron Scott Johnson

Criminal Appeal—Suppression—Rule 600—Waiver—Reasonable Suspicion—Refiling Charges

Charges against defendant initially dismissed because officer failed to appear for preliminary hearing; refiling the charges is appropriate.

No. CC 200. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Manning, P.J.—April 19, 2018.

OPINION

The defendant, Aaron Scott Johnson, was charged by criminal information with one count of Possession of a Firearm by a Prohibited Person (18 Pa. C.S.A. § 6105(A)(1)); Firearms Not to be Carried Without a License (18 Pa. C.S.A. § 6106(A)(1)); Tampering With and/or Fabricating Evidence (18 Pa. C.S.A. § 4910(1)); Resisting Arrest (18 Pa. C.S.A. § 5104); and Defiant Trespass (18 Pa. C.S.A. § 3503(b)(1)(ii)). A Pre-Trial Motion to Suppress was denied, as was a Petition for Writ of *Habeas Corpus*.[1]

The defendant then proceeded to a non-jury trial, at the conclusion of which he was adjudged guilty of all counts. He waived his right to a presentence report and proceeded to sentencing. At the charge of Possession of a Firearm by a Prohibited Person, he was sentenced to not less than sixteen (16) nor more than thirty-two months (32) months incarceration to be followed by five years' probation. He was given credit for time served. No further penalty was imposed on the remaining counts.

On June 16, 2017, the defendant filed a *Pro-Se* Notice of Appeal. He also filed a *Pro-Se* Concise Statement of Matters Complained of on Appeal on August 15, 2017. As the defendant was still represented by counsel, counsel thereafter filed a Concise Statement of Errors Complained of on Appeal on March 19, 2018, in which he raised the following claims:

1. The Court erred in denying the Motion to Suppress;

2. The Court erred in denying his Petition for Writ of Habeas Corpus; and

3. The defendant's charges should have been be dismissed pursuant to Pa. R. Crim. P. 600.

Turning first to the Suppression Motion, the evidence revealed that on September 2, 2014, Detective Matthew Poling was on patrol in the City of Pittsburgh with his partner, Officer Schweitzer. At approximately 8:28 p.m., he received a 9-1-1 call indicating that a burglar alarm had been set off at the Imani Christian School Academy. (N.T. 7)[2] Detective Poling arrived at the Academy and he and his partner began to walk around the perimeter of the property to look for open doors, broken windows or any other

evidence of forced entry. Both he and Officer Schweitzer were in uniform. He observed that the school appeared to be closed with no lights emanating from within. (N.T. 8-9). As they rounded the corner of the building, with Officer Schweitzer in front, Detective Polling observed an individual dressed in all black, later identified as the defendant, Aaron Johnson, at the rear of the building. The defendant looked in the direction of the officers, said, "Oh shit" upon seeing them, stood up, grabbed the right front side of his waistband and begin to run from the officer. Officer Schweitzer yelled "STOP POLICE" and began pursuit. (N.T. 20).

During the pursuit, the defendant tripped and fell down a couple of steps. As he got up to continue running, Officer Schweitzer observed the top of a black pistol protruding from his waistband. Earlier, he had seen the defendant reach to his waistband when he began running which, in his experience, is common as those fleeing police to hold on to the weapon to prevent it from falling out of the waistband. At one point, another individual, later identified as Jasan Pearson, interfered with Schweitzer's pursuit and yelled to the other defendant, "go bro, go bro." Officer Schweitzer stopped and placed the other individual under arrest while Detective Poling continued in pursuit of the defendant.

At one point in the pursuit, he observed the defendant take the firearm from his waistband and hold it in his hand as we was running. He then observed the defendant throw the firearm into some shrubbery along where he was running. He continued pursuit, tacked the defendant and placed him under arrest. (N.T. 13-15). The firearm was later retrieved.

The defendant claimed at the suppression hearing that the officers lacked reasonable suspicion to chase or detain him when they began to pursue him. Accordingly, he claims that the firearm that was recovered was the product of forced abandonment flowing from the unlawful pursuit. The law in this area is well established:

> In order to justify an investigatory stop, the police must have, at its inception, reasonable suspicion that criminal activity is afoot. The police must be able to point to specific and articulable facts which reasonably support that suspicion. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *See Commonwealth v. Hicks*, 434 Pa. 153, 253 A.2d 276 (1969).
>
> Particularly, police must possess both suspicious conduct on the part of the persons so detained and a reasonable belief of some sort of criminal activity. *Commonwealth v. Espada*, 364 Pa.Super. 604, 528 A.2d 968 (1987).
>
> In determining whether reasonable suspicion exists, we must look to the totality of the circumstances. *Commonwealth v. Wright,* 448 Pa.Super. 621, 672 A.2d 826 (1996). Merely because a suspect's activity may be consistent with innocent behavior does not alone make detention and limited investigation illegal. *Commonwealth v. White*, 358 Pa.Super. 120, 516 A.2d 1211 (1986). Rather, we view the circumstances through the eyes of a trained officer, not an ordinary citizen. *Commonwealth v. Fink*, 700 A.2d 447 (Pa.Super.1997). We are mindful that some of the factors to be considered include various objective observations, information from police reports, if such reports are available, and consideration of modes or patterns of operation of certain kinds of lawbreakers. *Id.*

Commonwealth v. Riley, 715 A.2d 1131, 1135 (Pa. Super. 1998).

The officers clearly had reasonable suspicion that warranted the attempt to stop the defendant. They received a dispatch indicating that a silent alarm had gone off at the Imani Christian School Academy. This certainly created reasonable suspicion to believe that someone may have been attempting to break in. Upon arriving at the scene, they observed the defendant, dressed in black, in the shadows directly outside the building where the alarm had gone off. Upon seeing the officers, in their full uniform, the defendant exclaimed, "oh shit" and proceeded to run from the scene. At the beginning of that pursuit and during that pursuit, the officers became aware that the defendant also possessed a firearm. The silent alarm, coupled with the observation of the defendant dressed in black directly outside of the building where the alarm went off, added to his immediate flight upon seeing the officers, amounted to reasonable suspicion sufficient to warrant an investigation detention. This reasonable suspicion ripened into probable cause to arrest when the defendant was observed throwing the gun away and as he resisted arrest when the officer caught up to him.

Next, the defendant contends that his Petition for Writ of *Habeas Corpus* should be granted in violation of Pennsylvania Rule of Criminal Procedure 544. Pennsylvania Rule of Criminal Procedure 544(A) provides:

> When charges are dismissed or withdrawn at, or prior to, a preliminary hearing, or when a grand jury declines to indict and the complaint is dismissed, the attorney for the Commonwealth may reinstitute the charges by approving, in writing, the re-filing of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges.

The record in this matter indicates that at docket number MJ-05003-CR-9054-2014, a criminal complaint was filed against this defendant arising out of the same incident and listing the same charges. It was postponed on September 16th and again on September 29, 2014 and then the charges were withdrawn on October 14, 2014. According to the Assistant District Attorney at the May 11, 2017 hearing, the charges were dismissed because the officer failed to appear. N.T. 3). At docket number MJ-05003-CR-10761-2014, the criminal complaint was refiled in the same magisterial district on October 21, 2014. After several postponements, all charges were held for Court following a preliminary hearing.

The criminal complaint was entered into evidence as Commonwealth Exhibit 1 at the May 11, 2017 hearing. Attached to the complaint was an affidavit of probable Cause. The affidavit explained that the charges had been dismissed on October 14, 2014 by Judge Martini and that this was a refiling of those charges. As the criminal complaint bears the signature of the Assistant District Attorney, it is clear that that office approved the refiling of the charges.

In *Commonwealth v. Bowman*, 840 A.2d 311 (Pa. Super.2003), the Superior Court addressed a similar argument and held that "... the presence of the Assistant District Attorney at the preliminary hearings in this matter certainly implied the authorization for the refiling of the complaint." at 3016. Here, there is no need to rely on any implication. The affidavit made it clear that this was a refiling and the signature of the Assistant District Attorney on the refiled complaint explicitly authorized the refiling. Accordingly, the Court did not err in dismissing the Petition for Writ of *Habeas Corpus* based on violation of Rule 544 if the rule was not, in fact, violated.

Finally, the defendant contends that the charges should have been dismissed due to violation of Rule 600. This claim was raised by the defendant *pro se*. As pointed out above, because the defendant was represented by qualified counsel throughout this matter, the Court was not required to address the claims raised in any *pro se* pleading. None of defendant's attorneys raised a claim that that the charges should be dismissed due to a violation of Rule 600. This claim was not mentioned at the May 11, 2017 hear-

ing. Accordingly, any Rule 600 claim defendant raises in this appeal is waived. *Commonwealth v. Ali*, 10 A.3d 282 (Pa. 2010). Because defense counsel did not raise the Rule 600 claim, no evidentiary hearing was held.

For the reasons set forth above, the defendant's judgment of sentence should be affirmed.

BY THE COURT:
/s/Manning, P.J.

Date: April 24, 2018

[1] The defendant also filed numerous pro-se pleadings. Other than his several requests for new counsel, this Court did not consider or rule on these pleadings. The defendant was represented by qualified counsel through these proceedings and this Court was not required "… to struggle through the *pro se* filings of (the] defendant[s] when qualified counsel represent[s] [those] defendant[s]." *Commonwealth v. Pursell*, 724 A.2d 293, 302 (Pa. 2005).

[2] N.T. refers to the notes of testimony of the Motion/Trial held on May 11, 2017.

Commonwealth of Pennsylvania v. Carl Collins

Criminal Appeal—Homicide—Sentencing (Discretionary Aspects)—Juvenile Homicide Defendant—Ex Post Facto Claim—Rehabilitation

Defendant, who was a juvenile when he committed 2nd degree murder, has exhibited efforts toward rehabilitation and thus is sentenced to 30 years to life.

No. CC 1993-12112. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—March 15, 2018.

OPINION

The Defendant has appealed from the judgment of sentence entered on October 11, 2017, following a resentencing hearing. 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.

The Defendant was charged with Criminal Homicide,[1] Possession of a Firearm Without a License,[2] Robbery,[3] Criminal Conspiracy[4] and Aggravated Assault[5] in connection with the August 31, 1993 shooting death of Odell Mahaffey. At the time of the killing, the Defendant was 16 years old. Following a jury trial held in February, 1994 before the Honorable Walter Little, then of this Court, the Defendant was found guilty of Second-Degree Murder and all other counts. On May 17, 1994, he was sentenced to a term of life imprisonment at the Second-Degree Murder count, plus an additional aggregate term of 15-43 years consecutive to the life sentence. Timely Post-Sentence Motions were filed and denied on June 8, 1994. The judgment of sentence was affirmed by the Superior Court on May 15, 1996 and his subsequent Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on October 31, 1996.

No action was taken until July 16, 1998, when the Defendant sought leave to reinstate his post-conviction rights *nunc pro tunc*. The Motion was granted and the Defendant filed a *pro se* PCRA Petition on August 12, 1998. Counsel was appointed to represent the Defendant, but a *Turner* letter was filed and she was granted permission to withdraw. After giving the appropriate notice, and reviewing the Defendant's response to that notice, Judge Little dismissed the Defendant's PCRA Petition on January 17, 2001. The Superior Court affirmed the dismissal on December 10, 2001 and the Defendant's Petition for Allowance of Appeal was denied on June 28, 2002.

On June 25, 2003, the Defendant filed a second pro se PCRA Petition. For reasons unclear to this Court,[6] counsel – Scott Coffey, Esquire - was appointed to represent the Defendant. However, after filing a *Turner* letter, counsel was permitted to withdraw. On June 30, 2005, Judge Little gave Notice of his Intent to Dismiss the Petition and the Defendant responded to the proposed dismissal. However, Judge Little never entered an Order dismissing the Petition.

Then, on September 16, 2005, the Defendant filed a third pro se PCRA Petition alleging a claim of after-discovered evidence in the form of a witness named Merrior Coleman. By this time the case had been transferred to Judge Cheryl Allen, also formerly of this Court. Again, for reasons unknown to this Court, Judge Allen appointed counsel – Scott Coffey, Esquire – to represent the Defendant. However, because he had formerly represented the Defendant at a prior stage of these proceedings, Attorney Coffey was permitted to withdraw and the Defendant elected to proceed *pro se*. On April 20, 2006, the Defendant filed an Amended Petition again alleging a second after-discovered witness - this time, Ronald Williams.

After giving the appropriate notice, Judge Allen denied post-conviction relief on September 19, 2006. On appeal, the Superior Court found that Judge Allen's Order pertained only to the September 16, 2005 Petition regarding Merrior Coleman, and did not resolve the April 20, 2006 Petition regarding Ronald Williams and so it remanded the case to this Court for an evidentiary hearing.

The proscribed evidentiary hearing was held before this Court on September 24 and 25, 2008. Following the hearing, this Court denied the Defendant's April 20, 2006 Amended Petition regarding the after-discovered evidence of Ronald Williams. That Order was affirmed by our Superior Court on July 22, 2011 and the Defendant's subsequent Petition for Allowance of Appeal was denied on December 28, 2011.

No further action was taken until July 10, 2012, when the Defendant filed a fourth[7] PCRA Petition raising a claim based on *Miller v. Alabama*, 132 S.Ct. 2455 (2012) This Court took no immediate action on the Petition while awaiting guidance from our appellate courts. Following our Supreme Court's decision in *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013), this Court gave notice of intent to dismiss the Petition on November 13, 2013 and subsequently dismissed it on December 5, 2013.

Meanwhile, unbeknownst to this Court, attorney Erika Kreisman filed a Motion to Grant Leave to Amend PCRA with Judge Manning of this Court. Judge Manning responded with a Notice of Intent to Dismiss on November 6, 2013 and purported to dismiss

the Petition on December 9, 2013, four (4) days after this Court had already dismissed it. Upon discovery of the filing error and the proper assignment of the case to this Court, Judge Manning vacated his Orders on January 8, 2014.

Despite the mix-up, the Defendant, through Attorney Kreisman, filed a timely Notice of Appeal from this Court's Order of December 5, 2013. On appeal, he took issue with the validity of the *Cunningham* ruling and argues that this Court erred in dismissing his Petition as untimely. After the appeal was initially dismissed for the Defendant's failure to file a brief, the appeal was reinstated and this Court's Order was affirmed on January 27, 2015. A Petition for Allowance of Appeal was filed but was discontinued shortly thereafter.

On February 23, 2016, the Defendant filed his fifth pro se Post Conviction Relief Act Petition, again raising a *Miller* claim, this time pursuant to the United States Supreme Court's decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) Suzanne Swan, Esquire, was appointed to represent the Defendant, but Attorney Kreisman once again entered her appearance on behalf of the Defendant and Attorney Swan withdrew. An Amended Petition seeking resentencing was subsequently filed and this Court granted relief in the form of a re-sentencing hearing, which was held on October 11, 2017. At the conclusion of that hearing, this Court vacated the sentences imposed on May 17, 1994 and imposed a term of imprisonment of 30 years to life at the second-degree murder charge. Timely Post-Sentence Motions were filed and were denied on October 30, 2017. This appeal followed.

On appeal, the Defendant raises two (2) claims of error, which are addressed as follows:

1. Ex Post Facto Violation

Initially, the Defendant argues that this Court erred in applying 18 Pa.C.S.A. §1102.1 retroactively because the killing occurred before the effective date of Section 1102.1. This claim is 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 subsequently held that *Miller*'s holding should be applied retroactively in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016)

In response to *Miller*, the Pennsylvania Legislature enacted 18 Pa.C.S.A. §1102.1 which states, in relevant part:

> ***§1102.1. Sentence of persons under the age of 18 for murder, murder of an unborn child and murder of a law enforcement officer.***
>
> *Effective: October 25, 2012*
>
> *…*
>
> *(c) Second degree murder. - A person who has been convicted after June 24, 2012, of a murder of the second degree, second degree murder of an unborn child or murder of a law enforcement officer of the second degree and who was under the age of 18 at the time of the commission of the offense shall be sentenced as follows:*
>
> *(1) A person who at the time of the commission of the offense was 15 years of age or older shall be sentenced to a term of imprisonment the minimum of which shall be at least 30 years to life.*
>
> *…*
>
> *(d) Findings. - In determining whether to impose a sentence of life without parole under subsection (a), the court shall consider and make findings on the record regarding the following:*
>
> *(1) The impact of the offense on each victim, including oral and written victim impact statements made or submitted by family members of the victim detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. A victim impact statement may include comment on the sentence of the defendant.*
>
> *(2) The impact of the offense on the community.*
>
> *(3) The threat to the safety of the public or any individual posed by the defendant.*
>
> *(4) The nature and circumstances of the offense committed by the defendant.*
>
> *(5) The degree of the defendant's culpability.*
>
> *(6) Guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing.*
>
> *(7) Age-related characteristics of the defendant, including:*
>
> *(i) Age.*
>
> *(ii) Mental Capacity.*
>
> *(iii) Maturity.*
>
> *(iv) The degree of criminal sophistication exhibited by the defendant.*
>
> *(v) The nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant.*
>
> *(vi) Probation or institutional reports.*
>
> *(vii) Other relevant factors.*

> *(e) Minimum sentence. - Nothing under this section shall prevent the sentencing court from imposing a minimum sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing may not supersede the mandatory minimum sentences provided under this section.*

18 Pa.C.S.A. §1102.1

However, the intersection of *Miller* (which held that mandatory life sentences for juveniles were found to be unconstitutional), *Cunningham* (which applied *Miller* retroactively) and 18 Pa.C.S.A. §1102.1 (which created a new sentencing scheme for offenses committed after October 25, 2012 only), creates a unique procedural problem for the sentencing court. In *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017) (***Batts II***), our Supreme Court addressed the issue and held that it was proper to impose a minimum term-of-years and maximum life sentence upon resentencing. It stated: "for juveniles convicted prior to *Miller* for whom a sentence of life without parole was unconstitutional, the prohibition against paroling inmates sentenced to serve life in prison could be severed from section 6137(a) of the Parole Code. Thus, a court may sentence affected defendants to a minimum term-of-years sentence and a maximum sentence of life in prison, exposing these defendants to parole eligibility upon the expiration of their minimum sentences." *Commonwealth v. Batts*, 163 A.2d 410, 439 (Pa. 2017) Thereafter, in *Commonwealth v. Melvin*, 172 A.3d 14 (Pa.Super. 2017), our Superior Court reiterated the *Batts* finding and concluded that the imposition of a sentence for a killing which occurred before June 24, 2012 does not raise an *ex post facto* violation claim as long as the sentencing factors of Section 1102.1 are considered. *Commonwealth v. Melvin*, 172 A.3d 14, 22 (Pa.Super. 2017)

As discussed more fully below, this Court engaged in an extensive analysis of the Section 1102.1 factors when imposing its sentence. This Court's actions were in accordance with the guidance provided by our appellate courts in *Batts* and *Melvin*, *supra* and so this claim must fail.

2. Excessive Sentence

The Defendant also argues that this Court erred in imposing a manifestly excessive sentence which failed to take into account his nonviolent prison adjustment and family support network. Again, this claim is meritless.

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) "Where pre-sentence reports exist, [the appellate court] shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. *Commonwealth v. Macias*, 968 A.2d 773, 778 (Pa.Super. 2009)

Our Supreme Court has mandated 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" when considering a sentence for a juvenile convicted of murder. *Commonwealth v. Batts*, 66 A.3d 286, 297 (Pa. 2013)

At the re-sentencing hearing, this Court noted that it had read and considered two (2) Pre-Sentence Investigation reports as well as an expert report on behalf of the Defendant, and it detailed its review of the record:

> THE COURT: Okay. Before we begin, I would like to place on the record that the Court has ordered both Pre-Sentence Reports. I have received two very well written sentencing memos. I have gone over - you can sit down if you want - all of the information that was gleaned from Dr. Applegate as well as my entire file which is about four inches thick.
> So because I was not the trial Judge in this case, I have made a real effort to learn as much as I can. I spent many, many hours this weekend with this case, and I'll ask you both to remember that when you're presenting evidence.

(Re-sentencing Hearing Transcript, 10/11/17, p. 3)

This Court then listened to and considered the testimony of psychologist Dr. Alice Applegate and numerous witnesses including Sheila Miles, a nurse from SCI Greensburg, Cordell Collins, the Defendant's brother, Tia Collins, the Defendant's sister-in-law, Antoine Bailey, a friend of the Defendant, the Defendant himself and victim impact testimony from Linda Mahaffey, Odel Mahaffey's sister. At the conclusion of the testimony, this Court listened to arguments presented by defense counsel and the Commonwealth and placed its own analysis on the record. It stated:

> THE COURT: All right. As I stated, I have two pre-sentence reports, two excellent sentencing memos. I have Dr. Applegate's insight as well as my entire - shouldn't be quite this big - four-inch thick file. I took extra caution to review the file because I was not the trial Judge in the case nor was I the original Judge assigned after Judge Little passed away.
>
> I do find the defendant was clearly 16 years old when this happened and three months. The crime has always identified the defendant as the shooter. This is a totally senseless crime. The victim had no money. There was certainly no reason to shoot him let alone to humiliate him as well as his friend. I find this to be a particularly heinous crime.
>
> Mr. Collins' childhood has two stories. He had a very difficult childhood and was raised by an abusive, alcoholic mother who was also mentally ill. There, however, was some support from his father and clearly support from his brother. Today, the defendant claims to have a relationship with his brother. I question this to be true - to be not true because of his background. I do not question, however, that his brothers are supportive of him, have been a good influence and continue to support him.
>
> Although the defendant was hanging - and I put that in air quotes - with the Bloods in this case when the crime occurred, he said that he was not an active member. I have no reason to disbelieve that. There was also some admissions of drug and alcohol use.

> However, I find most significant in this case the defendant's development at the institutions in which he has been placed. In the beginning, he had some minor misconduct, but none for the past many years. I do find it interesting, as Mr. Wabby pointed out, that in 2008, he was still professing his innocence and did so through a PCRA hearing before this Court which the Court found to be, his witness not to be credible.
>
> I do also find that he, in part at least, began his rehab in 1999 - 1995 which was when the first certificate was issued, and this was long before the Miller decision. This is important to me because I've had a number of juveniles that have come before me that started rehabilitating after the Miller decision. Mr. Collins has a huge list of accomplishments, and most important is his dedication to help others and to improve their lives. I think, Mr. Collins, that you were sincere in making yourself a better person, so the sentence is vacated, and I'm going to sentence the defendant at the second degree murder case to serve a term of 30 years to life imprisonment. The defendant is not RRRI eligible. There will be no concurrent sentences on this case.

(R.H.T., p. 50-52)

As the record reflects, this Court appropriately considered the lay and expert testimony, his exhibits and evidence of his rehabilitation activities, evaluated the *Miller* age-related factors and imposed a sentence which took all of these factors into consideration. The new sentence - 30 years to life - is a significant downward departure from the prior life sentence without the possibility of parole and reflects the Defendant's efforts towards rehabilitation. 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 October 11, 2017 following resentencing must be affirmed.

BY THE COURT:
/s/McDaniel, J.

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[1] 18 Pa.C.S.A. §2501 - CC 9312112

[2] 18 Pa.C.S.A. §6106(a) - CC 9313464

[3] 18 Pa.C.S.A. §3701(a)(1) – (2 counts) - CC 9313464

[4] 18 Pa.C.S.A. §903(a)(1) – CC 9313464

[5] 18 Pa.C.S.A. §2702(a) – CC 9313464

[6] The Defendant not being entitled to appointed counsel for second and subsequent PCRA Petitions, see Pa.R.Crim.Pro. 904(d)

[7] The Commonwealth considers this Petition the Defendant's fifth (5th), ostensibly because it considered the April 20, 2006 Amended Petition relating to Ronald Williams as a separate Petition