NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
LAVELL JONES	:	
Appellant	:	No. 657 EDA 2023

Appeal from the PCRA Order Entered February 24, 2023
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0732411-1993

BEFORE: DUBOW, J., KING, J., and LANE, J.

MEMORANDUM BY KING, J.: **FILED APRIL 25, 2024**

Appellant, Lavell Jones, appeals from the order entered in the Philadelphia County Court of Common Pleas, denying his second petition filed under the Post Conviction Relief Act ("PCRA"), at 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The PCRA court set forth the relevant facts and procedural history of this case as follows:

> On the evening of August 18, 1992, [Appellant] and Geary Myers visited the home of eyewitness [Horace] Archer [("Archer")] and his mother…. The men hung out for a few hours before Archer drove them home. As Archer was driving, Geary told Archer to stop at 40th street so that he could use a payphone. While stopped, [Appellant] called Alexis Morris over to the car and told her to get in. Archer recalled that she had on tan pants, a white shirt, and red lipstick.
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> Ms. Morris got into the backseat of Archer's '84 Thunderbird and sat in the backseat behind Archer. Geary was also

sitting [in] the backseat, and [Appellant] was in the front passenger seat. Once everyone was in the car, [Appellant] told Archer to drive straight. After only driving 5 blocks, [Appellant] told Archer to pull over. They were positioned midway over the [41st] Street Bridge. It was late at night, and the bridge was completely dark with no lighting or houses nearby.

[Appellant] told Ms. Morris to get out of the car. Archer recalled [Appellant] shifted his seat forward and she backed out of the car, passing over Geary, and exited the car backside first. After exiting the car, she leaned into the open passenger side door and asked [Appellant] why she had to get out of the car. [Appellant] responded by lifting a .25 caliber gun with a brown grip handle from the front of his pants and shooting her twice in the head. Archer saw Ms. Morris drop to the ground. Archer, in shock, asked [Appellant] "what are you doing," to which he replied, "I have my reasons." As Archer drove off, [Appellant] put his hand out the passenger window and fired 4 more shots at the woman as she lay dead on the side of the bridge.

After the murder, Archer dropped [Appellant] off at his house in that area, and then dropped off Geary. [Appellant] told Archer he would see him tomorrow, but instead, Archer saw [Appellant] again about a month later when he came over to Archer's house. Archer asked [Appellant] why he shot the young woman, and again [Appellant] only said that "he had his reasons[.]"

The victim's body was found at about 1:26 a.m. on the [41st] Street Bridge, face up, with her legs in the street and the rest of her body on the sidewalk. Her body was extremely cold, indicating she was deceased for a considerable amount of time before being found. Three FCCs were found in the area, two right near her body and one in the street further up the road. The victim's wounds were consistent with Archer's account—she had two bullet wounds to her head, one to her left temple and one to her left jaw with stippling indicating she was shot at close range. The medical examiner testified that the trajectory of the bullets was consistent with being shot while bent over as if leaning into a vehicle. The victim also had two bullet wounds to her stomach with a trajectory that was consistent with her lying

on the ground and being shot by a person in a vehicle that was driving away.

On April 27, 1993, homicide detectives went to [Archer's mother's home to speak with Archer]. Archer gave a statement detailing how [Appellant] shot Ms. Morris while Archer was driving him home. On July 14, 1993, Archer testified consistently with his statement at [Appellant's] preliminary hearing and identified [Appellant] as the person who killed Ms. Morris.

Subsequently, about a month before trial, [Appellant] began threatening to have Archer killed unless he changed his statement inculpating [Appellant]. The first threat occurred when Archer went to watch his friend participate in a boxing match at Holmesburg prison. [Appellant] was waiting for Archer inside the bathroom, and immediately asked Archer, "why you give that statement on me?" [Appellant] grabbed a knife that had been hidden and passed it to an unknown man in the bathroom. The man pointed the knife at Archer and threatened that if he did not change his statement, he would come see him when he was released from prison. The Deputy Warden of Holmesburg confirmed there was a sponsored boxing match on this date that Archer attended. The Deputy Warden also explained that inmates were able to interact with the visitors during this exhibition.

The next Monday, [Appellant] called Archer's house and told him to say it was a different Lavell that killed the woman. Using three-way calling, [Appellant] put Clyde Fuss, a defense investigator, on the phone with Archer. Because he was scared for his life, he told the investigator that a different Lavell was the shooter, the investigator typed up a statement based on that conversation and went to Archer's house to have him sign it. When the investigator arrived at his house, Archer refused to sign the statement because it was a lie—he saw [Appellant] kill Ms. Morris. Moreover, [Archer's mother] was home and would not allow him to sign a statement that was a lie.

[Appellant] did not stop there. The night before Archer testified at [Appellant's] trial, [Appellant] called his house at least two more times. When trial counsel asked Archer why he told the investigator that [Appellant] was not the killer,

> he explained that he believed [Appellant] would send someone to his house to kill him. [Appellant] knew where he lived, he watched [Appellant] shoot and kill a woman right next to him, and [Appellant] was now threatening his life for giving an inculpatory statement. When asked by trial counsel if the police ever threatened him in any way to give a statement or testify, Archer replied, "no."
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> Archer's mother testified at [Appellant's] trial that when her son came home from dropping off [Appellant] on the night of the murder, he was visibly nervous and scared. He told her that he saw "Vel"[1] shoot and kill a young lady. [Archer's mother] also confirmed that her son went to see a fight at Holmesburg prison and when he left her house, he was his normal, "happy go lucky" self. But when he came home, he was scared and looked "like death was on him." He told his mother that Vel tried to "shake [him] up in the bathroom" of the prison. She also testified that when the investigator came to her house with the new statement saying [Appellant] wasn't the killer, she "wouldn't let [her] son sign it ... because from what he told me from the beginning, that was a lie." Her son told her that [Appellant] killed the woman. She also confirmed that Vel called her house two times asking for her son right before the trial.
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> The jury convicted [Appellant] of first-degree murder and related offenses, and he was sentenced to a mandatory term of life without parole. [Appellant] appealed, and the Superior Court affirmed the judgment of sentence on January 17, 1996. [Appellant's] judgment became final on February 16, 1996. [Appellant] filed a PCRA on July 18, 2012. Counsel was appointed, but was removed after a ***Grazier*** hearing. [Appellant's] PCRA petition was dismissed on November 30, 2018. On October 7, 2020, and October 13, 2020, [Appellant] filed counseled petitions alleging newly discovered evidence. On November 6, 2020, [Appellant] filed exhibits to these petitions, including a recantation from … Archer claiming he did not witness the murder. On July 14, 2022, an evidentiary hearing was held before the [PCRA court], in which … Archer testified.

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[1] Archer stated at the PCRA hearing that "Vel" referred to Appellant, whose first name is Lavell. (***See*** N.T. PCRA Hearing, 7/14/22, at 51-52).

> [On February 10, 2023, the court announced its decision denying PCRA relief on the record.] On February 24, 2023, [the court] having considered all testimony, evidence and legal arguments presented by [Appellant] signed an Order dismissing [Appellant's] PCRA petition. On March 7, 2023, [Appellant] filed notice of the instant appeal. [On March 9, 2023, the court ordered Appellant to file a Pa.R.A.P. 1925(b) concise statement of errors, which Appellant timely filed on March 30, 2023.]

(PCRA Court Opinion, filed June 12, 2023, at 1-4) (internal citations omitted).

Appellant raises one issue for our review:

> Did the PCRA court err and/or abuse its discretion when it dismissed Appellant's PCRA claim based upon information received after trial—from Horace Archer, the Commonwealth's sole witness to the crime—as non-meritorious?

(Appellant's Brief at 4).

Our standard of review of the denial of a PCRA petition is limited to examining whether the record evidence supports the court's determination and whether the court's decision is free of legal error. ***Commonwealth v. Ford***, 947 A.2d 1251 (Pa.Super. 2008), *appeal denied*, 598 Pa. 779, 959 A.2d 319 (2008). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007). If the record supports a post-conviction court's credibility determination, it is binding on the appellate court. ***Commonwealth v. Dennis***, 609 Pa. 442, 17 A.3d 297 (2011).

Appellant argues that the Commonwealth's case against him hinged on

Archer's testimony. Appellant asserts that Archer testified at trial that he was driving a car that Appellant and Ms. Morris were passengers in when Appellant fatally shot Ms. Morris. Appellant contends that Archer did not disclose the crime to police until homicide detectives arrived at his home eight months after the murder and transported him to the homicide unit for questioning. Appellant insists that Archer's testimony concerning the details of the murder was sparse and bizarre. Appellant emphasizes that the Commonwealth presented no other witnesses to the murder. Appellant highlights that the Commonwealth provided no motive for the murder.

Appellant avers that years later, Archer came forward and testified that Appellant did not commit the murder. Appellant submits that Archer testified falsely against him because the police prepared a statement for Archer to sign implicating Appellant. Appellant claims that Archer admitted that police had threatened to charge Archer with the murder if he did not sign the statement implicating Appellant, memorize it, and testify against Appellant. Appellant insists that Archer communicated his recantation to a private investigator in October 2019, who informed Appellant of the recantation. Appellant maintains that he filed the current PCRA petition within one year of learning of Archer's recantation. Appellant submits that the PCRA court agreed at the PCRA hearing that Appellant satisfied the newly-discovered facts exception to the PCRA time-bar under these circumstances.

Appellant further argues that he satisfied the substantive after-

discovered evidence claim. Specifically, Appellant asserts that he could not have discovered Archer's recantation sooner with the exercise of due diligence; Archer's recantation was not merely corroborative or cumulative of other evidence; the recantation would not be used solely to impeach the credibility of another witness; and the recantation would have likely resulted in a different verdict at a new trial, where Archer was the only witness to implicate Appellant. Appellant concludes the PCRA court erred by denying relief, and this Court must reverse and remand for further proceedings. We disagree.

The timeliness of a PCRA petition is a jurisdictional requisite. ***Commonwealth v. Zeigler***, 148 A.3d 849 (Pa.Super. 2016). A PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). A judgment of sentence is final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S.A. § 9545(b)(3). The statutory exceptions to the PCRA time-bar allow very limited circumstances to excuse the late filing of a petition; a petitioner must also assert the exception within one year of the date the claim could have been presented. 42 Pa.C.S.A. § 9545(b)(1) and (b)(2) (effective December 24, 2018 for claims arising on or after December 24, 2017).

To obtain merits review of a PCRA petition filed more than one year after the judgment of sentence became final, the petitioner must allege and prove at least one of the three timeliness exceptions:

> (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.

42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).

To satisfy the "newly-discovered facts" timeliness exception set forth in Section 9545(b)(1)(ii), a petitioner must demonstrate that "he did not know the facts upon which he based his petition and could not have learned those facts earlier by the exercise of due diligence." ***Commonwealth v. Brown***, 111 A.3d 171, 176 (Pa.Super. 2015), *appeal denied*, 633 Pa. 761, 125 A.3d 1197 (2015). Due diligence requires the petitioner to take reasonable steps to protect his own interests. ***Commonwealth v. Carr***, 768 A.2d 1164 (Pa.Super. 2001). A petitioner must explain why he could not have learned the new fact(s) earlier with the exercise of due diligence; this rule is strictly enforced. ***Commonwealth v. Monaco***, 996 A.2d 1076 (Pa.Super. 2010),

appeal denied, 610 Pa. 607, 20 A.3d 1210 (2011).

To obtain relief on a substantive claim of after-discovered evidence under the PCRA once jurisdiction is established, a petitioner must demonstrate: (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict. ***Commonwealth v. Washington***, 592 Pa. 698, 927 A.2d 586 (2007). ***See also Commonwealth v. Small***, 647 Pa. 423, 189 A.3d 961 (2018) (discussing quality of proposed "new evidence" and stating new evidence must be of higher grade or character than previously presented on material issue to support grant of new trial).

When considering a claim involving recanted testimony, "[t]he well-established rule is that an appellate court may not interfere with the denial or granting of a new trial where the sole ground is the alleged recantation of state witnesses unless there has been a clear abuse of discretion[.]" ***Commonwealth v. Loner***, 836 A.2d 125, 135 (Pa.Super. 2003) (*en banc*), *appeal denied*, 578 Pa. 699, 852 A.2d 311 (2004) (quoting ***Commonwealth v. Mosteller***, 446 Pa. 83, 88-89, 284 A.2d 786, 788 (1971)). "Recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. There is no less reliable form of proof, especially when it involves an admission of perjury."

See id. Thus, "[t]he deference normally due to the findings of the [PCRA] court is accentuated where what is involved is recantation testimony." ***Id.*** at 141 (holding that victim's recantation testimony that she was influenced by CYS caseworkers was for PCRA court to accept or reject; because we cannot conclude that court clearly abused its discretion in denying appellant new trial based upon after-discovered evidence, we affirm denial of PCRA relief).

Instantly, this Court affirmed Appellant's judgment of sentence on January 17, 1996. Thus, Appellant's judgment of sentence became final on February 16, 1996, after expiration of the time to file a petition for allowance of appeal in our Supreme Court. ***See*** Pa.R.A.P. 1113(a) (stating appellant has 30 days to file petition for allowance of appeal in our Supreme Court). ***See also*** 42 Pa.C.S.A. § 9545(b)(3). Appellant had until February 16, 1997, to file a timely PCRA petition. ***See*** 42 Pa.C.S.A. § 9545(b)(1). Appellant filed the current PCRA petition on October 7, 2020, which is facially untimely.

Appellant now invokes the "newly-discovered facts" exception, claiming that he filed his PCRA petition within one year of learning about Archer's recantation, which Appellant maintains he could not have discovered sooner with the exercise of due diligence. At the PCRA hearing, both the PCRA court and the Commonwealth agreed that Appellant's petition satisfied the newly-

discovered facts timeliness exception. (***See*** N.T. PCRA Hearing at 157).[2]

Initially, we agree with the PCRA court and the Commonwealth that Appellant has satisfied the newly-discovered facts exception. The record confirms that Appellant filed the current petition on October 7, 2020, within one year of receiving the October 9, 2019 letter from the private investigator informing Appellant that the investigator had favorable information from Archer concerning Appellant's case. ***See*** 42 Pa.C.S.A. § 9545(b)(2). Further, Archer testified at the PCRA hearing that he had not previously disclosed this information to Appellant.[3] On this record, we agree that Archer's recantation was a new fact that Appellant could not have discovered sooner with the exercise of due diligence. ***See*** 42 Pa.C.S.A. § 9545(b)(1)(ii). ***See also Commonwealth v. Richardson***, No. 1744 EDA 2019 (Pa.Super. filed May 3, 2021) (unpublished memorandum)[4] (holding appellant satisfied newly-discovered facts exception to time-bar where nothing in record suggested that

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[2] In the conclusion section of the PCRA court opinion, the court stated that Appellant did not satisfy any time-bar exception. (***See*** PCRA Court Opinion at 9). Nevertheless, the court did not conduct any timeliness analysis and proceeded straight to an analysis of the substantive after-discovered evidence claim in the opinion. Based on the court's remarks at the hearing and the court's analysis in its opinion, it appears that the court's statement in the conclusion section that Appellant did not meet the timeliness exception was inadvertent.

[3] Archer testified at the PCRA hearing that he wrote an attorney about his intent to recant at one point previously, but the attorney did not respond.

[4] ***See*** Pa.R.A.P. 126(b) (explaining that we may rely on unpublished decisions of this Court filed after May 1, 2019 for their persuasive value).

witness's admission of deal for leniency in exchange for her testimony or general recantation of trial testimony were facts previously known to appellant; witness testified at PCRA hearing that she had never told anyone about plea deal until that time; further, this Court would find it untenable and unreasonable to impose standard on PCRA petitioners that would require them to continually harass Commonwealth's witness for decades after conviction in order to satisfy due diligence requirement in event that said witness eventually comes forward to recant or provide new evidence).

Nevertheless, the PCRA court decided Appellant could not satisfy the substantive after-discovered evidence claim, reasoning as follows:

> [Appellant] has failed to meet his burden because Archer's new statement is not credible and is directly refuted by the other evidence at trial.
>
> 1. There are substantial reasons to disbelieve Archer's new statement. Archer's contention, almost 30 years after this murder, that a detective made him sign someone else's statement is not credible.
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> Archer testified in great detail about witnessing [Appellant] shoot and kill Ms. Morris right next to him. Now, he claims that this was a lie and he never saw the murder. … Here, Archer's recantation is … not credible, and Archer has nothing to lose by recanting. Archer claims that "Geary told Police the information contained in the statement which Archer signed" since "they could not use Geary as a witness because he had a bad record." Supplemental Petition 10/13/20, at 10. Supposedly, the Detectives were adamant and emphasized that Archer had a criminal record that was "much more favorable" than Geary's. ***Id.*** This scenario is implausible. In April of 1993, when the statement was given, Geary had no convictions, while Archer had a conviction for Robbery, a *crimen falsi* offense. Defense counsel immediately elicited this fact at trial to impeach

Archer.

[Appellant] claims that Geary's arrest for an unrelated shooting made Geary an unusable witness. But the rules of criminal procedure are clear that mere arrests are not admissible for impeachment. A conviction for robbery, however, must be admitted as proof of dishonesty. ***See*** Pa.R.E. 609 (stating that "[for the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime ... must be admitted if it involved dishonesty or false statement").

Archer further claims that if he did not sign the statement inculpating [Appellant], detectives "would go another way," which he interpreted as a threat to charge him with the murder. Supplemental Petition 10/13/20, at 10. This claim is directly contradicted by his sworn testimony at trial. The following exchange took place between Archer and Defense counsel:

> "[A]t any time, Mr. Archer, did the Police ever threaten to arrest you for this particular killing?"
>
> "No."
>
> "Did anyone from the police department threaten you in any way about this incident[."]
>
> "No."

(N.T. 3/17/94 at 11). Archer testified that his statement to detectives was an accurate reflection of what happened, there was no question in his mind that [Appellant] killed Ms. Morris, and that he saw it happen in his own car. The only threats Archer mentioned at trial came from [Appellant], who threatened to have Archer killed if he testified against [Appellant]. Archer believed that if he told the truth, [Appellant] would send someone to "come up to [his] house and try to blow [his] brains out."

Starting approximately a month before trial, [Appellant] began threatening Archer. When Archer went to Holmesburg prison to watch a boxing match, [Appellant] and another inmate pulled knives on him in the bathroom

and threatened to kill him unless he changed his statement against [Appellant]. [Appellant] told Archer to say a different Lavell was the murderer and put Archer in touch with an investigator who recorded the new statement. Then, on the first night of trial, Archer received calls from [Appellant] that frightened him so much that he called Assistant District Attorney Jude Conroy's home at approximately 9 p.m. to tell him that he was in danger. It is unbelievable that Archer would candidly tell the [c]ourt, his mother, and the prosecutor that [Appellant] threatened him into giving a false statement, but would wait 30 years to tell anyone that detectives threatened him into signing a supposedly false statement.

2. Bessie Archer, … Archer's mother, corroborated that her son confided in her about witnessing [Appellant] kill a young woman.

Archer's mother, Bessie Archer, corroborated Archer's statement and trial testimony. Her son confided in her on the night of the murder that he saw Vel kill a young lady in his car. She recalled that he looked "nervous" and "scared." This was months before Archer met with detectives and directly contradicts Archer's new claim that he did not witness the murder and merely signed a statement given by Geary.

Archer also confided in his mother that Vel tried to "shake [him] up in the bathroom" at the Holmesburg prison when he went to watch the fight. She recalled her son was his normal "happy go lucky" self when he left for the fight, but was terrified upon returning home and looked "like death was on him." Ms. Archer also corroborated that [Appellant] called her house two times during the week of trial looking for her son. Archer told her that he was so scared from what happened at Holmesburg that he lied to the defense investigator and said [Appellant] did not kill the young woman. However, his mother refused to let him sign a statement saying it was not [Appellant], because she knew that was a lie.

Her son told her from the very beginning that he saw [Appellant] kill a young lady. Ms. Archer had no motive to lie at [Appellant's] trial. She did not know [Appellant] or

> the young woman he killed. She simply testified to what her son told her, her son's demeanor, and the numerous phone calls to her house.
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> 3. Archer's trial testimony was too detailed to be based on someone else's account.
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> If we were to believe Archer's new account, that Geary made this statement and Archer merely repeated it, it would not explain how Archer recalled more detail at trial and was able to answer over a hundred questions during two days of testimony.
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> Archer testified that [Appellant] shot the young woman twice in the head on the 41st Street Bridge as she leaned in to speak to him, and he kept firing as Archer drove away. The ballistics and post mortem examination match this account. The medical examiner concluded that based on the path the bullets traveled, she was shot twice in the head at close range as she was leaning over. Thereafter, she was shot in the body from a greater distance while already lying on the ground, consistent with the shooter being in a vehicle that was driving away from her.
>
> Archer testified that she was standing on the road right next to the sidewalk when she was shot, which was corroborated by her body being found with her feet still in the road and the rest of her body lying face up on the sidewalk. Archer also recalled that [Appellant] used a .25 automatic handgun with a brown grip. The bullets recovered from the victim and the FCCs recovered on the 41st Street Bridge were all from the same .25 automatic firearm.
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> Nonetheless, … the PCRA court granted [Appellant] an evidentiary hearing on July 14, 2022, wherein … Archer testified, and which he was found to not be credible. Archer's new statement and testimony at the evidentiary hearing is belied by his trial testimony, and the other evidence at trial.

(PCRA Court Opinion at 6-9) (some internal citations omitted).

On this record, we cannot say that the PCRA court committed a clear

abuse of discretion by rejecting Archer's recantation testimony as incredible. ***See Loner, supra***. ***See also Commonwealth v. Medina***, 92 A.3d 1210 (Pa.Super. 2014) (*en banc*), *appeal dismissed as improvidently granted*, 636 Pa. 77, 140 A.3d 675 (2016) (holding that it was within exclusive province of PCRA court to determine credibility of recantation testimony; finding no clear abuse of discretion on part of PCRA court in making its credibility determination, this Court is bound to accept it).[5] Accordingly, we affirm the order denying PCRA relief.

Order affirmed.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 4/25/2024

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[5] On appeal, Appellant primarily disputes the PCRA court's statements in its opinion regarding whether Geary would have been a better witness than Archer at trial. (***See*** Appellant's Brief at 42-44). This was merely one of many reasons the PCRA court rejected Appellant's after-discovered evidence claim. Consequently, even without this portion of the court's analysis, the record would still support denial of PCRA relief based on the PCRA court's findings that Archer's recantation was incredible.