J-S14003-14

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOHN BICKERSTAFF,	:	
	:	
Appellant	:	No. 1338 EDA 2012

Appeal from the Judgment of Sentence Entered April 20, 2012,
In the Court of Common Pleas of Philadelphia County,
Criminal Division, at No. CP-51-CR-0005500-2011.

BEFORE: SHOGAN, OTT and PLATT*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED APRIL 21, 2014**

Appellant, John Bickerstaff, appeals *pro se* from the judgment of sentence entered on April 20, 2012, in the Philadelphia County Court of Common Pleas.[1] Appellant has also filed a petition for remand. After review, we deny the petition for remand, and we affirm the judgment of sentence.

*Retired Senior Judge assigned to the Superior Court.

[1] On April 12, 2013, Appellant filed a motion in which he sought to represent himself on appeal, and to that end, he requested a hearing pursuant to ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998). In an order filed on April 30, 2013, this Court directed the trial court to hold a ***Grazier*** hearing. Following the ***Grazier*** hearing, the trial court concluded that Appellant knowingly, intelligently, and voluntarily waived his right to counsel and invoked his right to represent himself on direct appeal in an order filed on May 31, 2013. Accordingly, Appellant is proceeding *pro se* in this matter.

The trial court set forth the relevant facts and procedural history of this matter as follows:

> On February 20, 2011 at about 1:30 a.m., David McClain was outside the Bananas Bar, located in the 5500 block of Rising Sun Avenue, speaking with the security manager about potential employment as a bouncer. (N.T., 02/23/12 p. 138). As the two men spoke, they noticed an altercation between patrons taking place off to the right of where they stood. (N.T., 02/23/12 p. 139). As two men, complainant Michael Dowling and [Appellant's] friend Michael Sudgen began fist fighting, a crowd moved closer to where Mr. McClain stood with the security manager. (N.T., 02/23/12 p. 140). At that moment, [Appellant] emerged from the side of the building wearing a black Nike hoodie, black Nike sweatpants and black sneakers. (N.T., 02/23/12 pp. 100, 141). [Appellant] walked up to the two combatants and said "what the f__k" before drawing his gun. (N.T., 02/23/12 p. 143). [Appellant] then lowered the gun, pulled his hood over his head, and raised his gun again. (N.T., 02/23/12 p. 143). While standing approximately four (4) to five (5) feet away, [Appellant] fired one shot, hitting complainant in the back. (N.T., 02/23/12 p. 144).
>
> After firing his weapon, [Appellant] was approached by Mario Estiverne, who repeatedly punched [Appellant] in the chest, asking him "what the f__k happened?" (N.T., 02/23/12 p. 156). Mr. Estiverne then told [Appellant] "let's get the f__k out of here" and the two men, along with a third man, Devin Smith, jumped into a brown sedan and drove away, with Mr. Estiverne in the driver's seat and [Appellant] alone in the backseat. (N.T., 02/23/12 pp. 158-59). While calling 9-1-1 to report the incident and describe the getaway vehicle, Mr. McClain got into his own vehicle and followed [Appellant's] vehicle. (N.T., 02/23/12 p. 160). Mr. McClain was unable to keep pace with the [Appellant's] vehicle, so he returned to the scene to help responding officers and check on the victim. (N.T., 02/23/12 p. 160). After being shot, complainant was able to walk a short distance before collapsing in a parking lot nearby. (N.T., 02/23/12 p. 146). Complainant suffered a bullet through his right chest and right back, just inches away from his heart, which cracked his ribs, punctured his lungs, and required extensive surgery. (N.T., 02/27/12 pp. 57-59).

Officers Sprague and Henry were on duty when a 9-1-1 call came in reporting gunshots in the 5500 block of Rising Sun Avenue and they immediately rushed to the scene. (N.T., 02/23/12 p. 49). When police arrived they found complainant bleeding and unconscious in a parking lot …. (N.T., 02/23/12 p. 50). Other officers responded to the scene and transported complainant to nearby Einstein Hospital. (N.T., 02/23/12 p. 51). Officers Sprague and Henry remained on the scene. (N.T., 02/23/12 p. 52). Mr. McClain approached Officer Sprague and advised him that he had witnessed the shooting and provided a description of [Appellant], his companions, and the vehicle they used to flee the scene. (N.T., 02/23/12 pp. 52-53). Specifically, he told officers that they fled in a brown Mercury or Lincoln sedan with a rag top. (N.T., 02/23/12 p. 167).

Officers Glackin and Comitalo responded to the radio call, and while en route to the scene, they observed a vehicle matching the description of the shooter's vehicle. (N.T., 02/23/12 p. 86). The officers chased the vehicle but were unable to stop it for some time because the operator was travelling at a high rate of speed. (N.T., 02/23/12 p. 86). During the pursuit, the driver turned back onto the 5500 block of Rising Sun Avenue, where the shooting had just taken place, effectively returning to the scene, where he found the streets had been completely blocked by police cars. (N.T., 02/23/12 p. 87). There, [Appellant] and his companions attempted to abandon the vehicle and flee on foot, but were immediately apprehended by police. (N.T., 02/23/12 p. 87).

Officer Glackin approached the vehicle to investigate and notified police radio that he and his partner had detained three males who matched the description of those seen leaving the scene of the shooting. (N.T., 02/23/12 p. 88). They instructed the men to exit their vehicle and placed each man in separate police vehicles. (N.T., 02/23/12 p. 88). Officers Sprague and Henry then brought Mr. McClain out to the police vehicles to ascertain if he could make an identification. (N.T., 02/23/12 p. 88). Mr. McClain first identified the men's vehicle as the one he chased after the shooting. (N.T., 02/23/12 p. 88). Each man was then taken out of the police vehicles individually, and Mr. McClain identified [Appellant] as the shooter and Mr. Estiverne as the driver. (N.T., 02/23/12 p. 163). The third male in the

> car was not identified as having any involvement in the shooting. (N.T., 02/23/12 p. 163).

Trial Court Opinion, 11/30/12, 1-4.

> [Appellant] was tried before a jury commencing on February 22, 2012. On February 29, 2012, the jury convicted [Appellant] of attempted murder, aggravated assault, possessing instruments of crime, and violating Sections 6106 and 6108 of the Uniform Firearms Act. Thereafter, on April 20, 2012, [Appellant] was sentenced to imprisonment in a state correctional facility for a period of twenty (20) to forty (40) years. [Appellant] filed a pro se notice of appeal on April 25, 2012. On May 17, 2012 [Appellant] was ordered to file a Statement of Matters Complained of on Appeal. However, trial counsel was allowed to withdraw, and appellate counsel was appointed on August 13, 2012. Counsel then filed a "Petition to Remand Case to Allow Appointed Counsel to File a 1925(b) Statement" on August 16, 2012. On September 5, 2012, the Superior Court ordered [Appellant] to file a Statement within thirty (30) days. Said statement was filed October 5, 2012.

Trial Court Opinion, 11/30/12, at 1.

Upon review of Appellant's *pro se* brief, we note that Appellant has abandoned all of the issues raised by appellate counsel in the Pa.R.A.P. 1925(b) statement of errors complained of on appeal.[2] Instead, Appellant has focused his brief on his desire to have this matter remanded to

[2] Appellant's failure to pursue or develop the issues raised in his Pa.R.A.P. 1925(b) statement results in those issues being waived on appeal. ***See Commonwealth v. Bowen***, 55 A.3d 1254, 1263 n.3 (Pa. Super. 2012) (holding that the appellant's failure to develop claims in his brief rendered the claims waived). Although this Court is willing to liberally construe materials filed by a *pro se* litigant, *pro se* status confers no special benefit upon the appellant, and a litigant choosing to represent himself in a legal proceeding must, to a reasonable extent, assume that his lack of expertise and legal training will be his undoing. ***Commonwealth v. Adams***, 882 A.2d 496, 498 (Pa. Super. 2005) (citations omitted).

the trial court due to after-discovered evidence. In Appellant's brief, he presents only one issue:

> WHETHER THE APPELLANT IS ENTITLED TO REMAND BASED ON AFTER-DISOVERED [sic] EVIDENCE IN ACCORDANCE WITH PA.R.CRIM.P. 720(C)?

Appellant's Brief at 5. Additionally, we note that Appellant has also filed a separate *pro se* petition for remand due to after-discovered evidence. The alleged after-discovered evidence discussed in the petition for remand and the appellate brief consists of an affidavit dated September 6, 2013, and signed by Jamal Allen, in which Mr. Allen stated that he can identify the actual shooter. Appellant's Brief at 8.

We note that after-discovered evidence obtained during the direct appeal process must be raised promptly and should include a request for a remand to the trial judge. ***Commonwealth v. Perrin***, 59 A.3d 663, 665 (Pa. Super. 2013) (citing Pa.R.Crim.P. 720, Comment). In order to obtain relief based on after-discovered evidence, the petitioner must demonstrate that the after-discovered evidence:

> (1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted.

Perrin, 59 A.3d at 665 (citations omitted). With these principles in mind, and upon review of the first prong of the test in ***Perrin***, we conclude that Appellant is entitled to no relief.

In the first prong of the aforementioned standard, Appellant was required to demonstrate that he could not have obtained this evidence prior to the conclusion of the trial by the exercise of reasonable diligence. However, Appellant's *pro se* brief prevents him from establishing this element. In his brief, Appellant states that Mr. Allen was a co-worker of Appellant's, was a person known to Appellant, and was present at the time of the shooting. The only basis Appellant provides for failing to obtain this "evidence" sooner was that Mr. Allen did not want to get involved. Appellant's Brief at 9. We conclude that Appellant has fallen woefully short of establishing that the evidence contained in Mr. Allen's affidavit could not have been obtained through the exercise of reasonable diligence.

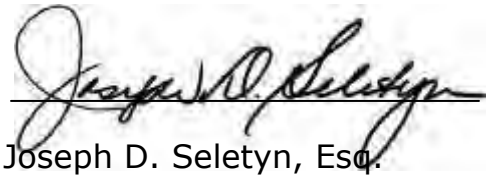
It is well-settled that after-discovered evidence is new evidence, of which the appellant was unaware, that comes to light after trial. ***Commonwealth v. Frey***, 517 A.2d 1265, 1268 (Pa. 1986). While Mr. Allen may have been reticent to testify, Appellant certainly could have subpoenaed the alleged exculpatory evidence. The rationale that Mr. Allen did not want to testify or would have been uncooperative if called as a witness does not equate to the alleged testimony being unavailable. ***Id***.

For the reasons set forth above, we deny Appellant's petition for remand. Moreover, because Appellant abandoned all of the issues raised in

his Pa.R.A.P. 1925(b) statement, there are no other issues for this Court to review on appeal. Accordingly, we affirm Appellant's judgment of sentence.

Petition for remand denied. Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/21/2014