NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DWAYNE HUNT, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1082 MDA 2013

Appeal from the PCRA Order of June 3, 2013
In the Court of Common Pleas of Berks County
Criminal Division, at No(s): CP-06-CR-0004385-1996

BEFORE: BOWES, OLSON AND FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J.: **FILED APRIL 22, 2014**

Appellant, Dwayne Hunt, appeals *pro se* from the order entered on June 3, 2013, dismissing his sixth petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The PCRA court summarized the facts and procedural history of this case as follows:

> On June 24, 1997, a jury convicted [Appellant] of murder, aggravated assault, possessing instruments of crime, and firearms not to be carried without a license[.] [Thereafter, he] was sentenced to life without parole on July 22, 1997. [Appellant] filed a post sentence motion, which was denied. He then filed a direct appeal to [this C]ourt, which affirmed the [] judgment of sentence on July 30, 1998. [Appellant] did not file a petition for allowance of appeal with the Supreme Court of Pennsylvania.

*Retired Justice specially assigned to the Superior Court.

> [Appellant] filed his first pro se [PCRA] petition on December 3, 1999. On December 15, 1999, Thomas R. Roman, Esquire, was appointed by [the PCRA court] as PCRA counsel to represent [Appellant] in all proceedings regarding the disposition of his first PCRA petition. [...A]n amended [PCRA petition] was filed March 1, 2000. Following a full evidentiary hearing on [Appellant's] claims for ineffective assistance of counsel, the [PCRA] court denied [Appellant's petition] by order dated October 11, 2000.
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> [Appellant] filed his second [PCRA] petition on September 9, 2001. […This Court] affirmed a dismissal of this petition by opinion dated August 26, 2002.
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> [Appellant] filed a third [PCRA] petition on March 17, 2005[.] […T]he petition was denied on August 29, 2005.
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> [Appellant] filed a fourth [PCRA] petition on June 4, 2009[.] […]On April 21, 2011, the petition was denied.
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> [Appellant] filed his fifth [PCRA] petition on October 27, 2011 wherein he alleged generally the ineffectiveness of counsel [and] upon consideration of the fifth petition for [PCRA] relief, the court dismissed [Appellant's] petition.
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> [Appellant] filed this, his sixth, PCRA petition on April 8, 2013. On May 1, 2013, [the PCRA] court filed a notice of intent to dismiss the petition [pursuant to Pa.R.Crim.P. 907]. On May 13, 2013, [Appellant] filed a response to [the PCRA] court's notice of intent to dismiss. On June 3, 2013, the [PCRA] court dismissed the PCRA petition. On June 17, 2013, [Appellant] filed a notice of appeal. The [PCRA] court ordered [Appellant] to file within twenty-one (21) days, a concise statement of matters complained of on appeal pursuant to [Pa.R.A.P.] 1925(b). On July 15, 2013, [Appellant] filed a concise statement of matters complained of on appeal. [The PCRA court] submitted [an opinion pursuant to Pa.R.A.P.] 1925(a) [on August 7, 2013].

PCRA Court Opinion, 8/7/2013, at 2-3 (superfluous capitalization and citations omitted).

On appeal, Appellant presents the following *pro se* issues for our review:

> 1. Whether the PCRA court erred in denying Appellant's PCRA petition without an evidentiary hearing where newly discovered evidence existed?
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> 2. Whether the court erred in finding that no ***Brady***[1] violation occurred when the District Attorney failed to disclose letters written to him by witnesses who aver that the prosecution's main witness provided false testimony to obtain favor and dismissal on pending criminal charges?

Appellant's Brief at 4 (superfluous capitalization omitted).

Before we may address the merits of Appellant's claims, we must determine whether we have jurisdiction to hear the appeal pursuant to the PCRA:

> [T]he timeliness of a PCRA petition is a jurisdictional requisite. Jurisdictional time limits go to a court's right or competency to adjudicate a controversy. Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition. The PCRA now requires a petition, including a second or subsequent petition, to be filed within one year of the date the underlying judgment becomes final. 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 review.

Commonwealth v. Williams, 35 A.3d 44, 52 (Pa. Super. 2011) (citations and quotations omitted).

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[1] ***Brady v. Maryland***, 373 U.S. 83 (1963).

Here, this Court affirmed Appellant's judgment of sentence on July 30, 1998. He did not file a petition for allowance of appeal with the Supreme Court of Pennsylvania. Thus, his judgment of sentence became final after the expiration of the 30-day appeal period to our Supreme Court, or on August 31, 1998.[2] ***See*** Pa.R.A.P. 903. Because the current PCRA petition was filed on April 8, 2013, almost 15 years after Appellant's judgment of sentence became final, it is patently untimely under the PCRA.

"Generally, to obtain merits review of a PCRA petition filed more than one year after a petitioner's sentence became final, the petitioner must allege and prove at least one of the three timeliness exceptions." ***Williams***, 35 A.3d at 52. The three exceptions to the PCRA's one-year timing requirement are as follows:

> (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;
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> (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
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> (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.

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[2] The 30th day fell on a Saturday, therefore, Appellant's judgment became final the following Monday. ***See*** 1 Pa.C.S.A. § 1908 (computation of time).

42 Pa.C.S.A. § 9545(b)(1)(i-iii). "Any petition invoking an exception […] shall be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S.A. § 9545(b)(2). "[W]hen a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." ***Williams***, 35 A.3d at 53.

In his PCRA petition, Appellant invokes the unknown facts exception to the PCRA's jurisdictional timing requirements pursuant to 42 Pa.C.S.A. § 9545(b)(1)(ii). He claims that a new inmate, Stephen Blackstone, moved into the cell next to him at SCI Green in March 2013 and provided new information about Appellant's case. Appellant attached an affidavit from Blackstone to his PCRA petition. In the affidavit, Blackstone avers that while incarcerated at the Bucks County Prison in 1997, Blackstone spoke with Rahim Parker, a Commonwealth eyewitness at Appellant's trial. Parker allegedly informed Blackstone that he intended to lie on the stand and implicate a person known as "Brooklyn" in the murder of the victim in this case. Blackstone states that he did not know who "Brooklyn" was, but he wrote a letter to the District Attorney's Office to inform the Commonwealth that Parker planned to lie under oath. Blackstone claims he did not receive a response from the Commonwealth. Moreover, it was not until March 25,

2013, when Blackstone was transferred to SCI Green and met Appellant that he realized Appellant was also known as "Brooklyn."[3]

Accordingly, Appellant asserts that the foregoing information is newly discovered and he presented his claims within 60 days of acquiring it. He claims that there was no forensic evidence linking him to the crimes and Blackstone's affidavit "cast doubt on the veracity of the [Commonwealth's] witnesses in a case that was purely circumstantial." Appellant's Brief at 8. Moreover, Appellant asserts that Blackstone sent a letter alerting the Commonwealth to Parker's intention to provide false testimony at trial. ***Id.*** at 9. In his second issue on appeal, Appellant claims that he never received Blackstone's letter from the Commonwealth during discovery, or thereafter, in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963). Appellant's Brief at 14.

To be entitled to relief under the PCRA on the basis of the unknown facts exception, the petitioner must plead and prove by a preponderance of the evidence "[t]he unavailability at the time of trial of exculpatory evidence

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[3] We note, in his PCRA petition and in his appellate brief, Appellant claims that yet another inmate, Sherman Hargrove, was present for the conversation between Blackstone and Parker. However, Appellant did not include an affidavit from Hargrove with his PCRA petition. Instead, in Blackstone's affidavit, Blackstone claims that both Hargrove and he wrote letters to the District Attorney. However, Appellant has the burden to plead and prove facts entitling him to relief under the PCRA. He has not met his burden with regard to Hargrove. Thus, we confine our analysis to the evidence proffered by Blackstone on behalf of Appellant.

that has subsequently become available and would have changed the outcome of the trial if it had been introduced." 42 Pa.C.S.A. § 9543(a)(2)(vi). As our Supreme Court has summarized:

> To obtain relief based on after-discovered evidence, [an] appellant must demonstrate that the 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.

Commonwealth v. Pagan, 950 A.2d 270, 292 (Pa. 2008) (citations omitted). "The test is conjunctive; the [appellant] must show by a preponderance of the evidence that each of these factors has been met in order for a new trial to be warranted." ***Commonwealth v. Foreman***, 55 A.3d 532, 537 (Pa. Super. 2012) (citation omitted). "Further, when reviewing the decision to grant or deny a new trial on the basis of after-discovered evidence, an appellate court is to determine whether the PCRA court committed an abuse of discretion or error of law that controlled the outcome of the case." ***Id.***

Here, the PCRA court determined that the information Appellant obtained from Blackstone would **not** have: (1) been used for any purpose other than impeachment of Parker's credibility and, (2) resulted in a different verdict if a new trial were granted. PCRA Court Opinion, 8/7/2013, at 6. First, the PCRA court noted that Parker's admission to Blackstone constituted "an alleged recantation and admission of perjury" which has

"long been recognized as one of the least reliable forms of after-discovered evidence." ***Id.*** at 5, *citing* ***Commonwealth v. McNeil***, 487 A.2d 802, 807 n.4 (Pa. 1985). Thus, the PCRA court opined that "although [Appellant] provided an affidavit in support of his allegation that a witness lied at trial, [the PCRA court] consider[ed] the evidence to be too unreliable to hold any evidentiary hearing, especially since the communication [between Parker and Blackstone] occurred sixteen years ago." ***Id.*** Moreover, the PCRA court determined that "Blackstone's affidavit is being used solely for impeachment purposes" and "Parker's veracity was fully explored by both sides during direct and cross examination" at trial. ***Id.*** at 6.

Next, the PCRA court determined that "[e]ven with the addition of the after discovered evidence, the Commonwealth still would have provided sufficient evidence to inculpate [Appellant]." ***Id.*** Two other eyewitnesses testified that after Appellant left the store, they heard a gunshot. ***Id.*** Appellant returned to the store shortly thereafter acting "itchy" and stated that he had "done what he did" because police would not find evidence connecting him to the murder because "they don't have nothing, no fingerprints or no gun." ***Id.*** (record citations omitted). Additionally, police recovered the murder weapon in an alleyway near the store, wrapped in a scarf worn by Appellant prior to the shooting. ***Id.***

Based upon our review of the certified record, we discern no abuse of discretion or error of law. At trial, defense counsel cross-examined Parker at length and explored the credibility of his testimony, including the timing of

his statement to police in this matter and the pendency of unrelated drug and firearm charges. N.T., 6/18/1997, at 98-112. Thus, at trial, defense counsel explored Parker's motivation for testifying against Appellant. Hence, the proffered evidence that Parker may have told someone he was motivated to lie to implicate Appellant at trial is merely corroborative of evidence already introduced therein. Further, the evidence supplied by Blackstone's affidavit was offered only to impeach Parker's credibility and would not have affected the overall outcome of trial.[4]

Finally, we further note that Blackstone's affidavit alleges that Parker told him that Parker had lied. This constitutes classic hearsay. ***See*** Pa.R.E. 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted."). Hearsay is not generally admissible as evidence except as provided by rule or statute. ***See*** Pa.R.E. 802. Pursuant to Pa.R.E. 613, Blackstone's information may have been permissible as a prior inconsistent statement to impeach Parker's testimony that Appellant was the perpetrator. Rule 613 provides, in pertinent part:

> **(a) Witness's Prior Inconsistent Statement to Impeach.** A witness may be examined concerning a prior

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[4] Appellant has not come forward with a copy of the letter Blackstone allegedly sent to the Commonwealth regarding Parker's purported perjurious intent to identify Appellant as the assailant. Thus, Appellant has failed to plead and prove that he recently discovered a ***Brady*** violation committed by the Commonwealth.

> inconsistent statement made by the witness **to impeach** the witness's credibility. The statement need not be shown or its contents disclosed to the witness at that time, but on request the statement or contents must be shown or disclosed to an adverse party's attorney.

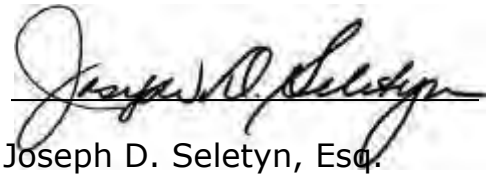
Pa.R.E. 613(a) (emphasis added). Our Supreme Court has "held that the admission of a prior inconsistent statement of a non-party witness shall be used as substantive evidence only when: (1) the statement was given under oath at a formal legal proceeding; or (2) the statement is reduced to a writing signed and adopted by the declarant; or (3) the statement is recorded verbatim contemporaneously with the making of the statement." ***Commonwealth v. Hanible***, 30 A.3d 426, 445 (Pa. 2011) (citation omitted).

In this case, Parker's statement would not qualify as admissible substantive evidence at trial. Parker did not make the statement under oath at a formal proceeding nor was it recorded contemporaneously at the time it was made. The statement was reduced to writing; however, it was signed and adopted by Blackstone, not Parker, the alleged declarant. Therefore, even if Blackstone's testimony had been discovered earlier and been permitted at trial, it could only have been used to impeach Parker's credibility. Because after-discovered evidence cannot be used solely to impeach the credibility of a witness, Appellant has not pled and proven an exception to the PCRA's one-year timing requirement. Thus, we conclude that the PCRA court did not err in denying relief without a hearing on this basis.

Appellant has not pled and proven an exception to the one-year timing requirement of the PCRA. As such, the PCRA court was without jurisdiction to reach the merits of Appellant's substantive claims. Thus, the PCRA court properly denied relief.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014