NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ANDRE LAMAR YATES, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1428 WDA 2012

Appeal from the PCRA Order September 13, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0005902-2003, CP-02-CR-0014110-2003

BEFORE: BOWES, JENKINS, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.: FILED: April 17, 2014

Andre Lamar Yates appeals from the September 13, 2012 order denying his second request for PCRA relief. We affirm.

A jury convicted Appellant of murder, attempted murder, and aggravated assault in connection with events that occurred on November 14, 2002. On the afternoon of the day in question, Edward Powell was driving a vehicle in which Alean Hudson was a passenger. When they were stopped at the intersection of Larimer Avenue and East Liberty Boulevard, Pittsburgh, numerous bullets were fired at their vehicle. As a result of the shooting, Ms. Hudson died and Mr. Powell was injured. Mr. Powell knew Appellant and positively identified him to police as the assailant, and again at trial.

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* Former Justice specially assigned to the Superior Court.

Commonwealth witness Robert Peele, who knew both Appellant and Mr. Powell, informed the jury that several days before the shooting, Appellant told Mr. Peele that he was going to shoot Mr. Powell because Mr. Powell had robbed Appellant. After his convictions, Appellant was sentenced to life imprisonment for the murder of Ms. Hudson and a concurrent term of five to ten years incarceration for the aggravated assault of Mr. Powell. On appeal, we affirmed, and our Supreme Court denied review on September 11, 2006. ***Commonwealth v. Yates***, 902 A.2d 984 (Pa.Super. 2006) (unpublished memorandum), *appeal denied*, 907 A.2d 1102 (Pa. 2006).

Appellant thereafter filed a timely PCRA petition, and counsel was appointed. After invoking his right to self-representation, Appellant was permitted to proceed *pro se*. The court denied PCRA relief. After procedural anomalies that resulted in three remands, we eventually affirmed the denial of PCRA relief. ***Commonwealth v. Yates***, 30 A.3d 532 (Pa.Super. 2011) (unpublished memorandum).

On May 10, 2012, Appellant filed his second PCRA petition alleging that he had recently discovered the existence of an eyewitness to the crime. The witness in question was Cedric Brookins, who was a fellow inmate of Appellant at the state penitentiary. The PCRA court appointed counsel and conducted two evidentiary hearings. At the first hearing, Appellant reported

that on April 10, 2012,[1] he was approached by Brookins and Brookins told him that he witnessed the November 14, 2002 incident and that he knew that someone other than Appellant was the shooter.

Brookins' testimony at the second hearing was consistent with the April 10, 2012 statement that he made to Appellant. Brookins reported that he saw an unidentified male shoot a rifle at the vehicle occupied by Ms. Hudson and Mr. Powell. Brookins admitted that he viewed news reports about the crime in 2002 and was aware that Appellant was arrested in connection with the shooting. Since the PCRA court had not presided over Appellant's trial, the Commonwealth presented the investigating officer, Allegheny County Detective Brian Weismantle, to summarize the evidence. Detective Weismantle stated that the weapon used on November 14, 2002 was a shotgun and that the surviving victim of the shooting, Mr. Powell, identified Appellant as the culprit. On cross-examination, Detective Weismantle acknowledged that both shotguns and rifles are long-barreled weapons that differ in appearance from handguns.

The PCRA court declined to grant Appellant a new trial based upon the fact that it found Brookins' testimony that he witnessed the crime wholly incredible and since the jury found Mr. Powell's identification of Appellant as

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[1] Since Appellant filed his PCRA petition within sixty days after his discovery of this evidence, his petition was facially timely under the after-discovered facts exception to the PCRA's one-year time bar. 42 Pa.C.S. § 9545(b)(1)(ii).

the shooter credible. The present appeal was filed from the denial of relief. Appellant asked to proceed *pro se*, and, after the conduct of the required oral colloquy on January 10, 2013, was granted that right. Appellant raises the following positions:

> I. Whether PCRA court erred and/or abused its discretion in denying Appellant's motion for a new trial for after-discovered evidence after witness Cedric Brookins testified that Appellant was not the person he seen [sic] commit the crimes for which Appellant is incarcerated for?
>
> II. Whether PCRA court erred and/or abused its discretion when it allowed Officer Brian Weismantle to testify in place of a full review of the trial record?
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> III. Whether PCRA court violated Appellants [sic] right to due process in violation of the Fourteenth Amendment to the United States Constitution by not reviewing the trial record and not granting the appellant a new trial?
>
> IIII. Whether ADA Ronald Wabby violated Rules of Professional Conduct Rule 8.4(c) (d) when he knowingly and intentionally allowed perjured testimony from Officer Brian Weismantle to be introduced to the court, namely the kind of weapon that ballistics said was used in the crimes charged?

Appellant's brief at 5 (grammatical errors in original).

Initially, we recite that, "Our standard of review of an order denying PCRA relief is whether the record supports the PCRA court's findings of fact, and whether the PCRA court's determination is free of legal error." ***Commonwealth v. Wantz***, 84 A.3d 324, 331 (Pa.Super. 2014). Additionally, it is a well-ensconced principle that the PCRA court's credibility determinations, when supported by the record, are binding on the reviewing court. ***Commonwealth v. Spotz***, 47 A.3d 63 (Pa. 2012); ***Commonwealth***

v. Stewart, 84 A.3d 701 (Pa.Super. 2013) (this Court is "bound by a PCRA court's credibility decisions").

In order to obtain a new trial based upon after-discovered evidence, the defendant

> 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. Perrin, 59 A.3d 663, 665 (Pa.Super. 2013) (citation omitted).

In the present case, the PCRA court determined that Brookins was not worthy of belief. First, Brookins admittedly saw news reports about the shooting in 2002 and did not come forward at that time to exonerate Appellant. Additionally, Brookins was unable to identify the shooter. Finally, the PCRA court viewed as incredulous the description of the events surrounding Appellant's purported discovery of Brookins as an eyewitness. Specifically, Brookins and Appellant claimed that Brookins randomly approached Appellant in the prison yard and told him that he saw someone else shoot at Ms. Hudson and Mr. Powell. The PCRA court aptly observed that this meeting between the perpetrator of a crime and an exonerating eyewitness occurring ten years after the crime would be miraculous, and it did not believe Brookins' testimony about that chance encounter. Thus, the

court's determination about Brookins' credibility is amply supported by the record.

We also reject Appellant's attack on the PCRA court's reliance upon Mr. Powell's identification testimony. Appellant notes that eyewitness testimony has been viewed as notoriously unreliable. However, that characterization involves eyewitnesses who are not familiar with the perpetrator of the crime. Herein, Mr. Powell already knew Appellant when the crime occurred. Mr. Powell told police Appellant's name when police arrived at the crime scene, pointed to Appellant during an ensuing photographic array, and identified Appellant at trial. Additionally, Mr. Powell's identification of Appellant as the perpetrator was supported by the testimony of Mr. Peele, who reported that Appellant threatened to kill Mr. Powell just days before the crime in question.

Accordingly, we reject Appellant's first contention and affirm the PCRA court's refusal to grant Appellant a new trial based upon Brookins' contrived testimony. ***See Commonwealth v. Johnson***, 966 A.2d 523 (Pa. 2009) (PCRA court must make credibility determination as to after-discovered evidence since its conclusion in this respect is outcome determinative of the question of whether that proof would likely compel a different verdict).

Since the PCRA court found Brookins' completely incredible based upon the testimony adduced at the PCRA hearing, we reject Appellant's assertions that the court was not permitted to rely upon Detective Brian Weismantle's

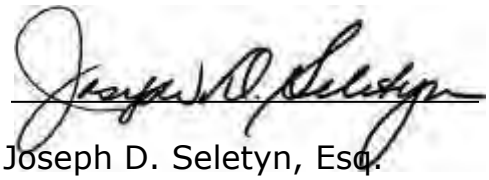
recollection of the evidence against Appellant and, instead, had an obligation to read the entire trial record. Appellant's second and third allegations are thus meritless.

Appellant's final position is that the assistant district attorney suborned perjury. This claim concerns the fact that Detective Weismantle reported at the PCRA hearing that the murder weapon was a shotgun. Appellant claims that the trial evidence conclusively establishes that the murder weapon was a rifle and that Detective Weismantle lied when he stated that it was a shotgun. Our review of the trial record indicates that Appellant's characterization of its contents is incorrect. The murder weapon was not recovered. The ballistics expert witness, Robert Levine, Ph.D., indicated that the bullet fragments recovered indicated that the **bullets** used were rifle bullets. He stated that the weapon in question would have been a "rifle-type firearm." N.T. Trial, 8/30/04-9/2/04, at 120. Mr. Powell reported that the gun used to shoot him was a shotgun. He also was specifically asked, "Do you know as a fact it was a shotgun versus another rifle?" ***Id***. at 141. The witness responded, "It was a sawed-off shotgun." ***Id***. Thus, Detective Wesimantle did not falsely report that Appellant used a shotgun.

Order affirmed.

Justice Fitzgerald Concurs in the Result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/17/2014