NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
STEVEN SZAREWICZ	:	
Appellant	:	No. 280 WDA 2023

Appeal from the PCRA Order Entered February 14, 2023
In the Court of Common Pleas of Allegheny County Criminal Division at No(s): CP-02-CR-0008902-1981

BEFORE: DUBOW, J., KING, J., and BENDER, P.J.E.

MEMORANDUM BY KING, J.: **FILED: November 14, 2024**

Appellant, Steven Szarewicz, appeals *pro se* from the order entered in the Allegheny County Court of Common Pleas, which denied his serial petition filed under the Post Conviction Relief Act ("PCRA").[1] We affirm.

Briefly, the relevant facts and procedural history of this appeal are as follows.[2] In 1983, Appellant was convicted of first-degree murder for the February 23, 1981, contract-killing of William Merriweather. He is presently serving a life sentence. "In the years following his trial, Appellant has filed post-sentence motions, a direct appeal, several *habeas corpus* and PCRA

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[1] 42 Pa.C.S.A. §§ 9541-9546.

[2] This Court has set forth a detailed history of this case in earlier appeals. ***See Commonwealth v. Szarewicz***, No. 1965 WDA 2010 (Pa.Super. filed June 13, 2012) (unpublished memorandum); ***Commonwealth v. Szarewicz***, No. 640 WDA 2005 (Pa.Super. filed May 15, 2006) (unpublished memorandum). We set forth only so much of the history as is necessary for the resolution of this appeal.

petitions, and multiple civil actions in a tenacious effort to challenge and/or overturn his conviction and sentence." ***Commonwealth v. Szarewicz***, No. 399 WDA 2013, unpublished memorandum at 1 (Pa.Super. filed Mar. 7, 2014).

Appellant filed the instant PCRA petition on December 18, 2012. He subsequently filed a "motion to stay," explaining that he filed the petition because he became aware of newly discovered facts, but Appellant understood that he had a pending PCRA petition at the time. After this Court affirmed the dismissal of the then-pending PCRA petition, Appellant filed a motion for permission to amend the instant petition. On December 3, 2014, the PCRA court appointed counsel, and directed Appellant's counsel to file an amended PCRA petition consolidating all of Appellant's claims. On July 13, 2015, Appellant filed an amended consolidated PCRA petition. Appellant filed a motion to file an amended supplemental PCRA petition, wherein counsel alleged that she was notified in February 2016 that Mr. Bevilacqua had fabricated his original testimony, after which a court-appointed investigator obtained a statement from Mr. Bevilacqua recanting his trial testimony. The court granted the motion, and Appellant filed a supplemental PCRA petition on April 18, 2016. In the supplemental petition, Appellant asserted newly discovered evidence based on Mr. Bevilacqua's recantation and a finding of the Third Circuit Court of Appeals, in an unrelated case, that Mr. Bowen, a witness in that case who had also testified in Appellant's trial, was not

credible.[3]

The PCRA court conducted a three-day evidentiary hearing on September 8th, 12th, and 22nd of 2016, and Appellant was represented by counsel at the hearing.[4] Following the hearings, the court deferred its decision to permit Appellant to file a brief and conduct further investigations and, if necessary, to file any additional supplemental petitions. Appellant filed his post-hearing brief on March 1, 2019. On February 14, 2023, the court issued an order denying PCRA relief. Appellant filed a timely notice of appeal on March 9, 2023. Pursuant to the court's order, Appellant filed a concise statement of errors complained of on appeal on April 21, 2023.[5]

On appeal, Appellant raises the following issues for our review:

> I. Did the PCRA court make [an] error of law, or abuse its discretion, by:
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> A. Denying Appellant relief for overcoming time bar when Appellant produced newly discovered facts which revealed that Commonwealth felon witness Richard Bowen had in fact, received leniency for testimony Bowen provided

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[3] ***See Munchinski v. Wilson***, 694 F.3d 308, 313 (3d Cir. 2012). Appellant similarly references the earlier decision of the United States District Court, which the Third Circuit affirmed. ***See Munchinski v. Wilson***, 807 F.Supp.2d 242 (W.D.Pa. 2011), *aff'd*, 694 F.3d 308 (3d Cir. 2012). In both decisions, the courts note the doubtable veracity of Bowen's testimony and conclude that the Commonwealth committed a violation under ***Brady v. Maryland***, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to turn over certain evidence that would impeach or contradict Bowen's testimony in that trial.

[4] Appellant filed additional motions for leave to amend and supplement his petition on the first two days of the PCRA hearing.

[5] On July 26, 2023, the PCRA court granted Appellant's motion to proceed *pro se*.

> against Appellant in Appellant's 1983 trial and conviction of first-degree murder?
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> B. ...Denying Appellant relief on a recantation by Commonwealth felon witness Ernest Bevilacqua who agreed, and provided, a taped statement to P.I. Meinert admitting that his 1983 trial testimony against Appellant was false?

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

Preliminarily, we recognize that 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).

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). Any petition invoking an exception concerning claims arising prior to December 24, 2017, must have been filed within 60 days of the date the claim could have been presented. 42 Pa.C.S.A. § 9545(b)(2).[6]

Here, there is no dispute that Appellant's current PCRA petition is facially untimely. ***See*** 42 Pa.C.S.A. § 9545(b)(1). Nevertheless, Appellant alleges that he is entitled to application of the newly discovered facts exception. ***See*** 42 Pa.C.S.A. § 9545(b)(1)(ii). Specifically, Appellant claims that the Third Circuit's decision in ***Munchinski***, which noted that Mr. Bowen's testimony in that trial was incredible, satisfies the time-bar exception. Because Mr. Bowen was a key witness in Appellant's case, Appellant insists that if this "impeachment evidence" were available at his trial, the outcome of the proceedings would have been different.

This Court has explained:

> The timeliness exception set forth in Section 9545(b)(1)(ii), also known as the "newly-discovered fact" exception, requires a petitioner to plead and prove: (1) [he] did not

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[6] As of December 24, 2018, Section 9545(b)(2) now allows any PCRA petition invoking a timeliness exception to be filed within one year of the date the claim first could have been presented. ***See*** Act 2018, Oct. 24, P.L. 894, No. 146, § 2, effective in 60 days [Dec. 24, 2018]. This amendment applies to claims arising on or after December 24, 2017. However, Appellant filed the current supplemental amended PCRA petition in 2016, so the previous version allowing a 60-day period in which to present a claim applies to him.

> know the fact(s) upon which [he] based [his] petition; and (2) [he] could not have learned those fact(s) earlier by the exercise of due diligence. Due diligence demands the petitioner to take reasonable steps to protect [his] own interests.… A petitioner must explain why [he] could not have learned the new fact earlier with the exercise of due diligence.

Commonwealth v. Shiloh, 170 A.3d 553, 557-58 (Pa.Super. 2017) (internal citations and footnote omitted). ***See also Commonwealth v. Abu-Jamal***, 596 Pa. 219, 941 A.2d 1263 (2008) (holding that affidavits alleging two key Commonwealth witnesses perjured themselves at trial did not constitute newly-discovered facts, for purpose of PCRA timeliness exception, because only "new" fact was that two new witnesses provided affidavits and testimony to support previously known fact of perjured testimony).

Furthermore, as our Supreme Court has explained, "judicial determinations do not satisfy the newly discovered fact exception[.]" ***Commonwealth v. Reid***, 661 Pa. 207, 243, 235 A.3d 1124, 1146 (2020). ***See also Commonwealth v. Watts***, 611 Pa. 80, 23 A.3d 980 (2011) (explaining that newly discovered facts exception applies only if petitioner has uncovered facts that could not have been ascertained through due diligence, and judicial determinations are not facts).

Instantly, the PCRA court discussed whether the ***Munchinski*** decision constituted a newly-discovered fact as follows:

> The [proffered] newly discovered [fact] involves the case of [***Munchinski, supra***.]
>
> The defendant, Munchinski, filed a federal Petition for

Habeas Corpus, alleging that the Fayette County District Attorney withheld exculpatory ***Brady*** material in his trial.

The Third Circuit affirmed the District Court and given the egregious nature of the ***Brady*** violations on the part of Fayette County, issued of writ of *habeas corpus* ordering the Commonwealth to either retry or release Munchinski, the defendant.

Richard Bowen, the most important witness in the Munchinski case, also testified against [Appellant] in his trial.

Richard Bowen was wholly discredited in the ***Munchinski*** case by the withheld ***Brady*** material.

[Appellant] avers that the federal court decision was based on the fact that Richard Bowen was an incredible witness in ***Munchinski***, and therefore, this determination was unavailable to petitioner at the time of trial and could be used to impeach Bowen in a new trial.

Essentially, [Appellant] avers that the new fact is that the Munchinski court found Richard Bowen to be an incredible witness in that case.

Although the decision and credibility determination of Richard Bowen in the ***Munchinski*** case was not available to [Appellant] at the time of his trial, he must satisfy that 1) facts upon which the claim is predicated were unknown to petitioner and 2) could not have been discovered by the exercise of due diligence. 42 Pa.C.S.[A.] § 9545(b)(1)(ii).

* * *

It appears that the ***Munchinski*** decision was based more on the egregious nature of the ***Brady*** violations than the credibility determination of the witness Bowen.

It would also appear to the PCRA court that the evidence of Bowen's credibility would be used solely to "impeach the credibility of a witness" in a new trial.

The PCRA court was constrained to agree with the

> Commonwealth that the use of the ***Munchinski*** decision does not fit within the newly discovered [facts] exception, and therefore, is time barred.

(PCRA Court Opinion, filed 7/18/23, at 4-5).

The record supports the PCRA court's conclusions.[7] Initially, we note that Appellant challenged Mr. Bowen's credibility in prior post-verdict motions, arguing that he was given leniency in a parole determination in exchange for his testimony against Appellant. (***See*** Amendment to *Nunc Pro Tunc* Post-Verdict Motions, 12/12/90, at 4, 88-93). Consequently, the ***Munchinski*** decision's statement concerning Mr. Bowen's lack of credibility does not constitute a "new" fact. Instead, the decision is merely a new source for previously known facts, that Appellant has been asserting for decades. ***See Abu-Jamal, supra***.[8] Additionally, we reiterate the general principle that judicial decisions are not "new facts" for purposes of the timeliness analysis. ***See Reid, supra***; ***Watts, supra***. Thus, Appellant cannot satisfy the newly-

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[7] Appellant alleged that he received a newspaper article discussing the ***Munchinski*** decision at the end of October 2012, right around Halloween. (***See*** N.T. PCRA Hearing, 9/8/16, at 7). The PCRA court credited this statement to decide that Appellant timely filed his PCRA petition within 60 days of this discovery. ***See*** 42 Pa.C.S.A. § 9545(b)(2). Assuming without deciding that Appellant satisfied the "60-day rule" under the prior version of Section 9545(b)(2), we agree with the PCRA court that Appellant cannot satisfy the newly-discovered fact exception to the time-bar under Section 9545(b)(1)(ii).

[8] To the extent Appellant suggests that parole documents discussed in ***Munchinski*** support his claim that Mr. Bowen received leniency in exchange for his testimony against Appellant, this similarly would not be a "new" fact, but a new source for previously known facts. ***See id.***

discovered facts exception based on the ***Munchinski*** case.[9]

Appellant also argues that he satisfied the newly-discovered facts exception based on the recantation of Mr. Bevilacqua. Initially, we agree with the PCRA court that Appellant has satisfied the newly-discovered facts exception to the PCRA time-bar concerning Mr. Bevilacqua's recantation, which Appellant discovered on February 18, 2016, when private investigator Meinert interviewed him. ***See Commonwealth v. Richardson***, No. 1744 EDA 2019 (Pa.Super. filed May 3, 2021) (unpublished memorandum)[10] (holding that 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). Additionally, Appellant filed the instant amended PCRA petition raising this claim on April 18, 2016, within 60 days of when this claim first could have been presented. ***See*** 42 Pa.C.S.A. §

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[9] Moreover, even if the evidence that Mr. Bowen had provided false testimony and statements in the ***Munchinski*** case satisfied the time-bar exception, as the PCRA court observed, Appellant would not be entitled to relief because evidence used solely to impeach the credibility of a witness does not meet the requirements to prove a substantive claim of after discovered evidence. ***See Commonwealth v. Padillas***, 997 A.2d 356, 365 (Pa.Super. 2010), *appeal denied*, 609 Pa. 687, 14 A.3d 826 (2010) (explaining that defendant seeking new trial must demonstrate that he will not use alleged after-discovered evidence solely to impeach credibility of witness).

[10] ***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).

9545(b)(2). Thus, we turn to the merits of Appellant's after-discovered evidence claim based on this recantation testimony.

Appellant argues that the PCRA court erred when it found the district attorney who interviewed Mr. Bevilacqua more credible in her assessment of Mr. Bevilacqua's recantation than the private investigator. Appellant insists that Mr. Bevilacqua's statement to the private investigator proves that he provided false testimony at Appellant's trial and contradicts evidence in the Commonwealth's case-in-chief. Appellant contends that Mr. Bevilacqua's assertion at the PCRA hearing that he did not remember anything was not truthful, and that the PCRA court should instead credit Mr. Bevilacqua's statement to the private investigator. Appellant concludes he is entitled to a new trial based on Mr. Bevilacqua's recantation. We disagree.

Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). 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). We do not give the same deference, however, to the court's legal conclusions. ***Commonwealth v. Ford***, 44 A.3d 1190 (Pa.Super. 2012). Traditionally, credibility issues are resolved by the trier of fact who had the

opportunity to observe the witnesses' demeanor. ***Commonwealth v. Abu-Jamal***, 553 Pa. 485, 720 A.2d 79 (1998), *cert. denied*, 528 U.S. 810, 120 S.Ct. 41, 145 L.Ed.2d 38 (1999). "A PCRA court passes on witness credibility at PCRA hearings, and its credibility determinations should be provided great deference by reviewing courts." ***Commonwealth v. Johnson***, 600 Pa. 329, 356, 966 A.2d 523, 539 (2009).

> When seeking a new trial based on alleged after-discovered evidence in the form of recantation testimony, the petitioner must establish that: (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.

Id. at 359–60, 966 A.2d at 541 (citations omitted).

In assessing the credibility of after-discovered evidence, "[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)). "[W]e have emphasized that, when addressing an after-discovered evidence claim premised on recantation testimony, 'the PCRA court must, in the first instance, assess the credibility and significance of the recantation in light of the evidence as a whole.'" ***Commonwealth v. Small***, 647 Pa. 423, 450-51, 189 A.3d 961,

977 (2018) (quoting ***Commonwealth v. D'Amato***, 579 Pa. 490, 523, 856 A.2d 806, 825 (2004)). "The deference normally due to the findings of the [PCRA] court is accentuated where what is involved is recantation testimony." ***Loner, supra*** at 141. Furthermore, "[i]t is well-settled recantation evidence is notoriously unreliable, and where it involves an admission of perjury, it is the least reliable source of proof." ***Commonwealth v. Hannibal***, 638 Pa. 336, 379, 156 A.3d 197, 222 (2016) (citations omitted).

Instantly, private investigator Meinert testified at the PCRA hearing that defense counsel contacted him and asked him to interview Mr. Bevilacqua, who allegedly had recanted his trial testimony. Investigator Meinert went to Mr. Bevilacqua's house and recorded his statement during which Mr. Bevilacqua recanted his original trial testimony against Appellant. (N.T. PCRA Hearing, 9/8/16, at 80-83). Jennifer DiGiovanni, Esquire, then testified that she is a deputy district attorney and was working in the district attorney's office when she received a call from Mr. Bevilacqua, who told her that he had received a subpoena for the PCRA hearing and needed to speak with her. (N.T. PCRA Hearing, 9/12/16, at 117). Attorney DiGiovanni had never been involved in Appellant's case but listened to Mr. Bevilacqua on the phone for 10 to 15 minutes. Attorney DiGiovanni testified that Mr. Bevilacqua told her that when the investigator came to his house, Mr. Bevilacqua lied to him and agreed with everything that the investigator said, and that Mr. Bevilacqua just did what he had to do to get the investigator out of his house. (***Id.*** at 119-

120). Attorney DiGiovanni explained that Mr. Bevilacqua told her that he felt ambushed and scared, and in her impression, he sounded terrified and stated that he was concerned about his safety. (***Id.*** at 121). During his testimony at the PCRA hearing, Mr. Bevilacqua claimed to have no memory concerning his trial testimony, his conversation with Investigator Meinert, or of his phone conversation with Attorney DiGiovanni. (***See*** N.T. Hearing, 9/8/16, at 60-72).

In its opinion, the PCRA court explained its credibility determination as follows:

> Ernest Bevilacqua testified against [Appellant] at trial. On February 18, 2016, Bevilacqua allegedly recanted his testimony, and on March 3, 2016, court-appointed investigator Robert Meinert conducted a taped interview with Bevilacqua. Bevilaqua alleged that he fabricated some, if not all, of his trial testimony. [Appellant] amended his PCRA petition, and this evidence appeared to be "newly discovered [facts]" and is a time bar exception under 42 Pa.C.S.[A.] § 9543(b)(1)(ii) which the PCRA had jurisdiction to consider. Bevilacqua told the investigator that he lied at trial, that the "mob" decreed that [Appellant] had to take the blame for the homicide, and that the DA would help him if he cooperated. Next, Bevilacqua testified that he said what he had to say to get the investigator out of his house, that he never lied 36 years ago and that he lied to the investigator. Finally, Bevilacqua claimed that he suffered from memory loss of his trial testimony, his alleged recantation with the investigator, and a conversation with Allegheny County Deputy District Attorney, Jennifer DiGiovanni. Ms. DiGiovanni testified that she spoke with Bevilacqua who sounded terrified, scared and upset in a phone call she had with him relative to his purported recantation. Under these circumstances, the PCRA [c]ourt did not find Bevilaqua's recantation to be credible. Accordingly, the PCRA [c]ourt denied relief on this claim.

(PCRA Court Opinion, 7/18/23, at 5-6) (formatting provided, record citations

omitted). The record supports the court's credibility determinations, and we are bound by them. ***See Johnson, supra***. ***See also Loner, supra***. Thus, Appellant is not entitled to relief.[11] Accordingly, we affirm.

Order affirmed.

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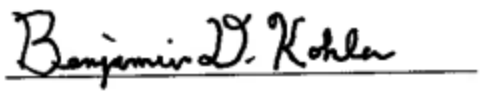
[11] Both the Commonwealth and Appellant agree that the certified record is missing a significant number of documents. On March 27, 2024, Appellant moved for this Court to remand with instruction on how to more completely supplement the record. We acknowledge that the certified record in this case skips from January 1982 to October 2010 and omits numerous filings during the ensuing 28-year period during which this case was continuously litigated. The record also omits Appellant's trial transcripts and other post-verdict and post-conviction hearings. On August 30, 2023, this Court granted the Commonwealth's request to supplement the record with certain documents relevant to this appeal, and the PCRA court forwarded a supplemental record that contained some additional documents. Although the record is still incomplete, the remaining missing portions of the record do not impede our review of the claims raised in this appeal, which we can decide based on the available record. Thus, we deny Appellant's request for remand without prejudice for him to petition the PCRA court for relief to help facilitate a complete record, in future filings Appellant may make.

Appellant filed a second motion on April 1, 2024, requesting copies of police reports which trial counsel obtained through discovery. Although we deny Appellant's request at this juncture, we again do so without prejudice for Appellant to petition the PCRA court with respect to any discovery or file copy requests that may be relevant, in future filings Appellant may make.

Finally, on May 15, 2024, Appellant filed a motion for extraordinary relief arguing that an error in the jury charge concerning specific intent to kill resulted in Appellant's wrongful conviction of first-degree murder, which he claims should be modified to a third-degree murder conviction. This issue was not raised in the PCRA petition at issue in this appeal. ***See*** Pa.R.A.P. 302(a) (stating issues not raised in PCRA court are waived and cannot be raised for first time on appeal). Thus, we decline to address this claim and deny Appellant's motion without prejudice for Appellant to seek such relief in a proper PCRA petition in which Appellant would first have to establish the court's jurisdiction to consider it.

Judgment Entered.



Benjamin D. Kohler, Esq.
Prothonotary

DATE: 11/14/2024