

**[J-63-2013] [MO: Eakin, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, : No. 19 EAP 2013

Appellant

v.

JOSE CASTRO,

Appellee

:
: Appeal from the Judgment of Superior
: Court Superior Court entered on October
: 5, 2012 at No. 3447 EDA 2009 vacating
: the Judgment of Sentence of the Court of
: Common Pleas of Philadelphia County,
: Criminal Division, entered on June 22,
: 2009 at Nos. CP-51-CR-0014957-2008,
: MC-51-CR-0012695-2008
:
: ARGUED: September 11, 2013

CONCURRING OPINION

MADAME JUSTICE TODD

DECIDED: JUNE 16, 2014

I join the Majority Opinion, subject to the following clarifications.

Initially, I note that there are two distinct aspects to this appeal. There is the standard for the award of a new trial based upon after-discovered evidence, and there is the separate issue of the standard to be employed to determine whether a hearing should be held on the issue of whether a new trial is warranted. As noted in footnote 7 of the Majority Opinion, to be awarded a new trial, the movant must produce *evidence* that: (1) could not have been obtained prior to trial by exercising reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach a witness's credibility; and (4) would likely result in a different verdict. Majority Opinion, at 5 n.7 (citing Commonwealth v. Pagan, 950 A.2d 270, 292 (Pa. 2008)). However, I would provide further guidance on the standard by which trial judges should consider

granting a hearing on the question of whether a new trial is warranted based upon after-discovered evidence.

Unfortunately, Pa.R.Crim.P. 720, which governs post-sentence procedures, including after-discovered evidence, is unhelpful as to what is required for a judge to hold a hearing on the issue of whether a new trial should be awarded.¹ In my view, a “less-than-actual-evidence” standard for granting a hearing on a motion for a new trial based on after-discovered evidence, seemingly suggested by the majority,² is sufficient and consistent with Pa.R.Crim.P. 720. Such a standard would require that the motion for a new trial based upon after-discovered evidence contain, at a minimum: (1) a summary of the relevant facts that the movant will prove at a hearing; and (2) a description of the evidence, then available, that the movant will present at a hearing to establish the relevant facts. The trial court would either grant or deny the request for a hearing based upon this proffer, subject to an abuse of discretion standard.

¹ Pa.R.Crim.P. 720 (C) provides: “A post-sentence motion for a new trial on the ground of after-discovered evidence must be filed in writing promptly after such discovery.” The official comment to Rule 720 states, in relevant part, “paragraph (C) requires that any claim of after-discovered evidence must be raised promptly after its discovery. Accordingly, after-discovered evidence discovered during the post-sentence stage must be raised promptly with the trial judge at the post-sentence stage; after-discovered evidence discovered during the direct appeal process must be raised promptly during the direct appeal process, and should include a request for a remand to the trial judge; and after-discovered evidence discovered after completion of the direct appeal process should be raised in the context of the PCRA.”

² While the majority persuasively explains that something more than the proffer of an article is required, it suggests both a somewhat relaxed informational requirement, Majority Opinion at 15 (“at the very least, describe the evidence that will be presented at the hearing”), and a seemingly more demanding standard. *Id.* at 16 (“[a]bsent identification of the actual testimony, physical evidence, documentation, or other type of evidence . . . we cannot conclude appellee had evidence to offer; to conclude otherwise would be speculation”).

Here, as noted by the majority, statements or affidavits from reporters or FBI agents could have been obtained, or, at a minimum, a summary of these individuals' purported testimony should have been provided in support of Appellee's motion. In light of Appellee's failure to provide such threshold information, the trial court properly denied his motion.