

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

DANIEL WALTON

Appellant

No. 1000 MDA 2012

Appeal from the Order Entered May 17, 2012
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0003298-2007
CP-35-CR-0003301-2007

BEFORE: PANELLA, J., ALLEN, J., and COLVILLE, J.*

MEMORANDUM BY PANELLA, J.

FILED MAY 29, 2013

Defendant, Daniel Walton, appeals *pro se* from the order entered May 17, 2012, by the Honorable Michael J. Barrasse, Court of Common Pleas of Lackawanna County, which denied his petition filed pursuant to the Post Conviction Relief Act ("PCRA").¹ We affirm.

Following a jury trial, on October 8, 2008, Walton was convicted of two counts of delivery of a controlled substance (cocaine), two counts of possession with intent to deliver a controlled substance (cocaine), two counts of unlawful possession of a controlled substance, and two counts of criminal conspiracy. On January 23, 2009, following review of a pre-

* Retired Senior Judge assigned to the Superior Court.

¹ 42 PA.CON.S.TAT.ANN. § 9541, *et seq.*

sentence investigation report, the trial court sentenced Walton to an aggregate term of six to twelve years' imprisonment. On January 29, 2009, Walton filed a Motion for Reconsideration of Sentence, which the trial court denied on February 18, 2009. On appeal, this Court affirmed Walton's judgment of sentence. ***Commonwealth v. Walton***, No. 486 MDA 2009 (Pa. Super., filed September 9, 2010) (mem. op.).

On November 1, 2010, Walton filed a *pro se* PCRA petition, which alleged Walton's innocence of the charges for which he was convicted. Although the PCRA court appointed Kurt T. Lynott, Esquire, as counsel, Attorney Lynott subsequently filed a petition to withdraw as counsel pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988). On May 17, 2012, the PCRA court granted counsel permission to withdraw and entered an order denying Walton's PCRA petition without a hearing. This timely appeal followed.

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

1. Whether [a]ppellate [c]ounsel (Kurt T. Lynott), abandon [sic] the defendant by failing to raise a meritable [sic] issue and all other subsequent issues contained within the record.
2. Whether the [t]rial [c]ourt erred by allowing counsel to withdraw [sic], and not conducting an evidentiary hearing to make a fair determination of the merits of defendant[']s claim.

Appellant's Brief at 3 (unnumbered).

Our standard of review of a PCRA court's denial of a petition for post-conviction relief is well-settled: We must examine whether the record supports the PCRA court's determination and whether the PCRA court's determination is free of legal error. **See Commonwealth v. Hall**, 867 A.2d 619, 628 (Pa. Super. 2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. **See Commonwealth v. Carr**, 768 A.2d 1164, 1166 (Pa. Super. 2001). Our scope of review is limited by the parameters of the PCRA. **See Commonwealth v. Heilman**, 867 A.2d 542, 544 (Pa. Super. 2005).

To be eligible for relief under the PCRA, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence resulted from one of the errors listed in 42 PA.CON.S.TAT.ANN. § 9543(a)(2)(i)-(viii). **Commonwealth v. Albrecht**, 554 Pa. 31, 41, 720 A.2d 693, 698 (1998). Section 9543(a)(2) requires, *inter alia*,

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) Deleted.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

42 PA.CON.S.TAT.ANN. § 9543(a)(2)(i)-(viii).

As noted, Walton argues in his PCRA petition that he is innocent of the crimes for which he was convicted. In support thereof, Walton attaches to his petition a notarized affidavit in which Arthur Loveland states he is the perpetrator of the crimes for which Walton was convicted. **See** PCRA Petition, 11/2/10, Exhibit A. To be entitled to PCRA relief on the basis of after-discovered exculpatory evidence, a petitioner must plead and prove 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. Foreman, 55 A.3d 532, 537 (Pa. Super. 2012) (citation omitted).

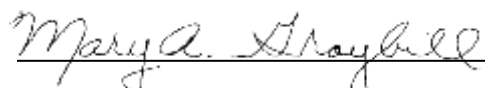
After review, we find that Walton's "new evidence" in the form of the Loveland affidavit does not meet the requirements for after-discovered

evidence because he does not demonstrate that the evidence could not have been obtained prior to the conclusion of trial by the exercise of reasonable diligence. Although the affidavit is dated after Walton's trial was completed, Walton fails to plead that the testimony could not have been discovered prior to his trial. Therefore, Walton's claim of exculpatory after-discovered evidence fails.

We likewise find no merit to Walton's bald assertion of PCRA counsel's ineffective assistance.² The sole basis of this claim appears to be that PCRA counsel withdrew his representation in this matter. Counsel certified in his petition that he determined the issue raised by Walton was without arguable merit after a conscientious examination of the record, and further that there were no issues of arguable merit which could have been raised. Petition to Withdraw as Counsel of Record, 5/17/12. We can perceive no error in PCRA counsel's review of the record or in the PCRA court's decision to grant counsel permission to withdraw.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.


Deputy Prothonotary

Date: 5/29/2013

² Walton filed an objection to counsel's motion to withdraw on May 25, 2012.