

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

TYREE WALLACE,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1110 EDA 2012

Appeal from the PCRA Order March 30, 2012  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0407921-1998

BEFORE: BENDER, BOWES, and LAZARUS, JJ.

MEMORANDUM BY BOWES, J.:

**FILED MAY 10, 2013**

Tyree Wallace appeals from the March 30, 2012 order denying him PCRA relief. We affirm.

On November 30, 1999, a jury found Appellant guilty of second-degree murder, robbery, conspiracy, and possession of an instrument of crime based upon Appellant's participation in the October 27, 1997 robbery and murder of Jhon Su Kang. Appellant was sentenced to life imprisonment, and, on appeal, we affirmed. ***Commonwealth v. Wallace***, 778 A.2d 739 (Pa.Super. 2001). In so doing, we extensively analyzed the evidence adduced against Appellant at trial, and we now briefly summarize our prior review of the Commonwealth's proof.

On October 26, 1997, Appellant, Raheem Shackelford, and Matthew Corprew decided to rob the Salt & Pepper Deli, which was owned by

Mr. Kang and located at 1640 Ellsworth Street, Philadelphia. Shortly before 10:00 p.m. on Monday, October 27, 1997, Appellant, Shackelford, and an unidentified female entered the store, purchased an item, and left. Mr. Kang and one of his employees, Van Griffin, then closed the Salt & Pepper Deli. Mr. Kang was walking toward his car and carrying a paper bag when Appellant and Shackelford approached him, beat him, shot him, and took the bag.

After the crime, Corprew confessed to police that he operated as a lookout for the other two perpetrators. Corprew's statement was admitted into evidence, but was heavily redacted so that the portion remaining "contained a single reference to a co-defendant which was redacted to read 'that's when a guy came up to me and asked what was up [and] did I want to get a couple dollars[.]'" **Id.** (unpublished memorandum at 2).

Mr. Griffin was shown photographic arrays and identified Appellant and Shackelford as the two men who entered the store just prior to 10:00 p.m. on October 27, 1997. James Davis related that the afternoon before the crime, Appellant and Shackelford asked him to participate in its commission, but Davis declined. That evening, Davis, who lived within blocks of the Salt & Pepper Deli, encountered Appellant, Shackelford and Corprew. At that time, Shackelford told Davis that he had secured a shotgun and revealed a portion of the gun, which was protruding from Shackelford's trousers. A few days after October 27, 1997, Shackelford told Davis that the robbery was

unsuccessful and that the perpetrators had recovered approximately \$100. Commonwealth witness Brian Brooks testified that he overheard Corprew and Appellant plan the robbery and that, after its commission, Appellant told Mr. Brooks that Shackelford shot the victim.

Appellant, Shackelford, and Corprew proceeded to a joint trial. During the course of that proceeding, Corprew elected to plead guilty to third degree murder. Appellant was convicted of the above-described offenses and sentenced to life imprisonment. After we affirmed Appellant's judgment of sentence, our Supreme Court denied review on August 29, 2001. ***Commonwealth v. Wallace***, 784 A.2d 117 (Pa. 2001).

On August 14, 2002, Appellant filed a timely PCRA petition, counsel was appointed, and counsel filed an amended petition raising an allegation that trial counsel was ineffective. After conducting a hearing, the PCRA court denied relief, and no appeal was filed. On July 17, 2006, Appellant filed a second petition, which was dismissed as untimely. An ensuing appeal also was dismissed based on Appellant's failure to file a docketing statement. Pursuant to a third PCRA petition, Appellant successfully obtained reinstatement of his appellate rights from the denial of his first PCRA petition, and, on June 9, 2010, we affirmed the denial of the first PCRA petition. ***Commonwealth v. Wallace***, 4 A.3d 680 (Pa.Super. 2010) (unpublished memorandum).

Five days later, on June 14, 2010, Appellant filed a fourth PCRA petition. He alleged that he was entitled to a new trial based upon newly-discovered evidence consisting of two affidavits executed by Corprew on March 7, 2007. Appellant alleged that he did not discover the existence of the affidavits until June 20, 2009, when Shackelford forwarded them to him. We note that Appellant could not have filed his fourth PCRA petition until after resolution of the prior PCRA proceeding. ***See Commonwealth v. Lark***, 746 A.2d 585 (Pa. 2000) (a PCRA petition cannot be filed until the resolution of any pending appeal of a previous PCRA petition). In the March 7, 2007 affidavits, Corprew claimed that he acted alone on October 27, 1997, that he shot and robbed the victim, and that Appellant and Shackelford were innocent of the crimes.

The PCRA court appointed counsel and scheduled a hearing. Prior to the hearing, the Commonwealth provided the PCRA court with documentation that indicated that Corprew was mentally ill. The court therefore appointed counsel for Corprew and ordered an independent competency evaluation of that co-defendant. On December 6, 2010, after personally evaluating Corprew, a psychiatrist, Dr. Pietro Miazzo, concluded that Corprew was delusional and incapable of distinguishing between fantasy and reality and that Corprew was incompetent. Thereafter, Appellant asked the PCRA court to conduct a competency hearing, which was held on

October 21, 2011. After that hearing, the PCRA court concurred that Corprew was not competent to testify.

Appellant then submitted a memorandum arguing that Corprew's affidavits should be admitted at a PCRA hearing as substantive evidence. Appellant asked that the PCRA court determine, based upon the March 7, 2007 affidavits, whether Appellant was entitled to a new trial. The PCRA court ruled that the affidavits were inadmissible hearsay and that they did not fall within the exception to the hearsay rule applicable to declarations against penal interest. After issuing notice of its intent to dismiss the PCRA petition without a hearing, the PCRA court, on March 30, 2012, dismissed Appellant's June 14, 2010 PCRA petition. In this ensuing appeal, Appellant raises one issue, "Did the PCRA Court err in not admitting the affidavits of Matthew Corprew as substantive evidence in a case where the affiant was unavailable and the affidavit bore sufficient indicia of reliability to make it probative despite the affiant's unavailability?" Appellant's brief at 6.

Our standard of review in this context is settled. "In reviewing the denial of PCRA relief, we examine whether the PCRA court's determination is supported by the evidence and free of legal error." ***Commonwealth v. Thomas***, 44 A.3d 12, 16 (Pa. 2012). Herein, Appellant fails to take umbrage with the PCRA court's underlying determination that Corprew was not competent to testify that he acted alone in robbing and killing Mr. Kang and that Appellant had no role in the crime. **See** Appellant's brief at 18.

Appellant asserts that the March 7, 2007 affidavits to that effect were admissible as substantive evidence, and that they warranted a hearing and merits review of the primary question of whether Appellant was entitled to a new trial on the basis of the contents of those documents.

Appellant appears to concede that the affidavits were not admissible as statements against penal interest. *Id.* (“Under the present state of the law[,] the affidavit[s] may well not be admissible as a statement against penal interest.”). However, he also suggests that the affidavits should fall within the hearsay exception applicable to declarations against penal interest since they impaired Corprew’s “chances for parole or pre-release or other favorable treatment by the Pennsylvania Board of Probation and Parole and/or the Department of Corrections.” *Id.* at 18-19.

Additionally, Appellant maintains that we should find that the affidavits were admissible as substantive evidence by using the “reasoning of F.R.E. 807 and under the circumstances of this rather unique case[,] remand the matter with direction to the PCRA Court that it admit the evidence set forth in the affidavit[s] as probabtive [sic] and to give is [sic] such weight as is appropriate under the facts of the case.” Appellant’s brief at 19.

We first examine Appellant’s position that we should apply the hearsay exception contained in Pa.R.E. 804 (b)(3), which provides

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In the present case, Corprew's affidavits do not fall within the ambit of this rule because they do not subject him to criminal liability. He has been convicted and sentenced in connection with the crime. The possible implications of the affidavits in terms of Corprew's future grant of release are not mentioned in this rule and are therefore irrelevant to its application. Having been convicted and sentenced nearly fifteen years ago, Corprew cannot be "subjected to" criminal liability and is not "exposed to" criminal liability in this matter, and, therefore, the March 7, 2007 affidavits do not fall within the parameters of Pa.R.E. 804(b)(3).

Additionally, the rule states that any statement tending to expose the declarant to criminal liability is inadmissible unless there are corroborating circumstances clearly indicating that the statement is trustworthy. Given that Corprew has a significant history of mental illness that rendered him incompetent to testify, the circumstances herein support a finding that the affidavits are not trustworthy. Thus, that aspect of Pa.R.E. 804(b)(3) also remains unsatisfied.

Next, we decline Appellant's invitation to apply the reasoning outlined in F.R.E. 807,<sup>1</sup> which is termed the "residual exception" to the hearsay rule. Pa.R.E. 803 relates to the hearsay exceptions applicable to statements by declarants whose availability to testify is immaterial. The comment to Pa.R.E. 803(24) provides, "Pennsylvania has not adopted F.R.E. 803(24) (now F.R.E. 807). The Federal rule is often called the residual exception to the hearsay rule." Pa.R.E. 804(b) governs exceptions to the hearsay rule for declarants who are unavailable. Consistently with Pa.R.E. 803, that rule states "Pennsylvania has not adopted F.R.E. 804(b)(5) (now F.R.E. 807). The Federal rule is often called the residual exception to the hearsay rule." Comment, Pa.R.E. 804(b)(5). ***See also Commonwealth v. Stallworth,***

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<sup>1</sup> F.R.E. 807 states:

**(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.



781 A.2d 110, 128 n.2 (Pa. 2001) (Pennsylvania has not adopted the residual exception contained in the Federal Rules of Evidence).

Thus, our Supreme Court has declined to adopt F.R.E. 807. The Supreme Court has the exclusive authority to create procedural rules applicable in court proceedings. Pa. Const. Art. V, § 10(c).<sup>2</sup> Hence, any attempt by this Court to adopt F.R.E. 807 would be unconstitutional.

We therefore conclude that the PCRA court did not abuse its discretion in refusing to grant Appellant PCRA relief. The affidavits in question are not

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<sup>2</sup> That provision states:

The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions. Notwithstanding the provisions of this section, the General Assembly may by statute provide for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television.

Pa. Const. Art. 5, § 10(c).

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admissible as substantive evidence, and *ipso facto* Appellant cannot obtain a new trial on their basis.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 5/10/2013