NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JEFF SCHIRONE WILLIAMS, A/K/A JAFARNIA WILLIAMS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 114 WDA 2012

Appeal from the PCRA Order Entered January 10, 2012
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0014658-2004

BEFORE: BENDER, ALLEN, and MUSMANNO, JJ.

MEMORANDUM BY BENDER, J.: Filed: March 12, 2013

Appellant, Jeff Schirone Williams (a/k/a Jafarnia Williams), appeals *pro se* from the January 10, 2012 order denying, without a hearing, his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. After careful review, we are compelled to vacate the court's order and remand for further proceedings.

The facts of Appellant's case were set forth by this Court on direct appeal as follows:

> On September 21, 2004, [T.T.] was waiting at the bus stop on East Liberty Boulevard and North Highland Avenue in the East Liberty section of the City of Pittsburgh. . . . [T.T. (or "the victim")], a 14[-]year[-]old ninth grader at the time, had walked to the bus stop where she planned to take a Port Authority bus to Allderdice High School[,] located in the Squirrel Hill section of Pittsburgh. At approximately 7:30 a.m.[,] a black Chevy Trail Blazer pulled up to [T.T.] The driver, whom she identified as [Appellant], asked her for directions. [Appellant] then exited the

SUV[,] came up behind the victim, and pushed her down on the back seat floor. While lying on the back seat floor, face down, with her hands beneath her, [Appellant] blindfolded [T.T.]

After driving[] for what [T.T.] said felt like 20 to 25 minutes, she was carried into a house by [Appellant] and thrown onto a bed. [Appellant] tied the victim's hands to the bed[,] and then the house phone rang and he answered it. As he returned to the room, [T.T.] heard [Appellant] muttering to himself "you can do this[.]" He entered the bedroom the victim was in and took off her blindfold.

[Appellant] had sheer panty hose covering his face when he lifted up [T.T.'s] sweatshirt. When [Appellant] was unsuccessful at taking off the victim's sweatshirt, he untied her arms and escorted her to his SUV. [The victim] recognized the neighborhood[, namely, Swissvale, Pennsylvania,] as the area [in which] her grandmother lived. [Appellant] drove her to a street close to Allderdice High School . . . and released her.

Once she was free[, T.T.] retrieved her cell phone from her book bag and called her mother. Upon arriving at school, she went to the office and reported the incident. The school notified the Pittsburgh City School Police and Officer Joseph Garrett responded and interviewed the victim. The officer then referred the matter to the City of Pittsburgh's Sexual Assault Unit. The city detectives obtained a description of the suspect and were able to find the location of the residence where the victim was taken. Also, based on the description and behavior [of the suspect], the detectives were able to put together a photographic line-up, which included [Appellant's] picture. [T.T.] immediately chose [Appellant].

Further investigation of [] [Appellant] showed [that] he owned a Chevy Blazer SUV and lived [with his girlfriend] at 235 Hawkins Ave. in Braddock, P[A], a borough adjoining Swissvale, PA. At 3:00 a.m. on the morning of September 22, 2004, the city detectives, accompanied by North Braddock police, arrested [] [Appellant] at his girlfriend's house. They also executed a search warrant [regarding the residence,] and took [Appellant's] SUV to the City's auto pound to be searched by the mobile crime unit. The search [of the car revealed] marijuana and . . . fingerprints. However, no usable latent prints matching the victim could be found. The[] [police] did find scales, marijuana,

> binoculars and a photo of the victim taken from inside [of] the vehicle.

Commonwealth v. Williams, 727 WDA 2008, unpublished memorandum at 1-3 (Pa. Super. filed May 3, 2010) (quoting Trial Court Opinion, 12/22/08, at 2-4) (citations to record and footnote omitted).

Based on these facts, Appellant, who represented himself at trial, was convicted by a jury of kidnapping, corruption of minors, possession of drug paraphernalia, possession with intent to distribute a controlled substance, and possession of a controlled substance. On June 25, 2007, Appellant was sentenced to an aggregate term of 15 to 30 years' imprisonment. He filed a *pro se* direct appeal, and on May 3, 2010, a panel of this Court affirmed his judgment of sentence. ***Commonwealth v. Williams***, 4 A.3d 181 (Pa. Super. 2010) (unpublished memorandum). Appellant petitioned for reargument, which this Court denied on June 23, 2010. He did not file a petition for permission to appeal to our Supreme Court.

On June 22, 2011, Appellant filed a timely *pro se* PCRA petition and counsel was appointed. However, Appellant subsequently petitioned to proceed *pro se* and, after conducting a ***Grazier*** hearing, the court granted that petition. Thereafter, Appellant filed an amended PCRA petition, to which the Commonwealth filed a response. On December 13, 2011, the PCRA court issued notice of its intent to dismiss Appellant's petition without a hearing in accordance with Pa.R.Crim.P. 907. Appellant responded to that Rule 907 notice, but ultimately the court issued an order on January 10,

2012, denying his PCRA petition. Appellant filed a timely *pro se* notice of appeal. Herein, he raises six issues for our review:

1. Whether the PCRA court erred by adopting the Commonwealth['s] Answer to the PCRA petition?

2. Whether the PCRA court denied [] Appellant meaningful review of his PCRA petition when the PCRA court falsely represented that the record and transcripts were reviewed by that court, [when] the record was unavailable between October of 2010 until July of 2012?

3. Whether [the] PCRA court erred by failing to recuse [itself] from the PCRA proceeding?

4. Whether the PCRA court erred by concluding that the following claims were previously litigated on direct appeal?

    a. [] Appellant was denied his [S]ixth Amendment [r]ight to effective cross-examination as to pending charges in regards to [C]ommonwealth witness [S.A.] due to the suppression of this evidence by the Commonwealth in violation of ***Brady v. Maryland***[, 373 U.S. 83 (1963)].

    b. [] Appellant was denied his Sixth Amendment [r]ight to effective cross-examination of the alleged victim due to the tardy disclos[ure] [of] suppressed photographs of Appellant's vehicle taken on the day of [] Appellant's arrest in violation of ***Brady*** [].

    c. [] Appellant was denied his Sixth Amendment [r]ight to conflict free counsel, which forced [] [A]ppellant to represent himself at trial.

5. Whether [] Appellant should be resentenced in light of the reversal of the 2006 conviction used and considered during the June 2007 sentencing proceeding?

6. Whether [] Appellant is entitled to time credit due to the prior conviction used to enhance the current sentence, which nearly five years of the previous custody did not credit to any other sentence of [] custody?

Appellant's Brief at 5-6.[1]

To begin, we note that our standard of review of an order denying post conviction relief is whether the determination of the court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Ragan***, 923 A.2d 1169, 1170 (Pa. 2007). This Court grants great deference to the findings of the PCRA court, and we will not disturb those findings merely because the record could support a contrary holding. ***Commonwealth v. Touw***, 781 A.2d 1250, 1252 (Pa. Super. 2001).

In Appellant's first and second issues, he essentially avers that the court did not conduct a meaningful review of his PCRA petition before denying it without a hearing. However, we conduct a meaningful examination of each of Appellant's assertions herein; therefore, Appellant's argument that he has not been afforded adequate review by the PCRA court is moot.

Next, Appellant argues that the PCRA court should have recused itself because this same court ostensibly recused itself in an unrelated matter involving Appellant. We are unable to review the merits of this assertion because Appellant did not raise it in his petition for post-conviction relief. Instead, he presented this claim for the first time in his response to the court's Rule 907 notice. In ***Commonwealth v. Rykard***, 55 A.3d 1177 (Pa.

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[1] For purposes of clarity and ease of disposition, we have reordered several of Appellant's issues.

Super. 2012), this Court clarified that a response to a Rule 907 notice "is not itself a petition" for post conviction relief, "and the law still requires leave of court to submit an amended petition." ***Id.*** at 1189. As Appellant did not seek leave to amend his petition to add his contention that the court should recuse itself, we cannot examine this claim on appeal. ***See Commonwealth v. Lauro***, 819 A.2d 100, 103 (Pa. Super. 2003) (citation omitted) (stating "issues not raised in a PCRA petition cannot be considered on appeal").

In his next two issues, Appellant alleges that the Commonwealth committed ***Brady*** violations by (1) not disclosing that one of its witnesses, S.A., had a pending driving under the influence (DUI) charge at the time she testified at trial, and (2) by withholding photographic evidence that could have been used to impeach the victim's testimony. Appellant contends that the withholding of this evidence by the Commonwealth violated his constitutional right to confront, and effectively cross-examine, the Commonwealth's witnesses who testified against him.

The PCRA court denied Appellant relief on these issues, reasoning that they were both previously litigated on direct appeal. ***See*** 42 Pa.C.S. § 9543 (in order to be entitled to post conviction relief, petitioner must prove that the claim was not previously litigated). Appellant, however, maintains that while he raised these claims on direct appeal, this Court did not specifically address them. After reviewing our decision on direct appeal, we agree with

Appellant that we did not expressly dispose of the merits of these precise arguments. Accordingly, they were not previously litigated. ***See*** 42 Pa.C.S. § 9544 (explaining an "issue has been previously litigated if … the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue").

Nevertheless, we conclude that Appellant's ***Brady*** claims are meritless.[2]

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[2] It is also arguable that these assertions are not cognizable under the PCRA. In ***Commonwealth v. Puksar***, 951 A.2d 267 (Pa. 2008), our Supreme Court stated:

> Placing aside the merits for purposes of assessing PCRA cognizability, ***Brady*** claims do not need to be presented in terms of ineffectiveness, since the essence of the claim is that the appellant was not informed of certain exculpatory information because it was withheld from him by a government agency with a constitutional duty to disclose. Some ***Brady*** claims, of course, can be available at trial and defaulted; but if the claim is based upon ***Brady*** material about which the defense knew nothing, the claim is cognizable, on its own, under the PCRA.

Id. at 283. Presently, Appellant acknowledges that the photograph of his vehicle was turned over by the Commonwealth midway through trial. Additionally, Appellant discovered the evidence of S.A.'s pending criminal charge after he filed a notice of appeal from his judgment of sentence on August 20, 2007. Appellant filed a petition for remand with this Court, and we granted that petition, dismissing his appeal and remanding for Appellant to file a post-sentence motion raising this ***Brady*** claim *nunc pro tunc.* Appellant filed that post-sentence motion, which the trial court ultimately denied following a hearing. Appellant then filed a second notice of appeal, raising, *inter alia*, these ***Brady*** claims for our review. However, as stated *supra*, this Court did not specifically address the merits thereof.

(Footnote Continued Next Page)

> [T]o establish a ***Brady*** violation, a defendant must demonstrate that: (1) the evidence was suppressed by the Commonwealth, either willfully or inadvertently; (2) the evidence was favorable to the defendant; and (3) the evidence was material, in that its omission resulted in prejudice to the defendant. ***Commonwealth v. Dennis***, 609 Pa. 442, 17 A.3d 297, 308 (2011).

Commonwealth v. Haskins, 2012 WL 4841446, 5 (Pa. Super. 2012).

In regard to the pending DUI charge against S.A., the Commonwealth concedes that Appellant's PCRA petition demonstrated the first two prongs of the ***Brady*** test. Namely, the Commonwealth admits that S.A.'s DUI charge "was inadvertently suppressed by the prosecution, and that evidence could have been used to impeach her testimony at trial." Commonwealth's Brief at 18-19. However, the Commonwealth argues that Appellant has not established that this withheld evidence was material, and that its omission prejudiced him.

By way of background, S.A. was called by the Commonwealth as a rebuttal witness after Appellant took the stand and denied that he picked up other young girls in his vehicle. ***See*** N.T. Trial, 1/3/10, at 592, 595. S.A.

(Footnote Continued) ––––––––––––––––––––

Consequently, even though Appellant discovered these ***Brady*** claims at the time of trial or shortly thereafter, we cannot conclude that he "defaulted" them as described in ***Puksar*** because he raised these issues before the trial court, and also attempted to have this Court examine them on direct appeal. Moreover, because for the reasons stated *infra*, we conclude that Appellant's ***Brady*** issues are meritless, we need not make a determination as to whether they are in fact cognizable under the PCRA.

testified that when she was 12 years old, she encountered Appellant at a convenience store near her home and, after Appellant forced her into his car, he drove her to another location where he forced her to engage in sexual intercourse and oral sex. ***Id.*** at 600-604. S.A. stated that Appellant then drove her back to the convenience store and left her there. ***Id.***

Appellant argues that impeaching S.A. with her pending DUI charge was imperative to discredit S.A. He contends that if the jury had disbelieved S.A., it would not have convicted him based solely on the incredible testimony of the victim, T.T. Appellant's argument is unconvincing. This Court recently explained that,

> [t]o demonstrate prejudice, "the evidence suppressed must have been material to guilt or punishment." ***Commonwealth v. Gibson***, 597 Pa. 402, 951 A.2d 1110, 1126 (2008). Evidence is material under ***Brady*** when there is a reasonable probability that, had the evidence been disclosed, the result of the trial could have been different. ***Kyles v. Whitley***, 514 U.S. 419, 433–34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish materiality in the constitutional sense." ***Commonwealth v. McGill***, 574 Pa. 574, 832 A.2d 1014, 1019 (2003) (quoting ***U.S. v. Agurs***, 427 U.S. 97, 109–10, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). The relevant inquiry is "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." ***Kyles***, 514 U.S. at 434, 115 S.Ct. 1555. To prove materiality where the undisclosed evidence affects a witness' credibility, a defendant "must demonstrate that the reliability of the witness may well be determinative of [the defendant's] guilt or innocence." ***Commonwealth v. Johnson***, 556 Pa. 216, 727 A.2d 1089, 1094 (1999).

Haskins, 2012 WL 4841446 at *7.

Instantly, S.A.'s reliability was not determinative of Appellant's guilt or innocence. S.A. was called as a rebuttal witness to refute Appellant's assertion that he had not previously picked up other young women.[3] She did not provide any information or testimony relating to Appellant's offenses against T.T. Moreover, the Commonwealth presented other evidence, namely T.T.'s testimony, to prove Appellant's guilt. Clearly, the jury credited that evidence and convicted Appellant of the above-stated offenses. We are unconvinced that the jury would have returned a different verdict had it been informed that S.A. had a pending DUI charge at the time she testified. Thus, Appellant's first ***Brady*** claim is meritless.

Similarly, Appellant's second ***Brady*** claim also fails. Appellant avers that it was not until after the Commonwealth rested its case and Appellant began the presentation of his defense that the Commonwealth turned over a photograph that police had taken of his vehicle at the time of his arrest. Appellant argues that the photograph, which ostensibly depicts his vehicle as being gray in color, could have been used to impeach T.T.'s testimony that his vehicle was black. However, Appellant alleges that he was not able to impeach T.T. with this evidence because "the trial court would not permit []

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[3] To the extent that Appellant's argument challenges the admissibility of S.A.'s testimony, that issue was previously litigated and found meritless on direct appeal. ***See Williams***, 727 WDA 2008, unpublished memorandum at 9-11.

Appellant to call [T.T.] back to the stand" after the photograph was disclosed. Appellant's Brief at 36.

Initially, Appellant does not cite to where in the record the court prevented him from recalling T.T. to the stand to impeach her with this photographic evidence. In fact, our review of the record indicates that after this photograph was revealed, Appellant stated that he wished to call to the stand the detective who took the photograph. N.T. Trial, 1/3/07, at 502-507. The court permitted him to do so. ***Id.*** at 507. At no point did Appellant seek to recall T.T. Therefore, while the Commonwealth should have turned this evidence over to Appellant earlier, Appellant has failed to demonstrate that he was prejudiced by its late revelation, as he could have recalled T.T. to the stand and impeached her with the photograph.

In his next argument, Appellant argues that he was denied his constitutional right to counsel because the trial court refused to appoint a "conflict free" attorney, thus forcing Appellant to represent himself. Appellant's Brief at 40. The PCRA court concluded that this issue was previously litigated. After carefully reviewing our decision on Appellant's direct appeal, we agree. ***See Williams***, 727 WDA 2008 at 14-16. Thus, this claim does not warrant post conviction relief. ***See*** 42 Pa.C.S. §§ 9543-9544.

In his next assertion, Appellant contends that we should vacate his sentence and remand for resentencing because in fashioning his term of imprisonment, the court considered a 2006 conviction that has subsequently

been vacated by this Court. Initially, we consider this claim as a challenge to the discretionary aspects of Appellant's sentence. ***See Commonwealth v. Downing***, 990 A.2d 788, 792 (Pa. Super. 2010) (claim that court considered improper factor in fashioning sentence raises challenge to discretionary aspect of sentence). However, the only cognizable sentencing challenge under the PCRA is a claim that the sentence imposed was "greater than the lawful maximum" or, in other words, a challenge to the legality of sentence. ***See*** 42 Pa.C.S. § 9543(a)(2)(vii). Instantly, Appellant only takes issue with the court's consideration of a prior conviction, arguing that had the court not considered this prior offense, it may have imposed his sentences to run concurrently rather than consecutively. This assertion does not amount to a challenge to the legality of his sentence. Consequently, his claim is not cognizable under the PCRA.[4]

Lastly, Appellant alleges that he is entitled to receive credit toward his sentence of incarceration in this case for time that he served for an unrelated conviction. "A challenge to the trial court's failure to award credit

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[4] Furthermore, even if it were a claim entitled to post conviction review, Appellant's argument is underdeveloped. For instance, Appellant does not cite any legal authority supporting his assertion that the reversal of his 2006 conviction entitles him to resentencing in the instant case. Even more problematic is Appellant's failure to cite to any place in the record where the court stated that it was considering his 2006 conviction in fashioning his current sentence. Therefore, even if cognizable under the PCRA, we would conclude that this claim does not warrant relief.

for time served prior to sentencing involves the legality of a sentence." ***Commonwealth v. Johnson***, 967 A.2d 1001, 1003 (Pa. Super. 2009) (citing ***Commonwealth v. Menezes***, 871 A.2d 204, 207 (Pa. Super. 2005) (citation omitted)). Accordingly, we will address Appellant's argument.

Appellant explains that from September 17, 1991, until December 29, 2000, he was incarcerated in an unrelated case, numbered CC199103256, for convictions of aggravated assault and kidnapping. On December 21, 2000, he was resentenced in that case after it was discovered that an incorrect prior record score was applied at the time of his initial sentencing. Appellant asserts that his new sentence in CC199103256 was two and one-half to five years' imprisonment for his aggravated assault conviction, followed by four years' probation for his kidnapping offense. Appellant avers that he was given credit for time served and, therefore, his maximum sentence of five years' imprisonment was satisfied on September 17, 1996. Consequently, Appellant argues that the time he served from September 17, 1996 until December 29, 2000,[5] must be credited toward his sentence of incarceration in the instant case, as it was not applied to any other sentence of imprisonment.

In rejecting this argument, the PCRA court concluded that the time Appellant served from September 17, 1996 until December 29, 2000, "was

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[5] Appellant was allegedly resentenced on December 21, 2000, but claims that he remained incarcerated until December 29, 2000.

attributable, and credited to the probationary sentence he received on the kidnapping [count]" in CC199103256. PCRA Court Opinion, 4/12/11, at 4. The Commonwealth agrees with the court's reasoning, citing ***Commonwealth v. Clark***, 885 A.2d 1030 (Pa. Super. 2005), in support thereof. In ***Clark***, the defendant was arrested for drug possession and placed in pretrial detention. ***Id.*** at 1031. After Clark was incarcerated for 47 days exclusively on the drug charge, additional charges of theft and receiving stolen property (RSP) were filed against him. ***Id.*** As such, Clark "continued pretrial detention, now on both sets of charges, from September 4, 2003 through June 17, 2004, when [he] pled guilty and the court announced that he receive a prison sentence on the theft and RSP charges, to be followed by a probationary sentence for the drug possession charge." ***Id.*** Subsequently, the trial court issued an order mandating that Clark's first 47 days of pretrial detention, attributable exclusively to the drug possession charge, be applied to his sentence of probation for that offense. ***Id.*** at 1032. Clark filed a timely appeal, arguing that the 47 days of pretrial detention must be attributed to his sentence of incarceration, rather than his period of probation. ***Id.***

This Court disagreed. First, we set forth 42 Pa.C.S. § 9760, the statutory provision addressing sentencing credit for time served. That section reads, in relevant part:

> (1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is

> imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.
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> (4) If the defendant is arrested on one charge and later prosecuted on another charge growing out of an act or acts that occurred prior to his arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former charge **that has not been credited against another sentence**.

42 Pa.C.S. § 9760(1) and (4) (emphasis added). We then emphasized in ***Clark*** that "[u]nder the Sentencing Code, an order of probation constitutes a sentence." ***Clark***, 885 A.2d at 1032 (citing 42 Pa.C.S. § 9721(1)). Accordingly, we concluded that "[c]ontrary to [Clark's] contention, Section 9760(4) does not compel the credit he seeks, for the first 47 days he served in pretrial detention for drug possession charges were, in fact, credited against 'another sentence,' *i.e.*, the sentence of probation he received for drug possession." ***Id.***

Likewise, in the instant case, the PCRA court concluded that the time period at issue was credited toward another sentence - Appellant's sentence of probation in CC199103256. However, without the record of that case before us, we cannot determine whether the PCRA court was correct in making this determination, or even confirm the exact dates on which Appellant was incarcerated and released in that case. Moreover, Appellant's probationary term in CC199103256 was four years; however, the time

period for which he seeks credit amounts to four years, three months, and twelve days. Consequently, even if four years of that term were properly credited toward his probationary sentence, the remaining time appears to be unaccounted for.

Clearly, Appellant's claim that he should receive credit for time served raises a question of material fact. Thus, an evidentiary hearing is warranted. ***See*** Pa.R.Crim.P. 907(1) (PCRA court may deny petition without a hearing where the court is satisfied that "there are no genuine issues concerning any material fact and the defendant is not entitled to post-conviction relief"). Accordingly, we vacate the PCRA court's order denying Appellant's petition and remand for the court to conduct a hearing to thoroughly examine this issue.

Order vacated. Case remanded for further proceedings. Jurisdiction relinquished.