NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CORNELL LEE POINTER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1154 WDA 2012

Appeal from the Judgment of Sentence Entered June 26, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0004299-2011

BEFORE: BENDER, P.J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY BENDER, P.J. **FILED DECEMBER 9, 2013**

Cornell Lee Pointer, Appellant, appeals from the judgment of sentence of life imprisonment, imposed after he was convicted by a jury of murder of the second degree, robbery, and criminal conspiracy. On appeal, Appellant challenges the sufficiency and weight of the evidence to support his convictions. Additionally, Appellant argues that the trial court improperly denied him an evidentiary hearing on his motion for a new trial based on after-discovered evidence. Upon careful consideration of the applicable case law, we are constrained to agree with Appellant that a hearing is warranted on his after-discovered evidence claim. Thus, we vacate Appellant's judgment of sentence and remand for further proceedings consistent with this memorandum.

The trial court provided the following factual history:

On February 16, 2011[,] Waishard White wanted to purchase 1-2 pounds of marijuana, and to accomplish that he contacted Elisha Jackson that afternoon to put him in contact with a possible local source/seller of marijuana. Jackson was a woman with whom White had been intimately involved with in the past, and who had also provided him with sources of marijuana prior to that day.

During the late morning and early afternoon, Jackson was with her then current boyfriend, [Appellant], and his close friend and associate, D'Andre Black, in the Everton area of the City of Pittsburgh. Everton was a small (two building) housing project that was relatively isolated and heavily wooded on all sides. During the early afternoon [Appellant] and Black drove her to a bus stop so that she could get a bus to downtown Pittsburgh. That afternoon while downtown, Jackson received White's call and she in turn contacted Black, who was still with Appellant, regarding White's desire to purchase marijuana. Jackson made Black aware of White's desire to buy 1-2 pounds of marijuana and asked Black if she could give White his phone number. Although Black did not have any marijuana to sell, he told Jackson that she could give White his number and he would handle it - that "they were going to get out on them[."]

White and a friend, Jemar Stenhouse, contacted Black, and following a series of phone conversations that late afternoon White and Stenhouse agreed to purchase two pounds of marijuana from Black in Everton for $2,500. Following the final conversation Black turned to [Appellant] and stated that, "I have a lick [robbery] set up for us[."] [Appellant] replied, "Let's do it[."]

Since neither [Appellant] or Black had any marijuana, they decided to purchase an ounce of marijuana and arrange it in a bag to make it appear to be the two pounds sought by White and Stenhouse. [Appellant] and Black believed that such a measure was necessary to lure White and Stenhouse out of their car when they arrived in Everton. They undertook this artifice in the apartment of Jocelyn Simmons, who was a mutual friend of both [Appellant] and Black. Part of their plan included [Appellant] arming himself with a firearm, and he left the apartment during this time and returned with an AK-47. Black's role was to get White and Stenhouse out of their car and close to the entrance of the building once they arrived in the Everton complex;

[Appellant] was then to come out of the building with the AK-47, order them to the ground and take their money.

White and Stenhouse arrived in Everton in Stenhouse's vehicle in the early evening and phoned Black, who came outside Simmons' residence and spotted the vehicle. Black waved to White and Stenhouse and in response they parked the vehicle, got out, and approached Black. Black recognized both Stenhouse and White as persons he knew from the Wilkinsburg area, a nearby community. Although he now had some reservations about the robbery, Black nonetheless led them toward the entrance to Simmons' building.

As the three men approached the front door of the building [Appellant] burst out of the building brandishing the AK-47 and ordered White and Stenhouse to the ground. White immediately turned and ran toward the parked vehicle but was pursued and shot one time by Appellant, causing him to fall to the ground. Stenhouse then fled in a different direction, only to be pursued and shot by Appellant. Stenhouse received a grazing wound to his left chest but managed to escape by diving over a hill and fleeing into the heavily wooded area behind the building. Stenhouse found his way to a nearby street where a woman on her porch allowed him to use her phone. Stenhouse contacted White's brother, Meijour, and told him that Waishard had been shot in Everton. Meijour, along with Waishard's father, drove to Stenhouse's location, picked him up and drove to the Everton complex. However, upon their arrival less than an hour after the shooting, neither Waishard nor the vehicle were there.

The vehicle was gone because Black drove the vehicle away immediately after the incident, leaving it in a shopping center in a neighboring community where it was recovered by Pittsburgh police several hours later. Pittsburgh police were contacted and began an investigation that included an unsuccessful search of the area for White. Two days later, February 18, 2011, two persons walking on a street below Everton observed what they believed to be a body in the woods. Police then discovered White's body near a path that led through the heavily wooded area behind Everton to the street below.

The autopsy indicated that White died of a single gunshot wound to the arm and trunk. The bullet transected many blood vessels including one major blood vessel, the subscapular artery, and caused contusions of upper and middle lobes of White's

> lung. The resultant internal bleeding caused cardiovascular collapse and a survivability period of only 10-15 minutes.

Trial Court Opinion (T.C.O.), 1/16/13, at 3-7 (citations to record omitted).

On November 18, 2011, the jury returned a verdict of guilty on the charges of second-degree murder, robbery, and criminal conspiracy. On February 16, 2012, the trial court sentenced Appellant to a period of life imprisonment with respect to the conviction of second-degree murder, and five to ten years' incarceration on each of the other two convictions, to be served consecutively. Shortly thereafter, Appellant filed a post-sentence motion. On April 2, 2012, he filed a supplemental post-sentence motion, which incorporated the earlier motion and sought, among other things, an evidentiary hearing based upon after-discovered evidence. On June 26, 2012, Appellant's post-sentence motion was denied by operation of law.

Appellant filed a timely appeal, and presents three issues for our review:

> I. Whether the evidence was insufficient to convict [Appellant] on Count 1—Second-Degree Murder, Count 3—Robbery, and Count 4—Criminal Conspiracy (Robbery) when the Commonwealth failed to prove, beyond a reasonable doubt, that [Appellant] was the shooter, or even a participant in the crimes?
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> II. Assuming, arguendo, that the evidence was sufficient to convict, whether the verdicts of guilty on Count 1—Second-Degree Murder, Count 3—Robbery, and Count 4—Criminal Conspiracy (Robbery) were nonetheless against the weight of the evidence?
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> III. Whether [the trial court] abused [its] discretion in failing to schedule an evidentiary hearing on [Appellant]'s post[-]sentencing claim of after-discovered evidence?

Appellant's Brief at 7.

Because Appellant's first issue concerns the sufficiency of the evidence, our standard of review is as follows:

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. ***Commonwealth v. Karkaria,*** 533 Pa. 412, 625 A.2d 1167 (1993)**.** Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. ***Commonwealth v. Santana,*** 460 Pa. 482, 333 A.2d 876 (1975). When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. ***Commonwealth v. Chambers,*** 528 Pa. 558, 599 A.2d 630 (1991).

Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000).

The offenses at issue are defined, in pertinent part, as follows. First:

> A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.

18 Pa.C.S. § 2502(b). Second, "A person is guilty of robbery if, in the course of committing a theft, he: . . . inflicts serious bodily injury upon another[.]" 18 Pa.C.S. § 3701(a)(1)(i). Finally:

> **(a) Definition of conspiracy.--** A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
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> > (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

> (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 Pa.C.S. § 903. "If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship." 18 Pa.C.S. § 903(c).

Appellant's first issue turns on his assertion that his accomplice, Mr. Black, was not a credible witness. Appellant emphasizes the fact that Mr. Black was the only witness able to identify him as the shooter and that no physical evidence corroborated that identification. Further, he argues that Mr. Black, as a co-conspirator, is a "corrupt source," requiring more scrutiny than most witnesses. In sum, he contends that Mr. Black's identification was so unreliable and/or contradictory that it was insufficient to sustain Appellant's convictions.

In general, challenges to a court's credibility determinations are aptly characterized as challenges to the weight of the evidence. Challenges of this kind, may, however, concern the sufficiency of the evidence. ***See***, ***e.g.***, ***Commonwealth v. Brown***, 52 A.3d 1139, 1164 (Pa. 2012). Here, Appellant unequivocally characterizes his argument as questioning the sufficiency of the evidence, analogous to the appellant's argument in ***Brown***.

In ***Brown***, our Supreme Court considered whether a conviction that is based solely upon recanted out-of-court statements violates the due process

guarantees of either the United States or Pennsylvania Constitutions. ***Brown***, 52 A.3d at 1142. Put another way, the Court was asked whether that particular type or class of evidence is so inherently unreliable as to be insufficient as a matter of law. The Court explained, "our Court has repeatedly refused to endorse the proposition that a particular type or class of evidence which is admitted at trial is, because of its intrinsic nature, insufficient as a matter of law to uphold a conviction—even if it is the only evidence adduced on the question of guilt." ***Id.*** at 1165. Ultimately, the Court held:

> [C]riminal convictions which rest only on prior inconsistent statements of witnesses who testify at trial do not constitute a deprivation of a defendant's right to due process of law, as long as the prior inconsistent statements, taken as a whole, establish every element of the offense charged beyond a reasonable doubt, and the finder-of-fact could reasonably have relied upon them in arriving at its decision.

Id. at 1171.

Here, Appellant makes a similar argument as that made by the appellant in ***Brown***. However, rather than focusing on recanted out-of-court statements, Appellant asserts that co-conspirator testimony is so unreliable that it is insufficient as a matter of law. He emphasizes:

> It is axiomatic that an alleged co-conspirator's testimony "comes from a corrupt source and is to be carefully scrutinized and accepted with caution...." ***Commonwealth v. Corley***, 816 A.2d 1109, 1114 (Pa. Super. 2003) (quoting ***Commonwealth v. Sisak***, 259 A.2d 428, 430 (Pa. 1969)). "[S]uch a witness, out of a reasonable expectation of leniency, has an interest in inculpating others." ***Commonwealth v. Thomas***, 387 A.2d 820, 822 (Pa. 1978) (citations omitted). This is especially true

> when the testimony of the alleged co-conspirator is uncorroborated. ***Commonwealth v. Banks***, 311 A.2d 576, 581 (Pa. 1973) (citations omitted). "The concern [i]s that a jury should not embrace testimony offered by an accomplice without a full understanding of the unreliability of the source of the evidence. It [i]s recognized a danger exists where there [i]s no other evidence to support the testimony of the accomplice." ***Id.***

Appellant's Brief at 27. Appellant concludes that Mr. Black's testimony is "so unreliable that it renders the verdict a product of surmise and conjecture." Appellant's Brief at 22 (quoting ***Brown***, 52 A.3d at 1156 n.18).

Just as our Supreme Court held in ***Brown***, with respect to recanted out-of-court statements, we cannot say that the testimony of a co-conspirator is *per se* insufficient, even where, as here, the conspirator's story apparently changed between the time of his arrest and his testimony at trial. Instead, we apply the well-settled standard of review for a sufficiency claim set forth in ***Widmer***, *supra*. After applying that standard, we conclude that the evidence adduced at trial was sufficient to support the convictions at issue. The jury heard testimony from Mr. Black that described, in detail, facts sufficient to establish the elements of second-degree murder, robbery, and criminal conspiracy. Accordingly, there is no merit in Appellant's first issue.

In Appellant's second issue he seeks review of the weight of the evidence, raising the same assertions as in his first issue regarding the reliability of co-conspirator testimony. Our standard of review is as follows:

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court

> cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Champney, 832 A.2d 403, 408 (Pa. 2003) (citations omitted).

Appellant argues that the Commonwealth's identification evidence, *i.e.*, Mr. Black's testimony, was "so vague, tenuous, and inconsistent that the verdicts of guilty were shocking to the judicial conscience." Appellant's Brief at 32. Specifically, Appellant emphasizes that "[Mr.] Black was admittedly a dishonest person, and his testimony was entirely suspect, self-serving, and unbelievable." ***Id.*** at 33 (citing N.T., 11/17/11, at 55-62).

Our review of the record demonstrates that the trial court did not err in concluding that the jury's verdict was in line with the evidence presented at trial. Although Appellant disagrees with Mr. Black's testimony, the testimony was evidence that the jury was entitled to rely upon. Thus, our review confirms that the trial court did not abuse its discretion in determining that the jury's verdict was not "so contrary to the evidence to shock one's sense of justice." ***Champney***, 832 A.2d at 408. Accordingly, Appellant's second issue is without merit.

In Appellant's third issue, he argues that the trial court abused its discretion in failing to schedule an evidentiary hearing on his post-sentence

claim of after-discovered evidence. Appellant, in his Supplemental Post-Sentence Motion, requested an evidentiary hearing to determine the validity of new information, consisting of a letter from Appellant's co-conspirator, Mr. Black, to Appellant's counsel. The letter included a recantation of the testimony that Mr. Black gave at Appellant's trial. The trial court did not hold a hearing on Appellant's motion, instead allowing it to be denied by operation of law. Appellant asserts that this was error.

Recently, this Court restated the standard to be applied to a motion for new trial based upon after-discovered evidence:

> To obtain relief based on after-discovered evidence, appellant must demonstrate 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.
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> ***Commonwealth v. Pagan,*** 597 Pa. 69, 950 A.2d 270, 292 (2008). The determination whether an appellant is entitled to a new trial must be made by the trial court at an evidentiary hearing. At the evidentiary hearing, the appellant must show by a preponderance of the evidence that each of these factors has been met in order for a new trial to be warranted. ***Commonwealth v. Padillas,*** 997 A.2d 356, 363 (Pa. Super. 2010).

Commonwealth v. Castro, 55 A.3d 1242, 1246 (Pa. Super. 2012) (*en banc*), *appeal granted*, 65 A.3d 291 (Pa. 2013).[1] This four-part test for

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[1] Our Supreme Court granted appeal in ***Castro*** on the following issue: "Is it possible to meet the test for after-discovered evidence where the defendant

after-discovered evidence, adopted by Pennsylvania courts, is commonly referred to as the ***Berry*** test. ***See generally*** Tim A. Thomas, *Recantation of Testimony of Witness as Grounds for New Trial—Federal Criminal Cases*, 94 A.L.R. Fed. 60 (1989); ***Berry v. State***, 10 Ga. 511, 512-13 (1851).

With respect to the question of whether to grant a new trial based upon a witness's recantation of testimony, our law exhibits particular reluctance:

> Recantation testimony is extremely unreliable. When the recantation involves an admission of perjury, it is the least reliable form of proof. The trial court has the responsibility of judging the credibility of the recantation. Unless the trial court is satisfied that the recantation is true, it should deny a new trial. An appellate court may not disturb the trial court's determination absent a clear abuse of discretion.

Commonwealth v. Henry, 706 A.2d 313, 321 (Pa. 1997) (citations omitted); ***see also Commonwealth v. Coleman***, 264 A.2d 649, 651 (Pa. 1970) (delineating Pennsylvania's use of four-factor ***Berry*** test for after-discovered evidence in the case of a recantation of testimony).

In the instant case, the trial court did not apply the four-factor ***Berry*** test. Instead, the court simply reasoned that its denial of Appellant's motion was appropriate given the inherent unreliability of recantation testimony, and no evidentiary hearing was required on these facts. T.C.O. at 18

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proffers no evidence, but instead relies on a newspaper article?" ***Castro***, 65 A.3d at 291.

(quoting ***Commonwealth v. Gaddy***, 424 A.2d 1268, 1270 (Pa. 1981) ("[R]ecanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true.")).

Appellant argues, however, that the trial court prematurely decided his motion for a new trial, because it failed to first hold an evidentiary hearing. Appellant, relying upon his reading of our language in ***Castro***, argues that the trial court *must*, on every motion for a new trial based on after-discovered evidence, hold an evidentiary hearing before it may deny a new trial. As laid out above, ***Castro*** states, "The determination whether an appellant is entitled to a new trial must be made by the trial court at an evidentiary hearing." ***Castro***, 55 A.3d at 1246.

Admittedly, ***Castro***'s language is susceptible to Appellant's interpretation. Nevertheless, we disagree that ***Castro*** holds that every claim of after-discovered evidence mandates an evidentiary hearing. The question before this Court in ***Castro*** was whether the content of a newspaper article, if proven, could support a grant of a new trial. ***Castro***, 55 A.3d at 1245-46. After providing the above-quoted recitation of law, this Court narrowed the issue further, investigating "whether a news article *may provide* the basis for an evidentiary hearing on newly-discovered evidence." ***Castro***, 55 A.3d at 1246 (emphasis added). Thus, this Court did not consider whether an appellant's motion, alone, mandated a hearing, but

rather, whether an evidentiary hearing is required where certain facts, if true, could provide the basis for a trial court's grant of a new trial.

Moreover, our review of the relevant rules of criminal procedure and case law demonstrates that the right to a hearing on a post-sentence motion is not absolute. Contrary to Appellant's reading of ***Castro***, upon the filing of a motion for a new trial based upon after-discovered evidence, the trial court must use its discretion to determine whether the allegations require briefing, memoranda of law, argument, or a hearing. ***See*** Pa.R.Crim.P. 720(B)(2). In determining the appropriateness of an evidentiary hearing, our courts should look to whether the movant alleges facts that, if true, would warrant a new trial under the ***Berry*** test for after-discovered evidence. ***See Castro*** 55 A.3d at 1245-46.

On the facts here, we conclude that the recantation of Mr. Black's testimony presents such an allegation. While the trial court did not conduct the requisite assessment, our application of the four-factor ***Berry*** test reveals sufficient allegations to warrant an evidentiary hearing. First, the fact that Mr. Black gave a detailed account of the offense at issue on three occasions, twice under oath and once in a recorded statement, makes it unlikely that Appellant could have discovered, with the exercise of due diligence, that Mr. Black would ultimately recant his testimony. Second, Mr. Black's recantation is not merely cumulative or corroborative. Third, given that Mr. Black was the sole identifying witness, his recantation would not be used merely for impeachment purposes, but also might serve an exonerative

purpose. ***See***, ***e.g.***, ***Commonwealth v. McCracken***, 659 A.2d 541, 545 (Pa. 1995) (determining that the four-part ***Berry*** test was met by recantation of testimony of pivotal witness); ***Commonwealth v. Perrin***, 59 A.3d 663, 667-68 (Pa. Super. 2013) (Wecht, J., concurring). Finally, given the importance of Mr. Black's testimony to the identification of Appellant, if a new trial were granted, the repudiation of that testimony might well result in a different verdict.

We stress that we do not pass upon the question of whether a new trial is in fact warranted on the basis of Mr. Black's recantation. We merely conclude, as a preliminary matter, that Appellant's allegations, if true, could support a consequent grant of a new trial. Accordingly, we are compelled to remand for the trial court to conduct an evidentiary hearing to assess the veracity and credibility of Appellant's after-discovered evidence, and determine if a new trial is necessary.[2]

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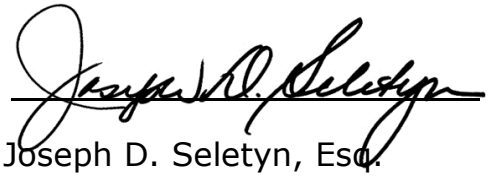
[2] As a supplementary matter, while Appellant does not argue that the trial court imposed an illegal sentence, we observe that it did. ***See Commonwealth v. Jacobs***, 900 A.2d 368, 374 (Pa. Super. 2006) (*en banc*) ("An illegal sentence can never be waived and may be reviewed *sua sponte* by this Court."). "[F]or double jeopardy purposes, the underlying felony in a felony-murder prosecution is the 'same offense' as the murder; therefore, sentences for both the murder and the underlying felony are prohibited." ***Commonwealth v. Adams***, 39 A.3d 310, 325 (Pa. Super. 2012), *appeal granted on other issues*, 48 A.3d 1230 (Pa. 2012) (citation omitted). Here, the court imposed a separate sentence for the crime of robbery, which merged with the crime of second-degree murder for sentencing purposes. However, because we are vacating Appellant's judgment of sentence, we need only draw the trial court's attention to this matter for any future sentencing that may occur in this case.

Judgment of sentence vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/9/2013