

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

DEVON O. SHEALEY

Appellant

No. 127 WDA 2013

Appeal from the PCRA Order January 9, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0015377-2008

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and WECHT, J.

MEMORANDUM BY OTT, J.:

FILED DECEMBER 20, 2013

Devon O. Shealey appeals from the order entered January 9, 2013, in the Allegheny County Court of Common Pleas denying him relief on his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq.* Shealey seeks relief from the judgment of sentence of an aggregate 30 to 60 years' imprisonment imposed on January 12, 2010, following his jury conviction of four counts of robbery,¹ two counts of conspiracy, one count of witness intimidation, and related offenses. On appeal, Shealey argues the PCRA court erred in failing to correct three sentencing errors and in failing to grant him a new trial based upon

¹ 18 Pa.C.S. §§ 3701(a)(1)(i), 903(a)(1), and 4952, respectively.

previously unavailable exculpatory evidence. For the reasons that follow, we affirm in part, reverse in part, and remand this case for re-sentencing.

The facts underlying Shealey's conviction were summarized by the trial court in its opinion filed in response to Shealey's direct appeal:

The cases involved four robberies at gunpoint, which occurred in the Strip District area of the City of Pittsburgh in the late evening hours on May 26, 2008. At trial the Commonwealth presented evidence through all four victims, various police and investigative witnesses. On the night in question Officer Kelly Joyce, of the Pittsburgh Police Department, while on patrol observed a black SUV Ford Explorer going at a high rate of speed down an alleyway with a blue vehicle chasing it. The driver of the blue vehicle (later identified as Marcus Neal) shouted to Officer Joyce that he had just been robbed. Officer Joyce attempted to make a traffic stop, when the SUV took off at a very high rate of speed and in the pursuit struck 11 parked vehicles, eventually causing the [SUV] to stop. At that time the occupants of the vehicle fled. The collisions caused the oil pan from the vehicle to explode inward covering much of the interior with black motor oil. Officer Joyce observed the passenger exit the vehicle, and initially was chasing him on foot while she had put out a description for the other officers who were responding. Three additional victims had come to the scene stating that they had been robbed at gunpoint by two individuals who both had weapons and were traveling in a dark SUV. All of the victims were robbed at gunpoint of money, jewelry, and cell phones. Various items which had been taken from the victims were identified at the scene of the crashed vehicle. The co-defendant, passenger [Germaine Edge], was apprehended and identified that evening by each of the four robbery victims, as being the passenger of the vehicle who had robbed them. [When he was apprehended, Edge was covered in motor oil.] [Shealey], driver of the vehicle, was identified a day or so later by each of the four victims through photo arrays which were introduced at trial. Additional evidence linking the defendant to the robberies was the license plate on the vehicle, which through previous tow slips of the police department came up with the defendant's name as the plate was registered to his girlfriend's mother.

With regard to the attempted witness intimidation charges, the Commonwealth introduced various audio tapes from the Allegheny County Jail for the jury's consideration of these charges. A captain of the Allegheny County Jail, as well as a homicide detective for the Pittsburgh police department, identified Devon Shealey as the person on the tapes.

Trial Court Opinion, 6/15/2010, at 2-3.

Shealey was originally charged with robbery (four counts), criminal conspiracy, persons not to possess firearms (two counts), firearms not to be carried without a license (two counts), reckless driving, fleeing and eluding a police officer, and accidents involving damage to unattended vehicles (11 counts).² Prior to trial, the Commonwealth was granted leave to amend the criminal information to add the charges of intimidation of a witness and criminal conspiracy.³ In addition, the charges of persons not to possess firearms were withdrawn.

The case proceeded to a jury trial, and, on September 18, 2009, the jury returned a verdict of guilty on all 10 charges. Thereafter, the trial court found Shealey guilty of all 12 summary motor vehicle offenses. On October 27, 2009, the Commonwealth notified Shealey of its intention to seek a five year mandatory minimum sentence under 42 Pa.C.S. § 9712 for each of the four robbery convictions, as well as the conviction of conspiracy to commit

² 18 Pa.C.S. §§ 3701(a)(1), 903(a)(1), 6105(a)(1), and 6106(a)(1), and 75 Pa.C.S. §§ 3736(a), 3733(a), and 3745, respectively.

³ 18 Pa.C.S. §§ 4952 and 903(a)(1).

robbery.⁴ On January 12, 2010, the trial court imposed an aggregate sentence of 30 to 60 years' imprisonment.⁵ Specifically, Shealey was sentenced to four consecutive terms of six and one-half to 13 years for each robbery charge, and two terms of four to eight years for the charges of firearms not to be carried without a license. The four to eight year terms were imposed to run concurrent to each other, but consecutive to the robbery sentences. No further punishment was imposed on the remaining counts.

Shealey filed a timely direct appeal challenging, *inter alia*, the constitutionality of his unjudged and unrecorded jury selection hearing. This Court affirmed the judgment of sentence in an unpublished memorandum decision filed on June 3, 2011. ***Commonwealth v. Shealey***, 31 A.3d 734 (Pa. Super. 2011) (unpublished memorandum). Thereafter, on April 26, 2012, Shealey filed a timely, *pro se* PCRA petition. Counsel was appointed, and, on May 21, 2012, filed an amended petition alleging three sentencing errors and one claim of ineffective assistance of counsel.

Subsequently, in June of 2012, a person named Tyrone Thomas sent a letter to the PCRA court claiming that he and another man had committed

⁴ Section 9712 provides for a five year mandatory minimum sentence for any crime committed during which the defendant visibly possesses a firearm. 42 Pa.C.S. § 9712(a).

⁵ As we will discuss *supra*, the sentencing order contains a patent error, and reflects an aggregate sentence of 34 to 68 years' imprisonment.

the robberies in question, and that Shealey was not involved and was wrongly convicted. On August 6, 2012, Shealey filed a supplemental amended petition, raising a claim of after-discovered evidence based on Thomas's confession. The PCRA court conducted an evidentiary hearing on August 30, 2012, during which Thomas testified that he and Darnell Dixon committed the crimes in question, and reiterated that Shealey was not involved. Although Dixon appeared for the hearing, he invoked his Fifth Amendment right against self-incrimination and refused to testify. Also during the hearing, the PCRA court indicated that Shealey was entitled to relief on his sentencing claims. However, on January 9, 2013, the PCRA court entered an order denying Shealey's PCRA petition. This timely appeal followed.⁶

Shealey's first three issues involve sentencing errors that implicate the legality of his sentence.⁷ First, Shealey contends he never received credit for the time he served in prison from November 7, 2008, until his sentencing hearing on January 12, 2012. Moreover, he argues that his written sentencing order contains two patent errors: (1) it includes a sentence of

⁶ On January 16, 2013, the PCRA court directed Shealey to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Shealey complied with the court's directive, and filed a concise statement on January 23, 2013.

⁷ "Issues concerning the legality of sentence are cognizable under the PCRA." ***Commonwealth v. Beck***, 848 A.2d 987, 989 (Pa. Super. 2004)

four to eight years' imprisonment for the charge of persons not to possess firearms, a charge that was withdrawn prior to trial, and (2) it indicates that all the sentences were imposed to run consecutively, when the trial court clearly indicated at sentencing that the two sentences imposed for the firearms convictions were to run concurrently with each other, but consecutively to the robbery convictions.

When reviewing an order dismissing a PCRA petition, we must determine whether the ruling of the PCRA court is supported by record evidence and is free of legal error. ***Commonwealth v. Burkett***, 5 A.3d 1260, 1267 (Pa. Super. 2010). "Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record." ***Commonwealth v. Carter***, 21 A.3d 680, 682 (Pa. Super. 2011) (citation omitted).

Here, the PCRA court, the Commonwealth, and Shealey all agree that Shealey is entitled to relief on these sentencing errors. First, both the PCRA court and the Commonwealth agree that Shealey was entitled to credit for his pretrial incarceration from November 7, 2008, until January 12, 2010, "because this period of incarceration was not applied to any other sentence of incarceration imposed on [Shealey]." PCRA Court Opinion, 7/2/2013, at 4. ***See also*** Commonwealth's Brief at 27. "[A] challenge to the trial court's failure to award credit for time spent in custody prior to sentencing involves the legality of sentence and is cognizable under the PCRA." ***Commonwealth v. Fowler***, 930 A.2d 586, 595 (Pa. Super. 2007)

(quotation omitted), *appeal denied*, 944 A.2d 756 (Pa. 2008). The PCRA court specifically stated in its opinion that it had intended to grant relief on this claim in its final order, but neglected to do so.

With regard to Shealey's contention that the written sentencing order contains two patent errors, we note that recently, in ***Commonwealth v. Borrin***, 60 MAP 2011, 2013 WL 5927624 (Pa. Oct. 30, 2013), our Supreme Court reiterated that trial courts have limited powers to correct "clerical errors" in their sentencing orders. The Court explained:

We have set a high bar for differentiating between errors that may be corrected under the inherent powers of trial courts, and those that may not, describing correctible errors as those determined to be "patent and obvious mistakes." ***Commonwealth v. Klein***, 566 Pa. 396, 400, 781 A.2d 1133, 1135 (2001). **The term "clerical error" has been long used by our courts to describe an omission or a statement in the record or an order shown to be inconsistent with what in fact occurred in a case, and, thus, subject to repair. See, e.g., *Commonwealth v. Silcox***, 161 Pa. 484, 496-97, 29 A. 105, 106 (1894) (upholding the trial court's direction to correct a "clerical" omission and amend the record to state that the defendant was present at every stage of the proceedings); ***Commonwealth v. Liscinsky***, 195 Pa.Super. 183, 171 A.2d 560, 561 (Pa.Super.1961) (explaining that the sentencing order contained a "clerical" error subject to correction, as it did not reflect that the trial court specifically stated at sentencing that the sentence it imposed was effective on expiration of defendant's federal sentence); ***Commonwealth v. Mount***, 172 Pa.Super. 258, 93 A.2d 887, 888 (Pa.Super.1953) ("Clerical errors or inaccuracies in docket entries [or orders] may be corrected by the trial court so that they conform to the facts.").

Most recently, in ***Commonwealth v. Holmes*** and its companion case, ***Commonwealth v. Whitfield***, [933 A.2d 57 (Pa. 2007),] we emphasized that a trial court's inherent power of correction encompasses not only those patent and obvious errors that appear on the face of an order, **but extends to such**

errors that emerge upon consideration of information in the contemporaneous record. *Holmes*, 593 Pa. at 618, 933 A.2d at 67.

Id. at *7 (emphasis supplied).

Here, both the PCRA court and the Commonwealth agree that Shealey's written sentencing order contains two patent mistakes. First, the order indicates that Shealey received sentences of four to eight years imprisonment on one count of persons not to possess firearms, a charge that was dismissed, and one count of criminal conspiracy. Second, the written order indicates that all the sentences are to run consecutively. **See** Order of Sentence, 1/12/2010. However, a review of the sentencing transcript reveals the trial court's clear and obvious intention to impose four consecutive six and one-half to 13 year sentences on the robbery charges, and two four to eight year sentences on the charges of firearms not to be carried without a license, that were to run concurrent to one another but consecutive to the robbery charges. **See** N.T., 1/12/2010, at 15-16. Accordingly, we agree that the written order contains a patent, correctible error.

Therefore, because we agree (1) Shealey was entitled to receive credit for time served, and (2) the written sentencing order was inconsistent with the unambiguous sentence imposed by the trial court at the sentencing hearing, we reverse the PCRA order in part, and remand for re-sentencing

consistent with this memorandum.⁸ **See *Commonwealth v. Holmes***, 933 A.2d 57, 67 (Pa. 2007) (acknowledging trial court has limited judicial power to correct “clear errors in the imposition of sentences that were incompatible with the record.”).

In his final claim, Shealey contends the PCRA court erred in failing to grant him a new trial on the basis of after-discovered evidence, specifically, the testimony of Tyrone Thomas that he and another man, Darnell Dixon, committed the robberies in question, and that Shealey was not involved.

The facts underlying this claim are as follows. As noted above, on June 7, 2012, Thomas sent a letter to the PCRA court in which he confessed to the crime and stated that Shealey was wrongfully convicted. Shortly thereafter, Thomas sent a letter to Shealey’s attorney informing him that he, Thomas, had information about Shealey’s innocence. On August 6, 2012, Shealey filed a supplement to his amended PCRA petition, asserting a claim of after-discovered evidence.⁹ On August 30, 2012, the PCRA court

⁸ We note that the PCRA court also concluded that the sentences of four to eight years’ imprisonment on the charges of firearms not to be carried without a license were illegal. A violation of 18 Pa.C.S. § 6106(a) is a third degree felony. The statutory maximum sentence for a third degree felony is seven years’ imprisonment. 18 Pa.C.S. § 1103(3). Therefore, the PCRA court also indicated its intention to correct the sentence imposed on the firearms charges to two terms of three and one-half to seven years’ imprisonment. PCRA Court Opinion, 7/2/2013, at 7.

⁹ Also attached to the supplement was a purported statement by Darnell Dixon in which he, too, confessed to his involvement in the crimes and claimed that Shealey was innocent. **See** Supplement to Amended PCRA (*Footnote Continued Next Page*)

conducted an evidentiary hearing, during which Shealey presented both Thomas and Dixon as witnesses. Dixon invoked his Fifth Amendment privilege against self-incrimination and refused to testify. N.T., 8/30/2012, at 27. Thomas, however, testified that he and Dixon committed the robberies, and provided some details regarding the events in question. ***Id.*** at 35-38. He did not remember anything specific about the damage to the vehicle. ***Id.*** at 46. Thomas testified that he had met Shealey through a mutual friend in county jail in December of 2010, and told Shealey that he had committed the crime. ***Id.*** at 48-51. However, he did not come forward until after he was sentenced to a term of imprisonment of 40 to 80 years for an unrelated homicide. ***Id.*** at 43.

Preliminarily, we note that the Commonwealth contends Shealey has waived this claim for PCRA review because it could have been raised during the pendency of his direct appeal. ***See*** 42 Pa.C.S. § 9543(a)(3) (to obtain relief under the PCRA, the petitioner must plead and prove, inter alia, “[t]hat the allegation of error has not been previously litigated or waived.”). The Commonwealth asserts that Shealey knew in December of 2010 that Thomas had allegedly committed the crimes, and that he was required, pursuant to Pa.R.Crim.P. 720(C), to raise the claim “promptly after such discovery.” ***Id.***

(Footnote Continued) _____

Peititon, 8/6/2012, attachment. However, the statement is not dated, and Dixon did not verify its authenticity.

Pennsylvania Rule of Criminal Procedure 720 states that “[a] post-sentence motion for a new trial on the ground of after-discovered evidence must be filed in writing promptly after such discovery.” Pa.R.Crim.P. 720(C). The comment to the Rule expounds that claims of after-discovered evidence need not wait until collateral review, but rather, “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[.]” Comment, Pa.R.Crim.P. 720. Therefore, the Commonwealth contends that because Shealey knew of Thomas’s “confession” in December of 2010 while his direct appeal was still pending,¹⁰ he had “a duty under Rule 720 to alert this Court and request a remand of his case[.]” Commonwealth’s Brief at 38. Since he did not do so, the Commonwealth argues his claim is now waived.

Shealey contends, however, that Thomas was not willing to testify regarding his role in the robberies until the summer of 2012, and would have asserted his Fifth Amendment privilege against self-incrimination had he been called to testify earlier. Therefore, Shealey argues Thomas was unavailable in December of 2010, and he promptly amended his PCRA

¹⁰ Shealey filed a notice of appeal on February 11, 2010. This Court affirmed his judgment of sentence in an unpublished memorandum decision filed on June 3, 2011. Therefore, in December of 2010, Shealey’s case was pending on direct appeal.

petition after he learned of Thomas's willingness to come forward in the summer of 2012.

While the Comment to Rule 720 appears to support the Commonwealth's waiver argument, our research has uncovered no appellate decisions discussing the effect of a defendant's failure to raise an after-discovered evidence claim during a pending direct appeal on a subsequent timely filed PCRA petition. In both of the cases cited by the Commonwealth, ***Commonwealth v. Rivera***, 939 A.2d 355 (Pa. Super. 2007), *appeal denied*, 958 A.2d 1047 (Pa. 2008), and ***Commonwealth v. Perrin***, 59 A.3d 663 (Pa. Super. 2013), this Court concluded that the direct appeal defendant had properly raised an after-discovered evidence claim in a petition for remand filed before the direct appeal court. Indeed, in both cases, we remanded for an evidentiary hearing on the issue. However, in neither of those decisions did we hold that the failure to "promptly" raise an after-discovered evidence claim during a pending direct appeal would result in waiver of that issue in a future PCRA proceeding. Further, because it is unclear whether Thomas was "available" to testify in December of 2010, we decline to find Shealey's claim waived here. Accordingly, we must determine whether the PCRA court erred in concluding that Shealey had failed to demonstrate that he was entitled to a new trial based upon Thomas's belated "confession" to the crime.

A claim of after-discovered evidence is cognizable under the PCRA. **See** 42 Pa.C.S. § 9543(a)(2)(vi).

To obtain relief based upon newly-discovered evidence under the PCRA, [the petitioner] must establish that: (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict.

Commonwealth v. Washington, 927 A.2d 586, 595-596 (Pa. 2007). The standard on PCRA review is whether “the new evidence ‘would have changed the outcome of the trial if it had been introduced.’” **Commonwealth v. Soto**, 983 A.2d 212, 216 (Pa. Super. 2009), *quoting* 42 Pa.C.S. § 9543(a)(2)(vi), *appeal denied*, 17 A.3d 1253 (Pa. 2011). **See Id.** (noting PCRA standard is “different, and higher” than direct appeal standard where defendant “only need[s] to prove that the evidence was ‘of such a nature and character that a different result [was] likely.’”) (citation omitted).

Shealey argues that Thomas’s testimony qualifies as after-discovered evidence and compels a new trial. The “confession” was discovered after trial, and could not have been discovered before that time because Thomas was unwilling to admit to his participation until the summer of 2012. He also contends that Thomas’s “confession” is not cumulative of any of the testimony that was offered at trial, nor is it being used solely for impeachment purposes. Indeed, Shealey asserts that “the primary thrust of this after-discovered evidence is to show [Shealey] wasn’t an actor and Mr. Thomas and a person other than [Shealey] were the two actors.” Shealey’s Brief at 36. Finally, he states Thomas’s consistent account of the crime completely exculpates him, and, if it is believed by a jury, it “is likely to compel a different result at a new trial in this matter.” **Id.** at 37.

The PCRA court, however, concluded Thomas's testimony did not compel a new trial. The court explained the rationale for its ruling as follows:

This Court did not find Thomas to be a credible witness and denied relief. There was overwhelming evidence that identified [Shealey] as the perpetrator of the crimes of conviction. The robberies were face to face encounters and [Shealey] was not wearing a mask. As [Shealey] and his co-defendant attempted to flee, the vehicle [Shealey] was driving crashed. The oil pan of the vehicle exploded into the interior of the vehicle. [Shealey's] co-defendant, Germaine Edge, was covered with oil when he was arrested moments after the incident. After Edge's arrest, he was positively identified by the victims of the robbery. After [Shealey's] arrest, the victims identified him as one of the perpetrators.

Thomas' testimony was inconsistent with the evidence obtained during the investigation. Most importantly, Thomas testified that he didn't know Edge and had never met him. The evidence was clear that Edge was a participant in the crime. Thomas also claimed that he was the passenger in the vehicle used to flee the robbery scene but he was not aware that the oil pan exploded after the accident. Thomas' testimony was also inconsistent with the testimony of the victims as to how the robbery occurred. This Court also believed that since Thomas was already serving a 40 to 80 year sentence of imprisonment, he could easily and falsely admit to [Shealey's] crimes with little or no risk of additional loss of liberty. This Court did not find Thomas to be credible and this "newly discovered evidence" was simply not reliable.

PCRA Court Opinion, 7/2/2013, at 10-11.

Bearing in mind our standard of review, we conclude that the findings of the PCRA court are supported by the record. **Carter**, 21 A.3d at 682. Thomas has failed to demonstrate that his testimony, albeit compelling at face value, would have changed the outcome of the trial. Although Thomas

was able to provide some details regarding the crimes, he was completely unaware of the oil pan explosion in the vehicle after it crashed. More importantly, he testified that he did not know Germaine Edge, Shealey's co-defendant, who was apprehended shortly after the crime covered in motor oil, and who was **convicted** for his role as the passenger in the SUV. Further, despite his desire to clear Shealey's name, we note Thomas did not come forward to confess his role until after he had been sentenced to a term of 40 to 80 years imprisonment for an unrelated homicide. **See Commonwealth v. Padillas**, 997 A.2d 356, 365-366 (Pa. Super. 2010) ("Before crediting as reliable a statement against penal interest, the court must consider the declarant's motive for making the statement and whether the surrounding circumstances indicate the statement is trustworthy.") Lastly, all four robbery victims identified Edge at the scene, and, separately, they identified Shealey in a photo array they were shown the next day.¹¹ **See** N.T., 9/16-18/2009, at 46-47, 70-71, 95-97, 132-135. Therefore, we

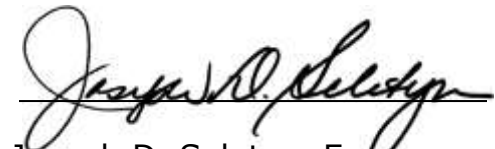
¹¹ Shealey attempts to minimize the significance of the identification testimony by stating that "[t]he identification of Germaine Edge was quite suggestive," and that one victim failed to identify Shealey at trial. **See** Shealey's brief at 35. However, he does not elaborate on these arguments, and did not include a challenge to the identifications on direct appeal. Moreover, he cannot escape the fact that all four victims identified him in a photo array. Although their trial testimony may have been less certain, it is important to remember that Shealey was also convicted of charges of witness intimidation, and the police officer who showed the victims the photo array testified that each one positively identified Shealey as the second person who had robbed them. **See** N.T., 9/16-18/2009, at 160-162.

affirm that part of the PCRA order denying Shealey relief on his after-discovered evidence claim.

Because we conclude that Shealey is entitled to relief on his allegations of sentencing errors, we reverse, in part, the order of the PCRA court denying him relief, and remand this case for re-sentencing in accordance with this Memorandum. In all other respects, we affirm the order denying PCRA relief.

Order reversed in part and affirmed in part. Case remanded for re-sentencing consistent with this Memorandum. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/20/2013