

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

DANIEL ROSADO

Appellant

No. 1460 EDA 2012

Appeal from the PCRA Order May 1, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1217452-1984

BEFORE: LAZARUS, J., OLSON, J., and FITZGERALD, J.*

MEMORANDUM BY LAZARUS, J.

FILED MAY 07, 2013

Daniel Rosado appeals from the order of the Court of Common Pleas of Philadelphia County dismissing his petition filed under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, *et seq.* After careful review, we affirm.

Rosado was tried before a jury, the Honorable Juanita Kidd Stout presiding, and convicted of second-degree murder, robbery, criminal conspiracy, possession of an instrument of crime, and related offenses. The court sentenced Rosado to life imprisonment. On direct appeal, this Court affirmed Rosado's judgment of sentenced, ***Commonwealth v. Rosado***, 528 A.2d 259 (Pa. Super. 1987); Rosado did not seek review in the Pennsylvania

* Former Justice specially assigned to the Superior Court.

Supreme Court. Rosado filed a petition under the Post Conviction Hearing Act, (now the PCRA), which was denied. On appeal, this Court affirmed. ***Commonwealth v. Rosado***, 665 A.2d 1302 (Pa. Super. 1994). Rosado then filed a petition for allocatur in the Supreme Court of Pennsylvania, which was denied. ***Commonwealth v. Rosado***, 668 A.2d 1129 (Pa. 1995).

In 1996, Rosado filed a second petition for collateral relief, this time under the PCRA, which was dismissed. This Court, on appeal, affirmed the PCRA court's order. ***Commonwealth v. Rosado***, 742 A.2d 1151 (Pa. Super. 1999). Rosado's petition for allowance of appeal in the Supreme Court of Pennsylvania was denied. ***Commonwealth v. Rosado***, 747 A.2d 900 (Pa. 1999).

Thereafter, in November 2000, Rosado filed a petition for *habeas corpus* in the United States District Court for the Eastern District of Pennsylvania, which was dismissed. The United States Court of Appeals for the Third Circuit denied Rosado's request for a certificate of appealability, and the United States Supreme Court denied his Petition for Writ of Certiorari.

On April 18, 2007, Rosado filed the instant PCRA petition, which the PCRA court dismissed, without a hearing, following notice pursuant to Pa.R.Crim.P. 907. On appeal before us, Rosado raises the following claims:

1. Whether appellant exercised due diligence when presenting the newly discovered evidence constituting an affidavit of an eyewitness who has never been interviewed consistent with 42 Pa.C.S.A. § 9545(b)(1)(ii)?

2. Was there a miscarriage of justice when Israel June Martinez's testimony was excluded from appellant's trial in violation of the Sixth and Fourteenth Amendments to the Constitution?
3. Whether appellant received ineffective assistance of counsel during the collateral proceedings, thereby a true violation of the United States Supreme Court decision in *Missouri v. Frye*, 132 S.Ct. 1399 (2012)?

On appeal, Rosado acknowledges that his petition was filed well beyond the one-year time requirement under 42 Pa.C.S. § 9545(b)(1), but asserts that he meets the timeliness exception under section 945(b)(1)(ii): "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence." 42 Pa.C.S. § 9545(b)(1)(ii). We disagree.

The proposed testimony, that Rosado was across the street when co-defendant robbed and shot the victim, is cumulative of the testimony presented at trial by witness Jose Aponte. Therefore, the testimony would not have altered the verdict at trial. ***See Commonwealth v. Johnston***, 42 A.3d 1120 (Pa. Super. 2012) (cumulative impeachment evidence did not meet requirements for time-bar exception under 42 Pa.C.S.A. § 9545(b)(1)(ii); ***see also Commonwealth v. Fisher***, 870 A.2d 864 (Pa. 2005) (defendant's after-discovered evidence claim failed where he was unable to establish that such evidence would likely compel different verdict).

Because Rosado's petition was untimely, and he has failed to plead any facts to invoke an exception that would excuse the untimeliness, the PCRA court had no jurisdiction to consider the merits of the petition. The

PCRA court, therefore, properly dismissed Rosado's petition without a hearing. **See Commonwealth v. Perrin**, 947 A.2d 1284, 1285 (Pa. Super. 2008) ("If the petition is determined to be untimely, and no exception has been pled and proven, the petition must be dismissed without a hearing because Pennsylvania courts are without jurisdiction to consider the merits of the petition.").

Order affirmed.

Judgment Entered.

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

Prothonotary

Date: 5/7/2013