NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOSEPH HOLMES, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2082 EDA 2013

Appeal from the Judgment of Sentence entered July 19, 2013,
in the Court of Common Pleas of Philadelphia County,
Criminal Division, at No(s): CP-51-CR-0003019-2010

BEFORE: ALLEN, MUNDY, and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.: **FILED JUNE 16, 2014**

Joseph Holmes ("Appellant") appeals from the judgment of sentence imposed after remand from this Court. The trial court explained the posture of this case as follows:

> On June 13, 2011, a jury convicted [Appellant] of first-degree murder and possession of an instrument of crime. Thereafter, on August 26, 2011, the Honorable Carolyn Engel Temin (retired) sentenced [Appellant] to a term of life imprisonment without the possibility of parole. Following the denial of his post-sentence motion on September 12, 2011, [Appellant] filed a notice of appeal on September 22, 2011. While his appeal was pending, [Appellant] filed a petition for remand wherein he claimed entitlement to a new trial based on after-discovered evidence. On June 5, 2012, the Superior Court denied the petition without prejudice to [Appellant's] right to raise his after-discovered evidence claim in his appellate brief. In his appellate brief, [Appellant] alleged the discovery of three witnesses who identified someone else as the murderer. On February 6, 2013, the Superior Court vacated the judgment of sentence and remanded for an evidentiary hearing to entertain [Appellant's] motion for a new trial based on after-discovered

*Former Justice specially assigned to the Superior Court.

> evidence. *See* Superior Court Docket No. 2665 EDA 2011. [FN1: The Superior Court also addressed the remaining issues [Appellant] raised on appeal and found those claims to be without merit.] The Superior Court further directed that "[i]f a new trial is not required, the trial court shall re-impose the judgment of sentence as originally entered." Superior Court February 6, 2013 Slip Opinion, p. 10.
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> Upon remand, this matter was transferred to [a new judge], and an evidentiary hearing was conducted. This court heard testimony over two days, on June 13, 2013 and June 26, 2013. Subsequently, counsel filed post-hearing memoranda, and oral argument was heard on July 19, 2013. On that same day, this court issued findings of fact and conclusions of law, dismissing [Appellant's] after-discovered evidence claim as meritless. Thus, this court denied [Appellant's] motion for a new trial and reinstated the mandatory minimum sentence of life imprisonment without the possibility of parole for his first-degree murder conviction. On July 25, 2013, [Appellant] filed a notice of appeal. [The trial court did not order Appellant to file a Pa.R.A.P. 1925(b) statement.]

Trial Court Opinion, 8/7/13, at 1-2.

Appellant presents the following issue for our review:

> 1. Did the [trial court] err in not granting Appellant a new trial based on after discovered evidence of two eyewitnesses who saw portions of the criminal activity and indicated [Appellant] was not present and on a third witness who received a confession from the actual killer? Did [the trial court] err since this after discovered testimony was not cumulative, would not be used solely to impeach, was of such a nature that would affect the verdict and could not have been discovered prior to trial? Did the [trial court] err in making findings of credibility on witnesses when that should be left to the jury? Did [the trial court] err in holding the new testimony would not have made a difference? Did [the trial court] err in finding the admission of Streets against penal interest would not have been admissible? Did [the trial court] further err in not granting a new trial based on the interest of justice exception? --- [The trial court] denied the request for a grant of a new trial based on after discovered evidence and resentenced [Appellant] to life imprisonment.

Appellant's Brief at 4.

Our Supreme Court has summarized:

> After-discovered evidence is the basis for a new trial when it: 1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of trial by the exercise of reasonable diligence; 2) is not merely corroborative or cumulative; 3) will not be used solely for impeaching the credibility of a witness; 4) is of such a nature and character that a new verdict will likely result if a new trial is granted. Further, the proposed new evidence must be "producible and admissible."
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> Unless there has been a clear abuse of discretion, an appellate court will not disturb the trial court's denial of an appellant's motion for a new trial based on after-discovered evidence. In order for after-discovered evidence to be exculpatory, it must be material to a determination of guilt or innocence.

Commonwealth v. Chamberlain, 30 A.3d 381, 414-16 (Pa. 2011) (citations omitted). In order for a new trial to be granted, a defendant must establish at the evidentiary hearing, by a preponderance of the evidence, that each of the above factors has been met. ***Commonwealth v. Castro***, 55 A.3d 1242, 1246 (Pa. Super. 2013) (*en banc*).

The trial court detailed its rationale:

> I have given due consideration to this matter from the time that I was first assigned the task of holding an evidentiary hearing. … [Appellant] was tried before a jury and found guilty of murder in the first degree and possession of an instrument of crime in the shooting death of Donovan Weary on 2/14/08. Thereafter, the trial Judge imposed a term of life imprisonment and [Appellant] appealed to the Superior Court.

During pendency of his direct appeal, defense counsel petitioned said Court to remand the case for an evidentiary hearing on the basis of new and [after] discovered evidence. Alleging that two eyewitnesses have been discovered and it appears the shooter was not [Appellant], but a Tyrell Woods, whose nickname is Streets, end quote.

In that petition defense counsel identified the two eyewitnesses as Malik Mack and Demon McNeayl and attached a letter allegedly written by McNeayl.

One Darryl Witherspoon was also identified as a newly discovered witness and a letter from him was also presented for review to the Superior Court. On 2/6/13 the Superior Court vacated the judgment of sentence and remanded the case to this Court for an evidentiary hearing with regards to McNeayl and Witherspoon.

This Court commenced an evidentiary hearing and took testimony on 6/13/13 and 6/26/13. Both McNeayl and Witherspoon testified, as did Mr. Mack by agreement of counsel.

In accordance with the order of the Superior Court, the issue for this Court is whether the aforementioned alleged newly discovered evidence warrants the grant of a new trial. It is well established that to warrant such relief, newly discovered evidence must meet a four prong test.

One, the evidence could not have been obtained before the conclusion of the trial by reasonable diligence. Two, the evidence is not merely corrobative or cumulative. Three, the evidence will not be used solely for impeachment purposes. And four, the evidence is of such nature and character that a different outcome is likely at a new trial. See Commonwealth versus Dennis, 715 A.2d 404.

With these factors in mind, a review of the evidence deduced at the evidentiary hearing is in order and this will be the Court's analysis of said [evidence].

First one, Darryl Witherspoon. The essence of Witherspoon's testimony was that Streets, later identified during a hearing as Terrell Holiday, told him that he killed the decedent. However, Witherspoon's testimony was at variance with his letter provided to defense counsel.

Further, this man Holiday is now dead, which requires an inquiry as to whether such hearsay evidence would be, quote, producible and admissible, end quote, at a new trial. See Commonwealth v. Chamberlain, 30 A.[3]d 381.

[Appellant's] counsel has opined that such statement is an admission against interest. However, Rule 804, which could provide an exception to the hearsay rule for statements which tends to subject the declarant to criminal liability, is applicable only where there are existing circumstances that provide clear assurance that such declarations are trustworthy and reliable.

The statement at issue here was not made to a person of authority or one having an adverse interest to the declarant. Rather, it was allegedly made by a friend to Witherspoon, a man with a prior conviction for robbery, upon crimen falsi, inside a parked car.

B, Demon McNeayl. McNeayl's testimony was taken as directed by the Superior Court because he, too, provided a written account to defense counsel. However, at the evidentiary hearing he disavowed the letter's content and stated that he did not submit that letter to [Appellant's] attorney. Indeed, although he acknowledged the name affixed to the letter was his, he also stated that said name was misspelled twice in the document and on the envelope.

Further, McNeayl testified that although he supposedly saw the shooting, he saw it through a first floor window. And he was also looking into a distant alley through an open garage door and could not identify the shooter.

C, Malik Mack. Mack's testimony was also taken at the evidentiary hearing. Although it was not the subject of the Superior Court's order because he never supplied an affidavit or letter or any prior account of the incident.

Thus, not only was Mack never interviewed by the police during the investigation, he was never – he never supplied a statement, document [of] his account of the shooting to anyone prior to his testimony at the evidentiary hearing. In the course of his testimony, he said that he did not witness the shooting, nor was he in the alley when it occurred, nor could he identify the shooter. The essence of his testimony, as was the testimony of the alibi witnesses at [Appellant's] trial, was that he did not see [Appellant] at the scene of the crime.

It should be noted that Mack, like Witherspoon and McNeayl, is serving a prison sentence, as is [Appellant]. Further, as is the case with [Appellant], Mack is serving a sentence for murder, albeit for a fixed term of years with a minimum and maximum term.

Indeed each of these three witnesses all knew [Appellant] from the neighborhood prior to the homicide. And each man served prison time with [Appellant]. Witherspoon was at SCI Albion with [Appellant] for some ten months. To wit, 1/20/12 through 4/12/12, 5/10/12 through 10/16/12, and 11/27/12 through 1/22/13. Coincidently, his letter was submitted on or about 5/25/12.

McNeayl was [at] SCI Graterford with [Appellant] from 4/18/12 through 5/10/12. Coincidentally his letter was mailed on or about 4/23/12.

Mack was at SCI Graterford with [Appellant] from approximately 4/12/12 through 4/16/12. As aforementioned, he did not submit a letter or an account of the incident but he was serving a sentence in the same facility as [Appellant] at or about the time the other two witnesses revealed themselves to defense counsel.

Indeed in [***Commonwealth v. Robinson***, 780 A.2d 675 [(Pa. Super. 2001)], the Court pointed out that for a witnesses actively engaged in a criminal lifestyle telling a story to help a friend or relative to beat a rap cannot be viewed as an extraordinary occurrence.

As required by the holding in [***Commonwealth v. Padillas***, 997 A.2d 356 (Pa. Super. 2010)], this Court has considered the following: The integrity of the alleged after discovered evidence, the motive of those offering said evidence and the overall strength of the evidence supporting the underlying conviction.

Accordingly, without addressing the first three prongs of the task governing whether allegedly after discovered evidence merits the grant of relief requested in this case, this Court finds that as to the fourth prong, the evidence produced at the evidentiary hearing[s] is not of such a character that a different result will likely result if a new trial is granted. Accordingly, the motion for a new trial based on after discovered evidence is denied.

N.T., 7/19/13, at 27-35.

Our review of the record supports the trial court's conclusion that Appellant has failed to prove, by a preponderance of the evidence, all four of the ***Chamberlain*** factors.

Appellant's claims to the contrary are meritless. His claim that the trial court erred in assessing the credibility of the after-discovered witnesses is inapposite. Such credibility assessments are a necessary component of the trial court's determination, as fact finder, as to whether Appellant has met his burden of proof. ***See Padillas***, 997 A.2d at 365 (explaining that, in order to determine whether the alleged after-discovered evidence is of such a nature and character that it would likely compel a different verdict if a new trial is granted, the trial court "should consider the integrity of the alleged after-discovered evidence, the motive of those offering the evidence, and the overall strength of the evidence supporting the conviction"); ***see also Commownwealth v. Perrin***, 59 A.3d 663, 669 (Pa. Super. 2013) (Wecht, J. concurring) (noting that credibility determinations regarding alleged after-discovered evidence are "best left to the trial court").

Equally inapposite is Appellant's claim that the trial court erred in concluding that the alleged confession to Mr. Witherspoon was not admissible under the exception to the hearsay rule involving a statement against penal interest. The trial court's discussion of that exception, reproduced above, is a correct statement of the law. ***See***, ***e.g.***, ***Robinson***, 780 A.2d at 677 (citation omitted) (rejecting application of the statement

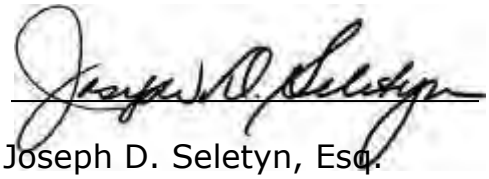
against penal interest exception to an inmate's testimony that a fellow inmate had confessed to the crime because the alleged statement lacked "any indicia of reliability"; after-discovered witness was "actively engaged in a criminal lifestyle. 'Telling a story' to help a friend or relative 'beat the rap,' cannot be viewed as an extraordinary occurrence").

Finally, given the trial court's assessment of the after-discovered evidence proffered, Appellant's claim the trial court erred in denying him a new trial based on the "interest of justice exception," is wholly devoid of merit. Appellant's Brief at 4 (citing ***Commonwealth v. Powell***, 590 A.2d 1240 (Pa. 1991)).

In sum, because after reviewing the record we cannot conclude that the trial court clearly abused its discretion in denying Appellant's motion for a new trial based on after-discovered evidence, we affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/16/2014