

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MARK CENTUOLLO,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2397 EDA 2013

Appeal from the PCRA Order entered July 19, 2013,
in the Court of Common Pleas of Philadelphia County,
Criminal Division, at No(s): CP-51-CR-0013732-2010

BEFORE: GANTMAN, P.J., ALLEN, and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.:

FILED JULY 15, 2014

Mark Centuollo ("Appellant") appeals from the order denying his first petition for post-conviction relief filed pursuant to the Post Conviction Relief Act ("PCRA"). 42 Pa.C.S.A. §§ 9541-46. We affirm.

The PCRA court detailed the pertinent facts and procedural history as follows:

On March 7, 2011, [Appellant] entered into a negotiated plea to possession with intent to deliver a controlled substance (PWID) and possession of an instrument of crime (PIC). Pursuant to the negotiation, the Commonwealth agreed to demandatorize [sic] the sentence which, based upon the weight of the controlled substance, would have been a minimum of 5 years [of] incarceration. Sentencing was deferred to permit trial counsel to attempt to resolve the issue of the forfeiture of [Appellant's] mother's home based upon the drug charges. On July 19, 2011, [Appellant] was sentenced to the

*Former Justice specially assigned to the Superior Court.

negotiated sentence of 2½ - 5 years [of] incarceration followed by three years [of] probation. Appellant did not file a direct appeal.

[On] April 4, 2012, [Appellant] filed a pro se petition for PCRA relief complaining that there was a discrepancy concerning the weight of the confiscated drugs; that because he had a prescription for 16 of the 102 tablets, the total weight of the drugs was lower, which would decrease the offense gravity score and the guideline range, and trial counsel was ineffective for permitting him to be sentenced to an incorrect guideline sentence on the PWID. PCRA counsel was appointed and, on November 8, 2012, counsel filed a [“no-merit” letter and petition to withdraw pursuant to **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*),] indicating that he had evaluated [Appellant’s] complaints and the record, and found no meritorious issues to be raised in an amended petition. On November 27, 2012, a notice pursuant to Pa.R.Crim.P. 907 was filed and served on [Appellant] indicating that the petition would be dismissed after 20 days without further proceedings, and the case was listed December 21, 2012 for formal dismissal. [Appellant filed a *pro se* response to the PCRA court’s Rule 907 notice.] The [PCRA court] reviewed [Appellant’s] submission and again determined that no relief was warranted.

At the December 21, 2012 listing, PCRA counsel informed the Court that he wished to withdraw the [**Turner/Finley**] letter based upon “hearing news” of allegedly corrupt and criminal Philadelphia Police Officers. The [PCRA court] permitted the withdrawal to allow counsel opportunity to investigate the claims. On January 10, 2013, [PCRA] counsel filed an amended petition requesting that the guilty plea be withdrawn because newly discovered evidence, namely allegations of police corruption concerning certain officers involved in [Appellant’s] arrest and claiming that [Appellant] pleaded guilty only because of the incarceration exposure he faced. The amended petition included [Appellant’s] affidavit, dated December 30, 2012, claiming that “the facts did not correspond to those recited by the District Attorney from the police officers’ report,” but no additional information regarding the date of the article or the specific allegations

against the officers. Appellant later submitted a second affidavit, dated June 2, 2013, claiming that he was innocent of the crimes he pleaded guilty to and again maintaining that he entered the negotiated plea only because of the potential prison time he faced had he gone to trial, namely the 5 year mandatory. The Commonwealth filed a motion to dismiss arguing that [Appellant] is bound by his statements under oath. On July 19, 2013, following the [PCRA court's] independent review and proper notice to [Appellant], [Appellant's] petition for PCRA relief was formally dismissed. Thereafter, [Appellant] filed a motion to reconsider the dismissal of his PCRA request to withdraw his guilty plea which was denied.

PCRA Court Opinion, 12/27/13, at 1-4 (footnotes omitted). This timely appeal followed. Both Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

Appellant raises the following issue on appeal:

1. Did the PCRA court err in not allowing Appellant to withdraw his guilty plea *nunc pro tunc* when the arresting officers have been implicated in corrupt and criminal activity?

Appellant's Brief at 4.

This Court's standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Halley***, 870 A.2d 795, 799 n.2 (Pa. 2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001). Moreover, a PCRA court may decline to hold a

hearing on the petition if the PCRA court determines that the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence. ***Commonwealth v. Jordan***, 772 A.2d 1011 (Pa. Super. 2001).

Appellant bases his eligibility for PCRA relief on "the unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced." Appellant's Brief at 9, *citing* 42 Pa.C.S.A. § 9543(a)(2)(vi). The test applied to determine whether a PCRA petitioner is entitled to post-conviction relief based on after-discovered evidence is well settled:

To obtain relief based on after-discovered evidence, [a PCRA petitioner] 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.

Commonwealth v. Foreman, 55 A.3d 532, 537 (Pa. Super. 2012) (*quoting Commonwealth v. Pagan*, 950 A.2d 270, 292 (Pa. 2008)).

Moreover, the above test "is conjunctive; the [PCRA petitioner] 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." ***Foreman***, 55 A.3d at 537 (citation omitted). "[W]hen reviewing the decision to grant or deny a new trial, on the basis of after-discovered evidence, an appellate court is to

determine whether the PCRA court committed an abuse of discretion or error of law that controlled the outcome of the case.” **Id.**

In support of his issue on appeal, Appellant asserts that the PCRA court erred in denying his request to withdraw his guilty plea, *nunc pro tunc*, because:

[Appellant] discovered new evidence that his arresting officers engaged in corrupt and criminal activity. Appellant faced a lengthy mandatory sentence and that is the reason for entering into a plea agreement. Appellant has subsequently sworn that he is innocent of the crimes for which he had been convicted. There are also **Brady** discovery issues and Procedural Due Process issues associated with preserving Appellant’s conviction. Therefore, this matter should be remanded to the PCRA court to allow Appellant to withdraw his guilty plea *nunc pro tunc*.

Appellant’s Brief at 7.

In rejecting Appellant’s arguments, the PCRA Court first noted that “Appellant does not challenge the voluntariness of his [guilty] plea per se.” PCRA Court Opinion, 12/27/13, at 5. The PCRA court then reasoned:

To substantiate his claim, [Appellant] cites to **Commonwealth v. Castro**, [55 A.3d 1242 (Pa. Super. 2012) (*en banc*),] *appeal granted*, 65 A.3d 291 (Pa. 2013).

In [**Castro**, the Superior Court] held that the after-discovered evidence [of a newspaper article discussing criminal allegations against a police officer involved in Castro’s case] entitled Castro to a remand for an evidentiary hearing to determine if a new trial was required. **Id.**

In the instance case, unlike Castro, who became aware of the news article four days after his trial, where [the same officer named in the article] was the only witness, Appellant became aware of the article approximately 17 months after he entered his plea and was sentenced. Additionally, unlike the defendant in **Castro**, who went to trial, [Appellant] pleaded guilty to the charges. He was thoroughly colloquied and, under oath, agreed that the summary of the evidence, and the amendments and additions by trial counsel read in the record by the [Assistant] District Attorney, were the facts to which he was pleading guilty. A defendant who elects to plead guilty has a duty to answer questions truthfully and is bound by the statements he makes in open court while under oath, and may not later assert grounds for withdrawing the plea which contradict the statements he made at his colloquy. ... Notwithstanding, [Appellant] fails to provide any specific information regarding the substance or content of the news article such that the Court is able to undertake the kind of meticulous analysis conducted in **Castro**. Additionally, in his December 30, 2012 affidavit, [Appellant] did not allege that any misconduct had occurred stating only that "the facts did not correspond to those recited by the [Assistant] District Attorney from the police officers' report. . ." Therefore, [Appellant] has not demonstrated that he is entitled to relief on this claim.

PCRA Court Opinion, 12/27/13, at 5-9 (citations and footnote omitted).

In arguing to the contrary, Appellant first asserts that he should be granted a new trial based on after-discovered evidence even though he previously entered a guilty plea. In support, Appellant cites to our Supreme Court's decision in **Commonwealth v. Peoples**, 319 A.2d 679 (Pa. 1974). Even if we were to agree with Appellant, he is not entitled to relief based upon the after-discovered "evidence" he presented at the evidentiary hearing.

On June 16, 2014, the Pennsylvania Supreme Court reversed this Court's decision in **Castro. Commonwealth v. Castro**, 2014 Pa. LEXIS 1515, ___ A.3d ___ (Pa. 2014). In **Castro**, the high court concluded "allegations [of police corruption] in an article do not constitute evidence" that would warrant a remand for an evidentiary hearing. **Id.** at *1. The **Castro** court stated:

We need not belabor the question of whether a newspaper article is evidence - - the parties agree the article itself is not evidence. The Superior Court erred in treating the article as containing evidence; the article contains allegations that suggests such evidence may exist, but allegations in the media, whether true or false, are no more evidence than allegations in any other out-of-court situation. Nothing in these allegations, even read in the broadest sense, can be described as "evidence," and references to the officer being under investigation for misconduct contains no information what evidence existed to substantiate this averment. One cannot glean from these bald allegations what evidence of misconduct [Castro] intended to produce at the hearing.

In short, things appear suspicious, but that is not proof, and the proffer of the article to point to misconduct by [Castro's arresting officer] required the trial court to speculate about possible corruption that has not been corroborated. Speculation is no more valuable than allegation. More than the article is required to prove the veracity of its contents.

Castro, 2014 Pa. LEXIS 1515, at *19-22 (footnote and citation omitted).

Focusing on the quantum of evidence necessary to warrant an evidentiary hearing, the high court disapproved this Court's majority pronouncement in **Castro** that "the potential for uncovering exculpatory

evidence makes it more than probable that a trier of fact would come to a different conclusion.” *Id.* at *23 n.13 (quoting **Castro**, 55 A.3d at 1249. As our Supreme Court noted, “[w]hile newspaper articles can alert a party to the possible existence of evidence, the party must do more than attach the article as establishing evidence that will meet the four-pronged [after-discovered evidence] test. *Id.* at *23. Finally, the high court reiterated: “Indeed, the [evidentiary] hearing is for the presentation of evidence, not the potential discovery of evidence. An evidentiary hearing [] is not meant to function as a fishing expedition for any possible evidence that may support some speculative claim[.]” *Id.* at *26 (citation omitted).

Here, without citing to any specific newspaper article that suggests police corruption, Appellant seeks not a remand for an evidentiary hearing, but rather the withdrawal of his guilty plea. According to Appellant, his guilty plea “was induced because of the corrupt police officers that the Commonwealth deemed to be non-credible.” Appellant’s Brief at 8. **Castro** involved a direct appeal from the trial court’s denial of a motion for new trial based on after-discovered evidence pursuant to Pa.R.Crim.P 720. In ruling regarding the quantum of evidence necessary to warrant an evidentiary hearing, the high court, while refusing “to impose a strict requirement” of attaching “affidavits or other offers of proof,” contrasted the requisite evidence for a Rule 720 motion with “the rules pertaining to PCRA petitions.” **Castro**, at *25; *see* Pa.R.Crim.P. 902(A)(15) (providing that a request for an evidentiary shall include a signed certification as to each

intended witness and the nature of his or her testimony). As stated by the PCRA court, Appellant utterly failed to meet this burden. Appellant's proffer of after-discovered evidence in this case amounted to no more than speculation and conjecture.

Appellant's purported **Brady** claim fails given the same paucity of after-discovered "evidence." The PCRA court explained:

In the amended petition, [Appellant] states that, "The federal government knew of the above-mentioned officers' corruption and refused to use these officers in federal prosecutions," as evidence that the Commonwealth was aware of the corruption allegations. This is simply insufficient to show a **Brady** violation. The PCRA requires petitioners to plead and prove their assertions by a preponderance of the evidence. Inherent in this pleading and proof requirement is that the petitioner must not only state what the issues are, but also he must demonstrate in his pleadings and briefs how the issues will be proved.

PCRA Court Opinion, 12/27/13, at 10 (citations omitted). We agree. Without citation to **any** source, Appellant asserts that "these Philadelphia police officers were known to be corrupt by the federal government but the Philadelphia District Attorney used them to prosecute cases nonetheless without revealing anything to defense attorneys. This was initially the means by which the story surfaced." Appellant's Brief at 15. Once again, any possible merit to Appellant's **Brady** claim relies on speculation and conjecture.

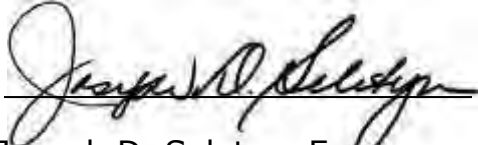
In sum, because Appellant failed to present sufficient evidence to support his after-discovered evidence and **Brady** claim, the PCRA court

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properly denied his PCRA petition. We therefore affirm the PCRA court's order denying Appellant post-conviction relief.

Order affirmed.

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: 7/15/2014