

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
DOUGLASS WILLIAMS,	:	No. 367 WDA 2014
Appellant	:	

Appeal from the PCRA Order, February 13, 2014
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0009620-2009

BEFORE: FORD ELLIOTT, P.J.E., SHOGAN AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED FEBRUARY 19, 2016**

Appellant appeals from the order denying his first petition filed pursuant to the Post Conviction Relief Act (“PCRA”).¹

On February 28, 2011, appellant was convicted of one count of indecent assault of a person less than 13 years of age.² Immediately thereafter, appellant was sentenced to three years’ probation.³ On June 5, 2012, this court affirmed the judgment of sentence, and on February 14, 2013, our supreme court denied appeal. ***Commonwealth v. Williams***, 53 A.3d 924 (Pa.Super. 2012) (unpublished memorandum), ***appeal denied***, 63 A.3d 777 (Pa. 2013).

¹ 42 Pa.C.S.A. §§ 9541-9546.

² 18 Pa.C.S.A. § 3126(a)(7).

On August 19, 2013, appellant filed the instant PCRA petition *pro se*. Counsel was appointed, an amended petition was filed, and an evidentiary hearing was held on January 12, 2014. At issue was the victim's recantation of her trial testimony that appellant, her father, had repeatedly fondled and pulled on her breasts when she was approximately 12 years old.

At the time of the PCRA hearing, the victim was 17 years old. She stated on direct examination that she previously lied under oath and that everything she testified to at trial was "a lie." (PCRA hearing transcript, 2/12/14 at 19.) The victim understood that she was admitting to perjury. (*Id.* at 13.) When asked why the PCRA court should believe her now, the victim stated: "[b]ecause I feel as though I'm trying to go back and correct my mistakes." (*Id.*)

After cross-examination, the PCRA court stated, "I want to understand the chronology of this set of events." (*Id.* at 25.) The PCRA court then reviewed with the victim her testimony at the trial where she explained when and where her father touched her breasts and what he said while he was doing it, that her mother witnessed her father do this twice, why the victim reported it to CYF, her mother's role in having her report the conduct to CYF, and how her father's conduct made her feel. The victim indicated to the PCRA judge that she remembered this testimony. The PCRA judge then extensively questioned the victim, for over ten pages of hearing transcript,

³ Appellant was also subject to ten years of reporting under Megan's Law.

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on her trial testimony and her reasons for recantation. Limited objections were made by counsel.

After the PCRA court's questioning, both counsel were permitted to ask follow-up questions.

Appellant's counsel then called the victim's mother (hereinafter "Mother") to testify. Appellant's counsel asked Mother if she believed her daughter (the victim) was a person of integrity. Her Mother stated that she believed she was. Mother also testified in response to questioning by the Commonwealth that Mother's testimony at the trial on February 28, 2011, was truthful and that she never coerced or forced the victim to lie in court or make false accusations against appellant. (*Id.* at 48.) Mother testified that the whole situation has been a burden on her family that her whole family was now divided and that she had no reason to have her child make up a lie.

The trial court then questioned Mother as follows:

THE COURT: [H]ow do you understand [the victim] doing this?

THE WITNESS: Chalk it up to forgiveness. She is forgiving. She has a kind heart. One thing I can say about my daughter is she doesn't judge. You can be rich [or] poor, handicapped or not, she is a loving person.

THE COURT: You believe her faith is the base for her forgiveness of her father?

THE WITNESS: I think she has forgiven him. The honest answer is that this young girl has forgiven her dad.

. . . .

THE COURT: Why do you think [the victim] has made such a radical shift in her posture with respect to her father?

. . . .

THE WITNESS: The bond is -- there was a time lapse, and then it became like, "Mom, can I go visit him," and I said, "I will not deny you your father, but if something changes I want to know about it."

It was a happy time. They play music together and they dance together, and I don't want to take that away. I just want her to be happy. I don't want her to have to go through things. I want to protect her from the things I went through.

Id. at 55-56.

Appellant's counsel placed an objection as to what Mother believed her daughter's motives were. The PCRA court overruled the objection, "It's her daughter. Who would know better?" (***Id.*** at 56.) The PCRA court continued its questioning, and honed in on whether Mother told the victim what to say to CYF about appellant, whether Mother told the victim that she needed her to say false things in order to separate Mother and the victim from appellant. In response, Mother testified that she did not coax or put words into the victim's mouth or tell her what to say and confirmed that she witnessed appellant touch the victim's breasts on two occasions. (***Id.*** at 54-58.)

At the end of the hearing, the PCRA court did not find the recantation testimony credible and denied post-conviction relief by order entered February 13, 2014. This timely appeal followed.

Appellant raises two issues on appeal:

- A. The lower court abandoned its role as “impartial arbiter” and engage[d] in protracted examination of Williams’s witnesses.
- B. The lower court denied post-conviction relief based upon inadmissible and unsubstantiated evidence.

Appellant’s brief at i.

This appeal has suffered several points of delay along the way. Following receipt of the record from the trial court, and prior to the filing of briefs, an application to stay and remand to the PCRA court based on the alleged recantation of another witness, the victim’s Mother, was filed in October 2014. This motion was handled under standard motions practice and deferred to the merits panel in due course.

In March 2015, this appeal was assigned to this panel for review and disposition along with the application to stay. On June 9, 2015, the appeal was dismissed as the record indicated that appellant’s three-year probationary sentence had expired. In the same order, the application to stay and remand was denied as moot. Appellant immediately filed an application for reconsideration, indicating that, in fact, appellant had a limited amount of time left on his probationary term. We granted the panel reconsideration and withdrew the June order as to the appeal and the application.

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Thereafter, on November 5, 2015, the application to stay appeal and remand for evidentiary hearing was granted. We remanded to determine if the allegations asserted in the petition were true, that Mother now also wished to recant her testimony at trial and at the PCRA hearing. The Honorable Joseph K. Williams, III, held a hearing in line with this court's order; Mother testified that she did not wish to recant; and the court denied relief. The court also took the extraordinary step of terminating appellant's probation 42 days before his sentence was set to expire. The text of the order is as follows:

AND NOW, this 9th day of December, 2015, the Court will memorialize the events from the December 4, 2015 hearing. Prior to the hearing, Mr. Williams moved for a stay of his sentence. This request was denied. A hearing took place with the mother of the child victim testifying. Her testimony was quite different than that proposed. The Court was not persuaded. PCRA relief was denied. The Court then proceeded to terminate any and all supervisory interest it had [i]n this case.

This action was the result of the Superior Court's directive at 367 WDA 2014 to conduct a limited hearing on supposed recantation testimony. Since the Court has complied with that directive, our clerk of court's shall forward this order to the Superior Court forthwith.

Order, 12/9/15.

Unfortunately, the PCRA court did not have jurisdiction to alter or change appellant's probationary period as this court had retained jurisdiction over this case pending remand on a very limited fact-finding determination.

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At this point, we are not sure if appellant's original sentence has run its course, but in the event it has not, we will address the merits of the claims on appeal.

In reviewing the denial of PCRA relief, we examine whether the PCRA court's determinations are supported by the record and are free of legal error. **Commonwealth v. Roney**, 622 Pa. 1, 79 A.3d 595, 603 (2013). The PCRA court's credibility determinations, when supported by the record, are binding on this Court; however, we apply a **de novo** standard of review to the PCRA court's legal conclusions. **Id.**

Commonwealth v. Watkins, 108 A.3d 692, 701 (Pa. 2014).

First, appellant contends that the PCRA judge abandoned his role as an impartial arbiter and assumed the role of advocate for the Commonwealth. He asserts that the judge's extensive and adversarial questioning of witnesses exhibited prejudice against him and denied him a fair and impartial post-conviction hearing. We disagree.

It is always the right and sometimes the duty of a trial judge to interrogate witnesses to clarify existing facts, remove ambiguities, protect the rights of parties and witnesses, and uphold the dignity of the proceedings. However, questioning from the bench should not show bias or feeling or be unduly protracted. **Commonwealth v. Brown**, 265 A.2d 101 (Pa. 1970); **Commonwealth v. Purcell**, 589 A.2d 217, 223 (Pa.Super. 1991). "Where the interest of justice so requires, the court may examine a witness regardless of who calls the witness." Pa.R.E. 614. A trial judge's

questions cannot show bias, hostility, or unfairness. **Commonwealth v. Hodge**, 369 A.2d 815, 819 (Pa.Super. 1977). "A new trial is required . . . only when the trial court's questioning is prejudicial, that is when it is of such nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial." **Purcell**, 589 A.2d at 224, quoting **Commonwealth v. Goosby**, 301 A.2d 673, 674 (Pa. 1973).

In support of his position that a new trial should be granted, appellant cites **Commonwealth v. Hammer**, 494 A.2d 1054 (Pa. 1985), **overruled on other grounds by Commonwealth v. Grant**, 813 A.2d 726 (Pa. 2002); **Commonwealth v. McCoy**, 162 A.2d 636 (Pa. 1960) (defendant was deprived of a fair and impartial jury trial where trial judge took an unduly active participation in the trial, with aggressive cross-examination and asked pointed questions from the bench); and **Commonwealth v. Manuel**, 844 A.2d 1 (Pa.Super. 2004). These cases are distinguishable from the case **sub judice**. Each of these cases involved jury trials and assertions that the trial judge's questioning of witnesses impacted or impressed the jury in such a manner as to deprive the defendant of a fair and impartial trial.

In a PCRA hearing, the PCRA judge is the fact-finder. The concerns or dangers of influencing or revealing a manifest bias to the jury are not present. We have carefully reviewed the record and conclude that the PCRA

judge's questioning of the witnesses was done in a fair and impartial manner. The PCRA judge's questions were an attempt to seek further clarification of what precipitated the victim's recantation. He did not assume the role of prosecutor. Both counsel were permitted to ask follow-up questions, and appellant was given ample opportunity to develop his case. Further, there is no indication that the PCRA judge prejudged the outcome before hearing all of the evidence or prematurely decided this issue. The PCRA judge asked the victim if, in fact, she did lie at trial, to explain what prompted her to fabricate such serious allegations against her father whom she admitted she loved. The PCRA judge appears to have been genuinely confused about the victim's explanation that her mother coerced her to lie and mother's motivations and why after two years the victim decided to come forward and recant her testimony. We view the PCRA judge's questioning as a conscious effort to determine the legitimacy of the victim's recantation. His questions were designed to elicit the truth and bring enlightenment on a material issue which he deemed to be obscure.

"Recantation testimony may qualify as newly discovered evidence entitling a defendant to post conviction relief, provided it meets the supreme court's four-prong standard governing after discovered evidence and the court finds the recantation testimony credible." ***Commonwealth v. Medina***, 92 A.3d 1210 (Pa.Super. 2014).

It is well established that recantation evidence is notoriously unreliable, particularly where the witness claims to have committed perjury. ***Commonwealth v. Johnson***, 966 A.2d 523 (Pa. 2009); ***Commonwealth v. Dennis***, 715 A.2d 404, 416 (Pa. 1998). “The deference normally due to the findings of the [PCRA] court is accentuated where what is involved is recantation testimony[.]” ***Commonwealth v. Loner***, 836 A.2d 125, 141 (Pa.Super. 2003) (*en banc*), ***appeal denied***, 852 A.2d 311 (Pa. 2004). ***See also Commonwealth v. Washington***, 927 A.2d 586, 597 (Pa. 2007) (opining that even with recantations that might appear dubious, the PCRA court must in the first instance assess the credibility and significance of the recantation).

Here, the PCRA judge was the fact-finder whose duty it was to determine the credibility of the victim’s recantation testimony. We are satisfied that the posture taken by this court was as an impartial fact-finder. Therefore, appellant was not deprived of a fair and impartial hearing.

Next, appellant contends that the PCRA court erred when it relied on Mother’s testimony that she believed that the victim’s recantation could be chalked up to forgiveness. Appellant contends that this testimony was inadmissible under Pa.R.E. 602 which provides that “[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Appellant asserts that Mother did not “have personal knowledge” as to why the victim was

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recanting and in light of the strained relationship between Mother and the victim, it was error for the PCRA court to allow Mother to opine on the subject. We find this issue to be without merit.

First, Mother was intimately aware of her minor daughter's demeanor, moods, attitude, and relationship with her father. The trial court did not err when it considered Mother's opinion of why she believed her daughter was recanting which was based on her first-hand observations.

The weight of the evidence is exclusively for the fact-finder who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. ***Commonwealth v. Champney***, 832 A.2d 403 (Pa. 2003). Here, the PCRA judge explained that the victim's recantation testimony:

needed to be examined through the lens of all the other evidence, including that presented at trial. The mother affirmed her trial testimony was accurate. HT, 48. She told this Court she did not coerce or force her daughter to come into court and lie. HT, 48-49. The Court believed what the daughter testified to at trial and confirmed by the mother -- then and at the PCRA hearing -- was what happened. This present proceeding can be seen, and should be seen, for what it is; a desperate attempt by a 17 year old to maintain a relationship with her father even though that requires her to forgive him for the despicable acts he performed on her. A lot to expect for such a young, bright girl but not enough for this Court to undo the verdict.

Trial court opinion, 7/28/14 at 5.

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Further, the PCRA court clearly based its decision on other relevant evidence, including the victim's testimony about how she can no longer rely on her Mother for financial or emotional support; that she was basically self-sufficient and moved into her church mentor's house because of Mother's inability to provide her with the basic essentials such as running water. She admitted to the PCRA court that she does not "want to feel that loneliness anymore" and that "I don't have anyone" and that she "needs her dad emotionally." (PCRA hearing transcript, 2/12/14 at 41-42.) This testimony supported the PCRA court's conclusion that the victim was recanting because she forgave her father and needed a parent figure in her life.

Finally, as noted earlier, in response to the allegation that following the PCRA hearing in this matter, Mother now also wished to recant her testimony, and recognizing that the PCRA court relied to a great degree on Mother's confirmation of her trial testimony at the hearing, we remanded to determine if Mother did, in fact, wish to voluntarily recant. At the December 4, 2015 hearing, Mother testified that she did not wish to recant her testimony.

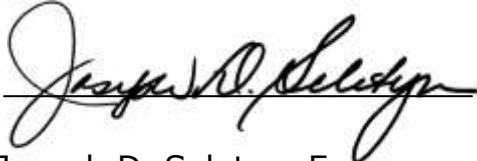
We conclude that appellant received a fair and impartial PCRA hearing. Accordingly, we will affirm the order below.

Order affirmed. Application for appellate review of errors arising on remand is denied.

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Judge Wecht did not participate in the consideration or decision of this Memorandum.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/19/2016