NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. KAREEM BLOUNT Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2400 EDA 2017

Appeal from the PCRA Order entered June 23, 2017
In the Court of Common Pleas of Philadelphia County
Criminal Division at No: CP-51-CR-0307941-2002

BEFORE: STABILE, J., DUBOW, J., and FORD ELLIOTT, P.J.E.

MEMORANDUM BY STABILE, J.: **FILED JUNE 22, 2018**

Appellant, Kareem Blount, appeals from an order of the Court of Common Pleas of Philadelphia County dismissing his second petition for collateral relief pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-46. Although we disagree with the PCRA court's determination that Appellant's PCRA petition was facially untimely, we agree with the court's decision that the petition failed to state a valid claim for relief. Accordingly, we affirm.

Appellant and an accomplice were charged with robbing and carjacking two victims, Heather Franklin and Karima Freemen. Both victims testified that while they were eating in Freeman's Pontiac Bonneville on the evening of December 6, 2001, Appellant and his accomplice broke into the car, robbed them at gunpoint, removed them from the car, and drove away. The victims

promptly reported the incident to the police. Less than a day later, the police spotted the Bonneville and chased it until the car ran into a tree. Appellant, the driver of the vehicle, was arrested. The victims identified Appellant and his accomplice from a photo array and then from a line up. Appellant did not testify in his own defense. The theory of his defense was that (1) he was not a perpetrator in the robbery and carjacking, (2) he did not know either victim, and (3) at the time of his arrest, he was test-driving the Bonneville while deciding whether to purchase it from another individual.

Following a two-day trial, the jury found Appellant guilty of robbery, carjacking, assault, and related charges. On May 27, 2003, the trial court sentenced him to consecutive terms of imprisonment of ten to twenty years each for the robberies and robbery of a motor vehicle and a consecutive term of twenty years' probation for conspiracy. This Court affirmed Appellant's judgment of sentence on direct appeal, and the Supreme Court denied his petition for allowance of appeal.

On May 12, 2005, defendant filed a *pro se* PCRA petition. Appointed counsel filed an amended petition on November 13, 2009. On May 18, 2010, the PCRA court dismissed the petition. This Court affirmed on March 19, 2012, and the Supreme Court denied Appellant's petition for allowance of appeal on November 7, 2012.

On November 23, 2015, through counsel, Appellant filed the PCRA petition presently under review. He alleged that within sixty days before filing

this petition, he learned from another prison inmate that the person who testified against him at trial under the name of Heather Franklin was actually a thief named Rae Hawkins. Had the jury known the true identity of this witness, Appellant continued, the jury would have reached a different verdict.

On February 2, 2017, the Commonwealth filed a motion to dismiss asserting that there was no newly-discovered evidence and that the PCRA petition was untimely. On May 3, 2017, the PCRA court filed a notice of intent to dismiss the PCRA petition without a hearing pursuant to Pa.R.Crim.P. 907. On June 23, 2017, the court dismissed the petition. Appellant timely appealed, and both Appellant and the PCRA court complied with Pa.R.A.P. 1925.

Appellant raises three issues in this appeal:

> I. Was Appellant's newly discovered evidence claim timely filed?
>
> II. Did the PCRA Court err when it found that Appellant's new evidence claim lacked merit?
>
> III. Did the PCRA Court err and abuse its discretion by not granting Appellant's request for discovery?

Appellant's Brief at 3.

In his first argument, Appellant contends that the PCRA court erred by determining without a hearing that his PCRA petition was untimely. We agree with Appellant.

"[A]n appellate court reviews the PCRA court's findings of fact to determine whether they are supported by the record, and reviews its

conclusions of law to determine whether they are free from legal error." ***Commonwealth v. Spotz***, 84 A.3d 294, 311 (Pa. 2014). All PCRA petitions, "including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final" unless an exception to timeliness applies. 42 Pa.C.S.A. § 9545(b)(1). The one-year time limitation, however, can be overcome if a petitioner (1) alleges and proves one of the three exceptions set forth in Section 9545(b)(1)(i)-(iii) of the PCRA, and (2) files a petition raising this exception within sixty days of the date the claim could have been presented. 42 Pa.C.S.A. § 9545(b)(2).

"The PCRA's time restrictions are jurisdictional in nature. Thus, [i]f a PCRA petition is untimely, neither this Court nor the [PCRA] court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims." ***Commonwealth v. Chester***, 895 A.2d 520, 522 (Pa. 2006) (first alteration in original) (internal citations and quotation marks omitted). Thus, we consider the issue of timeliness under Section 9545 before any other issue.

Here, Appellant argues that the allegations in his petition relating to Heather Franklin satisfy the newly-discovered evidence exception within Section 9545(b)(1)(ii), which requires him to prove that "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." ***Id.*** Due diligence demands that the petitioner take reasonable steps to protect his own

interests. ***Commonwealth v. Carr***, 768 A.2d 1164, 1168 (Pa. Super. 2001). A petitioner must explain why he could not have learned the new fact(s) earlier with the exercise of due diligence. ***Commonwealth v. Breakiron***, 781 A.2d 94, 98 (2001). On the other hand, "due diligence does not require a defendant to make such unreasonable assumptions." ***Commonwealth v. Davis***, 86 A.3d 883, 890-91 (Pa. Super. 2014).

Davis provides an illuminating example of due diligence. In response to defense counsel's cross-examination, a Commonwealth witness and a codefendant who testified for the Commonwealth testified perjuriously that the Commonwealth did not offer them leniency in exchange for their testimony against Davis. Following trial, the witness gave Davis an affidavit recanting his trial testimony. Davis immediately obtained the transcripts of the witness's and codefendant's sentencing hearings, which took place after his trial, and discovered that the witness and codefendant had perjured themselves during his trial. We held that Davis acted with due diligence in obtaining this evidence after trial, because until he received the affidavit, no reason existed for him to assume that the Commonwealth had suborned perjury, and because the Commonwealth took no action during trial to clarify the witness's and codefendant's testimony that they received no promises of leniency in exchange for their testimony. ***Id.*** at 890-91; ***see also Commonwealth v. Medina***, 92 A.3d 1210, 1216-17 (Pa. Super. 2014) (*en banc*) (PCRA petition based on newly-discovered facts was timely where

witnesses contacted defendant and recanted their testimony, claiming that police detective coerced their statements; defendant was not required to contact witnesses because he had no reason to suspect coercion and no duty to engage in fishing expedition as to why witnesses lied); ***see generally Commonwealth v. Robinson***, — A.3d —, 2018 Pa Super 109, at 16 (Pa. Super., May 2, 2018) (*en banc*) ("[t]here are situations in which a petitioner may passively rely on learning information as opposed to actively seeking out those facts").

In this case, the PCRA court gave the following explanation for determining that Appellant's petition failed to adequately allege his exercise of due diligence:

> Even if [Appellant] obtained th[e] information [about Ms. Franklin] entirely in good faith, and there was no unreasonable failure to discover this evidence, the fact that it was easily ascertainable at the time of trial means that it was [Appellant's] reasonable duty to have uncovered it at that time. [Appellant] argues that there was no requirement to obtain this information at the time of trial because [he] reasonably relied on the Commonwealth's assertion that the witness, Ms. Franklin, was who she alleged to be. While this is not incorrect, given that [Appellant] alleges a person not Ms. Franklin testified, purporting to be Ms. Franklin, this implies either that the Commonwealth was so careless as to not know the identity of their own witness or that the Commonwealth was complicit in the alleged perjury. Even if this were all true, it is still information that could feasibly have been obtained during trial, with reasonable effort and investigation on [Appellant's] part. This is compounded by the fact that the witness at issue, Ms. Franklin, was interviewed the day of the robbery by Detective Steven Mostovyk and had photographs of herself on file with the Commonwealth.

PCRA Court Opinion, 8/18/17, at 5-6 (citations, references to notes of testimony, and emphasis omitted).

The PCRA court's analysis is deficient in several respects. To begin with, we see no evidence in the record that supports the PCRA court's statement that Franklin's photographs were "on file with the Commonwealth." ***Id.*** at 6. Thus, we give no weight to this statement. More importantly, Appellant's PCRA petition suggests a reasonable explanation why he did not investigate, before or during trial, whether Franklin was an imposter. Appellant alleged that he was not one of the men who broke into the car and did not know either victim. Nothing in the record indicates that Appellant knew either victim prior to this incident. Thus, his petition plausibly alleged that he neither knew nor should have known during trial that Franklin was an imposter, and he did not learn that Franklin was an imposter until his conversation with a fellow prison inmate years after trial. It also bears emphasis that the Commonwealth called "Heather Franklin" to the stand, and she swore an oath to testify truthfully. N.T., 4/3/03, at 139. As in ***Davis*** and ***Medina***, Appellant had no reason to assume under these circumstances that the Commonwealth would knowingly present testimony from an imposter. For these reasons, Appellant's PCRA petition adequately alleged that he acted with due diligence in obtaining information that Franklin was an imposter. Moreover, Appellant's petition satisfactorily alleged that he complied with Section 9545(b)(2) by filing his

PCRA petition within sixty days after receiving this information. The PCRA court erred by determining that Appellant's petition was facially untimely.

In his second argument, Appellant asserts that the PCRA court erred by determining that his newly discovered evidence claim lacks merit. To obtain a new trial based on newly-discovered evidence, the petitioner must prove that

> the evidence could not have been obtained prior to the end of the trial by the exercise of reasonable diligence; the evidence is not merely corroborative or cumulative; it will not be used solely to impeach the credibility of a witness; and it would likely result in a different verdict if a new trial were granted. The test is conjunctive and the defendant must prove each factor by a preponderance of the evidence in order for a new trial to be warranted.

Commonwealth v. Woeber, 174 A.3d 1096, 1108 n.13 (Pa. Super. 2017). We agree with the PCRA court that even if Franklin was an imposter, this evidence likely would not have changed the verdict against Appellant.

The PCRA court reasoned:

> Franklin [] was interviewed the day of the robbery by Detective Steven Mostovyk[.] . . . [T]he two victims[] identified the two defendants on two separate occasions via multiple different forms—[i]nitially via photo arrays where each victim separately identified the two co-defendants [and additionally] via a lineup where each victim, again separately, identified both of the two co-defendants. This[,] coupled with the fact that the co-defendants were found in the victim's car hours after the robbery makes it highly unlikely that the [revelation of Franklin's true identity] would have changed the outcome of the trial. [Appellant] disagrees with this characterization, asserting that the jury was most swayed by the fact that [] Freeman and [] Franklin's testimonies corroborated each other, and that that factor was what ultimately led to [Appellant's] conviction.

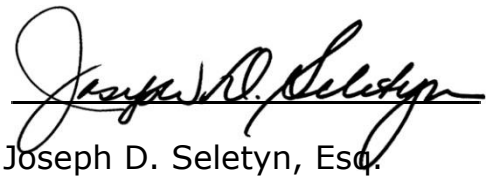
> Given the prevalence of other evidence, including multiple [reliable out-of-court] identifications and [Appellant] being found in the stolen vehicle, it seems significantly more likely that corroborated live testimony was merely a factor, and not determinative as [Appellant] alleges.

PCRA Court Opinion, 8/18/17, at 8 (citations, references to notes of testimony and emphasis omitted). We find this analysis persuasive. ***See Commonwealth v. Abu-Jamal***, 720 A.2d 79, 107 n.34 (Pa. 1998) (despite alleged newly-discovered evidence in homicide case, "there remains the following unequivocal testimony of Michael Scanlon and Albert Magilton, both of whom presented damaging testimony at trial, which testimony renders it unlikely that any of the above claims, either singularly or cumulatively, could compel a different verdict").

In his final argument, Appellant asserts that the PCRA court erred in denying his request for discovery with regard to Franklin's actual identity, including production of her driver's license and criminal history information. We concluded above that the outcome of trial likely would not have changed had the jury learned that Franklin was an imposter. Thus, we need not further address this issue.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/22/18