

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
ROBERT AUSTIN	:	
	:	
	:	
Appellant	:	No. 562 EDA 2019

Appeal from the PCRA Order Entered January 15, 2019
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0516941-1993

BEFORE: BOWES, J., SHOGAN, J., and STRASSBURGER, J.*

MEMORANDUM BY BOWES, J.:

FILED JANUARY 27, 2020

Robert Austin appeals from the January 15, 2019 order dismissing his petition for post-conviction DNA testing under 42 Pa.C.S. § 9543.1. We affirm.

This Court aptly summarized the pertinent factual history of this case in a memorandum affirming the dismissal of Appellant’s third PCRA petition:

[Appellant] was charged with the brutal 1993 robbery and slaying of Christina Ginsberg. He was tried before a jury, which was presented with a variety of evidence, including [Appellant’s] statement to police that the victim’s blood was splashed on his clothing by a cohort, whom he claimed was the real killer. [Appellant] had washed the clothing, however, a police chemist testified that by the time it was seized and tested for the presence of the victim’s blood, none was found. Contrary to [Appellant’s] version of events, two witnesses identified him as the lone man seen with the victim shortly before her lifeless body was discovered.

* Retired Senior Judge assigned to the Superior Court.

Commonwealth v. Austin, 6 A.3d 558 (Pa.Super. 2010) (unpublished memorandum at 1-2). Following a jury trial, Appellant was convicted of first-degree murder and robbery.

Appellant filed a direct appeal, which ultimately concluded in this Court affirming his judgment of sentence and the Pennsylvania Supreme Court denying Appellant's petition for allowance of appeal. Appellant's first PCRA petition was dismissed, and he did not appeal. Appellant's second PCRA petition was dismissed as untimely, and he appealed to this Court. While appealing the dismissal of his second PCRA petition, Appellant also filed a motion for post-conviction DNA testing in the PCRA court. The PCRA court¹ denied this request as well, and Appellant did not appeal. Ultimately, this Court also affirmed the dismissal of Appellant's second PCRA petition. Appellant also unsuccessfully petitioned both the Pennsylvania and United States Supreme Courts for review. Similarly, Appellant's third and fourth PCRA petitions were dismissed as untimely.

On July 25, 2018, Appellant filed the instant petition for post-conviction DNA testing of the shirt that he wore on the day of the murder, asserting that such analysis would demonstrate that the shirt was not "covered in blood."

¹ We refer to the court that reviewed Appellant's request for DNA testing under § 9543.1 as the "PCRA court" to avoid confusion, while recognizing that such petitions are separate and apart from PCRA petitions. **See *Commonwealth v. Brooks***, 875 A.2d 1141, 1148 (Pa.Super. 2005) ("Although Section 9543.1 is contained within the PCRA, a motion for forensic DNA testing of evidence filed thereunder is clearly separate and distinct from a petition filed pursuant to other sections of the statute.").

See Appellant's Motion, 7/25/18, at 1-4. On September 10, 2018, the PCRA court issued notice of its intent to dismiss the petition without a hearing pursuant to Pa.R.Crim.P. 907. On January 15, 2019, the PCRA court dismissed Appellant's petition. Appellant filed a timely notice of appeal. Appellant was not directed to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), but the PCRA court filed an opinion summarizing its reasoning in dismissing Appellant's petition. **See** PCRA Court Opinion, 2/14/19, at 1-6 (concluding that Appellant's petition was untimely and meritless under § 9543.1).

On appeal, Appellant asserts that the PCRA court has erred in its assessment of his petition for DNA testing and misapplied governing Pennsylvania law in dismissing it. At bedrock, Appellant has seized upon a single sentence from the trial court's July 8, 1996 opinion stating that "[t]he Commonwealth's evidence established that the defendant was the only person present at the store that evening, **and that the defendant's clothes were covered in blood.**" Trial Court Opinion, 7/8/96, at 5. Appellant asserts DNA testing would establish that this shirt was never "covered in blood," and thereby establish that the trial court erred in relying upon such evidence. **See** Appellant's brief at 6 ("An actual finding of the clothing having no blood

. . . would show . . . that [Appellant] has been incarcerated for more than 26 years based upon evidence that does not exist . . .”).² We disagree.

Our standard of review of an order denying a petition filed under the PCRA is whether the determination of the PCRA court is supported by the evidence and is free of legal error. ***Commonwealth v. Gandy***, 38 A.3d 899, 902 (Pa.Super. 2012). The PCRA court’s findings will not be disturbed unless there is no support for the findings in the certified record. ***Id.***

Appellant is technically correct in observing that the timeliness requirements for PCRA petitions is **not** applicable to requests for DNA testing under § 9543.1. ***See Commonwealth v. Walsh***, 125 A.3d 1248, 1252

² The exact contours of Appellant’s claim shift throughout his brief, and seek to encompass claims regarding post-sentence motions decided by the trial court over 20 years ago, sufficiency of the evidence adduced by the Commonwealth at trial, and violations of the Fourteenth Amendment to the U.S. Constitution. ***See*** Appellant’s brief at 2, 5-6. To the extent that Appellant relies upon these ancillary assertions for relief, they are beyond the scope of Appellant’s limited request for DNA testing and unreviewable at this juncture. ***See Commonwealth v. Walsh***, 125 A.3d 1248, 1252 (Pa.Super. 2015) (rejecting attempts by an appellant to “advance on appeal new issues outside his request for DNA testing” and limiting review to “the court’s denial of his request for DNA testing”); ***see also Commonwealth v. Gandy***, 38 A.3d 899, 905-06 (Pa.Super. 2012) (“We have previously ruled § 9543.1 cannot be used to raise extraneous issues not related to DNA testing in an effort to avoid the one-year time bar.”). Appellant is treating the instant petition for DNA testing as an all-encompassing challenge to his underlying conviction. This is clearly erroneous under our existing precedent. ***See Commonwealth v. Brooks***, 875 A.2d 1141, 1146 (Pa.Super. 2005) (“Rather, after DNA testing has been completed, the applicant may, within 60 days of receiving the test results, petition to the court for post-conviction relief on the basis of [a newly]-discovered [fact], an exception to the one-year statute of limitations.”) (citing 42 Pa.C.S. §§ 9543.1(f), 9545(b)(1)(ii), (b)(2)).

(Pa.Super. 2015). However, Appellant is incorrect in suggesting that such petitions are not subject to a temporal requirement at all. To the contrary, the statute provides as follows regarding the requirements attendant to such petitions:

(a) Motion.--

(1) An individual convicted of a criminal offense in a court of this Commonwealth may apply by making a written motion to the sentencing court **at any time** for the performance of forensic DNA testing on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction.

. . . .

(4) **DNA testing may be sought at any time if the motion is made in a timely manner and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice.**

. . . .

(6) The motion shall explain how, after review of the record of the applicant's trial, there is a reasonable possibility if the applicant is under State supervision, or there is a reasonable probability if the applicant is not under State supervision, . . . that the testing would produce exculpatory evidence that would establish:

(i) the applicant's actual innocence of the offense for which the applicant was convicted

42 Pa.C.S. § 9543.1 (emphasis added). Thus, a motion for DNA testing must be made in a "timely manner." In pertinent part to the case at bar, the statute also requires that an applicant must "present a *prima facie* case"

demonstrating that: (1) the identity or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction; and (2) DNA testing of the specific evidence, assuming exculpatory results, would establish the applicant's actual innocence of the offense for which the applicant was convicted. 42 Pa.C.S. § 9543.1(c)(3)(i)-(ii).

Appellant's focus upon whether blood was ever present on the at-issue shirt is exceedingly strange in light of the fact that the jury heard explicit testimony that none was found on it. **See Austin, supra** at 3 ("Austin sought DNA testing of his clothing to prove there was no blood on it, yet the jury had already been presented with evidence that testing of his clothing showed there was no blood on it."). Indeed, the suggestion that Appellant's shirt had been bloodied at some point originated with Appellant himself, who averred that a "cohort" had splashed the victim's blood on him. **Id.** at 1. Furthermore, in the same memorandum, this Court previously addressed Appellant's claim that the trial court erroneously opined regarding Appellant's shirt being "covered in blood" in a prior memorandum:

The Motion for DNA testing contained a mistaken allegation that [Appellant's] post-sentence motions challenging the sufficiency of the evidence were denied by the trial court based on the trial court's conclusion that [Appellant's] clothing was covered in blood. A review of the record reveals, however, that the post-sentence motions were denied not on their merits, as [Appellant] claims, but by operation of law.

Id. at 3 n.6. These passages significantly undercut Appellant's arguments regarding the arguable merits of his renewed request for DNA testing, making clear that Appellant's argument does not rest upon *terra firma*.

We find this controversy analogous to that in **Walsh**, wherein a defendant requested DNA testing of a hammer used in an aggravated assault, claiming that such a test would prove that the victim's blood was never on the hammer. **See Walsh, supra** at 1257-58. This Court rejected this argument, concluding that "the absence of the [v]ictim's DNA on the hammer would not establish Appellant's actual innocence for aggravated assault." **Id.** Appellant's request is of a similar ilk. Even assuming, *arguendo*, that Appellant's petition is timely and a DNA test established that Appellant's shirt had never been "covered in blood," that evidence would be merely duplicative of already existing testimony. **See Austin, supra** at 3. Furthermore, such a demonstration is not sufficient to make out a *prima facie* case of actual innocence because the absence of the victim's blood would prove (or disprove) nothing with respect to the evidence that undergirds Appellant's conviction. **See Commonwealth v. Heilman**, 867 A.2d 542, 547 (Pa.Super. 2005) ("In DNA as in other areas, an absence of evidence is not evidence of absence.").

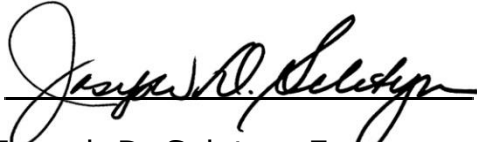
Based upon the foregoing, Appellant did not satisfy the threshold requirements to obtain DNA testing under § 9543.1. Specifically, he failed to present a *prima facie* case of actual innocence under § 9543.1(c)(3).

J-S48012-19

Therefore, the PCRA court properly denied Appellant's motion for post-conviction DNA testing.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/27/20