

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF  
: PENNSYLVANIA  
:  
v. :  
:  
:  
JAMES R. CRUZ, JR. :  
:  
Appellant : No. 643 MDA 2021

Appeal from the PCRA Order Entered April 19, 2021  
In the Court of Common Pleas of Centre County Criminal Division at  
No(s): CP-14-CR-0001246-1993

BEFORE: PANELLA, P.J., STABILE, J., and DUBOW, J.

MEMORANDUM BY DUBOW, J.:

**FILED APRIL 14, 2022**

Appellant, James R. Cruz, Jr., appeals from the April 19, 2021 Order dismissing his second Petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46, as meritless. After careful review, we affirm.

A prior panel of this court set forth the relevant facts and procedural history of this case as follows:

Cruz was convicted of criminal homicide and theft on June 14, 1994[,] and was sentenced to life imprisonment. At trial, the Commonwealth entered evidence relating to a number of hairs, recovered during the underlying criminal investigation, which implicated Cruz in the murder. Specifically, hair identified as belonging to the victim was found in the cab of Cruz's truck, and hair identified as belonging to Cruz was found on the ropes that had been used to bind and fatally strangle the victim.

To establish that the recovered hairs belonged to Cruz and to the victim, the Commonwealth relied, in part, on microscopic hair analysis. FBI Agent Chester Blythe testified at trial regarding the use of microscopic hair analysis as a forensic method. In this

testimony, Agent Blythe drew scientific conclusions that implicated Cruz in the murder of the victim. It is this testimony that forms the basis of Cruz's [] PCRA petition.

Per an agreement with the Innocence Project, the Department of Justice ("DOJ") ordered the FBI to undertake a review of cases that involved microscopic hair analysis, including Cruz's conviction. As a result of that review, the DOJ issued a letter on June 8, 2015<sup>[1]</sup> that identified several areas in which Agent Blythe's testimony exceeded the scientific limitations of microscopic hair analysis. A copy of the DOJ letter was subsequently provided to Cruz and prompted [Cruz to file a] PCRA petition[, his second, on March 10, 2015].

**Commonwealth v. Cruz**, No. 1728 MDA 2016, 1-2 (Pa. Super. filed Sept. 29, 2017).

Acknowledging that this PCRA petition was untimely on its face, Cruz asserted that the DOJ letter reflected a "newly-discovered fact" pursuant to 42 Pa.C.S. § 9545(b)(1)(ii), and could, thus, serve as an excuse to the untimeliness of the petition. The PCRA court disagreed with Cruz and, on January 5, 2017, dismissed Cruz's second PCRA petition as untimely. On September 29, 2017, this Court affirmed. **Cruz**, No. 1728 MDA 2016. The Pennsylvania Supreme Court granted Cruz's petition for allowance of appeal, reversed the Superior Court, and remanded to the PCRA court for reconsideration in light of the Supreme Court's holding in **Commonwealth v.**

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<sup>1</sup> The DOJ letter followed an April 20, 2015 FBI press release regarding the pervasive inaccuracy of FBI analysis' testimony related to microscopic hair analysis.

**Chmiel**, 173 A.3d 617 (Pa. 2017).<sup>2</sup> **See Commonwealth v. Cruz**, 183 A.3d 348 (Pa. 2018).

Following remand, the PCRA court dismissed Appellant's Petition without a hearing finding that, even in light of the Supreme Court's decision in **Chmiel**, Appellant's Petition was untimely. **See** PCRA Ct. Op., 12/14/18, at 1-2 (unpaginated). The PCRA court reasoned that Appellant's 60-day time limit for asserting the newly-discovered fact exception started on April 20, 2015, the date of the FBI press release. The PCRA court determined that Appellant's PCRA Petition, dated September 10, 2015, was, therefore, untimely. On November 15, 2019, this Court reversed the order dismissing Appellant's Petition as untimely and remanded the case once again to the PCRA court for a determination of the merits. **See Commonwealth v. Cruz**, 223 A.3d 274 (Pa. Super. 2019).

On July 27, 2020, the PCRA court ordered the Commonwealth to file a motion to dismiss Appellant's Petition within 60 days. The order also provided that "by agreement of the parties, the [c]ourt will decide the issues raised [in the motion] on briefs and without a hearing." Order, 7/27/20. The Commonwealth timely filed its motion and accompanying brief, and Appellant filed a timely response. On March 5, 2021, after considering the submissions

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<sup>2</sup> In **Chmiel**, the Court held that the DOJ press release announcing the FBI's admissions "that its examiners gave flawed and scientifically unsupportable testimony" which it spread to state and local analysis, constituted a newly-discovered fact for purposes of overcoming the PCRA's jurisdictional time bar. **Chmiel**, 173 A.3d at 626.

of the parties, the PCRA court issued notice of its intent to dismiss Appellant's Petition pursuant to Pa.R.Crim.P. 907 without further proceedings in accordance with the "agreement of the parties to consider the matter on briefs and without [an] evidentiary hearing" and "having found no genuine issues concerning any material fact." Rule 907 Notice, 3/5/21.

On March 25, 2021, Appellant filed a response to the court's Rule 907 Notice. By Order filed on April 19, 2021, the PCRA court responded to Appellant's Rule 907 response and dismissed Appellant's Petition.

This timely followed. Appellant complied with the PCRA court's order to file a Pa.R.A.P. 1925(b) statement and the court filed a Rule 1925(a) Opinion referring this Court to the reasons stated in the Rule 907 Notice.

Appellant raises the following four issues on appeal:

1. Did the PCRA [c]ourt for the third time[] dismiss the PCRA Petition without a merits review hearing where [Appellant] was otherwise entitled to the same, in violation of **Commonwealth v. Chmiel** or other controlling case law.?
2. Did the PCRA [c]ourt for the third time[] dismiss the PCRA Petition on the basis of insufficient after-discovered evidence which should have been addressed in the previous two dismissals, causing an unnecessary 6-year delay, three appeals to the Superior court and two appeals to the Supreme Court thereby creating an abuse of proceeding that resulted in a violation of [Appellant's] due process rights?
3. Did the PCRA [c]ourt misstate the facts?
4. Did the PCRA [c]ourt incorrectly find that [Appellant] was required to claim innocence on the basis this was a second PCRA Petition when in fact the first PCRA Petition went 15 years with no action because his counsel abandoned him[] and was never reviewed on the merits due to the delay caused by the abandonment?

Appellant's Brief at 4.

We review the denial of a PCRA Petition to determine whether the record supports the PCRA court's findings and whether its order is otherwise free of legal error. **Commonwealth v. Fears**, 86 A.3d 795, 803 (Pa. 2014). This Court grants great deference to the findings of the PCRA court if they are supported by the record. **Commonwealth v. Boyd**, 923 A.2d 513, 515 (Pa. Super. 2007). "Further, the PCRA court's credibility determinations are binding on this Court, where there is record support for those determinations." **Commonwealth v. Anderson**, 995 A.2d 1184, 1189 (Pa. Super. 2010). We give no such deference, however, to the court's legal conclusions. **Commonwealth v. Paddy**, 15 A.3d 431, 442 (Pa. 2011).

To be eligible for relief pursuant to the PCRA, Appellant must establish, inter alia, that his conviction or sentence resulted from one or more of the enumerated errors or defects found in 42 Pa.C.S. § 9543(a)(2). Appellant must also establish that the issues raised in the PCRA petition have not been previously litigated or waived. **Id.** at § 9543(a)(3).

Relevant here, the PCRA provides relief for a petitioner who demonstrates his conviction or sentence resulted from "[t]he 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." 42 Pa.C.S. § 9543(a)(2)(vi). To establish a claim of after-discovered evidence, a petitioner must prove that the evidence: "(1) could not have been obtained prior to the conclusion of the trial by 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. Tedford***, 228 A.3d 891, 911 (Pa. 2020) (citations omitted). The four-part test is conjunctive and if one prong is not satisfied, there is no need to analyze the remaining prongs. ***See Commonwealth v. Pagan***, 950 A.2d 270, 293 (Pa. 2008).

There is no right to a PCRA hearing; a hearing is unnecessary where the PCRA court can determine from the record that there are no genuine issues of material fact. ***Commonwealth v. Jones***, 942 A.2d 903, 906 (Pa. Super. 2008). “With respect to the PCRA court’s decision to deny a request for an evidentiary hearing, or to hold a limited evidentiary hearing, such a decision is within the discretion of the PCRA court and will not be overturned absent an abuse of discretion.” ***Commonwealth v. Mason***, 130 A.3d 601, 617 (Pa. 2015).

Although Appellant has presented four distinct questions for our review, his counseled brief contains only two sections of argument titled “Genuine Issue of Material Fact, Misstatement of Facts” and “Violation of Due Process.” Notwithstanding this violation of Pa.R.A.P. 2119(a), which requires that an appellant divide the argument “into as many parts as there are questions to be argued,” we consider the arguments raised within each section to the extent that we can discern them and that they are “fairly suggested” by the statement of questions involved. ***See*** Pa.R.A.P. 2119(a), 2116(a).

In the "Genuine Issue of Material Fact, Misstatement of Facts" section, Appellant claims that the PCRA court erred in dismissing his PCRA petition without holding a hearing on its merits. Appellant's Brief at 13-14. Appellant also asserts that there is a genuine issue of material fact regarding the relevance to the crime of "physical hair evidence collected." *Id.* at 11. He further asserts that the PCRA court's conclusion that there was "substantial" evidence outside of the hair analysis testimony to support the jury's verdict "misstates the entire case[,] especially where there was purportedly an alternative viable suspect who authorities were unable to locate. *Id.* at 15-16.

Appellant's assertion that the PCRA court erred in dismissing his petition without a hearing lacks merit as that the parties stipulated to the court resolving the issues on the briefs without a hearing. Moreover, it is well-settled that a PCRA hearing is unnecessary where the PCRA court can determine from the record that there are no genuine issues of material fact. Here, as explained below, it was apparent to the PCRA court that Appellant did not present any genuine issues of material fact necessitating an evidentiary hearing. Thus, the PCRA court did not err or abuse its discretion in dismissing Appellant's petition without holding a hearing.

With respect to Appellant's other claims, following our review, we conclude that the record belies Appellant's claim that the PCRA court misstated the facts of record and reached an erroneous conclusion. The Honorable Jonathan D. Grine, sitting as the PCRA court, has authored a comprehensive,

thorough, and well-reasoned Rule 907 Notice, citing the record, including the relevant testimony, and relevant case law in addressing Appellant's claim. The record supports the PCRA court's findings, and the Rule 907 Notice is otherwise free of legal error. We, thus, affirm on the basis of the PCRA court's March 5, 2021 Rule 907 Notice, which outlines the substantial evidence presented at trial that it was Appellant who committed the crimes and then properly concludes that the after-discovered evidence would not likely result in a different verdict. **See** Rule 907 Notice, 3/5/21, at 5-6, 10 (concluding that it properly dismissed Appellant's PCRA Petition because Appellant failed to demonstrate that a new trial would likely result in a different verdict because: (1) Agent Blythe's "testimony concerning the microscopic hair analysis was but one piece of evidence in the context of a seven day trial;" (2) "just under 50 witnesses [testified], and, overall, there was ample evidence" including evidence of Appellant's DNA present in semen and spermatozoa obtained from the victim's body and her underwear "upon which the jury returned the guilty verdict;" and (3) Agent Blythe's testimony regarding the hair analysis "was thoroughly mitigated by cross-examination.").

In the section of his brief entitled "Violation of Due Process," Appellant complains that "excessive delay[] and repeated dismissals," together with the PCRA court's refusal to hold a hearing on the merits of the instant petition, resulted in the violation of his due process rights. Appellant's Brief at 16-18.

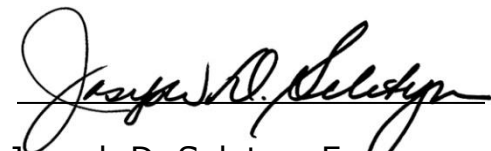


Appellant has not cited in his brief to the place in the record where he preserved this claim. This is a violation of Pa.R.A.P. 2119(c) (requiring citation to the record) and, moreover, our review of the record indicates that Appellant has raised this issue for the first time on appeal. Accordingly, he has waived it. **See** Pa.R.A.P. 302(a) (“Issues not raised in the [lower] court are waived and cannot be raised for the first time on appeal.”).

In sum, the record supports the trial court’s findings. Accordingly, the court did not err in dismissing Appellant’s PCRA petition without a hearing.

Order affirmed. The parties are instructed to attach a copy of the PCRA court’s March 5, 2021 Rule 907 Notice to all future filings.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above the printed name.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 04/14/2022