NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
LEON BRADLEY,	:	No. 3234 EDA 2011
Appellant	:	

Appeal from the PCRA Order, November 7, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-1133071-1992

BEFORE: FORD ELLIOTT, P.J.E., BENDER AND COLVILLE,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: January 30, 2013

Leon Bradley appeals from the order of November 7, 2011, denying his third PCRA[1] petition. We affirm.

Following a jury trial in 1993, appellant was found guilty of first-degree murder, arson and burglary. The charges related to an incident wherein appellant struck the victim, Alcie Shirer, on the head with a pipe, kicked over a kerosene heater and fled the house, leaving Shirer to perish in the ensuing fire. Appellant was sentenced to life imprisonment for murder, a consecutive 4 to 20 year term of imprisonment for arson, and a concurrent 1 to 2 years on the burglary charge. Subsequently, this court affirmed the judgment of

* Retired Senior Judge assigned to the Superior Court.

[1] Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546.

sentence and our supreme court denied allowance of appeal. ***Commonwealth v. Bradley***, 644 A.2d 803 (Pa.Super. 1994) (unpublished memorandum), ***appeal denied***, 539 Pa. 642, 651 A.2d 531 (1994).

On September 19, 1995, appellant filed a PCRA petition challenging trial counsel's stewardship for proceeding with a diminished capacity defense instead of with an alibi defense. Appellant's petition was denied without a hearing, and on June 5, 1997, this court affirmed. Our supreme court denied allowance of appeal on February 24, 1998. ***Commonwealth v. Bradley***, 700 A.2d 1022 (Pa.Super. 1997) (unpublished memorandum), ***appeal denied***, 552 Pa. 693, 716 A.2d 1247 (1998).

Appellant filed a second PCRA petition on April 9, 1999, which was dismissed for lack of jurisdiction. Therein, appellant argued that the after-discovered facts exception to the PCRA's one-year jurisdictional time bar applied because he had found a previously unavailable alibi witness. This court affirmed on February 28, 2001, finding that appellant failed to exercise due diligence in discovering the whereabouts of the witness and procuring her testimony at the time of trial. Our supreme court denied appellant's petition for allowance of appeal on September 14, 2001. ***Commonwealth v. Bradley***, 776 A.2d 1002 (Pa.Super. 2001) (unpublished memorandum), ***appeal denied***, 567 Pa. 720, 786 A.2d 985 (2001).

Appellant filed a petition for writ of ***habeas corpus*** in federal court which was denied on March 11, 2005. ***Bradley v. Vaughn***, 2005 WL

579888 (E.D.Pa. 2005). On November 25, 2008, appellant filed the instant PCRA petition, his third. Therein, appellant alleged after-discovered evidence warranting a new trial in the form of recantation testimony from two key Commonwealth witnesses. Following several evidentiary hearings at which both witnesses testified, as well as Detective Douglas Culbreth, appellant's petition was denied. The PCRA court found that the recantation testimony was not credible. This timely appeal followed on December 1, 2011. Appellant has complied with Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the PCRA court has filed an opinion.[2]

Appellant has raised the following issues for this court's review:

> 1. Did the lower Court err in denying PCRA relief based upon newly discovered evidence which reflected that the only Commonwealth witnesses had not told the truth at trial and that [appellant] was not guilty of committing murder?
>
> 2. Did the PCRA Court err in denying Appellant the opportunity to present the alibi testimony of both Leslie Mack and Appellant, as well as polygraph evidence which reflects that both Ms. Mack and [appellant] were truthful in their assertions that [appellant] did not commit this crime, which would have bolstered the recantation of the only eyewitnesses to the crime; and did this exclusion of evidence deny due process?

[2] The PCRA court filed an opinion on November 7, 2011, together with its order denying appellant's petition. After appellant filed his Rule 1925(b) statement, the court filed a supplemental opinion on January 13, 2012, addressing additional issues raised therein.

Appellant's brief at 2.

Initially, we recite our standard of review:

> This Court's standard of review regarding an order denying 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***, 582 Pa. 164, 870 A.2d 795, 799 n. 2 (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).

Commonwealth v. Turetsky, 925 A.2d 876, 879 (Pa.Super. 2007), ***appeal denied***, 596 Pa. 707, 940 A.2d 365 (2007).[3]

Before proceeding to address appellant's issues on appeal, we will briefly recount the facts of this case, as previously summarized by this court.

> Sometime after 9:30 p.m. on the evening of October 20, 1992, appellant approached acquaintances, Keon Sloan and Santee Renwick, asking if they'd like to purchase some batteries. The teenagers declined but suggested appellant try "Sammy's house," across the street, where the

[3] After careful review, the PCRA court determined that the after-discovered facts exception to the PCRA's time limitations, 42 Pa.C.S.A. § 9545(b)(1)(ii), applied and that appellant's petition was timely filed. The PCRA court found that the witness recantations were not made until years after appellant's trial and that appellant could not have obtained the evidence sooner through reasonable diligence. (PCRA court opinion, 11/7/11 at 9.) The PCRA court found that appellant filed the instant petition within 60 days of Santee Renwick's recantation. (***Id.*** at 11.) ***See*** 42 Pa.C.S.A. § 9545(b)(2) ("Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented."). The PCRA court also determined that since the Commonwealth's case relied primarily on the eyewitness testimony of Renwick and Keon Sloan, if their recantations are to be believed, it would likely compel a different verdict. (***Id.*** at 9.) We will not disturb these determinations on appeal.

> victim was staying and ultimately perished. The boys watched as the appellant knocked on Shirer's door, peered into the window and then left. Ten minutes later, as they stood under a street light outside the restaurant where they originally spoke with appellant, the youths observed Bradley, now wearing a long black jacket unlike the brown one he had worn earlier and carrying what appeared to be a two-foot pole, kick in the victim's porch window and climb into the house. Noises of an altercation were heard and Sloan testified he saw the shadows of two people fighting. Sloan stated he saw the victim attempt to rise from a chair and appellant strike him on the head with the pipe, kick over the kerosene heater, climb through the previously broken window and run down the street. Both boys then ran across the street to the burning house, saw the victim on fire, but realized they couldn't help. The fire department was called by Santee Renwick's father, Sims Anthony Renwick, who, while standing in his bedroom window, observed a black man running past his home, away from the fire. Sims described the man as medium built, medium complected, wearing light slacks and a black knee-length coat. Sims added the gentleman "had a clean haircut . . . with a kind of egg-shaped head." (N.T., 5/25/93, p. 675.) As the fire department fought the blaze, the boys saw the appellant, although now clad in a white jacket, standing across the street "nervously" watching the fire. The witnesses pointed out the appellant to Renwick's father, who recognized him as the man he had seen fleeing the scene twenty minutes earlier. The police were called and appellant was arrested.

Commonwealth v. Bradley, 03400 PHL 1993 at 2-3 (Pa.Super. filed March 24, 1994) (unpublished memorandum). Cause of death was blunt force trauma to the victim's skull and asphyxiation due to smoke inhalation. ***Id.*** at 4. On direct appeal, we rejected appellant's challenges to the sufficiency and weight of the evidence. We found there was sufficient evidence to

establish appellant was the perpetrator and that he caused the victim's death.

Turning to appellant's first issue, he claims that Santee Renwick and Keon Sloan recanted their trial testimony. Appellant argues that this is after-discovered evidence necessitating a new trial.

At the PCRA hearings, Renwick testified that after appellant left the victim's house the first time, he did not see him again until after the fire. (PCRA court opinion, 11/7/11 at 5.) Renwick testified that he could not see the perpetrator's face and was not sure whether it was appellant. (***Id.***) When asked why he identified appellant in statements to police and at trial, Renwick testified that he was just trying to impress his father. (***Id.***) Similarly, Sloan testified at the PCRA hearing that he did not see anyone enter or exit the victim's house prior to the fire. (***Id.*** at 6.) According to Sloan, he lied about seeing appellant exit the window of the burning house and run down the street because he was paid $40. (***Id.*** at 6-7.) Sloan also claims that police offered to help him with his juvenile cases if he identified appellant as the perpetrator. (***Id.*** at 7.)

> After-discovered evidence can be the basis for a new trial if it: (1) has been discovered after the trial and could not have been obtained at or 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) is of such nature

> and character that a different verdict will likely result if a new trial is granted.
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> ***Commonwealth v. Williams***, 537 Pa. 1, 25, 640 A.2d 1251, 1263 (1994) (citation omitted). "Unless the trial court has clearly abused its discretion in denying a new trial on the basis of after-discovered evidence, its order will not be disturbed on appeal." ***Commonwealth v. Cull***, 455 Pa.Super. 469, 688 A.2d 1191, 1198 (1997) (citation omitted). Moreover, the kind of evidence at issue here, an alleged recantation and admission of perjury, has often been recognized as one of the least reliable forms of after-discovered evidence. ***Commonwealth v. McNeil***, 506 Pa. 607, 617 n. 4, 487 A.2d 802, 807 n. 4 (1985).

Commonwealth v. Detman, 770 A.2d 359, 360 (Pa.Super. 2001), ***appeal denied***, 566 Pa. 677, 784 A.2d 114 (2001).

> Our Supreme Court has summarized appellate consideration of a claim involving recanted testimony as follows:
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> > The well-established rule is that an appellate court may not interfere with the denial or granting of a new trial where the sole ground is the alleged recantation of state witnesses unless there has been a clear abuse of discretion . . . . Recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. There is no less reliable form of proof, especially when it involves an admission of perjury.
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> ***Commonwealth v. Mosteller***, 446 Pa. 83, 88-89, 284 A.2d 786, 788 (1971) (quotations and citations omitted).

Commonwealth v. Loner, 836 A.2d 125, 135 (Pa.Super. 2003), ***appeal denied***, 578 Pa. 699, 852 A.2d 311 (2004).

Instantly, the PCRA court simply did not find Renwick and Sloan to be credible. (PCRA court opinion, 11/7/11 at 11.) For example, the PCRA court found Renwick's answers to questions about why he recanted to be wandering and evasive. (***Id.***) Renwick's explanation that he falsely identified appellant as the perpetrator under pressure from his father was contradicted by Sloan, who testified that Renwick's father was not on the scene at any time between the fire and their initial identification of appellant. (***Id.*** at 12.) In addition, at the PCRA hearing, Renwick was unclear about what he saw the night of the incident. (***Id.***) He could not say for certain whether or not it was appellant jumping through the broken window after the fire. (***Id.***) However, on the scene and later at trial, Renwick testified with certainty that it was appellant he saw that night. (***Id.***)

Similarly, with regard to Sloan, he testified that the victim's uncle gave them $40 to identify appellant and that they split the money; however, Renwick never mentioned seeing any of this money. (***Id.***) Although Sloan testified that detectives persuaded him to lie about appellant's involvement in the crime by promising to help him with his open cases, it was established that Sloan had no open cases and no arrests until months later. (***Id.***) Therefore, Sloan's PCRA testimony was demonstrably false. Detective Culbreth also testified before the PCRA court and denied telling

Sloan that he would help him with his open cases. (***Id.*** at 7.) In fact, Detective Culbreth did not run a record check on Sloan prior to interviewing him and therefore would have had no way of knowing whether Sloan had any arrests or open cases. (***Id.***)

Ultimately, the PCRA court, who heard the witnesses' testimony and observed their demeanor on the stand, did not find their current versions of what they saw on the night of the incident to be worthy of belief. (***Id.*** at 13.) By contrast, the court noted that their statements to police and their trial testimony was consistent and persuasive. (***Id.*** at 11.) Questions of credibility are for the finder of fact and will not be disturbed on appeal. ***Commonwealth v. Tate***, 485 Pa. 180, 182, 401 A.2d 353, 354 (1979).

In his second issue on appeal, appellant argues that the PCRA court should have considered Leslie Mack's proposed alibi testimony, as well as polygraph evidence, when reviewing his after-discovered evidence claim. According to appellant, Mack would testify that he was with her and not at the scene of the crime when the fire started. (Appellant's brief at 38.) Appellant also claims that both he and Mack passed polygraph examinations and that this should have been considered in conjunction with the recantation testimony of Renwick and Sloan. Appellant cites the United States Supreme Court case of ***Schlup v. Delo***, 513 U.S. 298 (1995), for the proposition that the PCRA court was required to consider all the evidence,

including relevant evidence that was either excluded or unavailable at trial. (***Id.*** at 39.)

Appellant's reliance on ***Schlup*** is misplaced. In that case, the petitioner was a prisoner convicted of killing another inmate who, in an effort to avoid the procedural bar in considering a constitutional claim in his federal ***habeas corpus*** petition, claimed his actual innocence. Schlup claimed that trial counsel was ineffective for failing to interview and call witnesses to establish his innocence. ***Schlup***, 513 U.S. at 306. Schlup also maintained that the state failed to disclose critical exculpatory evidence. ***Id.*** at 307. Attached to his ***habeas*** petition, Schlup further supported his contention with affidavits from numerous inmates who attested to his innocence. ***Id.*** The United States Supreme Court determined that an actual innocence determination must be made "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." ***Id.*** at 328 (footnote omitted). The ***Schlup*** Court ultimately ordered additional evidentiary hearings to reassess the credibility of previous witnesses and additional evidence and to hear new testimony.

We agree with the Commonwealth that ***Schlup*** is inapplicable. ***Schlup*** was interpreting then-existing federal requirements for ***habeas*** review of a state prisoner's constitutional claims and did not create a new

constitutional right for state petitioners or a new obligation on state courts for post-conviction collateral review. (Commonwealth's brief at 19.) ***Schlup*** was deciding the narrow issue of what standard of review applies where a successive or abusive ***habeas*** petitioner sets forth a claim of actual innocence. The ***Schlup*** Court held that the less stringent "probably resulted" standard enunciated in ***Murray v. Carrier***, 477 U.S. 478 (1986), governs the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims. ***Schlup***, 513 U.S. at 326-327. The ***Carrier*** standard requires the ***habeas*** petitioner to show that a constitutional violation probably resulted in the conviction of an innocent person, ***i.e.***, that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt in light of the new evidence. ***Id.*** at 327.

The ***Schlup*** Court observed that the ***Carrier*** standard's focus is on actual innocence; therefore, the reviewing tribunal is not bound by the rules of admissibility that would govern at trial, but should consider all relevant evidence in deciding whether, in light of the new evidence, no reasonable juror would have voted to find the defendant guilty. ***Id.*** at 328-329. ***Schlup*** does not stand for the proposition, as appellant herein suggests, that a serial PCRA petitioner bringing an after-discovered evidence claim is entitled to have the PCRA court review his claim in the context of all

available evidence, including evidence that is neither "after-discovered" nor admissible under Pennsylvania Rules of Evidence. The Court in ***Schlup*** was merely providing guidance to district courts regarding the appropriate standard of review for procedurally defaulted ***habeas*** petitioners who are raising a claim of actual innocence and has no applicability whatsoever to these proceedings.

Regarding Mack's proposed alibi testimony, this issue is previously litigated. Appellant raised this claim in his second PCRA petition, invoking the after-discovered evidence exception to the PCRA's one-year jurisdictional time bar. Appellant sought a new trial on the basis of Mack's proposed testimony. On appeal from denial of PCRA relief, this court held that the evidence was not after-discovered. We observed that if appellant were with Mack at the time the crime was committed, then he surely knew of her existence at time of trial and should have exercised due diligence in discovering her whereabouts and procuring her testimony. ***Commonwealth v. Bradley***, No. 0773 EDA 2000 at 3 (Pa.Super. filed February 28, 2001) (unpublished memorandum). We found that appellant had the knowledge to facilitate the procurement of witnesses for his defense but failed to exercise due diligence. ***Id.*** at 4. As such, the matter concerning Mack's proposed testimony and the alleged alibi defense is already litigated. 42 Pa.C.S.A. § 9544(a)(3). Appellant cannot attempt to bootstrap his previously litigated

alibi defense onto a new claim of after-discovered evidence based on Renwick and Sloan's recantation testimony.

Regarding the alleged polygraph results, appellant has failed to show how this is after-discovered evidence. As stated above, we have already held that Mack was available at time of trial. Presumably, these polygraph examinations could have been done earlier. More importantly, however, it is well established that polygraph results are inadmissible in Pennsylvania. "[T]he results of lie detector tests are inadmissible at trial due to their unreliable nature. Therefore, any reference to a lie detector test which raises an inference concerning the guilt or innocence of a defendant is inadmissible." ***Commonwealth v. Sneeringer***, 668 A.2d 1167, 1174 (Pa.Super. 1995), ***appeal denied***, 545 Pa. 651, 680 A.2d 1161 (1996) (citations omitted). ***See also Commonwealth v. Gee***, 467 Pa. 123, 141-142, 354 A.2d 875, 883-884 (1976) ("the results of a polygraph examination are inadmissible for any purpose in Pennsylvania because the scientific reliability of such tests has not been sufficiently established") (citations omitted).

Appellant cites ***Commonwealth v. A.R.***, 990 A.2d 1 (Pa.Super. 2010), ***appeal granted in part***, ___ Pa. ___, 50 A.3d 122 (2012), where this court held that the defendant's therapeutic polygraph examination results were admissible at his probation revocation hearing as evidence to support the underlying violation. However, in doing so, we distinguished the

general rule of inadmissibility: "[A] VOP hearing is not a trial and, as such, does not deal with questions of 'guilt' or 'innocence' as those terms are understood commonly in the criminal law." ***Id.*** at 6.[4] Here, appellant sought to admit the polygraph results as exculpatory after-discovered evidence. Therefore, ***A.R.*** is inapposite. Furthermore, as stated above, we reject appellant's contention that under ***Schlup***, the PCRA court was required to consider this otherwise inadmissible evidence in conjunction with Renwick and Sloan's recantation testimony to decide whether a new trial was warranted.[5]

For these reasons, we determine that the PCRA court did not err in denying appellant's petition.

Order affirmed.

[4] Indeed, we note that our supreme court recently granted ***allocatur*** as to this precise issue.

[5] An additional issue raised in appellant's Rule 1925(b) statement and addressed by the PCRA court in its supplemental opinion, that it erred in permitting the Commonwealth to introduce into evidence the statements of Arthur Davis and Johnny Berry to rebut the recantation testimony of Renwick and Sloan, has been abandoned on appeal.