

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

WALTER KARL MORRIS,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 849 MDA 2012

Appeal from the Order of April 30, 2012,  
in the Court of Common Pleas of Dauphin County,  
Criminal Division at No. CP-22-CR-0001441-2008

BEFORE: SHOGAN, OTT and COLVILLE\*, JJ.

CONCURRING AND DISSENTING MEMORANDUM BY COLVILLE, J.:

**FILED MAY 06, 2013**

I agree Appellant is not entitled to relief on his claims. However, I write separately to address the court's denial of Appellant's post-sentence motion for a new trial.

Appellant purports to appeal from the denial of his PCRA petition and the denial of his "post-sentence motion for a new trial based on after-discovered evidence." This posture is obviously improper. A defendant may not simultaneously litigate both a direct appeal from and a collateral attack on his sentence. The "post-sentence motion," if treated as such, was untimely. Pa.R.Crim.P. 720(A)(1); further, no appeal would lie from the

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\*Retired Senior Judge assigned to the Superior Court.

denial of a post-sentence motion – that appeal would be from the judgment of sentence. ***Commonwealth v. Lewis***, 911 A.2d 558, 561 n.1 (Pa. Super. 2006). Appellant’s judgment of sentence became final after this Court affirmed it on February 22, 2010. ***Commonwealth v. Morris***, 996 A.2d 11 (Pa. Super. 2010) (unpublished memorandum). Thus, the “post-sentence motion” could not have been entertained by the lower court as such.<sup>1</sup>

Appellant’s motion, based on alleged after-discovered evidence, requests relief contemplated by the PCRA. **See** 42 Pa.C.S.A. § 9543 (a)(2)(vi) (stating that to be eligible for relief under the PCRA, the petitioner must prove his 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.”). Appellant’s motion is either a response to the PCRA’s Pa.R.Crim.P. 907 notice or a new PCRA petition. **See** 42 Pa.C.S.A. § 9542 (stating that the PCRA is the sole means of obtaining collateral relief and encompasses all common law and statutory remedies intended to afford such relief); **see also *Commonwealth v. Wrecks***, 931 A.2d 717, 720 (Pa. Super. 2007) (holding that when a criminal defendant files an untimely post-sentence motion requesting relief cognizable under the PCRA, the court may treat the document as a PCRA petition regardless of how the document is titled).

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<sup>1</sup> The Majority finds Appellant’s motion to be meritless based, in part, on Appellant’s failure to comply with Pa.R.Crim.P. 720(C), requiring the prompt filing of a post-sentence motion for a new trial on the ground of after-discovered evidence. For the above-stated reasons, I would not apply this rule to this motion.

In disposing of Appellant's motion, the lower court noted that "although Defendant's pleading is styled as a Post-Sentence Motion for a New trial, . . . the filing was made in response to the court's notice of intention to dismiss his PCRA Petition." PCRA Court Opinion, 04/30/12, at 2 n.2. It appears to me, then, that the court properly treated Appellant's motion as a response to the PCRA court's Rule 907 notice.<sup>2</sup>

In any event, I believe that Appellant failed to meet his burden concerning the requirements to obtain relief based on after-discovered evidence;<sup>3</sup> thus, I would affirm the order denying PCRA relief on that basis. Accordingly, I concur in that disposition.

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<sup>2</sup> Although the lower court purported to deny the "post-sentence motion" separately, as a response to the 907 notice, no separate order was warranted. In my view, that order was a nullity and any appeal therefrom should be quashed.

<sup>3</sup> As this Court has stated:

To obtain relief based on after-discovered evidence, [an] appellant must demonstrate that the evidence: (1) could not have been obtained 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) would likely result in a different verdict if a new trial were granted.

***Commonwealth v. Foreman***, 55 A.3d 532, 537 (Pa. Super. 2012).