NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
WALTER KARL MORRIS,	:	
	:	
Appellant	:	No. 849 MDA 2012

Appeal from the Orders Entered 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.

MEMORANDUM BY SHOGAN, J.: **FILED MAY 06, 2013**

Appellant, Walter Karl Morris, appeals from two Orders entered April 30, 2012, denying his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546, and denying his related motion for a new trial.[1] Upon review, we affirm.

The PCRA court summarized the relevant procedural history of this case as follows:

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*Retired Senior Judge assigned to the Superior Court.

[1] We note that taking one appeal from several orders is not acceptable practice and is discouraged. ***General Elec. Credit Corp. v. Aetna Cas. & Sur. Co.***, 437 Pa. 463, 469, 263 A.2d 448, 452 (1970). Our Supreme Court has held that "[w]hen circumstances have permitted, however, we have refrained from quashing the whole appeal." ***Id.*** at 470, 263 A.2d at 452-453. Because the Commonwealth has not objected and our appellate review is not hampered in this case, we shall address Appellant's claims.

> On November 21, 2008, [Appellant], was convicted by a jury of first-degree murder for the killing of Doug Harris. On December 8, 2008, the trial court sentenced [Appellant] to an aggregate term of life imprisonment which sentence was affirmed by the Pennsylvania Superior Court by opinion dated February 22, 2010. On February 22, 2011, [Appellant] filed a *pro se* Petition under the Post-Conviction Relief Act[1] (PCRA), and was appointed counsel for purposes of pursuing his Petition. After two (2) amendments to [Appellant's] PCRA Petition, this Court issued a September 14, 2011 Order notifying [Appellant] of its intention to dismiss his petition within twenty days after independent judicial review found no genuine issues of material fact and determined that Morris was not entitled to post-conviction collateral relief.
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> [1] 42 Pa.C.S. §§ 9541-9546.
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> On October 7, 2011, [Appellant] filed a Post-Sentence Motion for a New Trial[2] alleging that he had uncovered after-discovered evidence that his co-defendant, Brian Tuckey (Tuckey), confessed to shooting and murdering Doug Harris. [Appellant] requested that this court schedule an evidentiary hearing on his Post-Sentence Motion and stay the issuing of a final order on the PCRA Petition until such time that the Motion could be considered.
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> > [2] The Court notes that although [Appellant's] pleading is styled as a Post-Sentence Motion for a New Trial, however, the filing was made in response to the court's notice of intention to dismiss his PCRA Petition.
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> This Court held two hearings relative to [Appellant's] Motion on December 13, 2011 and February 9, 2012.

Trial Court Opinion, 4/30/12, at 1-2.

The PCRA court denied Appellant's amended PCRA petition and motion for a new trial on April 30, 2012. Appellant filed a notice of appeal on May 3, 2012. Pursuant to court order, Appellant timely filed his statement of errors complained of on appeal.

Appellant sets forth the following issues for review, which we have reproduced verbatim:

> A. Whether the PCRA court erred by finding that trial counsel was not ineffective for failing to request an accomplice liability instruction where Appellant's Co-Defendant testified at trial and accused him of committing a murder and that Co-Defendant entered guilty pleas to several criminal offenses related to the same incident just one day prior to his testimony?
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> B. Whether the trial court erred by finding that trial counsel was not ineffective for failing to request a cautionary instruction for the testimony of an underaged witness who named Mary Beth Owens who was under the influence of alcohol prior to observing the shooting and could not identify Appellant in a photo lineup the day after the shooting and admitted that she observed the perpetrators from behind but testified at trial that Appellant was the shooter?
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> C. Whether the PCRA court erred by denying Appellant's post-sentence motion for a new trial based on after-discovered evidence where a disinterested third party testified that the Co-Defendant that testified at trial against Appellant confessed to the murder that Appellant is serving a life sentence for to him while in county prison?

Appellant's Brief at 5 (full capitalization omitted).

Our standard of review for an order denying PCRA relief is whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. ***Commonwealth v. Berry***, 877 A.2d 479, 482 (Pa. Super. 2005), *appeal denied*, 591 Pa. 688, 917 A.2d 844 (2007). 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).

When considering an allegation of ineffective assistance of counsel ("IAC"), counsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for his or her conduct; and (3) Appellant was prejudiced by counsel's action or omission. ***Commonwealth v. Pierce***, 515 Pa. 153, 158-159, 527 A.2d 973, 975-976 (1987). "In order to meet the prejudice prong of the ineffectiveness standard, a defendant must show that there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different." ***Commonwealth v. Wallace***, 555 Pa. 397, 407, 724 A.2d 916, 921 (1999). A claim of ineffective assistance of counsel will fail if the petitioner does not meet any of the three prongs. ***Commonwealth v. Williams***, 581 Pa. 57, 70, 863 A.2d 505, 513 (2004).

In his first issue, Appellant argues that trial counsel was ineffective for failing to request an accomplice instruction. Appellant's Brief at 16. During Appellant's trial, Brian Tuckey ("Tuckey") testified on behalf of the Commonwealth, and made a number of statements regarding Appellant's involvement in the crimes. N.T., 11/18/08, at 77-160. Tuckey had pled guilty to several charges arising from the incident involving Appellant and admitted that he was hoping that the trial judge would favorably consider his cooperation when it was time for Tuckey to be sentenced. ***Id.*** at 78. As a result, Appellant maintains that counsel should have requested an

accomplice charge. Appellant's Brief at 20. It is Appellant's position that because counsel failed to request an accomplice charge, the jury was not directed to consider Tuckey's testimony with caution. ***Id.*** at 20. Appellant argues that: "Accordingly, the jury in the case *sub judice* was permitted to ignore the fact that Brian Tuckey's testimony was coming from a corrupt and polluted source." ***Id.*** Appellant argues that but for counsel's failure to request the accomplice instruction, the jury may have acquitted Appellant of the charges. ***Id.*** at 24.

> It is the rule in Pennsylvania that the testimony of an accomplice of a defendant, given at the latter's trial, comes from a corrupt source and is to be carefully scrutinized and accepted with caution; it is clear error for the trial judge to refuse to give a charge to this effect after being specifically requested to do so. An accomplice charge is required only when the evidence permits an inference that the witness was an accomplice. The justification for the instruction is that an accomplice may inculpate others out of a reasonable expectation of leniency.

Commonwealth v. Corley, 816 A.2d 1109, 1114 (Pa. Super. 2003) (citations omitted).

A review of the record reflects that Appellant's defense throughout trial was that he did not murder the victim. N.T., 11/20/08, at 33, 36. As such, an instruction that Tuckey was Appellant's accomplice in the murder would be counter to Appellant's claim of innocence. It is well established in this Commonwealth that where a party claims that he is innocent or was not present when a crime was committed, it is not IAC if his counsel does not seek an accomplice instruction. ***See Commonwealth v. Karabin***, 493 Pa.

249, 253, 426 A.2d 91, 93-94 (1981) (finding no IAC for failure to request accomplice instruction where it would have been in derogation of appellant's claim of innocence); ***Commonwealth v. Quarles***, 522 A.2d 579, 582 (Pa. Super. 1987), *appeal denied*, 517 Pa. 592, 535 A.2d 82 (1987) (finding no IAC for failure to request accomplice instruction where it would have conflicted with appellant's alibi defense). Thus, we conclude that counsel had a reasonable basis for not requesting an accomplice instruction. Accordingly, Appellant has failed to establish that trial counsel was ineffective for failing to request an accomplice jury charge.

Further, we cannot agree that Appellant suffered prejudice as a result of counsel's failure to request an accomplice instruction. Given the testimony presented at trial establishing Appellant as the shooter, it is not likely that an accomplice instruction regarding Tuckey would result in the outcome of the proceeding being different.

Moreover, Tuckey testified at Appellant's trial that he had pled guilty to crimes arising from this incident and that he was hoping that the judge would favorably consider his cooperation in sentencing him. The jury heard this testimony and could come to their own conclusion regarding Tuckey's motivation and the truthfulness of his testimony. As a result, we cannot agree that an accomplice instruction would likely result in a different outcome. Thus, Appellant's claim fails.

Appellant next argues that trial counsel was ineffective for failing to request a ***Kloiber***[2] instruction regarding the testimony of Mary Beth Owens. Appellant's Brief at 24. Appellant maintains that a ***Kloiber*** instruction was necessary due to the fact that Mary Beth Owens was not physically in a position to clearly observe the assailant during the commission of the murder and that she was unable to identify Appellant from a photo array the day after the shooting. ***Id.*** at 30.

Prior to addressing the merits of Appellant's claim, we note that Appellant failed to raise this issue in his Pa.R.A.P. 1925(b) statement.[3] Any issues not raised in a 1925(b) statement will be deemed waived. ***Commonwealth v. Otero***, 860 A.2d 1052, 1055 (Pa. Super. 2004), *appeal denied*, 584 Pa. 706, 885 A.2d 41 (2005) (quoting ***Commonwealth v. Lord***, 553 Pa. 415, 420, 719 A.2d 306, 309 (1998)). Thus, this issue is waived.

Finally, Appellant argues that the PCRA court erred in denying his post-sentence motion seeking a new trial on the basis of after-discovered

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[2] ***Commonwealth v. Kloiber***, 378 Pa. 412, 106 A.2d 820 (1954), *cert. denied*, 348 U.S. 875 (1954).

[3] In his Pa.R.A.P. 1925(b) statement, Appellant raises the issue of trial counsel's ineffectiveness for failing to request an impaired witness instruction regarding Mary Beth Owens and the fact that she was intoxicated at the time that she observed the shooting. Statement of errors complained of upon appeal pursuant to Pa.R.A.P. 1925(b), at 6-7. While this issue pertains to witness Mary Beth Owens, it differs significantly from the claim of counsel's failure to request a ***Kloiber*** instruction on the basis of Owens' physical location during the shooting and her inability to identify Appellant in a photo array, which was the argument presented in Appellant's brief.

evidence. Appellant's Brief at 31. The after-discovered evidence is an alleged confession made by Tuckey to Jaason McAllister ("McAllister") that Tuckey was responsible for the murder of Doug Harris. ***Id.*** at 31-32. Tuckey's alleged confession took place in the Dauphin County Prison, after Appellant's trial. ***Id.*** at 31-32, 35. McAllister came forward with Tuckey's confession in response to Appellant's counsel's request. ***Id.*** at 32.

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. Pagan, 597 Pa. 69, 106, 950 A.2d 270, 292 (2008), *cert. denied*, 555 U.S. 1198 (2009) (citations omitted). "The test is conjunctive; the [appellant] must show by a preponderance of the evidence that each of these factors has been met in order for a new trial to be warranted." ***Commonwealth v. Padillas***, 997 A.2d 356, 363 (Pa. Super. 2010), *appeal denied*, 609 Pa. 687, 14 A.3d 826 (2010) (citation omitted). Further, the proposed new evidence must be "producible and admissible." ***Commonwealth v. Smith***, 518 Pa. 15, 50, 540 A.2d 246, 263 (1988), *cert. denied* 133 S.Ct. 24 (2012); ***Commonwealth v. Scott***, 503 Pa. 624, 631, 470 A.2d 91, 95 (1983). "A post-sentence motion for a new trial on the ground of after-discovered evidence must be filed in writing promptly after such discovery." Pa.R.Crim.P. 720(C). Our standard of review of an order

granting or denying post-conviction relief is limited to examining whether the court's determination is supported by evidence of record and whether it is free of legal error. ***Commonwealth v. Cobbs***, 759 A.2d 932, 934 (Pa. Super. 2000), *appeal denied*, 565 Pa. 663, 775 A.2d 801 (2001). Our task is not to engage in a *de novo* evaluation of testimony. ***Id.***

The PCRA court made the following finding regarding McAllister's testimony:

> This court does not find the testimony of Jaason McAllister convincing or credible. McAllister never came forward with whatever information regarding a murder he thought he had and his testimony was inconsistent. Additionally, Brian Tuckey unequivocally repudiated the alleged confession.

Trial Court Opinion, 4/30/12, at 6.

We cannot disturb the factual determinations of the PCRA court. Thus, because the PCRA court found the testimony of McAllister to be incredible and inconsistent, the evidence would not likely result in a different verdict if a new trial were granted. Furthermore, given the testimony of other witnesses presented at trial establishing Appellant as the shooter, such alleged confession evidence, which Tuckey denies, would not likely result in a different verdict. Thus, Appellant has failed to establish the fourth prong required for the grant of a new trial. ***Pagan***, 597 Pa. at 106, 950 A.2d at 292.

Additionally, as outlined, the proposed new evidence must be "producible and admissible." ***Smith***, 518 Pa. at 50, 540 A.2d at 263.

During his testimony, when asked whether he would be willing to testify if a new trial was granted for Appellant, McAllister responded: "I don't know." N.T., 12/13/11, at 28. When presented with the same question again, McAllister stated that "[He] probably would" testify. ***Id.*** at 29. In further questioning, counsel asked McAllister if he would testify against Tuckey, and McAllister stated: "Probably not. I mean, honestly, you know, no." ***Id.*** at 29. Counsel continued this line of questioning, and McAllister continued to answer that he was uncertain as to whether he would testify if a new trial were granted. ***Id.*** at 29-34.

Moreover, in a letter addressed to Appellant's counsel, McAllister stated:

> I will not put myself in a situation to be put on Tuck's paperwork. If I can help in the case by testifying on behalf of Morris without prosecuting Tuck, I will. As much as I want to help, I can't if I would be put on Tuck's paperwork and be used by the D.A. If all you need me for is Morris's case, I am here to help.

N.T., 12/13/11, at 26. In the event that Appellant was granted a new trial on the basis of after-discovered evidence, the after-discovered evidence of Tuckey's confession to the crime would be pivotal. McAllister has made clear that he will not testify against Tuckey. As such, we cannot conclude that McAllister's testimony regarding Tuckey's confession would be producible and admissible.

Further, as noted, Pa.R.Crim.P. 720(C) requires that a motion for a new trial on the ground of after-discovered evidence must be filed promptly

after such discovery. While not entirely clear, it appears from testimony that the alleged confession by Tuckey was made to McAllister at the Dauphin County Prison in 2008, possibly in March of 2008. N.T., 12/13/11 at 6-7, 20; N.T., 2/9/12, at 7, 10-14. McAllister testified that he did not report the alleged confession to any law enforcement officers. N.T., 12/13/11, at 23. McAllister testified that he met Appellant sometime in 2011, and, at that time, informed Appellant of Tuckey's alleged confession. N.T. 2/9/12 at 23-24. McAllister was unable to identify the time at which he first had this conversation with Appellant, other than stating that the conversation took place in 2011. ***Id.*** at 23-24. Although Appellant allegedly asked McAllister to step forward with this information, McAllister testified that he did not come forward with the confession due to feared retaliation. ***Id.*** at 24, 41. The testimony further reflects that Appellant's counsel, by letter dated September 15, 2011, contacted McAllister and asked him if he would come forward with this information. ***Id.*** at 38. McAllister responded to Appellant's counsel by undated letter in September 2011. N.T., 12/13/11, at 24-25. In that letter, McAllister indicates that he told Appellant of Tuckey's alleged confession, but does not identify when that discussion took place. ***Id.*** at 26.

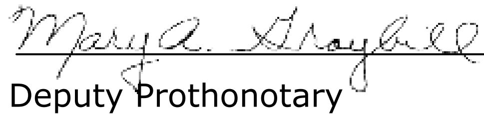
Appellant has failed to establish that he complied with Pa.R.Crim.P. 720(C). The record is unclear as to when McAllister first informed Appellant of Tuckey's alleged confession. Evidence of record establishes only that Appellant learned of this after-discovered evidence

sometime in 2011. This evidence is insufficient to establish that Appellant's motion for a new trial based on after-discovered evidence, filed October 7, 2011, was promptly filed.[4] Accordingly, Appellant's final claim lacks merit.

Orders affirmed.

COLVILLE, J., files a Concurring and Dissenting Memorandum.

Judgment Entered.



Deputy Prothonotary

Date: 5/6/2013

[4] Testimony regarding counsel's September 15, 2011 letter to McAllister, and McAllister's response, is irrelevant to a determination as to when Appellant first learned of the alleged confession from McAllister. The September 15, 2011 letter does not identify when McAllister informed Appellant of the alleged confession. Post-sentence motion for a new trial based on after-discovered evidence, 10/7/11, Exhibit A.