

2011 PA Super 130

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOSE CASTRO,	:	
	:	
Appellant	:	No. 3447 EDA 2009

Appeal from the Judgment of Sentence of June 22, 2009
 In the Court of Common Pleas of Philadelphia County, Criminal
 Division, Nos. MC-51-CR-0012695-2008, CP-51-CR-0014957-2008

BEFORE: BENDER, LAZARUS, and STRASSBURGER*, JJ.

OPINION BY LAZARUS, J.:

Filed: June 24, 2011

Jose Castro ("Castro") appeals from his judgment of sentence imposed in the Court of Common Pleas of Philadelphia County on June 22, 2009. We vacate and remand.

The trial court set forth the relevant factual history as follows:

On March 11, 2008, at approximately 11:45 a.m., Officer Richard Cujdik met with a CI [(confidential informant)], searched the CI for any money or contraband, and provided the CI with \$20 USC of pre-recorded buy money.[¹] The officer then directed the

¹ Since February of 2009, the *Philadelphia Daily News* and *Philadelphia Inquirer* have published numerous stories regarding the alleged misconduct of Jeffrey Cujdik, Richard Cujdik and other members of the Philadelphia Police Department Narcotics Field Unit. Jeffrey Cujdik was the initial focus of the misconduct probe by local and federal law enforcement, which has since expanded to include Richard Cujdik. Both officers have been placed on desk duty. Officer Cujdik identified the confidential informant as CI "N-142." N.T. Trial, 3/26/2009, at 13.

*Retired Senior Judge assigned to the Superior Court.

CI toward the residence at 1947 East Orleans Street in the City of Philadelphia. The CI knocked, Yvette Torres ("Torres") answered the door, and after a brief conversation the CI and Torres went inside the residence. The CI exited the residence a few minutes later and returned to Officer Cujdik with two (2) clear glass jars with red lids. The jars contained a green weed oily substance, alleged PCP.

Officer Cujdik obtained a search and seizure warrant for the residence at 1947 East Orleans Street and returned to the location at approximately 4:50 p.m. that same day with other members of his unit. Officer Cujdik was positioned at the rear of the property when the other officers knocked on the door of the residence and he [(Officer Cujdik)] observed Castro exit the residence and toss a clear plastic baggie into a neighboring yard. Officer Cujdik observed Officer Dmytryk arrest Castro in the back yard and recover \$41 USC from his person. Officer Cujdik then recovered the baggie that Castro tossed into the neighboring yard and inside the bag were five (5) clear glass jars, three of which had purple lids and two of which had red lids. All of the jars contained green weed oily substance, alleged PCP. Officers stopped and arrested Torres after she was identified by Officer Cujdik and \$20 USD and a key to the residence were recovered from her person. From the living room, the officer recovered two pieces of mail that were addressed to Torres and Castro at 1947 East Orleans Street. The seizure analysis performed on all (7) jars – two (2) from the CI and five (5) from the baggies tossed by Castro – indicated the presence of PCP.

See Trial Court Opinion, 5/17/2010, at 3-4.

On March 26, 2009, Castro proceeded to a bench trial, where Officer Richard Cujdik was the only individual to testify. The court found Castro guilty of conspiracy to engage in possession with intent to deliver a controlled substance ("conspiracy-PWID") and knowing and intentional possession of a controlled substance. **See** 18 Pa.C.S.A. § 903(a)(1) and 35 P.S. § 780-113(a)(16). On June 22, 2009, the court sentenced Castro to 6-23 months' incarceration followed by two years' probation for conspiracy-PWID, and to 6-

23 months' incarceration followed by one year of probation for knowing and intentional possession, sentences to run concurrently.

On June 24, 2009, Castro filed a post-sentence motion seeking a new trial based upon after-discovered evidence. On November 6, 2009, the court denied the motion after a brief hearing where it received neither evidence nor argument from the parties; a timely notice of appeal and court-ordered Pennsylvania Rule of Appellate Procedure 1925(b) statement followed. On appeal, Castro raises the following issue for our review:

SHOULD NOT THIS COURT REMAND THIS MATTER TO THE COURT OF COMMON PLEAS FOR FURTHER PROCEEDINGS BASED ON AFTER-DISCOVERED EVIDENCE REGARDING THE CORRUPT AND CRIMINAL ACTIVITIES OF POLICE OFFICER RICHARD CUJDIK, THE PROSECUTION'S ONLY LIVE WITNESS?

Appellant's Brief, at 3.

Castro asks that we remand this matter for an evidentiary hearing based on his claim of after-discovered evidence. Castro relies on a March 30, 2009 newspaper article published in the *Philadelphia Daily News* about a drug raid at a corner grocery store. Allegedly, Officer Richard Cujdik wrote in the warrant application that CI-142 purchased drug paraphernalia (small ziplock bags) from the store around 4:30 p.m. When Officer Cujdik, and other members of the Narcotics Field Unit, raided the store roughly two hours later, the store's hidden back-up surveillance system recorded the officers attempting to disable

the store's surveillance cameras.² According to the article, the surveillance footage also shows that no one purchased ziplock bags from the store during the time alleged by Officer Cujdik in the warrant application.

Our Supreme Court has explained:

To obtain relief based on after-discovered evidence, 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, 950 A.2d 270, 292 (Pa. 2008); ***see also Commonwealth v. Rivera***, 939 A.2d 355, 359 (Pa. Super. 2007).

Upon review, we conclude that Castro has satisfied the four-prong test above. First, Castro discovered the evidence after his trial, on March 30, 2009. Second, the evidence is not merely cumulative or corroborative because Castro did not present evidence regarding Cujdik's prior conduct. Third, Castro could include such evidence in a motion to reveal the identity of the confidential informant or in a motion to suppress physical evidence.³ Finally, this evidence could completely invalidate Officer Cujdik's testimony by revealing his practice

² Three surveillance videos capturing the police raid can be viewed on the *Philadelphia Daily News*' website www.philly.com. The March 2009 newspaper article also contains a transcript of the surveillance system's audio recording of the raid.

³ The trial court concluded that Castro's after-discovered evidence claim failed to satisfy the third prong. **See** Trial Court Opinion, 5/17/2010, at 9 ("Although the proposed evidence satisfies some of the prongs required for a new trial, the evidence lacks a purpose for admission independent from impeaching the credibility of the officer."). However, for the reasons stated, we disagree.

of fabricating controlled-buys to procure and execute search warrants, and would likely result in a different verdict at a new trial. Having satisfied the four-prong test above, we remand the matter for an evidentiary hearing on Castro's claim that he is entitled to a new trial based on after-discovered evidence.⁴ **See Rivera**, 939 A.2d at 356-59 (remanding based on after-discovered evidence, in prosecution for drug offenses, where a newspaper article indicated Commonwealth laboratory technician, who testified by stipulation to nature and weight of drugs and chain of custody, "had been exposed as a corrupt and criminal individual who had abused her position of

⁴ We are aware of this Court's recent ruling in **Commonwealth v. Estep**, --- A.3d ---, 2011 WL 941202 (Pa. Super. 2011), where we denied appellant's claim of after-discovered evidence based on newspaper articles reporting on Officer Jeffrey Cujdik's alleged misconduct. While at first blush, that holding might appear to control here, upon closer review, **Estep** is factually distinguishable and, therefore, not controlling. In **Estep**, appellant cited two newspaper articles, centering on Jeffrey Cujdik's alleged misconduct, and dated only by handwritten notes from an unknown individual. Here, Castro has produced an authentic newspaper article, dated by the publisher, different from the articles presented in **Estep**, suggesting that Richard Cujdik falsified a search warrant application. Furthermore, **Estep's** holding was narrow and limited to the facts of that case, i.e. appellant's deficient proffer of undated newspaper articles. **See id.** at *2 ("We specifically hold that the newspaper articles Appellant offers in this case are not sufficient to meet the test for after-discovered evidence.") (emphasis added). Thus, **Estep** cannot be read to foreclose all after-discovered evidence claims based on newspaper articles reporting on either Jeffrey or Richard Cujdik's alleged misconduct. Because this case is factually distinguishable from **Estep**, this Court's holding there is not controlling here. Finally, the newspaper article is not the only evidence that Castro could introduce. There is other corroborating evidence, in the form of video surveillance.

trust with the Philadelphia Police Department and had been charged with stealing drugs from the lab").⁵

In granting Castro's request for remand, we emphasize that the key individuals in this case - Officer Cujdik, the sole testifying witness against Castro, and CI-142, the CI who allegedly purchased the drugs from Torres - are the same individuals allegedly referred to in the March 30, 2009 newspaper article and video surveillance. Therefore, the interests of justice further compel the result reached here.

Judgment of sentence vacated. Case remanded for an evidentiary hearing on Castro's claim of after-discovered evidence. Jurisdiction relinquished.

STRASSBURGER, J., files a Dissenting Opinion.

⁵ "At an evidentiary hearing, an 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." *Rivera*, 939 A.2d at 359. "[P]rocedure demands that the lower court develop the record and make that call in the first instance." *Id.*

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DISSENTING OPINION BY STRASSBURGER, J.:

Were I writing on a clean slate, I would agree with the result reached by the Majority. The information in the Philadelphia Daily News article meets the four-prong test for after-discovered evidence set forth in ***Commonwealth v. Pagan***, 950 A.2d 270, 292 (Pa. 2008). While the after-discovered evidence could be used to impeach the credibility of Officer Richard Cujdik, it would not be used *solely* for that purpose. As the Majority correctly observes

Castro could include such evidence in a motion to reveal the identity of the confidential informant or in a motion to suppress physical evidence.

Majority Opinion at 4.

Unfortunately, we are not dealing with a *tabula rasa*. I believe that this Court's recent panel opinion in ***Commonwealth v. Estep***, ___ A.3d ___, 2011 WL 941202 (Pa. Super. 2011), while incorrectly decided, is controlling.

*Retired Senior Judge assigned to the Superior Court.

In that case, where the alleged “bad cop” was Jeffrey Cujdik, the brother of Richard Cujdik, the alleged “bad cop” in this case, a panel of this Court held that the newspaper articles merely state that Officer (Jeffrey) Cujdik was under investigation for misconduct. Thus, the ***Estepp*** court held that Estepp could only speculate about possible corruption that had not been corroborated. While the ***Estepp*** court also noted that no printed dates existed on the newspaper articles, that does not appear to be the basis for the decision, given that the dates were obviously available.

I believe that ***Estepp*** is inconsistent with this Court’s panel opinion in ***Commonwealth v. Rivera***, 939 A.2d 355, 359 (Pa. Super. 2007). There we held that the arrest for corruption and illegal practices of the laboratory technician who testified as to the type and amount of drugs was after-discovered evidence warranting a remand for an evidentiary hearing to determine if a new trial was required. Even though, given the presumption of innocence clothing the laboratory technician in ***Rivera***, this Court did not say, as did the ***Estepp*** court, that we can only speculate about possible corruption that has not been corroborated. Rather, we remanded for an evidentiary hearing to find out if a possibly innocent defendant had been prejudiced by an allegedly corrupt Commonwealth witness. The same result should have obtained in ***Estepp***, and should have obtained here, were it not for ***Estepp***. Thus, I reluctantly dissent.