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Commonwealth v. Harshman

Commonwealth of Pennsylvania v. Ronald Harshman, Petitioner
Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Criminal Action No. 2000-851

HEADNOTES

Post Conviction Relief Act; After Discovered Evidence; Recantation; Exculpatory Evidence; Ineffective Assistance of Counsel

1. "When seeking a new trial based on alleged after-discovered evidence in the form of recantation testimony, the petitioner must establish that: (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict." Commonwealth v. Washington, 927 A.2d 586 (Pa. 2007); Commonwealth v. Johnson, 966 A.2d 523, 541 (Pa. 2009).

2. When assessing recantation evidence, the trial court must assess the credibility of the witness or the matter will be remanded for such a determination.

3. Recantation testimony has been held to be "one of the least reliable forms of proof, particularly when it constitutes an admission of perjury." Commonwealth v. Padillas, 997 A.2d 356, 366 (Pa. Super. 2010).

Appearances:
Christopher Sheffield, Esq., *Attorney for Defendant*
Zachary Mills, *Attorney for Commonwealth*

OPINION

Before, Herman, P.J.

Procedural History

Petitioner, Ronald Harshman, was convicted of first degree murder on July 13, 2001. The instant amended Post Conviction Relief Act (PCRA) petition was filed June 30, 2006. The basis for the amended petition was the alleged recantation of two of the Commonwealth's trial witnesses, Keith Granlun and Randi Kohr and the ineffective assistance of trial counsel. Both witnesses were inmates at the Franklin County Jail at the same time as the Petitioner and testified at trial for the Commonwealth. A PCRA hearing was held in 2009 and both witnesses were called to testify based upon their recantation. However, both witnesses invoked their 5th Amendment right against self-incrimination and refused to testify for fear of criminal prosecution.

Following the hearing, the court dismissed Petitioner's PCRA petition on September 13, 2010. The Petitioner appealed to the Superior Court. The Superior Court issued an opinion on August 31, 2011 which affirmed the matter, in part, but also remanded on very specific grounds regarding the manner in which the right not to self-incriminate could be applied. A hearing was held on September 6, 2012, and Mr. Granlun made the decision to testify despite the risk of prosecution in order to recant his testimony at trial. Mr. Kohr decided to continue to invoke his right not to self-incriminate. A final hearing was held on March 28, 2013. The transcript of these proceedings was filed on June 8, 2013 and the petitioner was to file his brief 14 days later which was June 24, 2013. From the date of the filing of Petitioner's brief, the Commonwealth was to have 20 days to file its own brief. Petitioner did not file a brief until July 31, 2013.

Discussion

The Superior Court's Opinion dated August 31, 2011 left open several issues to be determined on remand. The Superior Court deferred judgment on these issues until the recanting witnesses were questioned in a manner that the Opinion directed; that is, pleading protection under the Fifth Amendment to each individual question and

not merely a blanket protection. Unlike the other proposed recanting witness, Mr. Granlun decided not to exercise his right against self-incrimination so we must revisit these issues in light of his new testimony.

Before us are two issues in light of the recantation of Keith Granlun: First is the issue of after-discovered evidence in the way of recantation evidence. The second issue is the alleged ineffective assistance of counsel in light of Mr. Granlun's recantation.

After-Discovered Evidence

At trial, Mr. Granlun testified that Petitioner confessed his crime to him. At the recent PCRA hearing, Mr. Granlun testified he lied at trial because a the Franklin County District Attorney made a deal with him in which his testimony would be provided in exchange for removing all fines and releasing him from custody. His testimony at the PCRA hearing was that he never met or spoke with Petitioner and that the entire testimony at trial was a lie which he concocted to benefit from the deal.

A petitioner may be eligible for relief pursuant to the PCRA only if he proves that his conviction 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. Con. Stat. § 9543(a)(2)(vi). "When seeking a new trial based on alleged after-discovered evidence in the form of recantation testimony, the petitioner must establish that: (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict." Commonwealth v. Washington, 927 A.2d 586 (Pa. 2007); Commonwealth v. Johnson, 966 A.2d 523, 541 (Pa. 2009). In making such an analysis, the trial court has a duty to assess the credibility of the recanting witness. Id. Failure to do so may result in a remand to the trial court for the limited purpose of assessing credibility. Commonwealth v. D'Amato, 579 Pa. 490, 856 A.2d 806, 825-26 (2004).

First, we will address Mr. Granlun's credibility. It is well established that recantation testimony "is one of the least reliable forms of proof, particularly when it constitutes an admission of perjury." Commonwealth v. Padillas, 997 A.2d 356, 366 (Pa. Super. 2010) (citing Commonwealth v. McCracken, 659 A.2d 541, 545 (Pa. 1995); Commonwealth v. Dennis, 715 A.2d 404, 416 (1998) ("Recantation, however, is notoriously unreliable, particularly where the witness claims to have committed perjury."); Commonwealth v. Birdsong, 24 A.3d 319 (Pa. 2011) ("[R]ecantation testimony is 'exceedingly unreliable,' and 'there is no less reliable form of proof, especially when it involves an admission of perjury."); Commonwealth v. Abu–Jamal, 553 Pa. 485, 720 A.2d 79, 99 (1998).

In light of the case law, Mr. Granlun's testimony is inherently untrustworthy. We can determine that he was either lying at the time of trial or at the time of the PCRA hearing. Further, even his brother-in-law testified that Mr. Granlun was a liar. Mr. Granlun was advised by counsel that although he could be charged with perjury, the statute of limitations would bar a conviction. (N.T. 9/26/13, at 13). Mr. Granlun has certainly been untruthful at some point. He has given two conflicting stories, is know by his own relative to be a liar, and testified at the PCRA hearing under no fear of prosecution for perjury. We are unable to assign any credibility to his testimony. For whatever reason, he has come forward to give this most recent testimony, but we simply cannot speculate as to whether he has had a change of heart or has some ulterior motive. We are left not knowing which version of the events is true, however, Mr. Granlun's testimony is not to be given the benefit of being viewed in "a most favorable light." Johnson, 966 A.2d at 542. Therefore, we cannot find his new testimony credible.

Next we evaluate the newly discovered evidence against the four-part analysis set forth in Commonwealth v. Washington cited above. First, has the evidence has been discovered after trial and could not have been obtained at or prior to trial through reasonable diligence? Due to the nature of the evidence, that is, recantation, the evidence could only have come after trial. Second, is the evidence cumulative? The evidence is not cumulative because it essentially proves a negative, that is, that no other witnesses testified that Petitioner did not confess to them. Third, is the evidence being used solely to impeach credibility? Clearly it is not because the evidence is exculpatory in nature. Fourth, would the evidence likely compel a different verdict? This is the main factor that we must address. It is also the factor where Petitioner's argument fails. We must determine whether Mr. Granlun's testimony that he did not speak to Petitioner and never heard him confess would have persuaded a jury to acquit Petitioner of murder.

We find that the new evidence which comes by way of Mr. Granlun's recantation, would not have compelled a different verdict. According to the Petitioner's brief, the testimony of Mr. Granlun and Mr. Kohr were the only two witnesses at trial who could "place the Petitioner near the alleged victim," and all other witnesses merely provided circumstantial evidence that Petitioner was in fact the person who committed the murder. First, we note that the

Commonwealth may sustain its burden by means of circumstantial evidence, alone. Commonwealth v. DiPanfilo, 993 A.2d 1262, 1264 (Pa. Super. 2010). Where the law allows a verdict of guilty to a charge of murder where no victim's body has been recovered, surely we are not required to have evidence that the accused has confessed his crime to someone. Further, because Mr. Kohr did not testify at the PCRA hearings and hearsay evidence of his purported recantation was not admitted, we are left with the testimony he originally gave at trial.

The evidence presented at trial is located in the record, so we need not review it in full. However, we note that the jury heard evidence that Petitioner previously crashed his car into Snyder's vehicle and fired two gunshots at him, missing him both times. Harshman informed people that he would seek revenge against Snyder for ruining his marriage. Within days of receiving divorce papers from his wife, Petitioner purchased a .25 caliber pistol. On May 25, 1985, Snyder had disappeared. His gardening tools were strewn about the garden in atypical fashion, suggesting a disturbance. Neighbors reported seeing a brown pickup truck at the Snyder residence. A .25 caliber pistol shell casing was found in the Snyder barn. Several days later, the same neighbors noticed the same brown pickup truck at the Harshman residence. Snyder's truck was found in Maryland with all of his personal belongings, and was wiped clean of fingerprints. Years later, in 1999, after Harshman had moved, the Harshman property was searched and a .25 caliber pistol shell casing was found. It was determined that the gun that shot this round was the same gun that shot the shell found at the Snyder residence. Therefore, we find that Mr. Granlun's new testimony would have little, if any, effect on the jury's verdict.

For the foregoing reasoning, we will deny Petitioner's claim for relief regarding recantation testimony.

Ineffective Assistance of Counsel

Petitioner also argues that he is entitled to relief based upon the ineffective assistance of his trial counsel. Specifically, trial counsel was ineffective for failing to meet with Mr. Granlun prior to trial.

Counsel is presumed effective and the petitioner has the burden to prove otherwise. Commonwealth v. Carpenter, 725 A.2d 154, 161 (Pa. 1999). To determine whether Mr. Harshman was aggrieved by the ineffective assistance of counsel we will apply a three-prong test. "Specifically, a petitioner must show: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or inaction; and (3) counsel's error caused prejudice such that there is a reasonable probability that the result of the proceeding would have been different absent such error. Commonwealth v. Fink, 24 A.3d 426, 430 (Pa. Super. 2011) citing Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987). Failure to satisfy any of the three prongs will require rejection of the claim. Commonwealth v. Hammond, 953 A.2d 544, 556 (Pa. Super. 2008).

At the PCRA hearing, trial counsel, David Keller, testified that after he received a vague phone call from Walter Dill, Granlun's brother-in-law, Keller did go to the jail in an attempt to speak to Granlun two days before trial began. Attorney Keller concluded, after reviewing notes from his file that he was unable to see Mr. Granlun on that day but could not recall a reason. This alone shows that Attorney Keller had a reasonable basis for not having met with Mr. Granlun.

We need not address the other factors of the test, however, we do note that neither of the other factors are satisfied. First, this claim lacks arguable merit. As the Commonwealth points out, we do not know whether Mr. Granlun would have told Attorney Keller the same thing he testified to at the PCRA hearing. Petitioner's position is that Mr. Granlun would have notified Attorney Keller that he was offered a deal and that he is going to testify falsely. It goes without saying, that we simply do not know that this is true. Even if we give Mr. Granlun the benefit of the doubt and believe that he would have told Attorney Keller this information when he visited the jail, why didn't Mr. Granlun simply tell the truth at trial? If he wanted to come clean to someone, he had his opportunity to do so while on the witness stand. Suppose he did have a chance to divulge to Attorney Keller his intentions to commit perjury. At trial, following his allegedly false testimony, Mr. Keller would likely have asked, "Do you recall telling me, at the jail, that you planned on testifying falsely?" Are we to believe that Mr. Granlun would then have told the truth after testifying falsely? If he had the desire to testify truthfully, he could have easily done so at trial without having to be asked. Second, for the reasons we stated above, we do not believe Petitioner was prejudiced by this claim because the jury would not likely have been persuaded based on Mr. Granlun's testimony, alone.

For these reasons, we will deny Petitioner's claim for relief regarding ineffective assistance of counsel.

Conclusion

In light of the foregoing discussion, we will deny Petitioner's claims for relief on the basis of newly discovered evidence by way of witness recantation. We also deny relief on the claim asserting that trial counsel was ineffective.

ORDER

NOW THIS 10th day of March 2014, upon review of the evidence presented at the proceedings held in response to the Superior Court's remand dated August 31, 2011,

THE COURT HEREBY finds that the remaining issues which were raised in the Petition for Relief pursuant to the Post Conviction Relief Act and have been remanded by the Superior Court for further proceedings are **DENIED**.

YOU ARE HEREBY ADVISED THAT Pursuant to Rule 907(4) of the Pennsylvania Rules of Criminal Procedure:

1. You have a right to appeal from the Court's decision disposing of your petition [Pa. R. Crim. P. 907(4)];

2. If you choose to exercise that right, you must do so within thirty (30) days of the date of this order. [Pa. R. Crim. P. 907(4); Pa. R. App. P. 903(a)];

2. If counsel has been appointed to represent you, that appointment shall be effective throughout the post-conviction collateral proceedings, including an appeal from this order. [Pa. R. Crim. P. 904(F)(2)];

3. If your appointed counsel has determined your claims to be meritless and the Court has permitted withdrawal from representation, you may proceed *pro se* or through privately retained counsel. Commonwealth v. Maple, 559 A.2d 953 (Pa. Super. 1989).

Pursuant to Pa.R.Crim.P. 114, the clerk of courts shall immediately docket this Order and record in the docket the date it was made. The clerk shall forthwith furnish a copy of the Order, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.