

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
KHALID ANDERSON	:	
	:	
Appellant	:	No. 216 EDA 2021

Appeal from the PCRA Order Entered December 15, 2020
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0900791-2002

BEFORE: BENDER, P.J.E., BOWES, J., and DUBOW, J.

MEMORANDUM BY DUBOW, J.:

FILED JUNE 28, 2022

Appellant, Khalid Anderson, appeals from the Order entered by the Court of Common Pleas of Philadelphia County dismissing his third Petition filed pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S. §§ 9541-46. After careful review, we affirm.

On July 7, 2002, Sabre Clinton drove Appellant and Scott Slade to the home of Frank Surace (“Victim”) to engage in a drug transaction. Clinton and Appellant had a history of supplying Victim with PCP, which Victim then repackaged and resold. When the trio arrived at Victim’s house, Clinton witnessed Appellant give Slade a handgun. Appellant and Slade then went into Victim’s home while Clinton waited in the car.

During the transaction, Appellant and Slade robbed Victim. The incident devolved into a violent struggle; Appellant and Slade hit Victim in the face and head multiple times and Victim stabbed Appellant and Slade. Ultimately, either

Appellant or Slade shot Victim in the back, killing him. The shooter left behind the magazine from the gun.

Bleeding profusely, Appellant and Slade fled Victim's house and returned to Clinton's car. Clinton drove the pair to the hospital, and police went to the hospital to investigate the stabbings. Clinton and Slade gave false names to the police and Clinton gave police a false account of what occurred. To identify Appellant and Slade and to preserve evidence if either died from his stab wounds, police confiscated Appellant's and Slade's clothing. Police found \$863 in Appellant's pants pocket, bundled in "butterfly clips" that Victim regularly used. DNA testing revealed that the money was stained with blood from Victim and Slade.

Police found Clinton's car several blocks from the hospital. Police found a gun under the carpet in the front passenger's side of the vehicle. The gun was missing its magazine and was covered with Victim's blood. The magazine found at the crime scene fit the gun found in Clinton's car.

When police arrived at Victim's home, they found Victim lying on the living room floor and determined that he had died. Victim's pockets were inside out and police found Victim's wallet in his second-floor bedroom with no money in it. Police found blood in the front vestibule, kitchen, living room, and bedroom, and on Victim's wallet.

Clinton testified at trial consistent with the above facts.¹ Appellant also testified and admitted that he had been in Victim's house with Slade. Appellant, however, also testified that Victim attacked him with a knife and Slade killed Victim in the defendants' mutual self-defense. Appellant denied that he gave Slade a handgun.

On March 3, 2005, a jury convicted Appellant of Third-Degree Murder, Robbery, and Criminal Conspiracy. The court sentenced Appellant to an aggregate term of 26 to 52 years' incarceration. This Court affirmed Appellant's Judgment of Sentence and, on November 27, 2007, our Supreme Court denied allowance of appeal. ***Commonwealth v. Anderson***, 931 A.2d 40 (Pa. Super. filed June 28, 2007) (non-precedential decision), *appeal denied*, 937 A.2d 442 (Pa. 2007).

On December 16, 2016, Appellant *pro se* filed the instant PCRA Petition, his third.² Appellant attached to his Petition a statement allegedly signed by Sabre Clinton. In the statement, Clinton stated, *inter alia*, that he never saw Appellant give Slade a handgun.³ Based on this statement, Appellant argued

¹ Clinton testified pursuant to an immunity agreement with the Commonwealth.

² On November 16, 2017, attorney Carole L. McHugh entered an appearance on behalf of Appellant. On March 21, 2019, Attorney McHugh filed a memorandum in support of Appellant's *pro se* December 16, 2016 filing.

³ Clinton alleges that he authored the statement due to "years of guilt[.]" PCRA Petition at Exh. A, pg. 2.

for application of the newly discovered fact exception to the PCRA's one year time bar and posited a substantive after-discovered evidence claim.

Also on December 16, 2016, Appellant *pro se* filed a motion seeking DNA testing of swabs of blood taken from Victim's bedroom and wallet. As discussed *infra*, Appellant asserted that testing would prove that he did not rob Victim.

On October 1, 2020, the PCRA court issued a Rule 907 Notice of its intent to dismiss Appellant's petition without a hearing. The court explained that Appellant's "petition [was] untimely filed and [did] not invoke an exception to the timeliness provision of the Post[]Conviction Relief Act." Notice, dated 10/1/20, at 1 (unpaginated).⁴ On December 15, 2020, the PCRA court dismissed Appellant's petition and Motion for DNA Testing. Appellant timely filed a Notice of Appeal and both he and the trial court complied with Pa.R.A.P. 1925.

Appellant raises the following issues on appeal:

1. Did the PCRA court err in dismissing [Appellant's] PCRA petition as untimely, since [Appellant] (a) first learned of Sabre Clinton's recantation, in the exercise of due diligence, while a previously filed PCRA was pending on appeal and (b) filed his instant PCRA within 60 days after the said appeal was concluded.
2. Did the PCRA court err in failing to grant relief upon the merits of [Appellant's after] discovered evidence claim?
3. Did the PCRA court err in failing to grant DNA testing?

⁴ It is not clear why nearly four years elapsed between Appellant's filing of his PCRA Petition and the PCRA court's Rule 907 Notice. The delay is not at issue on appeal.

4. Did the PCRA court err by failing to restore [Appellant's] appellate rights with respect to his first PCRA, in light of the proof proffered by Petitioner that he did not receive timely notice of the court's order of dismissal.

Appellant's Br. at 3.

In his first two issues, Appellant asserts that the trial court erred by denying his PCRA Petition as untimely. *Id.* at 22-26. Appellant claims that Clinton's statement satisfied the newly discovered fact exception to the PCRA's one-year time bar. *Id.* As a result, the court should have addressed the merits of his claim. *Id.* at 26-31.

Our standard of review is well-settled. On appeal from a PCRA court's dismissal of a petition, we examine whether the record supports the PCRA court's findings and whether the court's conclusions of law are free from legal error. *Commonwealth v. Johnson*, 236 A.3d 63, 68 (Pa. Super. 2020) (*en banc*) "We view the findings of the PCRA court and the evidence of record in a light most favorable to the prevailing party." *Id.* (citation omitted). The PCRA court's credibility determinations are binding on this Court when supported by the record, but we review its legal conclusions *de novo*. *Id.*

"Any petition under [the PCRA] shall be filed within one year of the date the judgment becomes final[.]" 42 Pa.C.S. § 9545(b)(1). The instant Petition, filed December 16, 2016, is facially untimely as Appellant filed it well after his Judgment of Sentence became final on February 25, 2008.⁵ Appellant asserts,

⁵ "[A] judgment becomes final at the conclusion of direct review[.]" 42 Pa.C.S. § 9545(b)(3). The Pennsylvania Supreme Court denied review on November
(Footnote Continued Next Page)

however, that his claim merits review because he pleaded and proved the newly discovered fact exception to the PCRA's one-year time-bar.⁶

To invoke the newly discovered fact exception, a petitioner must plead and prove that "(1) the *facts* upon which the claim is predicated were *unknown* and (2) could not have been ascertained by the exercise of *due diligence*." ***Commonwealth v. Hart***, 199 A.3d 475, 481 (Pa. Super. 2018). **See** 42 Pa.C.S. § 9545(b)(1)(ii). "The focus of the exception is on the newly discovered *facts*, not on a newly discovered or newly willing source for previously known facts." ***Commonwealth v. Marshall***, 947 A.2d 714, 720 (Pa. 2008) (brackets, quotation marks, and citation omitted).

Appellant claims that Clinton's statement contained a new fact: "[Appellant] did not hand a gun to co-defendant Slade." Appellant's Br. at 25. The PCRA court dismissed Appellant's Petition because Clinton's statement failed to present a new fact. PCRA Ct. Op., 7/6/21, at 7-8.

27, 2007, and, as a result, Appellant's Judgment of Sentence became final on February 25, 2008, at the expiration of time to file for *certiorari* by the U.S. Supreme Court. **See** U.S.Sup.Ct.R. 13.

⁶ Appellant alleged that he received Clinton's recantation statement on February 20, 2015, during the pendency of the appeal of his second PCRA Petition. PCRA Petition at 2. Appellant filed the instant Petition within 60 days of October 24, 2016, the date this Court denied relief on Appellant's second Petition. Appellant, thus, satisfied 42 Pa.C.S. § 9545(b)(2) of the PCRA, which at that time required a petitioner invoking an exception to the PCRA time bar to file their petition within 60 days "of the date the claim could have been presented." **See also *Commonwealth v. Montgomery***, 181 A.3d 359, 364 (Pa. Super. 2018) (*en banc*).

We agree with the PCRA court's conclusion. At trial, Appellant testified that he did not give Slade a handgun. Thus, Clinton's identical statement is not a "previously unknown fact" to Appellant. **See** N.T. Trial, 2/23/05, at 56 ("[Q.] Did you ever give Scott Slade a gun on July the 7th, 2002 sometime in the afternoon? A. No."). Clinton's statement is simply a new source for a previously known fact, insufficient to satisfy the newly discovered fact exception to the PCRA time bar. As a result, Appellant's first and second claims fail because he did not invoke the PCRA court's jurisdiction.⁷

In his third issue, Appellant avers that the trial court erred by denying his motion for DNA testing on blood found in Victim's bedroom. Appellant's Br. at 31-35. Appellant argues that testing would reveal that the blood belonged solely to Victim, not Appellant. **Id.** Appellant reasons that, since he was bleeding after being stabbed, proof that his blood was not upstairs would exculpate him of the crime of robbery. **Id.**

We review an order denying a request for post-conviction DNA testing to determine if the evidence of record supports the court's determination and

⁷ In his Reply Brief, Appellant posits another "new fact" found in Clinton's statement, that Clinton testified against Appellant in exchange for immunity from prosecution. Appellant's Reply Br. at 2. Appellant's argument is both meritless and improper. First, Clinton's immunity is not a "new" fact, as he testified at trial that he received immunity in exchange for his testimony. N.T. Trial, 2/10/05, at 259. Additionally, it is improper to raise a new argument in a reply brief, as "[t]he scope of the reply brief is limited[to] matters raised by appellee and not previously addressed in appellant's brief." Pa.R.A.P. 2113 note.

if the order is free of legal error. ***In re Payne***, 129 A.3d 546, 553-54 (Pa. Super. 2015) (*en banc*).

Section 9543.1 governs requests for post-conviction DNA testing. 42 Pa.C.S. § 9543.1. To qualify for testing, the defendant must, *inter alia*, present a *prima facie* case demonstrating that “DNA testing of the specific evidence, assuming exculpatory results, would establish[]the applicant’s actual innocence of the offense for which the applicant was convicted.” 42 Pa.C.S. § 9543.1(c)(3)(ii)(A). “Significantly, in DNA testing cases, an absence of evidence is not evidence of absence.” ***Commonwealth v. Walsh***, 125 A.3d 1248, 1255 (Pa. Super. 2015) (citation omitted). ***See also Commonwealth v. Williams***, 35 A.3d 44 (Pa. Super. 2011) (affirming denial of DNA testing where appellant failed to demonstrate *prima facie* case of actual innocence; absence of appellant’s DNA on wig worn by perpetrator would not prove appellant’s innocence).

In the instant case, the PCRA court found that Appellant failed to present a *prima facie* case that DNA testing would establish his innocence of any crimes charged. PCRA Ct. Op. at 10-11. It explained that “[p]olice recovered [Victim’s] bloodied money from [Appellant] at the hospital, establishing that [Appellant] stole from [Victim]. The absence of [Appellant’s] blood on the second floor would do nothing to exculpate him with respect to abundant evidence of the shooting death and robbery on the first floor. . . . Accordingly, there is no reasonable possibility that such DNA evidence would have

established his 'actual innocence' on the charges of murder, robbery[, or] conspiracy." **Id.**

We agree. Assuming that new DNA testing would reveal that police found only Victim's blood in Victim's bedroom and on Victim's wallet, it would not prove Appellant's innocence. The fact that the blood belonged to Victim and not Appellant would only prove that Appellant did not leave behind blood in Victim's bedroom or on Victim's wallet—factors not dispositive of Appellant's guilt.⁸

Moreover, the Commonwealth presented significant circumstantial evidence proving Appellant's guilt. Appellant admitted that he was present when either he or Slade shot Victim. **See** N.T. Trial, 2/23/05, at 56-66. When police found Victim, his pockets were turned out and his wallet was empty. After the shooting, Police Detective Joseph McDermott collected Appellant's clothing at the hospital and, in doing so, found \$863 in Appellant's pants pocket. N.T. Trial, 2/17/05, at 142, 147, 153-56. The money was mostly in three bundles, held together by "butterfly paperclips." **Id.** at 155-56. Other trial testimony established that Victim regularly kept his money in "butterfly paperclips." **Id.** at 195-96. Additionally, the money was covered with blood

⁸ For example, even if DNA testing proved that the blood in Victim's bedroom and wallet belonged to Victim, such evidence would not prove Appellant's innocence, as the incident could have occurred as the Commonwealth argued in its closing argument: Appellant or Slade hit Victim causing Victim to bleed, the pair had Victim retrieve his money for them, then at some point after, Victim was able to retrieve a knife and stab Appellant and Slade before the pair shot him to death. **See** N.T. Trial, 3/1/05, at 89.

from Victim and Slade. N.T. Trial, 2/22/05, at 56-60. As a result of the above, Appellant's third claim fails.

In his fourth issue, Appellant seems to challenge a prior decision of this Court affirming the denial of his second PCRA Petition. Appellant's Br. at 35-36. Appellant argues:

Petitioner raised in his response to the Commonwealth's motion to dismiss the deprivation of his merits appeal from the denial of his first PCRA, as having resulted from the court's failure to send him timely notice of the formal dismissal of his petition. . . . Petitioner should have had his appeal rights reinstated, due to governmental interference with those rights, per 42 Pa.C.S. §§ 9543(a)(2)(iv) and 9545(b)(1)(i), as was alleged by Petitioner in his second PCRA.

Appellant's Br. at 26.

Appellant's argument is insufficiently developed and incomprehensible. An appellant must develop arguments and include pertinent citations in his brief. **See Commonwealth v. Farmer**, 758 A.2d 173, 181 (Pa. Super. 2000); Pa.R.A.P. 2119(a). We refuse to develop an argument for an appellant or scour the record to make sense of his claim. **Commonwealth v. Beshore**, 916 A.2d 1128, 1140 (Pa. Super. 2007). Where an appellant fails to develop an argument on appeal, we will find that issue waived. **Commonwealth v. Charleston**, 94 A.3d 1012, 1022 (Pa. Super. 2014).


Defects in Appellant's brief preclude our meaningful review of his final issue. Moreover, to the extent that Appellant is critical of this Court's disposition on appeal from the PCRA court's dismissal of his second PCRA

Petition, his proper recourse would have been to seek review by the Pennsylvania Supreme Court, not to take an additional appeal to this Court.

In conclusion, Appellant failed to invoke a timeliness exception to the PCRA time-bar, failed to establish a *prima facie* case that the requested DNA testing would prove his innocence, and failed to present a reviewable issue in his final claim. As a result, we affirm the PCRA court Order dismissing Appellant's third PCRA Petition.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/28/2022