

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA : NO.: CR-1712-2012  
:   
vs. :   
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:   
BENJAMIN VILLANUEVA, III, : Opinion and Order re PCRA petition  
Defendant :

**OPINION AND ORDER**

Before the court is Benjamin Villanueva’s Amended Petition for Post-Conviction Relief pursuant to Pennsylvania’s Post-Conviction Relief Act (PCRA). 42 Pa. C.S.A. § 9501 et. seq.

Following a non-jury trial on October 21, 2014 and October 22, 2014, Villanueva was found guilty of robbery and numerous related counts. Following the Superior Court’s denial of his appeal, Villanueva filed a pro se PCRA Petition on March 1, 2019. Counsel was appointed and a counseled Amended PCRA Petition was filed on April 4, 2019. A hearing on the PCRA Petition was held before this court on July 22, 2019.<sup>1</sup>

During the trial in this matter, Kimberly Fry, testified that she was working on October 11, 2009 as a cashier at the Sunoco A-Plus store in South Williamsport. A little after 5:00 a.m., while she was at the back sink area, she heard a sound from out front near the counter cashier area.

She “came around the corner” and noticed two individuals. The shorter one, “like 5 ft. 7 inches or 5 ft. 8 inches” was holding a fire extinguisher and demanding money out of the

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<sup>1</sup> The court directed the court reporter to prepare a transcript of the hearing and directed the parties to file briefs. Villanueva’s brief was filed on September 20, 2019, and the Commonwealth’s brief was filed on October 25, 2019.

register. He put it above his head as if he was going to hit her. The other individual was taller “probably about 6 feet.” The one was wearing a Halloween mask and the other was wearing a mask that she couldn’t describe. They both were of average build, wearing jeans and believed to be white. While the two were behind the counter, she ran out of the front store door. The two soon exited the store running towards Route 15 south. She lost sight of them when they “hit the bushes.” She then returned to the store and called 911. Trial Transcript, 10/21/2014, at 13-15.

Mike Gardner, the store manager at the time, was called to the store following the incident and asked by law enforcement to access the video surveillance system. At the time of the incident, the video surveillance system was operational from multiple angles. Trial Transcript, 10/21/2014, at 24.

Videos of the incident from these multiple angles were played for the court. These videos corroborated the testimony of Ms. Fry. Further and by way of clarification, the taller individual was wearing a black ski mask and was carrying a blue bag with white lettering. As well, it was determined that “roughly” \$159 was taken along with 14 to 15 cigarette packs. Trial Transcript, 10/21/2014, at 26-30.

Corporal Carl Finnerty of the South Williamsport Police Department received a 911 dispatch to the store at 5:25 a.m. He responded and made contact with Ms. Fry. As part of his initial investigation he obtained ATM camera footage from the Citizens and Northern Bank building adjacent to the western wall of the Sunoco. The footage was played for the court. It verified that the two individuals left the store heading west at approximately 5:17 a.m. Trial Transcript, 10/21/2014, at 32-34.

Former Williamsport Bureau of Police Officer Roy Snyder responded to the scene with his K-9 German Shepherd police dog “Boss.” He deployed “Boss” to track the offenders. Based on the tracking, the offenders left the store traveling westbound in front of the bank and then headed southwest through the drive-thru lanes of the bank, then through bushes and landscaping, then across Market Street/south route 15 into a residential yard, then between two houses to a rear alley and then southbound on the alley. Trial Transcript, 10/21/2014, at 36-39.

Terry O’Connell was employed by the South Williamsport Police Department in October 2009 with the rank of sergeant. On October 13, 2009, a few days after the Sunoco robbery, he was dispatched to a traffic stop in the proximity of the Sunoco. During the stop, he noticed Villanueva on the other side of the street walking away from the stop but keeping “a very close eye” on the incident. Trial Transcript, 10/21/2014, at 51.

The driver of the vehicle was Stephen Moore, III. He was operating a gold colored Chrysler vehicle. Stephen Moore was taken into custody and Sergeant O’Connell along with Chief Miller of the Penn College Police Department started searching the area near the stop. Sergeant O’Connell located a pair of gloves, a couple of Halloween “type” masks with one mask containing red nylon hair, a loaded handgun and a cell phone. The gun was wrapped up in the mask with the red nylon hair. Trial Transcript, 10/21/2014, at 53-54.

Sergeant O’Connell also obtained and executed a search warrant on the gold Chrysler vehicle. Among other things, he recovered a black ski mask with red nylon hair or fiber on it, a blue bag, and a green jacket. The black ski mask had different size eyeholes cut out of it. The blue bag was an insulated hot/cold bag from Giant Food Store with white lettering and

symbols on it. The green jacket had a patch on the right shoulder sleeve area. Trial Transcript, 10/21/2014, at 59-61.

Chief Chris Miller of the Pennsylvania College of Technology Police Department made contact with Villanueva on October 13, 2009 near Phillips Park Drive in South Williamsport “on the levy system.” Following this encounter, he assisted Sergeant O’Connell in searching the area. He corroborated the testimony of Sergeant O’Connell. The mask was found “about three blocks” from where Villanueva was first contacted. Trial Transcript, 10/21/2014, at 88-89, 92.

Sergeant David Pletz of the Penn College Police Department assisted the South Williamsport police on October 13, 2009 and made contact with Villanueva at the levy near Phillips Park Drive. Villanueva initially falsely identified himself as “Justin Gonzalez.” After being taken into custody and on the way to City Hall, Villanueva voluntarily gave his correct name and birthday. Further and while at City Hall, Villanueva admitted that he had previously been with Stephen Moore and he asked if Stephen Moore got “locked up.” Trial Transcript, 10/21/2014, at 97-98.

Christina Hall contacted the police on October 13, 2009 because she was informed by her boyfriend that her “name was on the scanner.” Her son, Philip Hall, was a friend of Stephen Moore through school. She realized that the license plate on her vehicle was not the correct plate. She subsequently was informed that her correct plate was on Stephen Moore’s gold Chrysler vehicle. Trial Transcript, 10/21/2014, at 101-103.

Ebony McLaughlin is the mother of Stephen Moore’s child. She owned the gold

Chrysler vehicle Stephen Moore was operating on October 13, 2009. Previously in October of 2009, she had removed the license plate from the vehicle to try to prevent Stephen Moore from driving it. Nonetheless, “he still took it.” Stephen Moore, Philip Hall and Villanueva were all friends in October of 2009. Trial Transcript, 10/21/2014, at 109-111.

On October 11, 2009, Sergeant James Taylor of the South Williamsport Police Department was called to assist in the Sunoco robbery investigation. He eventually was assigned as the lead investigator. Among other things, he thoroughly reviewed the various surveillance tapes. He discerned the shorter assailant was close to Ms. Fry’s 5 ft. 7 inches height and “clearly a white male.” He was wearing a grey hoodie and a flesh colored Halloween mask. The other individual was a “good head taller” than Ms. Fry and was wearing a “black hood or ski mask and a green coat.” Trial Transcript, 10/21/2014, at 116-117.

When Villanueva was later processed at the prison, his height was listed as 6 ft. 4 inches. Additionally, Sergeant Taylor calculated the difference between the Sunoco and where Stephen Moore was apprehended a few days later to be relatively short. In comparing the videos to the items located a few days later, he noted that the blue Giant tote bag, black hooded ski mask, one Halloween mask, an olive drab green coat with a brown patch on the right sleeve or shoulder all looked very consistent with the items contained in the surveillance videos. Trial Transcript, 10/21/2014, at 120-128, 130-134.

Sergeant Taylor further testified that at Villanueva’s guilty plea before this court on April 7, 2010, in connection with an attempted robbery on October 13, 2009, he testified that

he and Stephen Moore planned to rob the Woodland's bank on that date.<sup>2</sup> Further, he obtained and listened to a prison call that Villanueva had with his mother on July 19, 2012. The prison call confirmed that Villanueva was aware of the mask and in fact intended to use it as he had done in the past. Trial Transcript, 10/21/2014, at 128-131.

Sergeant Taylor also sent several items for DNA analysis including the Halloween masks and ski mask. Sergeant Taylor theorized that Villanueva wore the one Halloween mask with the red fiber underneath the black ski mask. Trial Transcript, 10/21/2014, at 144-145. This theory was supported by the evidence.

Brune Coolbaugh testified as an expert in serology. In anticipation of DNA testing, she prepared samples from the black ski mask, both Halloween masks and four cigarette butts that were found near the scene of the incident. Only the portions of the Halloween masks and two of the cigarette butts were sent for DNA analysis. She also prepared and sent the red fiber hair for trace analysis. Trial Transcript, 10/21/2014, at 156-158, 161.

Nicholas Plumley testified as an expert in the field of trace analysis. He conducted a scientific comparison of the fibers found on the ski mask and with the fibers from the one Halloween mask. While not being able to conclude that the fibers had a common origin, the red fibers from both were "visually, microscopically and chemically consistent" with each other. Trial Transcript, 10/21/2014, at 168-170.

Angela DiFiore testified as an expert in the field of forensic DNA analysis. She developed DNA profiles from Villanueva's buccal swab, the buccal swab from Philip Hall and

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<sup>2</sup> See Commonwealth v. Villanueva, CP-41-CR-0002079-2009.

both Halloween masks. She compared the profiles with each other.

Philip Hall was included as a contributor to the major DNA mixture on the one Halloween mask. The profile from the mask was “5.1 billion times more likely” to be from Philip Hall and another individual than it was from two individuals in the unrelated Caucasian population. As for the black ski mask, there were no DNA results. As for the Halloween mask with red hair, the profile was a mixture with a single major contributor. This major contributor or component was a match to the known sample of Villanueva. This quantity of DNA was “most likely” not from incidental contact. The lesser contributors were “uninterpretable.” Trial Transcript, 10/21/2014, at 186, 192-197.

The known sample from Stephen Moore was not included as a contributor to the DNA mixture profiles obtained from either of the Halloween masks or the cigarette butts. Trial Transcript, 10/21/2014, at 194.

In October of 2009, Kevin Rentzel worked as a special agent for the Federal Bureau of Investigation (FBI). At the request of Sergeant O’Connell, he extracted information from the cell phones previously seized from both the car and properties. One phone was identified as Stephen Moore’s. Another phone was identified as Christine Hall’s. Between midnight on October 10, 2009 until 4:00 a.m. on October 11, 2009, there were 20 calls between the phones. Trial Transcript, 10/22/2014, at 8, 11-12, 21.

Following the testimony of the witnesses and the admission of the Commonwealth’s other evidence, the court deliberated. In announcing the verdict, the court concluded that the circumstantial evidence established Villanueva’s guilt beyond a reasonable

doubt.

At the July 22, 2019 PCRA hearing, Thomas Moore testified that he is presently serving a life sentence to be followed by 20 to 40 years for a homicide conviction. In 2016, he became aware that his good friend, Philip Hall and “Villanueva” were sentenced for a robbery that he was involved in. PCRA Transcript, 7/22/2019, at 3-4, 7.

As a result, he wrote a letter to Villanueva’s trial attorney, Trisha Hoover, indicating that he was responsible for the robbery and not Villanueva. He testified that the robbery occurred at a Sunoco “on the south side of Williamsport.” He and Philip Hall planned the robbery. He was wearing jeans, red and black sneakers and a green American Eagle coat. He was also wearing a Halloween mask described as a rubber scary clown with red hair. He could not recall what Philip Hall had over his face to conceal his identity. He could not remember if he had a weapon but remembered Philip Hall having a fire extinguisher that Philip Hall accidentally set off in the car following the incident. Thomas Moore noted that he was 5 ft. 10 inches tall but closer to 5 ft. 11 inches tall. They drove a red Dodge Stratus and parked across the street from the Sunoco near a bar lot or vacant grassy lot. They both went into the Sunoco. He directed the cashier to put all of the money in the bag. He was carrying a bag with strings on it. He remembered jumping over the counter, taking money and cigarettes and then leaving. PCRA Transcript, 7/22/2019, at 9-17.

With respect to the jacket he was wearing, he had recently purchased it from American Eagle. He “definitely” remembered wearing it because he had it with him in 2011 when he went to state prison and decided to send it home rather than having it destroyed. PCRA



Transcript, 7/22/2019, at 27.

Philip Hall also testified. He pled guilty to robbing the Sunoco. During his guilty plea hearing in 2015, he admitted to the robbery but specifically denied that Villanueva had been involved. PCRA Transcript, 7/22/2019, at 41-42.

More specifically, the transcript of his proceeding on January 5, 2015 in case CR-1714-2012 (Lycoming County), Philip Hall pled no contest to one count of robbery. The plea agreement was for 12 to 36 months in state prison with a consecutive three years' probation. During the hearing, President Judge Butts indicated that she was not willing to accept a no contest plea but required a plea of guilty.

Mr. Hall pled guilty. When asked if he was with Villanueva, he indicated that Villanueva was the co-defendant but he actually wasn't the one that was involved with him. He refused to say who it was. He did admit that he was part of a "group" that took stuff out of the A-Plus.

At the PCRA hearing, he testified that he committed the crime with Thomas Moore. It was a spur of the moment decision. When he pled guilty, although he knew that Villanueva was innocent and they were friends and that Villanueva was convicted and would "go away to state prison for...a long period of time", he refused to name the person who committed the crime with him. He wasn't going to be labeled a snitch so he just "stood quiet." PCRA Transcript, 7/22/2019, at 45-46, 57-59.

He admitted to being incarcerated with Villanueva at the Lycoming County Prison after being charged but stated that they didn't talk about the robbery. Contrary to Thomas

Moore's testimony, Philip Hall testified that Thomas Moore was wearing a ski mask and camouflage jacket. Contrary to Thomas Moore's testimony, Philip Hall testified that they drove to the Sunoco in a gold car. Contrary to Thoams Moore, the fire extinguisher did not go off in the car; it was empty. Contrary to Thomas Moore, they left the store and made a left, they cut through a yard that lead into an alley, got in the car which was hidden and left. Contrary to Thoams Moore, Thomas Moore wasn't driving; another individual was driving the car. Contrary to Thomas Moore, they didn't go over the Market Street Bridge back into Williamsport; rather they went over "the little green bridge."<sup>3</sup> PCRA Transcript, 7/22/2019, at 47-49.

Philip Hall did note, however, that with respect to his recollection of the events, he was using drugs at the time and that he suffers from mental health issues that "affect" his memory. PCRA Transcript, 7/22/2019, at 62-63.

Villanueva's PCRA Petition requests relief based on after discovered evidence. Villanueva's burden, as concisely stated in his brief, is to demonstrate by a preponderance of the evidence that his conviction resulted from the unavailability at the time of trial of exculpatory evidence that has subsequently become available that would have changed the outcome of the trial had it been introduced. 42 Pa. C.S.A. § 9543 (a)(2)(vi).

Prior to reaching the merits of Villanueva's claim, however, the court must consider the timeliness of his petition. *Commonwealth v. Williams* 215 A.3d 1019, 1023 (Pa. Super 2019)(citing *Commonwealth v. Miller*, 102 A.3d 988, 992 (Pa. Super. 2014)). "The time limitations of the PCRA are jurisdictional in nature and, as such, a court cannot address the

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<sup>3</sup>The "little green bridge" would have been the Arch Street bridge.

merits of any untimely petition.” *Id.* (citing *Commonwealth v. Robinson*, 837 A.2d 1157, 1161 (Pa. 2003)).

All PCRA petitions must be filed within one year of the date the judgment becomes final. 42 Pa. C.S.A. § 9545 (b)(1). A judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review. 42 Pa. C.S.A. § 9545 (b)(3).

On August 25, 2016, Villanueva’s direct appeal was denied. Accordingly, he had until September 25, 2017 in which to file a Post-Conviction Petition. Accordingly, his petition is facially untimely. This court lacks jurisdiction to review his petition unless he can successfully plead and prove an exception to the PCRA’s time bar.

Here, Villanueva argues that his petition qualifies for the newly discovered facts exception. This exception provides as follows:

**(b) Time for filing petition.—**

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and petitioner proves that:

(ii) the facts upon which the claim was predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence.

42 Pa. C.S.A. § 9545 (b) (1) (ii).

When Philip Hall pled guilty on January 5, 2015, he specifically noted on the record and under oath that Mr. Villanueva was not with him when the robbery occurred. Villanueva claims, however, that the after discovered evidence was unknown to him until he

received a letter from his trial attorney enclosing the letter from Thomas Moore on February 15, 2019. Attorney Hoover Jasper sent a letter dated February 15, 2019 to Villanueva enclosing the letter from Thomas Moore and explaining Villanueva's options regarding the filing of a Petition for Post-Conviction Collateral Relief. He subsequently filed his pro se petition less than one month after receipt of the information from Attorney Hoover Jasper.

Under all of the circumstances, the court agrees with Villanueva's contention that this new evidence could not have been obtained even by the exercise of reasonable diligence. In a nutshell, neither Philip Hall nor Thomas Moore was willing to admit that Thomas Moore, and not Villanueva, was involved in the incident until Thomas Moore wrote his letter. Accordingly, the court will address Villanueva's petition on its merits.

The court finds that Villanueva has, as an initial jurisdictional threshold, alleged and proven that there were "facts" unknown to him and that he exercised due diligence in discovering those facts. Jurisdiction is now established. However, this conclusion does not automatically result in Villanueva's substantive after discovered evidence claim having merit.

To prevail on an after discovered evidence claim for relief under the PCRA, a petitioner must prove that (1) the exculpatory evidence has been discovered after trial and could not have been obtained at or prior 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. *Williams*, 215 A.3d at 1024 n.3 (citing *Commonwealth v. Burton*, 158 A.2d 618, 629 (Pa. 2017)); see also *Commonwealth v. Small*, 189 A.3d 961, 972 (Pa. 2018).

The Commonwealth does not dispute that Villanueva has met the first three

elements. The Commonwealth does argue, however, that this evidence would not likely compel a different verdict at a new trial. The court cannot conclude that the after discovered evidence is of such a strong nature and character that a different verdict will likely result at a retrial. *Williams*, 215 A.3d at 1028.

Not only was there ample evidence from a wide range of sources to support his conviction, but the testimony of Thomas Moore and Philip Hall lacks sufficient credibility for this court to conclude that such undermines the confidence in the verdict. See *Commonwealth v. Jones*, 210 A.3d 1014 (Pa. 2019).

There are numerous reasons that the court finds Thomas Moore's testimony not credible. It was fraught with inconsistencies and was contrary to the evidence presented at trial. On the one hand, he identified Villanueva as someone with whom he did not have a relationship. He indicated that he never really had contact with Villanueva except for being in the same block (RHU Unit) at the Lycoming County Prison in 2011 and that they never spoke with each other. On the other hand, he referred to him by his first name as "Benjamin." He first claimed that the bag he had with him was blue with strings but later stated that it was a white one with designs or a blue one. He previously wrote a letter to Villanueva's attorney stating that he "didn't remember too much of the incident" but his testimony was full of details. He said he remembered the mask "because [he] had used it before" but shortly afterwards he said "I don't think I used it prior to that."

He also testified to facts vastly different from the credible trial testimony and other evidence. He testified that the fire extinguisher went off in the car following the incident

yet the testimony from both the trial and the PCRA hearing was that it was empty.

He testified that he was 5 ft. 10 inches tall but closer to 5 ft. 11 inches. This height difference from Philip Hall is only a matter of two or three inches which is belied by the difference in height depicted in the surveillance video. The taller actor on the surveillance video was not “maybe two inches” taller than Philip Hall, he was at least a head taller.

Thomas Moore also testified that they parked across the street from the Sunoco near a bar lot or a vacant grassy lot contrary to the actual physical layout of the property and structures. This was also directly contrary to the testimony of Philip Hall.

He testified that he drove a red Dodge Stratus. The testimony from the trial as well as the PCRA hearing is that the parties used a gold vehicle driven by Stephen Moore.

Thomas Moore stated that they left the store first contrary to what Ms. Fry said. He stated they left going right out of the store, got in their vehicle and drove across the bridge into Williamsport. This is directly in contravention to the evidence that proved that the assailants went left out of the store, in front of the ATM, across Market Street and then another block to the alley.

He testified that he either gave the mask to Philip Hall or threw it away but could not explain how Villanueva’s DNA got on the mask.

He said he was wearing a jacket during the robbery that he still had with him in 2011 when he went to state prison and then returned it home. Yet, the jacket was recovered a few days later from the vehicle Stephen Moore was driving.

Importantly and as for when the robbery occurred, he remembered it being in

November after 7:30 when it was dark out but it “wouldn’t have been past midnight.” It was “maybe close” to midnight. According to Thomas Moore, it would not have been at 4 or 5 in the morning. However, the undisputed trial evidence which was presented through testimony and surveillance videos proved that the incident occurred at approximately 5:00 a.m. in the morning on October 11, 2009.

He failed to remember significant details, which begs logic. He testified that he couldn’t remember if he had a weapon. It is incomprehensible that an individual who committed this robbery would not remember if he had a weapon or if his coconspirator was wearing a Halloween mask. He also couldn’t remember if he or Mr. Hall had any physical contact with the cashier although the evidence was clear that she was struck at least one time by one of the assailants.

He testified to wearing a Halloween type mask but said nothing of the black ski mask that was worn over the Halloween mask. Clearly, the assailant wore a black ski mask.

He clearly had a motive to fabricate and nothing to lose by testifying at this time. The statute limitations had expired on these robbery charges. Furthermore, he could not adequately explain why he waited for years to contact anyone about his contention that Villanueva was serving years in state prison for an offense that Villanueva did not commit but that he committed. He was “more focused” on his appeal and has some “free time.” Yet when he wrote the letter, he thought he was putting himself in jeopardy.

Finally, and as noted above, his testimony was inconsistent in some very important aspects from the testimony of Philip Hall who pled guilty to the offense. Indeed, the

court cannot credit the testimony of either Philip Hall or Thomas Moore.

Their testimony in no way undermines this court's confidence in its verdict.

**ORDER**

**AND NOW**, this \_\_\_ day of January 2020, the court denies Villanueva's PCRA petition.

Villanueva is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirements set forth in Rule 904 of the Rules of Appellate Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.A.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Villanueva may lose forever his right to raise these issues.

**The Clerk of Courts shall mail a copy of this order to Villanueva by certified mail, return receipt requested.**

By The Court,

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Marc F. Lovecchio, Judge



cc: Joseph Ruby, Esquire (ADA)  
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