

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
DESMOND LARON JOHNSON,	:	
	:	
Appellant	:	No. 1038 WDA 2012

Appeal from the Judgment of Sentence May 16, 2012,
Court of Common Pleas, Erie County,
Criminal Division at No. CP-25-CR-0001802-2011

BEFORE: DONOHUE, MUNDY and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: March 12, 2013

Desmond Laron Johnson (“Johnson”) appeals from the judgment of sentence entered following his convictions of aggravated assault, recklessly endangering another person (“REAP”), possession of an instrument of crime (“PIC”), firearms not to be carried without a license, and persons not to possess a firearm.¹ Johnson’s counsel (“Counsel”) has filed a petition seeking to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967) and *Commonwealth v. Santiago*, 602 Pa. 159, 978 A.2d 349 (2009). Following our review, we affirm the judgment of sentence and grant Counsel’s petition to withdraw.

There are particular requirements that counsel seeking to withdraw pursuant to *Anders* must follow. These requirements and the significant

¹ 18 Pa.C.S.A. §§ 2701(a)(1), 2705, 907(a), 6106(a)(1), 6105(a)(1).

*Retired Senior Judge assigned to the Superior Court.

protection they provide to an **Anders** appellant arise because a criminal defendant has a constitutional right to a direct appeal and to counsel on that appeal. **Commonwealth v. Woods**, 939 A.2d 896, 898 (Pa. Super. 2007).

We have summarized these requirements as follows:

Direct appeal counsel seeking to withdraw under **Anders** must file a petition averring that, after a conscientious examination of the record, counsel finds the appeal to be wholly frivolous. Counsel must also file an **Anders** brief setting forth issues that might arguably support the appeal along with any other issues necessary for the effective appellate presentation thereof.

Anders counsel must also provide a copy of the **Anders** petition and brief to the appellant, advising the appellant of the right to retain new counsel, proceed *pro se* or raise any additional points worthy of this Court's attention.

Id. (citations omitted).

Moreover, there are requirements as to precisely what an **Anders** brief must contain:

[T]he Anders brief that accompanies court-appointed counsel's petition to withdraw ... must: (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Santiago, 602 Pa. at 177-78, 978 A.2d at 361. If counsel has met these obligations, “it then becomes the responsibility of the reviewing court to make a full examination of the proceedings and make an independent judgment to decide whether the appeal is in fact wholly frivolous.” **Id.** at 168 n.5, 354 n.5.

We conclude that Counsel has complied with the requirements outlined above. She has filed a petition with this Court stating that after reviewing the record, she finds this appeal to be wholly frivolous. She has filed a brief setting forth two issues that she believes might arguably support an appeal. In conformance with **Santiago**, Counsel’s brief includes summaries of the facts and procedural history and discusses the only two issues she believes might support Johnson’s appeal. Counsel also discusses why these issues would be frivolous to raise on appeal, with relevant citations, and states her conclusion to that effect. Finally, Counsel has appended to her petition the letter that she sent to Johnson, which enclosed Counsel’s petition and **Anders** brief, and advised Johnson that he may proceed *pro se* or with private counsel. Accordingly, we undertake our independent review to determine whether Johnson’s appeal is wholly frivolous.

The first issue presented by Counsel in the **Anders** brief challenges the sufficiency of the evidence as to all of Johnson’s convictions.

When evaluating a sufficiency claim, our standard is whether, viewing all the evidence and reasonable inferences in the light most favorable to the

Commonwealth, the fact[-]finder reasonably could have determined that each element of the crime was established beyond a reasonable doubt. This Court considers all the evidence admitted, without regard to any claim that some of the evidence was wrongly allowed. We do not weigh the evidence or make credibility determinations. Moreover, any doubts concerning a defendant's guilt were to be resolved by the fact[-]finder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from that evidence.

Commonwealth v. Kane, 10 A.3d 327, 332 (Pa. Super. 2010) (citation omitted).

The evidence of record, when considered in the light most favorable to the Commonwealth, establishes that on June 15, 2011, Johnson was "hanging out" with a group of at least five other teenagers near the corner of East 8th Street and Ash Street in Erie, Pennsylvania. N.T., 3/14/12, at 30-31, 34. A black vehicle with three passengers pulled up to the stop sign at the intersection of these streets. ***Id.*** at 39, 48. Johnson removed a gun from his waistband, fired multiple times at the vehicle and immediately fled. ***Id.*** at 81. Natasha Beason ("Beason") was struck by a bullet in the back of the head. ***Id.*** at 36.

Police arrived on the scene quickly and began to investigate. Within a day of the shooting, they interviewed Chante Husband ("Husband") and Aaliyah Miller ("Miller"), who were present at the scene. N.T., 3/15/12, at 18, 61. Both Husband and Miller identified Johnson as the shooter and further stated that no one present - including the occupants of the black

vehicle – had a gun besides Johnson. *Id.* at 63-64; *see also* N.T., 3/14/12, at 103, 111-16. On July 21, 2011, the police interviewed Beason, who was still in the hospital recovering from the gunshot wound to her head. N.T., 3/14/12, at 67. Although intubated and unable to talk, Beason was fully conscious and alert. *Id.* at 67-68. The police asked Beason questions and she responded by nodding her head or writing her responses on a piece of paper. *Id.* at 68-69. During this interview, Beason stated that Johnson was the only person with a gun at the scene; that he shot at the black vehicle when it pulled up to the corner of East 8th and Ash Streets; and that it was a bullet from his gun that struck her. *Id.* at 70-73. Beason also stated that no one in the black car had a gun. *Id.* at 73.

All three women² testified consistently with their statements to the police at Johnson's preliminary hearing. At trial, however, all three claimed that they did not know what happened that day. They all indicated that they told the police that Johnson was the shooter because that was what they heard "on the streets." *Id.* at 42, 79-80, 105. The Commonwealth impeached their trial testimony with transcripts of their testimony from the preliminary hearing and with the written and videotaped statements they gave to the police, all of which were admitted into evidence.

² Beason and Miller are sisters. Beason, Miller and Husband are all cousins of Johnson.

We conclude that the evidence as outlined above is sufficient to support all of Johnson's convictions. To convict Johnson of REAP, the Commonwealth was required to prove that Johnson "recklessly engage[ed] in conduct which places or may place another person in danger of death or serious bodily injury." 18 Pa.C.S.A. § 2705. "The *mens rea* required for this crime is a conscious disregard of a known risk of death or great bodily harm to another person." ***Commonwealth v. Chapman***, 763 A.2d 895, 900 (Pa. Super. 2000). We have no hesitation concluding that the elements of this crime are satisfied by the evidence that Johnson fired a gun at an occupied vehicle while in the midst of a group of people. Such action certainly permits a finding that Johnson acted with "a conscious disregard of a known risk of death or great bodily harm" for the people in the vehicle at which he shot and the people present in his vicinity when he fired the gun.

To convict Johnson of aggravated assault, the Commonwealth was required to prove beyond a reasonable doubt that "he [] attempt[ed] to cause serious bodily injury to another, or cause[d] such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life[.]" 18 Pa.C.S.A. § 2702(a)(1). Serious bodily injury is defined as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.A. § 2301. The evidence establishes that Johnson did

cause serious bodily harm to Beason, in that the injury she suffered – a gunshot wound to the head – undoubtedly created a substantial risk of death. Moreover, the evidence establishes that Beason’s injury was caused by Johnson’s reckless conduct as discussed above; *i.e.*, shooting a gun at a vehicle in the midst of multiple bystanders.

For a conviction of PIC, the Commonwealth had to establish that Johnson “possesse[d] any instrument of crime with intent to employ it criminally.” 18 Pa.C.S.A. § 907(a). An instrument of crime is defined, as relevant here, “[a]nything used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have.” 18 Pa.C.S.A. § 907(d). The evidence establishes that Johnson possessed a firearm and used it in the commission of a crime, thus satisfying the elements of PIC.

Finally, to prove the firearms violations with which he was charged, the Commonwealth had to prove that Johnson was previously convicted of any one of certain enumerated offenses, which prohibits him from possessing a firearm, and that Johnson was carrying a firearm on his person without a valid license to do so. **See** 18 Pa.C.S.A. §§ 6105(a)(1), 6106(a)(1). There was a stipulation that Johnson had a prior conviction for aggravated assault, **see** N.T., 3/15/12, at 85, which satisfies the “previous conviction” requirement for a conviction under section 6105(a)(1). **See** 18 Pa.C.S.A. § 6105(b) (including aggravated assault among the crimes for which a

conviction of prohibits a person from possessing a firearm). As this stipulation establishes that Johnson is not permitted by law to possess a firearm, it also establishes that he could not have had a license to carry a concealed weapon. Thus, we agree with Counsel that there is no merit to this claim. In doing so, we note that the jury was free to conclude that the witnesses testified truthfully at the preliminary hearing and not at trial. **See Commonwealth v. Pruitt**, 597 Pa. 307, 318, 951 A.2d 307, 313 (2008) (“The trier of fact bears the responsibility of assessing the credibility of the witnesses and weighing the evidence presented. In doing so, the trier of fact is free to believe all, part, or none of the evidence.”).

Counsel also sets forth a claim challenging Johnson’s sentence as excessive.³ This is a claim addressed to the discretionary aspects of Johnson’s sentence. The discretionary aspects of a sentence are not appealable as of right. **Commonwealth v. Sierra**, 752 A.2d 910, 912 (Pa. Super. 2000). Before we may review the merits of a challenge to the discretionary aspects of a sentence, we must determine: (1) whether appellant has filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether appellant's brief has a fatal defect; and (4) whether

³ Johnson was sentenced to an aggregate term of seven and a half to 15 years of imprisonment. The sentences imposed on the individual convictions are each within the permissible statutory range. **See** Pennsylvania Commission on Sentencing Guideline Sentence Form, 5/16/12, at 1-9.

there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b). ***Commonwealth v. Evans***, 901 A.2d 528, 533 (Pa. Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006).

The record reveals that Johnson's notice of appeal was timely filed and that he raised this claim in a post-sentence motion, and so the first two requirements as set forth above have been satisfied. We further conclude that Johnson's brief does not suffer from a fatal defect, as Counsel has included the requisite statement pursuant to Pa.R.A.P. 2119(f) in the brief she has filed on appeal. The fourth factor of the ***Evans*** test as set forth above requires that we consider whether the issue presented by Counsel raises a substantial question requiring us to review the discretionary aspects of the sentence. "The determination of what constitutes a substantial question must be evaluated on a case-by-case basis." ***Commonwealth v. Moury***, 992 A.2d 162, 170 (Pa. Super. 2010). A substantial question exists only when an appellant advances a colorable argument that the sentence is either inconsistent with a specific provision of the Sentencing Code or contrary to the fundamental norms which underlie the sentencing process. ***Id.*** Counsel alleges only that Johnson's sentence is inappropriate under the Sentencing Code because the trial court "failed to take into consideration several mitigating factors." ***Anders*** Brief at 13. However, "a claim that the court failed to consider certain mitigating factors does not present a

substantial question" so as to invoke our review. ***Commonwealth v. Corley***, 31 A.3d 293, 298 (Pa. Super. 2011).

Even if this claim did present a substantial question, we would agree with Counsel that it lacks merit. The mitigating factors that Counsel argues the trial court failed to consider are that Johnson turned himself into the police; that Johnson has a learning disability; that the injury to Beason was accidental; and that he is the father to an infant. ***Anders*** Brief at 14-15. Counsel acknowledges that Johnson has a criminal history that includes juvenile offenses, but further contends that the trial court failed to consider that Johnson became a "contributing and productive member of society." ***Id.*** at 15.

At the sentencing hearing, Johnson's trial counsel addressed the trial court and asked the trial court to consider, *inter alia*, that Johnson has a learning disability; that the injury to Beason was accidental (as she was not Johnson's target when he was firing his gun); that Johnson has not only a newborn son but five other children; and that Johnson has obtained a dental assistant certificate and a welding certificate, which would enable him to work and therefore to be a productive member of society. N.T., 5/16/12, at 6-7. Johnson himself addressed the trial court and reiterated that he has multiple children to support and that he has obtained dental assistant and welding certifications that would allow him to "be a better young man" upon his release from prison. ***Id.*** at 12.

When imposing the sentence, the trial court stated that it “considered a number of things” including the pre-sentence investigative report, the Sentencing Guidelines, and “the various statements made here to me today.” *Id.* at 13. Thus, the trial court did consider Johnson’s obligations as a father to six children, his learning disability, and that he obtained certifications that would qualify him to work as a dental assistant or welder, and therefore contribute to society. As such, there is no merit to this claim. Indeed, we can find no abuse of discretion in the sentence imposed. A sentencing court must consider the Sentencing Guidelines and follow the general principle that the sentence imposed should call for confinement that is “consistent with the protection of the public, the gravity of the particular offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.” *Commonwealth v. Walls*, 592 Pa. 557, 564, 926 A.2d 957, 962-63 (2007); 42 Pa.C.S.A. § 9721(b). Considerable deference is given to the sentencing court because it is “in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it.” *Id.* at 565, 961 (quotation and citations omitted). The trial court’s explanation for the sentence imposed exhibits its consideration of the Sentencing Guidelines, the gravity of the offense, the need for the protection of the public, and Johnson’s rehabilitative needs. *See id.* at 13-15. Accordingly, we could not disturb the sentence.

Finally, our independent review of the record does not reveal any issue that would arguably support an appeal. Accordingly, we grant Counsel's petition and affirm Johnson's judgment of sentence.

Judgment of sentence affirmed. Petition to withdraw granted.