

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JAMES LEMAR,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1300 MDA 2012

Appeal from the Judgment of Sentence May 15, 2012  
In the Court of Common Pleas of Lycoming County  
Criminal Division at No.: CP-41-CR-0000902-2011

BEFORE: DONOHUE, J., ALLEN, J., and PLATT, J.\*

MEMORANDUM BY PLATT, J.

**FILED: MAY 17, 2013**

Appellant, James Lemar, appeals from the judgment of sentence entered following his conviction of retail theft.<sup>1</sup> Appellant's counsel has filed a brief and a petition to withdraw under *Anders v. California*, 386 U.S. 738 (1967) and *Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009), alleging that the appeal is wholly frivolous. We affirm the judgment of sentence and grant counsel's petition to withdraw.

On March 19, 2011, Appellant stole a pack of cigarettes from a Uni Mart, in Jersey Shore, Lycoming County, Pennsylvania. The store clerk observed Appellant stealing the cigarettes, followed him out of the store,

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> 18 Pa.C.S.A. § 3929(a).

and they engaged in a conversation, wherein Appellant admitted that he was not going to pay for the cigarettes. Based upon the store clerk's description, the police identified a potential suspect and showed the clerk a photo array. The store clerk identified Appellant from the photo array. On May 15, 2012, following a non-jury trial, the trial court convicted Appellant of one count of retail theft and immediately sentenced him to a term of probation of not less than twenty-four months to be served consecutively to any other sentence Appellant was then serving. That same day, Appellant filed a post-sentence motion challenging the weight of the evidence. On July 6, 2012, the trial court denied the motion. Appellant filed the instant, timely appeal.<sup>2</sup>

Preliminarily, we note that Appellant's court-appointed counsel has petitioned for permission to withdraw and has submitted an **Anders** brief, which is procedurally proper for counsel seeking to withdraw on direct appeal. Court-appointed counsel who seeks to withdraw from representing an appellant on direct appeal on the basis that the appeal is frivolous 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

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<sup>2</sup> Appellant was ordered to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Instead, counsel filed a statement of intent to file an **Anders** brief. The trial court then issued an opinion relying on its July 6, 2012 opinion denying Appellant's post-sentence motion.

case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

**Santiago, supra** at 361. When we receive an **Anders** brief, we first rule on the petition to withdraw and then review the merits of the underlying issues. **See Commonwealth v. Garang**, 9 A.3d 237, 240-41 (Pa. Super. 2010). In addition, “[p]art and parcel of **Anders** is our Court’s duty to review the record to insure no issues of arguable merit have been missed or misstated.” **Commonwealth v. Vilsaint**, 893 A.2d 753, 755 (Pa. Super. 2006).

Here, counsel has complied with all the requirements of **Anders** and **Santiago**. Specifically, she has petitioned this Court to withdraw on grounds of frivolity. In addition, after her review of the record, she filed a brief with this Court that provides a summary of the procedural history and facts with citations to the record, refers to any facts or legal theories that arguably support the appeal, and explains why she believes the appeal is frivolous. (**See Anders** Brief, at 5, 8-12). Lastly, she has attached as an exhibit to the petition to withdraw a copy of the letter sent to Appellant giving notice of his rights and including a copy of the **Anders** brief and the petition. **See Commonwealth v. Millisock**, 873 A.2d 748, 749 (Pa. Super. 2005). Appellant has not responded. Because counsel has expressly complied with the dictates of **Anders**, **Santiago**, and **Millisock**, we will examine the issues set forth in the **Anders** brief that counsel believes have arguable merit. **See Garang, supra** at 240-41.

On appeal, Appellant claims that the verdict was against the weight of the evidence. (**See Anders** Brief, at 4). Appellant argues that the testimony of the store clerk, the sole witness against him, was not credible. (**See id.** at 6).

. . . [O]ur review of the trial court's decision is extremely limited. Generally, unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, these types of claims are not cognizable on appellate review.

Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

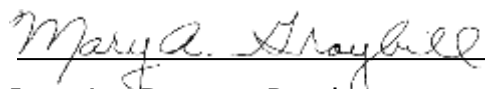
**Commonwealth v. Trippett**, 932 A.2d 188, 198 (Pa. Super. 2007) (citations and quotation marks omitted).

In this case, because Appellant argues that the testimony of the store clerk was not credible, he asks us to reassess the credibility of the witness. (**See Anders** Brief, at 10). However, it is well settled that we cannot substitute our judgment for that of the trier of fact. **Commonwealth v. Holley**, 945 A.2d 241, 246 (Pa. Super. 2008), *appeal denied*, 959 A.2d 928 (Pa. 2008). Further, the trial court, sitting as finder of fact was free to believe the Commonwealth's witness and to disbelieve the testimony of Appellant. **Commonwealth v. Griscavage**, 517 A.2d 1256, 1257 (Pa. 1986) (holding that the finder of fact is free to believe all, none, or part of the testimony presented at trial). "[I]t is for the [trial judge sitting as the

finder of fact] to make credibility determinations, and the finder of fact may believe all, part, or none of a witness's testimony." **Commonwealth v. Lee**, 956 A.2d 1024, 1029 (Pa. Super. 2008), *appeal denied*, 964 A.2d 894 (Pa. 2009) (citation omitted). Here, the trial court heard all of the testimony and, as finder of fact, chose to give deference to the Commonwealth's version of events. Because Appellant's challenge goes to the weight of the evidence, he necessarily concedes that the evidence is sufficient to sustain the verdict and nothing in the record leads us to believe that the verdict shocks one's sense of justice. Thus, we will not disturb the trial court's findings. Further, this Court has conducted an independent review of the record as required by **Anders** and **Santiago** and finds that no non-frivolous issues exist.

Petition to withdraw as counsel granted. Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.

  
Interim Deputy Prothonotary

Date: May 17, 2013