

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JOHN J. LYNCH

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1422 EDA 2012

Appeal from the Judgment of Sentence April 26, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0000748-2011

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J.

Filed: January 24, 2013

John. J. Lynch appeals from his judgment of sentence, entered in the Court of Common Pleas of Montgomery County, after he was convicted of the summary offense of driving while operating privilege suspended (DUI-related).¹ Lynch was sentenced to time served and a \$500.00 fine. Counsel has also filed a petition to withdraw and brief pursuant to ***Anders/Santiago***², concluding that this appeal is wholly frivolous and seeking to withdraw. After careful

* Retired Senior Judge assigned to the Superior Court.

¹ 75 Pa.C.S.A. § 1543(b)(1). Lynch was initially charged with various drug offenses (possession/paraphernalia). Although all charges were held for court, the Commonwealth ultimately agreed to *nol pros* those charges and proceed solely on the section 1543(b)(1) violation.

² ***Anders v. California***, 386 U.S. 738 (1967); ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009).

review, we grant counsel's petition to withdraw and affirm Lynch's judgment of sentence.

On appeal, Lynch raises the following issues for our consideration:

- (1) Did the trial court err in disposing of Appellant's post-sentence motion pursuant to Pa.R.Crim.P. 720(D) procedure where Appellant's trial was **NOT** a *de novo* appeal from a lower court's judgment of sentence?
- (2) Did the Commonwealth present legally sufficient evidence at trial to establish all of the elements of driving while under a DUI-related suspension?
- (3) Did the trial court err in failing to conduct a hearing on Appellant's *pro se* petition for *habeas corpus*?
- (4) Is Appellant entitled to relief based on the Commonwealth's failure to file a summary complaint against him within [five]³ days of his arrest as required by Pa.R.Crim.P. [519]?
- (5) Did the Commonwealth fail to file a summary complaint against Appellant within the required statute of limitations?
- (6) Was the Appellant's conviction precluded by the doctrine of collateral estoppel based on the Commonwealth Court's 1998 decision involving PennDOT?
- (7) Were Appellant's due process rights violated and his case prejudiced by a purportedly improper notice of trial?

In order for counsel to withdraw from an appeal pursuant to **Anders**, certain requirements must be met, and counsel must:

- (1) provide a summary of the procedural history and facts, with citations to the record;

³ Counsel improperly states that the complaint was not filed within (30) days of Lynch's arrest, in violation of Rule 519. However, he properly indicates in the argument section of his **Anders** brief the rule's five-day time-limit.

- (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.

Commonwealth v. Santiago, 978 A.2d 349, 361 (Pa. 2009). Our Court must then conduct its own review of the proceedings and make an independent judgment to decide whether the appeal is in fact wholly frivolous. ***Id.*** at 359 (citation omitted).

Counsel has complied with the dictates of ***Anders*** and ***Santiago***, having made a conscientious examination of the record, controlling case law and applicable statutes. Counsel has also identified for our Court the issues and supporting testimony that may arguably be raised on appeal. Furthermore, counsel has notified Lynch of his request to withdraw, furnished him with a copy of the ***Anders*** brief, and advised him that he may retain new counsel, proceed *pro se* or raise any additional points that he deems worthy of our consideration. We will now conduct our independent review of the issues raised by counsel and determine, using our own judgment, whether those issues are wholly frivolous.

Rule 720

Lynch first claims that the trial court erroneously treated his *pro se* post-sentence motion as a motion filed after a *de novo* summary appeal, rather

than one filed following a summary trial conducted in the Court of Common Pleas. We agree with Lynch that the trial court improperly cited Pa.R.Crim.P. 720(D) in its order denying his motion. This was not a summary case appeal; as discussed *infra*, summary cases only involve summary charges. Here, although the Commonwealth ultimately agreed to *nol pros* two misdemeanor drug charges at his trial, Lynch was initially charged with those non-summary offenses in the criminal complaint.

Substantively, five of the seven issues raised in Lynch's post-sentence motion involve claims of counsel's ineffectiveness. These claims must be dismissed without prejudice at this stage in the appellate process. ***Commonwealth v. Barnett***, 25 A.3d 371 (Pa. Super. 2011) (Superior Court of Pennsylvania cannot engage in review of ineffective assistance of counsel claims on direct appeal absent express, knowing and voluntary waiver of Post-Conviction Relief Act review). Lynch's remaining issues (no hearing on his *pro se* pretrial motion and lack of trial notice), which are discussed later in this memorandum decision, are also without merit. ***Fewell, supra***; ***see*** Improper Notice, ***infra***.

Sufficiency of the Evidence

Instantly, Lynch was convicted of violating section 1543(b)(1) of the Motor Vehicle Code. Pursuant to section 1543(b)(1):

§ 1543. Driving while operating privilege is suspended or revoked.

(b) Certain offenses.

(1) A person who drives a motor vehicle on a highway or trafficway of this Commonwealth at a time when the person's

operating privilege is suspended or revoked as a condition of acceptance of Accelerated Rehabilitative Disposition for a violation of section 3802 (relating to driving under influence of alcohol or controlled substance) or the former section 3731, because of a violation of section 1547(b)(1) (relating to suspension for refusal) or 3802 or former section 3731 or is suspended under section 1581 (relating to Driver's License Compact) for an offense substantially similar to a violation of section 3802 or former section 3731 shall, upon conviction, be guilty of a summary offense and shall be sentenced to pay a fine of \$500 and to undergo imprisonment for a period of not less than 60 days nor more than 90 days.

75 Pa.C.S.A. § 1543(b)(1). To support its case, the Commonwealth presented the testimony of arresting officer Detective Schramm, who testified that Lynch was driving a motor vehicle on a public street on November 13, 2010. The Commonwealth also admitted into evidence Lynch's certified PennDOT driving record which showed that he had a number of license suspensions and violations for driving under suspension.

Lynch's driving record indicates that his license had been suspended for one year, effective September 24, 2010, for a prior violation of section 1543(b). To rebut the Commonwealth's evidence, Lynch testified that the suspensions were ineffective because the underlying convictions had been reversed on appeal; however, Lynch admitted that he had failed to take the appropriate steps to have his operating privileges restored. N.T. Summary Trial, 4/26/2012, at 10-11. **See** 75 Pa.C.S. § 1543(c)(1) (requiring individual to complete proper administrative steps after statutory suspension has ended before being entitled to drive without restriction).

Although Lynch attacked the accuracy of his driving record at trial, the trial judge chose to credit the information contained within the certified record

and found him guilty of violating section 1543(b). **See *Commonwealth v. Pirela***, 580 A.2d 848, 852 (Pa. Super. 1990) (issues of credibility are left to the trier of fact, who is free to accept all, part, or none of witness's testimony). Moreover, because Lynch admittedly did not take the required steps to restore his operating privileges, he was still driving with a suspended license in violation of section 1543.

Hearing on *Habeas Corpus* Petition

Lynch alleges that the trial court failed to conduct a hearing on his pre-trial motion to strike from trial list/appoint new counsel/send to *habeas corpus*. It appears that the trial court did not dispose of Lynch's motion on the merits prior to his trial. Moreover, we disagree with counsel's assessment that because Lynch was represented at the time he filed this *pro se* his motion is a nullity. ***Anders*** Brief, at 14.

Although Lynch appears to have filed this motion with the trial judge, even though he was represented by counsel at the time, the Rules of Criminal Procedure specifically provide that when a defendant submits a document *pro se* to a judge without filing it with the clerk of courts, and the document requests some form of cognizable legal relief, the judge "promptly shall forward the document to the clerk of courts for filing and processing in accordance with this rule." Pa.R.Crim.P. 576(A)(5). Moreover, when such a *pro se* motion is filed with the clerk of courts, the motion should be forwarded to counsel of record in accordance with our Rules of Criminal Procedure. **See** Pa.R.Crim.P. 576(4) ("In any case in which a defendant is represented by an

attorney, if the defendant submits for filing a written motion, notice, or document that has not been signed by the defendant's attorney, the clerk of courts shall accept if for filing, time stamp it with the date of receipt and make a docket entry reflecting the date of receipt, and place the document in the criminal case file[.]).

Although it appears that these procedures were not followed in the instant case,⁴ once a defendant has gone to trial and been found guilty of the crime, any defect in the pretrial process is rendered immaterial. ***Fewell, supra***. Moreover, he has failed to allege or prove how he suffered any prejudice.

Rule 519⁵

With regard to Lynch's claim that Pennsylvania Rule of Criminal Procedure 519(B)(2) was violated because the Commonwealth did not file the criminal complaint within 5 days of his arrest, we find it, too, is without merit. While the record does reflect that the complaint was filed thirty-three days following Lynch's arrest, he has neither alleged nor shown how he suffered any

⁴ The record reflects that the motion was not docketed until *after* Lynch's trial on May 16, 2012. However, Lynch prepared the motion on November 18, 2011 – more than five months prior to trial.

⁵ Both the trial court and defense counsel assert that Lynch has waived his Rule 519 and statute of limitations issues on appeal. We disagree. As noted *infra*, the record contains a pre-trial *pro se* motion, entitled "Defendant's Motion to Strike from Trial List, Appoint New Counsel, and Send to Habeas Corpus;" this motion includes both the Rule 519 and statute of limitations issues.

prejudice from this misstep. *Commonwealth Revtai*, 532 A.2d 1, 10, (Pa. 1987) (violation of rule of procedure involving filing of criminal complaint does not mandate dismissal without showing that defendant suffered prejudice).

Statute of Limitations/Pro Se Motion

In his "Motion to Strike from Trial List, Appoint New Counsel, and Send to *Habeas Corpus*," Lynch specifically states that:

Defendant claims defects in procedure, which are prejudicial to the defendant, meritorious defences [sic], and preliminary objections therefrom as follows:

- A. The Commonwealth's complaint is untimely having failed to file the complaint within the time required by the Pennsylvania Rules of Court Criminal Procedure No # 519 B(2) which stated (When a defendant is released pursuant to paragraph (b) a complaint shall be filed against the defendant within five days of the defendant's release[]).

This instant matter is borne out of the filing of a complaint 33 days after the incident.

- B. The associated motor vehicle charge is untimely either by Pa.R.Cr[im.]P. 519 (b) 2 or title 42 §§ 5553E provisions that a motor vehicle charge, and citation must be served upon a defendant not more than 30 days from the incident.

Pro Se Motion, 11/18/11,⁶ at ¶15(B).

Lynch is correct that, according to the Motor Vehicle Code, proceedings for a motor vehicle summary offense "must be commenced within 30 days after the commission of the alleged offense or within 30 days after the

⁶ While the motion was time-stamped by the clerk of courts on May 16, 2012, Lynch prepared the motion prior to trial in November 2011.

discovery of the commission of the offense or the identity of the offender[.]” 42 Pa.C.S. § 5553(a). However, in a case where at least one offense charged is a misdemeanor, felony or murder, that case shall proceed as a “court case” under the Rules of Criminal Procedure. Pa.R.Crim.P. 103 (defining “court case”). A summary case, however, is one in which the *only* offenses charged are summary offenses. ***Id.***

Here, because Lynch was charged with two misdemeanor drug offenses, as well as a section 1543 summary offense, his case should proceed as though it were a court case under Chapter 5 of the Rules. ***Id.***; ***see also*** Pa.R.Crim.P. 400 (*Comment*). Thus, section 5553(a), which is the statute of limitations applicable for *summary* proceedings, does not apply to the instant matter.⁷

Collateral Estoppel

Lynch next claims that the instant prosecution is barred by doctrine of collateral estoppel⁸ based upon the Commonwealth Court’s decision, ***Lynch v.***

⁷ In fact, the misdemeanor charges remained a part of the case until the Commonwealth agreed to *nol pros* the drug offenses immediately prior to Detective Schramm’s testimony at Lynch’s trial. ***See*** N.T. Summary Trial & Sentencing, 4/26/2012, at 3.

⁸ The doctrine of collateral estoppel precludes relitigation of an issue determined in a previous action if:

(1) the issue decided in the prior case is identical to the one presented in the later action; (2) there was a final adjudication on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior
(Footnote Continued Next Page)

Dep't of Transp. Bureau of Driver Licensing, 710 A.2d 126 (Pa. Cmwlth. 1998). In ***Lynch, supra***, the Commonwealth Court reversed the trial court's decision to affirm PennDOT's cancellation of three of Lynch's driver's license numbers. Essentially, the Commonwealth Court found that there was not enough evidence to show that Lynch either: (1) gave false information on his license application in violation of 75 Pa.C.S.A. § 1572(a)(1)(ii); or (2) that Lynch had an out-of-state license suspended or revoked to implicate 75 Pa.C.S.A. § 1572(b). ***Id.*** at 128.

Although this case also involves a violation of the motor vehicle code, the issue in this case was whether Lynch was driving with a suspended license. Even if Lynch's driver's license cancellation had been reversed in the 1998 Commonwealth Court decision, he was still required to restore his operating privileges in order to lawfully operate his vehicle. Because he failed to do this, the reversal of the cancellation has no impact on the instant section 1543(b)(1) violation; thus, the prosecution is not collaterally estopped from bringing the instant charge against him. ***Kiesewetter, supra.***

Improper Notice

(Footnote Continued) _____

proceeding; and (5) the determination in the prior proceeding was essential to the judgment.

Office of Disciplinary Counsel v. Kiesewetter, 889 A.2d 47 (Pa. 2005).

Finally, Lynch claims that he was never given notice of his impending bench trial in the instant case. We disagree. The record shows that in compliance with Pa.R.Crim.P. 114,⁹ Lynch received notice when his attorney was mailed, *via* personal delivery, the trial court's scheduling order indicating that the case would proceed to trial on April 26, 2012 at 1:00 p.m.¹⁰

Consequently, after an independent review of the appeal, we find that Lynch's appeal is wholly frivolous, *Anders, supra*, and grant counsel's petition to withdraw.

Judgment of sentence affirmed. Petition to withdraw granted.

COLVILLE, J., concurs in the result.

⁹ **See** Pa.R.Crim.P. 114 (B)(1) ("A copy of any order or court notice promptly shall be served on each party's attorney, or the party if unrepresented.").

¹⁰ To the extent that Lynch claims he was only put on notice of a summary plea hearing, the court explained that it issued such a notice because it was originally under the impression that Lynch was going to enter a plea. However, as Lynch's defense was that his license had never actually been suspended, it is apparent that he had no intention to actually plead to the charges.