

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
CLARENCE E. SWARNER, JR.,	:	
	:	
Appellant	:	No. 1458 MDA 2012

Appeal from the Judgment of Sentence Entered July 10, 2012,
In the Court of Common Pleas of Lancaster County,
Criminal Division, at No. CP-36-CR-0004924-2011.

BEFORE: PANELLA, SHOGAN and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED MAY 07, 2013

Appellant, Clarence E. Swarner, Jr., appeals from the judgment of sentence entered on July 10, 2012, in the Lancaster County Court of Common Pleas. Appellant’s counsel has filed a petition to withdraw and brief pursuant to **Anders v. California**, 386 U.S. 738 (1967), **Commonwealth v. McClendon**, 495 Pa. 467, 434 A.2d 1185 (1981), and **Commonwealth v. Santiago**, 602 Pa. 159, 978 A.2d 349 (2009). Upon review, we grant counsel’s petition to withdraw and affirm Appellant’s judgment of sentence.

On July 10, 2012, following a jury trial, Appellant was found guilty of one count of fleeing or attempting to elude a police officer and one count of recklessly endangering another person (“REAP”) in connection with a high-speed chase that occurred after Appellant failed to pull over for a suspected

*Retired Senior Judge assigned to the Superior Court.

Motor Vehicle Code violation. On the fleeing or eluding conviction, the trial court sentenced Appellant to a term of time served to 23 months of incarceration followed by 3 months of probation. On the REAP conviction, the trial court sentenced Appellant to a concurrent term of time served to 23 months of incarceration. Appellant timely appealed.

At the outset, we note that “[w]hen faced with a purported **Anders** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw.” **Commonwealth v. Rojas**, 874 A.2d 638, 639 (Pa. Super. 2005). Furthermore, there are clear mandates that counsel seeking to withdraw pursuant to **Anders**, **McClendon**, and **Santiago** must follow.

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

- (1) counsel must petition the court for leave to withdraw stating that after making a conscientious examination of the record it has been determined that the appeal would be frivolous;
- (2) counsel must file a brief referring to anything that might arguably support the appeal, but which does not resemble a “no merit” letter or *amicus curiae* brief; and
- (3) counsel must furnish a copy of the brief to defendant and advise him of his right to retain new counsel, proceed pro se or raise any additional points that he deems worthy of the court’s attention.

Commonwealth v. Millisock, 873 A.2d 748, 751 (Pa. Super. 2005).

In **Santiago**, the Supreme Court set forth specific requirements for the brief accompanying counsel's petition to withdraw:

[I]n the **Anders** brief that accompanies court-appointed Counsel's petition to withdraw, counsel 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, 978 A.2d at 361.

In the case before us presently, Appellant's counsel has complied with the requirements of **Santiago**, and our review of counsel's petition to withdraw, supporting documentation, and **Anders** brief reveals that counsel has satisfied all of the foregoing requirements. Counsel has furnished a copy of the brief to Appellant; advised him of his right to retain new counsel, proceed *pro se*, or raise any additional points that he deems worthy of this Court's attention; and has attached a copy of the letter sent to the client to the **Anders** petition as required under **Millisock**. Counsel also avers that the appeal is frivolous. **Anders** Brief at 13.

Once counsel has met his or her 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.” **Santiago**, 978 A.2d at 355 n.5. Thus, we will now examine the issues set forth by counsel in the **Anders** brief.

In the **Anders** brief, counsel has raised issues purporting to challenge the sufficiency of the evidence necessary to sustain convictions for fleeing or eluding and REAP. **Anders** Brief at 10-11. We begin our analysis by setting forth the applicable standard of review.

“The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.” **Commonwealth v. Hutchinson**, 947 A.2d 800, 805 (Pa. Super. 2008) (citation omitted). In applying this test, we may not weigh the evidence and substitute our judgment for the fact-finder. **Id.** Additionally, the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence, and any doubts regarding a defendant’s guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. **Id.** at 805-806. “The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.” **Id.** at 806. “Moreover, in applying the above test, the entire record must be evaluated

and all evidence actually received must be considered.” **Id.** “Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.”

Id.

Fleeing or attempting to elude a police officer is defined in the Motor Vehicle Code as follows:

Fleeing or attempting to elude police officer

(a) Offense defined.--Any driver of a motor vehicle who willfully fails or refuses to bring his vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police officer, when given a visual and audible signal to bring the vehicle to a stop, commits an offense as graded in subsection (a.2).

75 Pa.C.S.A. § 3733(a). In its opinion, the trial court addressed this issue as follows:

At trial, Carrie Peace, [Appellant’s] then girlfriend, testified that on the evening of September 7, 2011, [Appellant] borrowed her green Saturn station wagon. (N.T. Trial, 65:12 - 66:5.) Officer Michael Polaski of the Christiana Borough Police Department testified that on that same evening he was on duty performing stationary traffic enforcement detail when his attention was drawn to a green Saturn station wagon with no lights illuminating the license plate. (N.T. Trial, 76:21 - 78:18; 80:6 - 81:15.) Officer Polaski activated his overhead lights and pulled out behind the Saturn. (N.T. Trial, 81:18-25.) The officer testified that the driver of the Saturn initially pulled off the roadway but then began accelerating and reentered the roadway. (N.T. Trial, 80:25 - 81:1.) The officer activated his sirens and began chasing after the driver of the Saturn. (N.T. Trial, 82: 2-4.) The officer reached a speed of approximately 100 miles per hour and witnessed two other cars being forced off the roadway from the driver’s erratic swerving. (N.T. Trial, 82:4-8.) The officer later identified [Appellant] as being the

driver of the Saturn. (N.T. Trial, 83:20-25.) Viewed in a light most favorable to the Commonwealth, there is more than enough evidence to show that [Appellant] fled within the meaning of 75 Pa.C.S.A. § 3733(a).

Trial Court Opinion, 11/15/12, at 3-4 (citations to the notes of testimony in original). Upon review, we agree with the trial court's analysis. The record provides ample support for a conviction for fleeing or attempting to elude a police officer.

Next, REAP is defined in the Crimes Code as follows:

Recklessly endangering another person

A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

18 Pa.C.S.A. § 2705. The trial court addressed the sufficiency of the evidence to establish REAP as follows:

At trial, Officer Polaski testified that [Appellant] drove his vehicle at 100 miles per hour on a roadway with a posted speed limit of 45 miles per hour at 11:00 p.m. during a period of heavy rain. (N.T. Trial, 78:11-12; 82:4; 90: 17-20.) During his flight from Officer Polaski, [Appellant] forced at least two other drivers from the roadway as a result of his erratic driving. (N.T. Trial, 88:7-11.) Viewed in a light most favorable to the Commonwealth, there is more than enough evidence to show that [Appellant] recklessly engaged in conduct which placed at least two other individuals, and Officer Polaski, in danger of death or serious bodily injury.

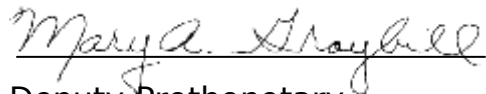
Trial Court Opinion, 11/15/12, at 4 (citations to the notes of testimony in original). Again, we agree with the trial court's analysis. Appellant's decision to drive a vehicle at more than twice the posted speed limit, during

a period of rain, and forcing two motorists off the roadway, placed those drivers and Officer Polaski at risk of serious bodily injury or death. As such, there was sufficient evidence to support Appellant's conviction for REAP.

For the reasons set forth above, we conclude that Appellant is entitled to no relief. It is our determination that Appellant's counsel has complied with the requirements of **Anders** and that an appeal in this case would be wholly frivolous. Furthermore, we have conducted our own, independent review of the record. We do not discern any non-frivolous issues that Appellant could have raised. In light of the foregoing, we grant counsel's petition to withdraw and affirm the judgment of sentence.

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

Judgment Entered.


Deputy Prothonotary

Date: 5/7/2013