NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. OSCAR ODELL STOCKS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 149 EDA 2013

Appeal from the Judgment of Sentence of May 16, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0000176-2011

BEFORE: GANTMAN, DONOHUE AND OLSON, JJ.

MEMORANDUM BY OLSON, J.: **FILED NOVEMBER 25, 2013**

Appellant, Oscar Odell Stocks, appeals from the judgment of sentence entered on May 16, 2012 as made final by the denial of his post-sentence motion on September 17, 2012. On this direct appeal, Appellant's court-appointed counsel has filed both a petition to withdraw as counsel and an accompanying brief pursuant to ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981), and its federal predecessor, ***Anders v. California***, 386 U.S. 738 (1967). We conclude that Appellant's counsel has complied with the procedural requirements necessary to withdraw. Moreover, after independently reviewing the record, we conclude that the instant appeal is wholly frivolous. We therefore grant counsel's petition to withdraw and affirm Appellant's judgment of sentence.

The trial court summarized the facts of this case as follows:

There were only two witnesses at trial: for the Commonwealth, Kelly Murphy, a loss-prevention officer at the Hollister store in the King of Prussia Mall; and for the defense, [Appellant], testifying on his own behalf. The testimony showed the following.

Murphy observed [Appellant] enter the store along with another man. The two men went to a case displaying female perfumes; [Appellant] grabbed three of [the perfumes] and concealed them in his friend's backpack. Murphy was standing right next to [Appellant] at the time, about a foot away. The two men then exited the store, passing all points of purchase without attempting to pay. From the time [Appellant] put the fragrances in his friend's backpack [until] the time the two exited the store, they did not part, they came in and left together. As they left, they set off an alarm. Murphy detained the men with the help of mall security, and recovered the fragrances from the friend's backpack. [Appellant] also had a backpack, but no Hollister merchandise was found in his pack. Neither man had a receipt for the perfumes. The value of the merchandise was $150[.00]. Murphy determined the value by entering the [stock-keeping units ("SKUs")] from the box into her "system," which showed "that three items were taken for $150[.00], at $50[.00] each."

On cross-examination, Murphy explained why she had said nothing to [Appellant] at the time he placed the perfumes in his friend's backpack. Although she was standing only a foot away. She said, "As far as my job goes, I have to observe selection, concealment, and then passing all points of sale and exiting the store before I approach the suspects." She elaborated that the store's policy was to watch suspects pass points of sale before taking any action.

[Appellant's] story differed. He testified he entered the store with his co[-]defendant, [Brian] Bailey. Bailey was carrying a backpack, but [Appellant] wasn't. Contrary to Murphy's testimony, [Appellant] said the two men were on different sides of the store, not next to each other. [Appellant] didn't see Bailey conceal any merchandise. When they left the store, there was no alarm. [Appellant] testified that when Bailey's bag was searched, two bottles of cologne were found, not three, at $50[.00] a bottle, for a value of $100[.00], and that it was men's cologne, not females'. [Appellant] said he didn't put the

> cologne in Bailey's bag, and he had no idea the cologne was there.

Trial Court Opinion, 5/15/13, at 1-2 (citations omitted).

The procedural history of this case is as follows. A complaint was filed against Appellant on January 7, 2011. On May 16, 2012, Appellant waived his right to a trial by a jury of his peers and instead proceeded to a bench trial. The trial court found Appellant guilty of retail theft of merchandise, valued not less than $150.00.[1] Appellant was immediately sentenced to three years' probation. On May 18, 2012, Appellant filed a post-sentence motion. On September 17, 2012, Appellant's post-sentence motion was denied by operation of law. ***See*** Pa.R.Crim.P. 720(B)(3)(a); 1 Pa.C.S.A. § 1908. This timely appeal followed.[2]

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[1] 18 Pa.C.S.A. § 3929(a)(1).

[2] Pennsylvania Rule of Criminal Procedure 720(B)(3)(c) requires an order denying a post-sentence motion by operation of law be filed forthwith. However, the clerk of courts did not file the order until December 13, 2012, 87 days after the post-sentence motion was denied by operation of law. Appellant filed his notice of appeal on January 10, 2013. Appellant had 30 days from December 13, 2012 to file his notice of appeal. ***See Commonwealth v. Patterson***, 940 A.2d 493, 499 (Pa. Super. 2007), *appeal denied*, 960 A.2d 838 (Pa. 2008) (citations omitted); Pa.R.Crim.P. 720(A)(2)(b). As Appellant filed his notice of appeal on January 10, 2013, 28 days after the order denying his post-sentence motion was entered by the clerk of courts, his notice of appeal is timely.

On January 17, 2013, the trial court ordered Appellant to file a concise statement of errors complained of on appeal ("concise statement"). ***See*** Pa.R.A.P. 1925(b). Appellant filed his concise statement on February 5, 2013. The trial court filed its Rule 1925(a) opinion on May 15, 2013. All of the issues raised in counsel's ***Anders*** brief were raised in Appellant's concise statement.

Appellant's counsel included two issues in her ***Anders*** brief:

1. Is Appellant's conviction for retail theft supported by legally sufficient evidence of record?

2. Did the trial court abuse its discretion when it denied Appellant's motion for a new trial in that the guilty verdict was manifestly against the weight of the evidence?

Anders Brief at 4 (capitalization removed).

Before reviewing the merits of this appeal, however, this Court must first determine whether counsel has fulfilled the necessary procedural requirements for withdrawing as counsel. ***Commonwealth v. Washington***, 63 A.3d 797, 800 (Pa. Super. 2013). To withdraw under ***Anders***, court-appointed counsel must satisfy certain technical requirements. First, counsel must "petition the court for leave to withdraw and state that after making a conscientious examination of the record, [s]he has determined that the appeal is frivolous." ***Commonwealth v. Martuscelli***, 54 A.3d 940, 947 (Pa. Super. 2012), *quoting* ***Commonwealth v. Santiago***, 978 A.2d 349, 361 (Pa. 2009). Second, counsel must file an ***Anders*** brief, in which counsel:

> (1) provide[s] a summary of the procedural history and facts, with citations to the record;
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> (2) refer[s] to anything in the record that counsel believes arguably supports the appeal;
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> (3) set[s] forth counsel's conclusion that the appeal is frivolous; and
>
> (4) state[s] 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.

Washington, 63 A.3d at 800, *quoting* ***Santiago***, 978 A.2d at 361.

Finally, counsel must furnish a copy of the ***Anders*** brief to her client 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, and attach[] to the ***Anders*** petition a copy of the letter sent to the client." ***Commonwealth v. Daniels***, 999 A.2d 590, 594 (Pa. Super. 2010) (citation omitted).

If counsel meets all of the above 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, *quoting* ***McClendon***, 434 A.2d at 1187. It is only when both the procedural and substantive requirements are satisfied that counsel will be permitted to withdraw. In the case at bar, counsel has met all of the above procedural obligations.[3] We now turn to the issues raised in counsel's ***Anders*** brief.

The first issue raised in counsel's ***Anders*** brief is whether the evidence was sufficient to sustain the guilty verdict. "A claim challenging the sufficiency of the evidence presents a question of law." ***Commonwealth v. Fortune***, 68 A.3d 980, 983 (Pa. Super. 2013) (citation omitted). "In

[3] Appellant has not filed any response to counsel's ***Anders*** brief.

reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense." ***Commonwealth v. Cox***, 72 A.3d 719, 721 (Pa. Super. 2013), *quoting* ***Commonwealth v. Koch***, 39 A.3d 996, 1001 (Pa. Super. 2011). "[T]he facts and circumstances established by the Commonwealth need not preclude every possibility of innocence . . . . [T]he 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." ***Commonwealth v. Thomas***, 65 A.3d 939, 943 (Pa. Super. 2013) (first alteration in original), *quoting* ***Commonwealth v. Ratsamy***, 934 A.2d 1233, 1236 n.2 (Pa. 2007).

> We have noted that,
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> [a] person is guilty of a retail theft if he . . . takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof.

Commonwealth v. Graeff, 13 A.3d 516, 518 (Pa. Super. 2011), *quoting* 18 Pa.C.S.A. § 3929(a)(1). Appellant advances three arguments for why the evidence against him was insufficient. He argues that:

> (1) there was no evidence that he left the store with any merchandise which was not paid for; (2) the Commonwealth's evidence only establishes that merchandise was found in the possession of [Bailey]; and (3) there is no videotape or other

> recording showing him removing merchandise from the Hollister store without paying for it.

Anders Brief at 12.

Appellant's first and second arguments are that there was no evidence that he left the store with any merchandise he did not pay for and that merchandise was only found on his co-defendant, Bailey. However, under the relevant statute:

> Any person intentionally concealing unpurchased property . . . either on the premises or outside the premises . . . shall be *prima facie* presumed to have so concealed such property with the intention of depriving the merchant of the possession, use[,] or benefit of such merchandise without paying the full retail value thereof within the meaning of [§ 3929(a)], and the finding of such unpurchased property concealed, upon the person or among the belongings of such person, shall be *prima facie* evidence of intentional concealment, and, if such person conceals, or causes to be concealed, such unpurchased property upon the person or among the belongings of another, such fact shall also be *prima facie* evidence of intentional concealment on the part of the person so concealing such property.

18 Pa.C.S.A. § 3929(c). "Such a presumption is a presumption of fact or an inference, and not to be confused with an irrebuttable presumption." ***Commonwealth v. Martin***, 446 A.2d 965, 968 (Pa. Super. 1982).

At trial, Murphy testified that she "observed [Appellant] enter the store. . . . He went over to the female fragrance presentations, selected three fragrances, concealed them in his friend's backpack, and then they proceeded to exit the store on the men's side without making any attempt to purchase the items. . . . They set off the alarm." N.T., 5/16/12, at 6. Murphy testified that she was only one foot away from Appellant when he

took the three fragrances and concealed them in Bailey's bag. ***Id.*** at 9. After the incident occurred, Murphy used the SKUs on the fragrances to determine that they were worth an aggregate $150.00. ***Id.*** at 11.

Viewed in the light most favorable to the Commonwealth, this evidence was sufficient to show that Appellant caused unpurchased merchandise to be concealed in Bailey's belongings. Thus, the presumption of Section 3929(c) applies and it is presumed that Appellant concealed the items with the "intention of depriving the merchant of the possession, use[,] or benefit of such merchandise without paying the full retail value thereof[.]" 18 Pa.C.S.A. § 3929(c). Appellant did not attempt to rebut this presumption at trial or on appeal. Instead, he argues that he never concealed the merchandise on Bailey.

We have previously considered cases similar to the one *sub judice* and found that the evidence was sufficient to support a conviction for retail theft. In ***Commonwealth v. Lawson***, the defendant helped his co-defendant steal jewelry by lifting the display case for him. 461 A.2d 807, 809 (Pa. Super. 1983). The defendant left the store without any jewelry on his person, as the co-defendant carried all of the jewelry on his person. ***Id.*** We found that the evidence was sufficient to convict the defendant of retail theft. ***Id.*** at 810.

Likewise, in ***Commonwealth v. Lewis***, the defendant picked up several radios and gave the radios to an another individual who then

concealed the radios in his jacket. 623 A.2d 355, 356 (Pa. Super. 1993). The defendant then left the store without any stolen merchandise on his person. ***Id.*** We found that the evidence was sufficient to convict the defendant of retail theft, although we ordered a new trial because of an evidentiary error. ***Id.*** at 359. Thus, the fact that Appellant did not have any merchandise on his person was not dispositive. We conclude that the concealment of the fragrances, coupled with the value of those fragrances, constituted sufficient evidence for the retail theft conviction.

Appellant's final argument against the sufficiency of the evidence is that there is no video recording of his theft. We have previously rejected similar arguments regarding mandatory introduction of such evidence. In ***Commonwealth v. Fisher***, we held that the Commonwealth is not required to produce recordings if the recordings are not necessary to prove an element of the offense. 764 A.2d 82, 87–88 (Pa. Super. 2000), *appeal denied*, 782 A.2d 542 (Pa. 2001). In ***Commonwealth v. Steward***, we held that the evidence was sufficient to convict the defendant of, *inter alia*, theft by unlawful taking, despite the fact that a videotape of the evidence was subsequently taped over and thus not presented at trial. 762 A.2d 721, 722-723 (Pa. Super. 2000), *appeal denied*, 782 A.2d 545 (Pa. 2001). Likewise, in ***Commonwealth v. Dent***, we found that the Commonwealth was not required to present a videotape at trial because it had been destroyed. 837 A.2d 571, 590 (Pa. Super. 2003), *appeal denied*, 863 A.2d

1143 (Pa. 2004). Thus, we affirmed Dent's conviction for retail theft. ***Id.*** at 591.

In this case, a videotape was not required in order to prove an element of the offense. Murphy's testimony alone was sufficient to prove each element of retail theft of items totaling at least $150.00. Accordingly, we conclude that Appellant's sufficiency of the evidence claim is wholly frivolous.

Appellant next contends that the conviction is against the weight of the evidence. ***Anders*** Brief at 11-12. A challenge to the weight of the evidence must first be raised at the trial level "(1) orally, on the record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion." Pa.R.Crim.P. 607; ***Commonwealth v. Foley***, 38 A.3d 882, 891 (Pa. Super. 2012), *appeal denied*, 60 A.3d 535 (Pa. 2013). Appellant properly preserved his weight of the evidence claim by raising the issue in his post-sentence motion.

"To grant a new trial based upon the weight of the evidence, it must appear to the trial court that the verdict was so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative." ***Commonwealth v. Luster***, 71 A.3d 1029, 1049 (Pa. Super. 2013) (internal quotation marks and citation omitted). "[We do] not answer for [ourselves] whether the verdict was against the weight of the evidence . . . . [O]ur review is limited to whether the trial judge's discretion was

properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion." ***Commonwealth v. Brown***, 71 A.3d 1009, 1013 (Pa. Super. 2013), *quoting* ***Commonwealth v. Karns***, 50 A.3d 158, 165 (Pa. Super. 2012).

"The record reflects that Appellant had a bench trial, so the trial judge was the factfinder. The same evidence in the record that provided sufficient evidence to support Appellant's conviction also convinced the trial judge that the verdict was not against the weight of the evidence." ***Commonwealth v. Davidson***, 860 A.2d 575, 582 (Pa. Super. 2004), *affirmed*, 938 A.2d 198 (Pa. 2007). "We will respect a trial court's findings with regard to the credibility and weight of the evidence [after a bench trial] unless the appellant can show that the court's determination was manifestly erroneous, arbitrary and capricious[,] or flagrantly contrary to the evidence." ***J.J. DeLuca Co., Inc. v. Toll Naval Assocs.***, 56 A.3d 402, 410 (Pa. Super. 2012) (quotation marks and citation omitted).

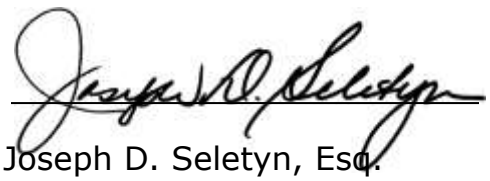
As evidenced by our discussion with respect to the sufficiency of the evidence, the trial court's findings regarding the weight of the evidence are clearly supported by the record. There were only two witnesses presented at trial and Appellant's guilt became a question of the witnesses' credibility. "The [trial] court, as finder of fact, believed Murphy's testimony[.]" Trial Court Opinion, 5/15/13, at 2. This finding was not "manifestly erroneous, arbitrary and capricious[,] or flagrantly contrary to the evidence." ***J.J.***

Deluca, 56 A.3d at 410. Thus, the trial court did not abuse its discretion in denying Appellant's post-sentence motion for a new trial.

Accordingly, we conclude that both issues raised in counsel's ***Anders*** brief are frivolous. Furthermore, after an independent review of the entire record, we conclude that no other issue of arguable merit exists. Therefore, we will grant counsel's request to withdraw. Having determined that all issues on appeal are frivolous, we will affirm the judgment of sentence.

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

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013