

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
VAUGHN THORNTON,	:	No. 16 WDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, October 25, 2011,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0011637-2010

BEFORE: FORD ELLIOTT, P.J.E., WECHT AND STRASSBURGER,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: FILED: December 6, 2013

Vaughn Thornton appeals from the judgment of sentence of October 25, 2011, following his conviction of drug charges. Appointed counsel, Scott B. Rudolf, Esq., has filed a petition to withdraw and accompanying **Anders**¹ brief. After careful review, we grant counsel's withdrawal petition and affirm the judgment of sentence.

Following a jury trial held July 7, 2011, before the Honorable Edward J. Borkowski, appellant was found guilty of one count each of possession of a controlled substance, possession with intent to deliver ("PWID"), and delivery. The charges related to a July 20, 2010 incident in which appellant

* Retired Senior Judge assigned to the Superior Court.

¹ **Anders v. California**, 386 U.S. 738 (1967).

J. S60001/13

was observed by undercover officers handing several stamp bags of heroin to a known drug user in exchange for United States currency. On October 25, 2011, appellant was sentenced to two to four years' imprisonment followed by two years of probation. No post-sentence motions were filed. This timely appeal followed.²

As noted above, appellant's counsel, Attorney Rudolf, has filed a petition to withdraw and accompanying **Anders** brief. "When presented with an **Anders** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw." **Commonwealth v. Daniels**, 999 A.2d 590, 593 (Pa.Super. 2010), citing **Commonwealth v. Goodwin**, 928 A.2d 287, 290 (Pa.Super. 2007) (*en banc*) (citation omitted).

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

² Appellant's **pro se** notice of appeal was not docketed until November 30, 2011. (Docket #14.) The trial court opined that the appeal was untimely. (Trial court opinion, 7/16/12 at 1.) However, the envelope in which the notice of appeal was mailed from SCI Forest bears a post date of November 23, 2011. Therefore, we deem appellant's appeal to have been timely filed. **See Commonwealth v. Chambers**, 35 A.3d 34, 38 (Pa.Super. 2011), **appeal denied**, 616 Pa. 625, 46 A.3d 715 (2012) ("in the interest of fairness, the prisoner mailbox rule provides that a **pro se** prisoner's document is deemed filed on the date he delivers it to prison authorities for mailing") (citation omitted). On December 2, 2011, trial counsel filed a motion for leave to withdraw, which was granted on December 9, 2011, and new counsel appointed. An amended notice of appeal was filed on appellant's behalf on December 28, 2011.

- (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.

Id., quoting ***Commonwealth v. Santiago***, 602 Pa. 159, 178-179, 978 A.2d 349, 361 (2009).

Our review of Attorney Rudolf's application to withdraw, supporting documentation, and ***Anders*** brief reveals that he has complied with all of the foregoing requirements. We note that counsel also 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 attached to the ***Anders*** petition a copy of the letter sent to appellant as required under ***Commonwealth v. Millisock***, 873 A.2d 748, 751 (Pa.Super. 2005). ***See Daniels***, 999 A.2d at 594 ("While the Supreme Court in ***Santiago*** set forth the new requirements for an ***Anders*** brief, which are quoted above, the holding did not abrogate the notice requirements set forth in ***Millisock*** that remain binding legal precedent.").

As Attorney Rudolf has complied with all of the requirements set forth above, we now turn to any issues counsel states arguably support the appeal.³

As Attorney Rudolf observes, trial counsel did not file any pre-trial motions, make any objections during trial, nor did he file any post-sentence motions.⁴ Therefore, most issues would be waived for failure to preserve them in the trial court. **See** Pa.R.A.P., Rule 302(a), 42 Pa.C.S.A. (“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.”). Jurisdiction, merger, and the legality of appellant’s sentence are all non-waivable issues which may be raised for the first time on appeal; however, the trial court unquestionably had jurisdiction, appellant was only sentenced on count one, delivery, and his sentence fell at the low end of the standard range of the sentencing guidelines.⁵ The only

³ Appellant has not responded to counsel’s motion to withdraw.

⁴ This is by no means a commentary on trial counsel’s stewardship.

⁵ It is well established that simple possession and PWID merge with the crime of delivery of a controlled substance when based on the same set of facts. **See Commonwealth v. Eicher**, 605 A.2d 337, 353 (Pa.Super. 1992), **appeal denied**, 533 Pa. 598, 617 A.2d 1272 (1992) (appellant’s convictions for possession, PWID and delivery of cocaine merged for sentencing purposes where they arose out of the same transaction and all were premised on the same set of facts); **Commonwealth v. Edwards**, 449 A.2d 38, 39 (Pa.Super. 1982) (“Delivery necessarily includes possession with the intent to deliver and possession with the intent to deliver clearly includes possession.”) (citations omitted). Therefore, appellant was properly sentenced only on the delivery charge.

conceivable issue appellant could raise on direct appeal is the sufficiency of the evidence; therefore, we will briefly address this issue.⁶

When considering a challenge to the sufficiency of the evidence, this court must view the evidence presented in a light most favorable to the Commonwealth, the verdict winner, and draw all reasonable inferences therefrom. ***Commonwealth v. Ketterer***, 725 A.2d 801, 803 (Pa.Super. 1999). We must then determine whether the evidence was sufficient to permit the fact-finder to conclude that all of the elements of the crimes charged were proven beyond a reasonable doubt. ***Id.*** Any question of doubt is for the fact-finder, unless the evidence is so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances. ***Id.*** at 804.

The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire trial record must be evaluated and all evidence actually received must be considered. 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.

Commonwealth v. George, 705 A.2d 916, 918 (Pa.Super. 1998), ***appeal denied***, 555 Pa. 740, 725 A.2d 1218 (1998), quoting ***Commonwealth v.***

⁶ Trial counsel did make a motion for judgment of acquittal which was denied. (Notes of testimony, 7/7/11 at 72.)

Valette, 531 Pa. 384, 388, 613 A.2d 548, 549 (1992) (citations and quotation marks omitted).

The offense of delivery of a controlled substance is provided for in section 780-113(a)(30) of The Controlled Substance, Drug, Device and Cosmetic Act, (the "Act"). According to that section, the offense occurs in the following circumstances:

Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a)(30). The term delivery, as used in this section, is defined by the Act as "the actual, constructive, or attempted transfer from one person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship." 35 P.S. § 780-102. Thus, for a defendant to be liable as a principal for the delivery of a controlled substance there must be evidence that he knowingly made an actual, constructive, or attempted transfer of a controlled substance to another person without the legal authority to do so. **See Commonwealth v. Metzger**, 247 Pa.Super. 226, 372 A.2d 20, 22 (1977) ("[t]he offensive conduct is simply the 'actual, constructive or attempted transfer from one person to another' of the prohibited substance").

Commonwealth v. Murphy, 577 Pa. 275, 284-285, 844 A.2d 1228, 1233-1234 (2004) (footnote omitted). "A defendant actually transfers drugs whenever he physically conveys drugs to another person." **Id.** at 285, 844

J. S60001/13

A.2d at 1234, citing **Commonwealth v. Cameron**, 372 A.2d 904, 907 (Pa.Super. 1977); Black's Law Dictionary 1504 (7th ed. 1999) (footnote omitted).

The Commonwealth adduced the following evidence at trial. On July 20, 2010, undercover narcotics officers were operating in an unmarked vehicle in the Hazelwood section of the City of Pittsburgh. (Notes of testimony, 7/7/11 at 28.) This section of Hazelwood was known for violence and narcotics trafficking. (**Id.** at 29.) The officers observed a known drug user, Carl O'Shell ("O'Shell"), walking back and forth with money in his hand. (**Id.** at 31.) Officer Francesco Rosato testified that he could clearly see that it was U.S. currency. (**Id.**)

A few minutes later, a Ford Explorer, driven by appellant, approached very slowly and stopped in front of O'Shell. (**Id.** at 31-32.) The front seat passenger, appellant's brother Justin Thornton, stuck his head out of the window and was looking up and down the street "almost like a countersurveillance tactic." (**Id.** at 33-34.) Officer Rosato observed O'Shell hand appellant currency, and accept several loose white objects in return. (**Id.** at 33.) From Officer Rosato's knowledge and experience, he believed the objects to be stamp bags of heroin. (**Id.**)

After the transaction, O'Shell began walking towards the officers' position, counting his bags of heroin. (**Id.** at 34, 51.) Officer Gregory Woodhall testified that he exited the unmarked police vehicle,

J. S60001/13

grabbed O'Shell, and stated, "Carl, give me the stuff." (*Id.* at 51.) O'Shell handed over seven stamp bags of heroin, each worth approximately \$10. (*Id.* at 47, 50.) O'Shell did not have any money on him. (*Id.* at 47.) Officer Woodhall informed O'Shell that he would receive a summons, and he was released. (*Id.* at 46, 51.) It was stipulated that the seven stamp bags contained .13 grams of heroin, a Schedule I controlled substance. (*Id.* at 71-72.)

Officer Rosato radioed Sergeant Brian Elledge to stop appellant's vehicle and gave him the license plate number. (*Id.* at 34.) Sergeant Elledge stopped the vehicle approximately four to six minutes later, less than one mile from the scene of the drug transaction. (*Id.* at 56-57.) Sergeant Elledge identified appellant as the driver of the vehicle. (*Id.* at 57.) Appellant was searched incident to arrest, and police recovered \$351 in U.S. currency, mostly in small bills. (*Id.* at 67.) No drugs were recovered from appellant's person. (*Id.*) Regarding the currency found in appellant's pocket, Officer Rosato testified:

They were -- it was all in separate folds, low denominations and different -- facing different ways, and the reason people carry that kind of money is they want to know who paid them what from whatever transaction they had conducted during that day. In this case [appellant] didn't have any other drugs on him, but he had a lot of money and he was unemployed, so that it's an indication that he may have been sold out through that day and that's why there was the high amount of money and no narcotics.

J. S60001/13

- Q. How many narcotics arrests involving the seizure of U.S. currency have you done?
- A. Probably anywhere between eight hundred and a thousand.
- Q. And have you seen money in this -- money appearing like this before in terms of the small bills and the way it was folded?
- A. Yes, because generally addicts will only have a small amount of money and generally will have small denominations, so for somebody to have a lot of, say, five-, ten-, fifteen-, twenty-dollar folds facing different directions all in one pile, it signifies that's how much they got off each person they had sold to.

Id. at 67-68.

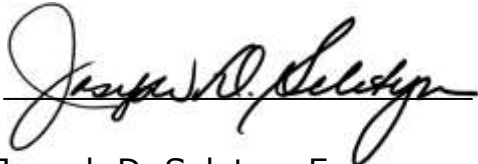
Clearly, this evidence, if believed by the jury, was sufficient to find appellant guilty of delivery of heroin. Multiple undercover narcotics officers conducting surveillance in a high-crime area observed O'Shell, a known drug user, approach appellant's car and exchange U.S. currency for several small objects. When officers stopped O'Shell immediately afterwards, he had seven stamp bags of heroin in his possession but no money. Officers stopped appellant's car less than one mile away and recovered \$351 in small bills from his pocket. Officer Rosato testified that the low denominations and the manner in which they were folded was indicative of drug activity. Examining all the evidence in the light most favorable to the Commonwealth, as verdict winner, we agree with Attorney Rudolf that any claim premised on the sufficiency of the evidence would lack arguable merit. In addition, after

J. S60001/13

our own independent review, we can discern no other issues of arguable merit from the record. Therefore, we will grant Attorney Rudolf's petition to withdraw and affirm the judgment of sentence.

Petition to withdraw granted. Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/6/2013