**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA,<br><br>Appellee<br><br>v.<br><br>TAUHEED SADAT,<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br>No. 1603 EDA 2012 |

Appeal from the PCRA Order Entered May 21, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0402002-2006

BEFORE: BENDER, P.J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY BENDER, P.J. **FILED DECEMBER 20, 2013**

Appellant, Tauheed Sadat, appeals from the trial court's May 21, 2012 order denying his petition for relief under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546. Appellant contends that his direct appeal counsel was ineffective for waiving a challenge to the sufficiency of the evidence to sustain Appellant's convictions. After careful review, we affirm.

The facts of this case are as follows:

> On November 7, 2005, at about 3:15 [p.m.,] Officers Gill and Glaviano of the Philadelphia Police Department were on routine patrol in South Philadelphia when they received a radio call of a possible shooting at Snyder Avenue and Opal Streets. The officers immediately proceeded to the location and upon arriving there, they were directed by various individuals to an individual laying [sic] on the pavement in the 2000 block of Opal Street. The male, later identified as Daniel Starling, the decedent

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* Retired Senior Judge assigned to the Superior Court.

herein, was bleeding heavily from several gunshot wounds and was unconscious. The officers placed him in their patrol car and took him to the University of Pennsylvania Hospital where he was pronounced dead shortly after his arrival at the hospital.

An investigation of the area where the decedent was found indicated that he had been shot in front of 1925 Snyder Avenue and had traveled to the location where Officers Gill and Glaviano found him. Upon investigating the scene[,] police found six .45 caliber spent shell casings on Snyder Avenue as well as some lead fragments in and around the 1900 block of Snyder Avenue.

Just prior to the shooting, Philadelphia Detectives William Urban and Frank Wallace were driving south on 19th Street toward Snyder Avenue when they heard several gunshots. When the detectives reached the intersection of Snyder Avenue and 19th Street[], Detective Urban looked in the direction where he believed the gunfire had emanated. When he did so, he saw [co-]defendant Tyrik Hawkins, running eastbound on Snyder Avenue. Hawkins[,] who had a gun in his hand, turned north at Garnet Street where he placed the gun in his waistband.

The detectives followed Hawkins and when they turned onto Garnet Street, they observed a vehicle with two individuals standing by it. Hawkins signaled to them at which time all three men got into the car which proceeded north on Garnet Street at a high rate of speed. The detectives followed it for several blocks.

When it reached the intersection of 20th and Fernon Streets, the driver lost control of the car while attempting to turn onto Fernon Street and it collided with a fence. All three men fled the vehicle when it stopped moving. Detective Urban chased two of the males, namely defendant Tauheed Sadat and the third male[,] into an alley. Detective Wallace chased Hawkins. Neither detective was able to apprehended any of the males.

On December 16, 2005, Detective Urban gave a statement to homicide detectives. He also participated in two photographic identification sessions. During one of them he identified a photograph of Tyrik Hawkins and said it depicted the male he saw with the gun. During the second one he identified a photograph of Tauheed Sadat, who he stated, was driving the car Hawkins got into with the third male.

PCRA Court Opinion, 2/20/13, at 2-4 (unnumbered pages).

Based on these facts, Appellant was convicted, following a nonjury trial, of third-degree murder and criminal conspiracy. He was sentenced to an aggregate term of 15 to 30 years' incarceration. Appellant filed a timely direct appeal and, after this Court affirmed his judgment of sentence, our Supreme Court denied his subsequent petition for permission to appeal. ***Commonwealth v. Sadat***, 981 A.2d 933 (Pa. Super. 2009) (unpublished memorandum), *appeal denied*, 987 A.2d 161 (Pa. 2009).

Appellant then filed a timely *pro se* PCRA petition. Counsel was appointed and an amended petition was filed alleging, *inter alia*, that Appellant's prior counsel rendered ineffective representation by failing to properly raise on direct appeal a challenge to the sufficiency of the evidence. After issuing a Pa.R.Crim.P. 907 notice, the PCRA court dismissed Appellant's petition without a hearing. He filed a timely notice of appeal, as well as a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Herein, Appellant raises one issue for our review:

> Whether Appellant was deprived of his right to effective assistance of counsel under the United States and Pennsylvania [C]onstitutions by defense counsel's failure to preserve a meritorious issue for appeal – that the evidence at trial was insufficient to convict – by failing to raise it in the statement of [errors] complained of on appeal pursuant to [Rule] 1925(b)?

Appellant's Brief at 2.

We begin by noting that "[t]his Court's standard of review from the grant or denial of post-conviction relief is limited to examining whether the

lower court's determination is supported by the evidence of record and whether it is free of legal error." ***Commonwealth v. Morales***, 701 A.2d 516, 520 (Pa. 1997) (citing ***Commonwealth v. Travaglia***, 661 A.2d 352, 356 n.4 (Pa. 1995)). Where, as here, a petitioner claims that he received ineffective assistance of counsel, our Supreme Court has stated that:

> [A] PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." Generally, counsel's performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the petitioner. To obtain relief, a petitioner must demonstrate that counsel's performance was deficient and that the deficiency prejudiced the petitioner. A petitioner establishes prejudice when he demonstrates "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." … [A] properly pled claim of ineffectiveness posits that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice befell the petitioner from counsel's act or omission.

***Commonwealth v. Johnson***, 966 A.2d 523, 532-33 (Pa. 2009) (citations omitted).

By way of background, on direct appeal, Appellant raised the following assertion:

> Should the Defendant be awarded a new trial on all charges where the verdict is clearly against the weight of the evidence; where the Commonwealth did not prove its case beyond a reasonable doubt; where the Defendant was not present at the scene of the crime; where the Defendant was not the shooter and, where the Defendant was neither a criminal conspirator,

> nor an accomplice, but an unfortunate peripheral bystander and friend of the co-defendant.

***Commonwealth v. Sadat***, No. 3232 EDA 2007, unpublished memorandum at 4-5 (Pa. Super. filed July 31, 2009). We characterized this claim as "a hybrid between sufficiency and weight of the evidence." ***Id.*** at 7 n.5. However, we concluded that Appellant's counsel had waived the sufficiency issue by failing to raise it in Appellant's Rule 1925(b) statement. ***Id.*** Accordingly, we only addressed Appellant's challenge to the weight of the evidence, a claim which concedes that there is sufficient evidence to sustain the challenged conviction. ***Id.***; ***see also Commonwealth v. Lewis***, 911 A.2d 558, 565 (Pa. Super. 2006) (citation omitted) ("A motion for a new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict."). Ultimately, we concluded that Appellant's challenge to the weight of the evidence was meritless and affirmed his judgment of sentence.

However, the Honorable Richard B. Klein filed a concurring memorandum, conceding that the sufficiency issue was waived, but noting that because "there is a strong case for *insufficiency* of the evidence," counsel was "clearly ineffective" for failing to properly raise that claim. ***Commonwealth v. Sadat***, No. 3232 EDA 2007, unpublished concurring memorandum at 1 (Pa. Super. filed July 31, 2009). Judge Klein explained why he believed the evidence was insufficient to sustain Appellant's convictions, stating:

> The only thing proven beyond a reasonable doubt by the Commonwealth was that [Appellant] was present at the scene. However, it could not show that [Appellant] knew of the crime in advance, *planned* on being the getaway driver, saw the crime, knew that Hawkins was the shooter when they got in the car, or was driving for any reason other than the fact that a man with a gun in his hand told him to drive.

***Id.*** at 4.

While conceding that Judge Klein's concurring memorandum "has no precedential authority … and is not binding on this Court," Appellant quotes large portions of that decision and asks this Court to accept Judge Klein's conclusion that the evidence was insufficient. Unfortunately for Appellant, we respectfully disagree with Judge Klein.

In ***Commonwealth v. Lambert***, 795 A.2d 1010 (Pa. Super. 2002), we stated:

> "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." In applying [the above] test, we may not weigh the evidence and substitute our judgment for that of the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. 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. 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 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.

***Id.*** at 1014 (citations omitted).

Appellant challenges his convictions for conspiracy and third-degree murder. "To sustain a conviction for criminal conspiracy, the Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and, (3) an overt act was done in furtherance of the conspiracy." ***Commonwealth v. Rios****,* 684 A.2d 1025, 1030 (Pa. 1996). In regard to third-degree murder, our Supreme Court has stated:

> [T]o convict a defendant of the offense of third[ ]degree murder, the Commonwealth need only prove that the defendant killed another person with malice aforethought. This Court has long held that malice comprehends not only a particular ill-will, but ... [also a] wickedness of disposition, hardness of heart, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured.

***Commonwealth v. Santos***, 876 A.2d 360, 363 (Pa. 2005) (internal citation, quotation, and emphasis omitted).[1]

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[1] Our Supreme Court recently rejected the argument that "because conspiracy is a specific intent crime, and a key element of third[-]degree murder is the absence of specific intent, it is a logical impossibility to agree to commit an unintended killing." ***Commonwealth v. Fisher***, 2013 WL 5827178, at *4 (Pa. 2013). Instead, the Court held that "*absence* of specific intent to kill is *not* an element of third[-]degree murder; rather, such crime is an intentional act, characterized by malice, that results in death, intended or not." ***Id.*** at *5 (emphasis added). Thus, "conspiracy to commit third[-]degree murder is a cognizable offense." ***Id.*** at *9.

We also note that because Appellant clearly was not the shooter, his conviction for third-degree murder rests on an accomplice liability theory. Therefore, to sustain his murder conviction, "there must be evidence to show that [Appellant] intended to promote or facilitate the underlying offense," and that he "actively participated in the crime or crimes by soliciting, aiding, or agreeing to aid the principal…." ***Commonwealth v. Kimbrough***, 872 A.2d 1244, 1251 (Pa. Super. 2005) (citation omitted).

> Only '[t]he least degree of concert or collusion in the commission of the offenses is sufficient to sustain a finding of responsibility as an accomplice. ***Commonwealth v. Cocciolетti***, 425 A.2d 387, 390 (Pa. 1981). No agreement is required, only aid. ***Commonwealth v. Graves***, 463 A.2d 467, 470 (Pa. Super. 1983).

***Id.***

Reviewing the evidence in the light most favorable to the Commonwealth, we conclude that it was sufficient to sustain Appellant's convictions for the above-stated offenses. As the PCRA court explained:

> [T]he evidence established that [Appellant] was an accomplice and co-conspirator of the shooter, Hawkins. [Appellant] drove Hawkins to the area where the shooting occurred and then waited for him to return. When Hawkins re-appeared, he was running and after he signaled to [Appellant], Hawkins, [Appellant], and the third male immediately jumped into the vehicle, which [Appellant] drove from the area at a high rate of speed while being pursued by police. [Appellant] did not stop even though he was aware that he was being pursued by police. Then, when the vehicle finally came to rest, [Appellant] and the other two men ran from police and evaded apprehension.

PCRA Court Opinion, 2/20/13, at 7.

This evidence – albeit circumstantial - was sufficient to prove that Appellant agreed to aid Hawkins in the commission of the murder, and did so by driving Hawkins to the scene and helping him to escape after the crime was complete. Furthermore, Appellant's flight from the scene, which he continued even after police began to pursue his vehicle, indicated his consciousness of guilt. ***See Commonwealth v. Dent***, 837 A.2d 571, 576 (Pa. Super. 2003) (citation omitted) ("[F]light does indicate consciousness of guilt, and a trial court may consider this as evidence, along with other proof, from which guilt may be inferred."). Accordingly, Appellant's convictions were supported by sufficient evidence, and the PCRA court did not err in denying Appellant's ineffective assistance of counsel claim. ***See Commonwealth v. Smith***, 995 A.2d 1143, 1156 (Pa. 2010) (citation omitted) ("[C]ounsel cannot be deemed ineffective for failing to raise [a] meritless issue.").

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/20/2013