NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ANDRE JACOBS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1631 WDA 2012

Appeal from the Judgment of Sentence April 18, 2008
In the Court of Common Pleas of Fayette County
Criminal Division at No(s): CP-26-CR-0000265-2005

BEFORE: STEVENS, P.J., BOWES, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.: FILED: MAY 10, 2013

Andre Jacobs appeals *nunc pro tunc* from the judgment of sentence imposing twenty-seven months to ten years imprisonment after a jury convicted him of aggravated assault of a corrections officer while in the performance of his duty pursuant to 18 Pa.C.S. § 2702(a)(3), simple assault, and two counts of criminal attempt. We affirm.

The convictions stem from Appellant's assault of two corrections officers while he was incarcerated in the long-term segregation unit ("LTSU") at the State Correctional Institution-Fayette ("SCI Fayette"). The trial court succinctly summarized the relevant facts as follows:

> On February 24, 2004, at approximately 4:30 P.M., Corrections Officer Ernest Hall and Scott Carlson were distributing meals in the LTSU. When they arrived at the defendant's cell, LA 2023, Officer Carlson attempted to open the food aperture with his key but the lock on the aperture would not open. (N.T. 33, 80) Officer Hall then attempted to open the

> aperture with his key, but the aperture would not open. (N.T. 33, 80) Since the aperture could not be opened, Officer Carlson ordered the defendant to retreat to the back of his cell. The defendant complied with this order. (N.T. 33, 82) Officer Carlson then called to Sergeant Kalp in the control booth requesting that the cell door be unlocked. (N.T. 33, 82) The locking mechanism to the cell door was activated. Carlson slid the door open for Hall to enter the cell with the tray. (N.T. 34, 83) As Officer Hall stepped into the cell with the tray, defendant rushed from the back of the cell to the cell door knocking the tray from Officer Hall's hands. (N.T. 35, 83) Defendant swung repeatedly at the officers with his clenched fists striking Officer Carlson in the left side of his face. The officers attempted to gain control over the defendant pushing him into his cell. Defendant continued swinging, pushing and kicking at the officers. (N.T. 64) Defendant was finally subdued and handcuffed by Officer Pete Ferrari who had responded to a trouble call made by Sergeant Robert Kalp from the control booth. (N.T. 45, 58, 85) As a result of defendant's actions in striking him in the face with his fist, Officer Carlson suffered an abrasion, redness and swelling behind his left eye. (N.T. 75) Officer Carlson was initially examined by Noel Ranker, a registered nurse employed by the Department of Corrections at SCI Fayette, who photographed the injury. The photograph was admitted as Commonwealth's Exhibit #1. Officer Carlson also received treatment for his injury at the Brownsville General Hospital. (N.T. 91)

Trial Court Opinion, 1/3/13, at 4-5. Appellant was charged with various offenses stemming from his assault of the corrections officers. While the record is unclear, Appellant's preliminary hearing apparently convened at SCI Fayette over his objections.[1]

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[1] Neither the Commonwealth nor the trial court dispute Appellant's assertion that his preliminary hearing was held at SCI Fayette or that he objected to the location. The certified record does not reveal where the hearing occurred. In light of the Commonwealth's and trial court's acquiescence, for the purpose of our disposition, we assume the veracity of Appellant's assertions regarding the location of the hearing and his objection thereto.

A jury convicted Appellant of the above-referenced offenses, and the trial court imposed the judgment of sentence consecutively to the term of imprisonment Appellant was serving when he committed the offenses. We dismissed Appellant's ensuing appeal due to his failure to file a brief. He filed a timely PCRA petition and, on September 27, 2012, the PCRA court granted Appellant permission to file a direct appeal *nunc pro tunc*. This timely appeal followed on October 19, 2012. Appellant filed a Rule 1925(b) statement leveling two arguments that he reiterates on appeal as follows:

> 1. Did the trial court err when [it] failed to permit the Appellant to represent himself or to schedule a ***Grazier***[2] hearing when the Appellant requested to proceed *pro se* in this case?
>
> 2. Was the Appellant denied his constitutional rights when the preliminary hearing was held in a state correctional institution?

Appellant's brief at 9.

Appellant's initial complaint pertains to the fact that during the ***Grazier*** colloquy, the trial court refused to permit Appellant to proceed *pro se* due to the fact that he retracted his stated voluntary desire to represent himself. In ***Commonwealth v. El***, 977 A.2d 1158 (Pa. 2009), our Supreme Court outlined the precepts that are relevant to this issue. The Court explained as follows:

> A criminal defendant's right to counsel under the Sixth Amendment includes the concomitant right to waive counsel's

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[2] ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998).

> assistance and proceed to represent oneself at criminal proceedings. ***Faretta v. California****,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); ***Commonwealth v. Szuchon****,* 506 Pa. 228, 484 A.2d 1365 (1984). The right to appear *pro se* is guaranteed as long as the defendant understands the nature of his choice. ***Faretta****,* 422 U.S. at 835, 95 S.Ct. 2525. In Pennsylvania, Rule of Criminal Procedure 121 sets out a framework for inquiry into a defendant's request for self-representation. Pa.R.Crim.P. 121. Where a defendant knowingly, voluntarily, and intelligently seeks to waive his right to counsel, the trial court, in keeping with ***Faretta****,* must allow the individual to proceed *pro se*. ***See Commonwealth v. Starr****,* 541 Pa. 564, 664 A.2d 1326, 1335 (1995) (holding that a defendant must demonstrate a knowing waiver under ***Faretta***). ***See also Commonwealth v. McDonough****,* 571 Pa. 232, 812 A.2d 504, 508 (2002) (concluding that ***Faretta*** requires an on-the-record colloquy in satisfaction of Pa.R.Crim.P. 121, which colloquy may be conducted by the court, the prosecutor, or defense counsel.)

Id. at 1162-63 (footnotes omitted).

As our High Court illuminated in ***El***, pursuant to Pa.R.Crim.P. 121(A)(2), the trial court was required to conduct an on-the-record inquiry in the instant case to determine if Appellant understood the consequences of waiving his right to counsel. The rule provides in pertinent part as follows:

> (2) To ensure that the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent, the judge or issuing authority, at a minimum, shall elicit the following information from the defendant:
>
> > (a) that the defendant understands that he or she has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent;
> >
> > (b) that the defendant understands the nature of the charges against the defendant and the elements of each of those charges;

> (c) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;
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> (d) that the defendant understands that if he or she waives the right to counsel, the defendant will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;
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> (e) that the defendant understands that there are possible defenses to these charges that counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and
>
> (f) that the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, these errors may be lost permanently.

> (3) The judge or issuing authority may permit the attorney for the Commonwealth or defendant's attorney to conduct the examination of the defendant pursuant to paragraph (A)(2). The judge or issuing authority shall be present during this examination.

Pa.R.Crim.P. 121.

The following facts are pertinent to our disposition. Prior to the jury trial, Appellant asked to represent himself. N.T., 8/7/07, at 7. At that point, the trial court questioned Appellant, in accordance with ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998), to determine whether Appellant's decision to waive his right to counsel was knowing, intelligent, and voluntary. During the colloquy, the trial court inquired whether Appellant: 1) was aware of his right to be represented by an attorney and that counsel would be provided if he was indigent; 2) comprehended the charges that were leveled against him; 3) was aware of the permissible range of sentences; 4) recognized that

he would be bound by the normal rule of procedure; and 5) understood that he may waive possible objections or other rights inadvertently by failing to assert the error or right during trial. ***Id***. at 8-9. In addition, the trial court advised Appellant that he would not be able to raise his own ineffectiveness on appeal. ***Id***. at 9. Throughout the colloquy, Appellant responded that he realized the rights that he was going to forego by waiving his appointed counsel and understood the concomitant hazards that he would encounter by proceeding *pro se*.

Thereafter, the following exchange occurred:

> Q. Do you voluntarily wish to give up the right to counsel?
>
> A. No, sir.
>
> Q. What?
>
> A. No, sir.
>
> Q. So now you want him to represent you?
>
> A. No. I'm being forced to give up my right to counsel.
>
> Q. The Court: Well, then, in that case, Mr. Davis [(Trial Counsel)], you are counsel.
>
> A. Defendant: How is that, Your Honor?
>
> Q. Because if you think you're being forced, then you're not voluntarily waiving your right to counsel. In order to waive your right to counsel you have to do that voluntarily. If you think you're being forced to waive counsel, then you're not doing it voluntarily and he's going to represent you.
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> A. I believe that I have to protect my rights. That's my concern.

> Q. I understand, and that's why we placed it all into the record.

N.T., 8/7/07, at 9-10.

The crux of Appellant's argument is that once he indicated that he felt compelled to proceed *pro se*, the trial court was required to continue the colloquy to determine the reason for Appellant's perspective. We disagree.

Herein, the trial court performed a waiver colloquy that addressed the required components under Rule 121(A) to determine whether Appellant's waiver of his right to the assistance of counsel was knowing, voluntary, and intelligent. At the close of the exchange between Appellant and the trial court, Appellant stated emphatically that his waiver was not voluntary because he felt like he was "being forced to give up [his] right to counsel." N.T., 8/7/07, at 9. Accordingly, the trial court declined to find that defendant understood the nature of his choice.

Appellant's argument that the trial court was required to persist with further interrogation in order to determine what compelled Appellant to seek to waive his right to counsel against his will is unpersuasive. Stated simply, absent an allegation of ineffectiveness *per se* or an irreconcilable difference with his counsel, neither of which was asserted in this case, once the record confirmed that Appellant's waiver request was not voluntary, any additional inquiry would have been superfluous and irrelevant. Accordingly, we conclude that the trial court did not abuse its discretion in denying

Appellant's request to proceed *pro se* based upon Appellant's responses during the waiver colloquy.

Next, we address Appellant's contention that he was denied his constitutional rights to due process and a public trial because his preliminary hearing was held in SCI Fayette rather than the Magisterial District Judge's office. Appellant argues that although he was constitutionally entitled to an open proceeding, his preliminary hearing within the prison was essentially closed to the public. Thus, he asserts that he should be granted a new trial.

Appellant's request for relief reveals his misunderstanding of the relevant law. In ***Commonwealth v. Murray***, 502 A.2d 624 (Pa.Super. 1987), this Court held that since a state correctional facility is not freely open to the public, it violates a defendant's constitutional rights pursuant to Article I, Sections 9 and 11 of the Pennsylvania Constitution and the Sixth Amendment to the United States Constitution to hold a preliminary hearing in that location without justification.[3] Specifically, we reasoned "preliminary hearings are covered by a trio of constitutional provisions, and . . . this

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[3] In pertinent part, the Sixth Amendment to the U.S. Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." Similarly, Article I, Section 9 of the Pennsylvania Constitution provides, "In all criminal prosecutions the accused hath a right to . . . a speedy public trial." Finally, Article I, Section 11 of the Pennsylvania Constitution directs, "All courts shall be open."

particular closure was not justified.[4]" ***Id***. at 629. In addition, we found that, "because the harm is by nature incalculable and unquantifiable[,]" prejudice is presumed where a preliminary hearing is closed to the public improperly. ***Id***. at 629, 631.

Nevertheless, despite a presumption of harm, we concluded in ***Murray*** that the constitutional violation was not grounds for relief once the trial occurred and the Commonwealth established its case beyond a reasonable doubt. We explained that

> ordering a new, public, preliminary hearing (and a new trial only if the hearing yielded a new result) would be an empty and futile remedy here. We find it extremely unlikely that once the Commonwealth had proved its case beyond a reasonable doubt, it would fail to pass the *prima facie* test at the new preliminary hearing. If the new preliminary hearing somehow did yield a new result, it could only be that certain charges should be dropped, which could not warrant a new trial on those charges. Logically, a new preliminary hearing is foolish once the evidentiary trial is completed without reversible error.
>
> Since there was no reversible error in the trial held before the jury, we are loath to order a complete new trial. We see no reason to believe that the constitutional infirmity of the preliminary hearing infected the remainder of the trial.

Id. at 630.

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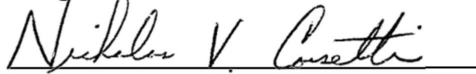
[4] We observed, "Only a compelling government interest justifies closure and then only by a means narrowly tailored to serve that interest." ***Commonwealth v. Murray***, 502 A.2d 624, 629 (Pa.Super. 1987). The ***Murray*** Court then reasoned that the trial court's stated reason for holding the preliminary hearing in a correctional facility, *i.e*., "security," was an insufficient justification to close the proceedings. ***Id***.

Herein, the Commonwealth established its case against Appellant beyond a reasonable doubt by obtaining the jury verdicts against him. Thus, in light of our reasoning in ***Murray***, ***supra***, the constitutional infirmity associated with the closed preliminary hearing does not constitute reversible error. Indeed, no relief is due. ***See also Commonwealth v. Tyler***, 587 A.2d 326 (Pa.Super. 1991) ("Once appellant has gone to trial and been found guilty of the crime, any defect in the preliminary hearing is rendered immaterial."); ***Commonwealth v. Fewell***, 654 A.2d 1109, 1112 (Pa.Super. 1995) (argument that district justice should not have held case over for trial at preliminary hearing became moot after jury conviction). Accordingly, we conclude that Appellant's request for a new trial must fail.

Judgment of sentence affirmed.

Judgment Entered.



Deputy Prothonotary

Date: MAY 10, 2013