NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. GARY MILLIGAN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1642 WDA 2010

Appeal from the Judgment of Sentence August 2, 2010
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0011003-2008

BEFORE: STEVENS, P.J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY STEVENS, P.J. Filed: February 14, 2013

This is an appeal from the judgment of sentence of the Court of Common Pleas of Allegheny County for Voluntary Manslaughter[1]; Carrying a Firearm without a License[2]; and Possession of a Firearm by a Minor[3]. Appellant raises four issues on appeal: (1) Appellant was wrongly convicted due to trial counsel's ineffectiveness; (2) The verdict was against the weight of the evidence; (3) The evidence was insufficient to sustain a conviction on all three of Appellant's charges; and (4) The trial court erred in failing to conduct a hearing on Appellant's Motion for a New Trial alleging trial

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* Former Justice specially assigned to the Superior Court.
[1] 18 Pa.C.S.A § 2503(b).
[2] 18 Pa.C.S.A § 6106(a).
[3] 18 Pa.C.S.A. § 6110(a).

counsel's ineffectiveness. Appellant's counsel has filed an ***Anders***[4] brief with this Court, requesting to withdraw as counsel. We grant counsel's application and affirm.

> The facts of the case are as follows:
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> On June 19, 2008, Appellant went to a bar in the Mt. Washington section of the City of Pittsburgh, Allegheny County. He was accompanied by his cousin, Derwin Milligan, and a third person, John Flenery. The three men seated themselves at the bar, which was very crowded that particular night. Brandon Alton (victim) was in the rear section of the bar seated with several of his friends.
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> Apparently there was some pre-existing hostility between the victim and Appellant's cousin, Derwin Milligan. Fifteen minutes after Appellant, Derwin Milligan and Flenery arrived, Alton approached Derwin Milligan as he sat on a bar stool and punched him in the face, knocking him off the bar stool. A fight ensued between the victim, Derwin Milligan, and two (2) others – one (1) from each group. Appellant was not involved in the initial confrontation nor the subsequent fight among the four (4) young men.
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> Shortly after the fight began Appellant took a step back from the group, pulled out a chrome revolver and fired two (2) shots at the victim. One (1) of those bullets entered the victim's left side and passed through his left lung and thoracic artery, the largest artery of the body. The victim was emergently transported to Mercy Hospital where he died within the hour from the gunshot wound to the trunk.
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> Appellant and his associates fled the scene, and he discarded the weapon, however the subsequent police investigation led to his arrest and being charged as noted hereinabove.

Trial Court Opinion 2/13/2012 pp. 3-4 (internal citations omitted).

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[4] ***Anders v. California***, 386 U.S. 728, 87 S.Ct. 1396, 18 L. Ed. 2d 493 (1967).

Appellant's counsel has filed an ***Anders*** brief with this Court, concluding that Appellant's appeal is frivolous. "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)).

An ***Anders*** brief must meet the requirements established in ***Anders***, ***McClendon***,[5] and ***Santiago***.[6] An ***Anders*** brief 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.

Santiago, 602 Pa. at 178-79, 978 A.2d at 361.[7]

Our review of counsel's application to withdraw, supporting documentation, and ***Anders*** brief reveals that counsel has complied with

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[5] ***Commonwealth v. McClendon***, 495 Pa. 467, 434 A.2d 1185 (1981).
[6] ***Commonwealth v. Santiago***, 602 Pa. 159, 978 A.2d 349 (2009).
[7] The holding in ***Santiago*** altered prior requirements for withdrawal under ***Anders***. ***Santiago*** requires counsel to provide the reasons for concluding the appeal is frivolous. The Pennsylvania Supreme Court explained the requirements enumerated in ***Santiago*** would apply only to cases wherein the briefing notice was issued after August 25, 2009, the date upon which ***Santiago*** was filed. The Notice of Appeal in the instant case was filed on October 21, 2011, therefore the ***Anders*** requirement set forth in ***Santiago*** is required.

these four procedural requirements. Counsel has provided us with a summary of the procedural history and facts, has concluded that Appellant's appeal is frivolous, and has stated reasons for this conclusion, while citing to the record to support these conclusions. Furthermore, counsel has also furnished a copy of the ***Anders*** brief to Appellant and advised Appellant of his right to retain new counsel, proceed *pro se* or raise any additional points that Appellant deems worthy of the court's attention. Counsel has also attached to his ***Anders*** brief a copy of the letter sent to Appellant as required under ***Commonwealth v. Millisock***, 873 A.2d 748, 751 (Pa. Super. 2005).

An independent review of the appeal leads us to conclude the appeal is frivolous. Appellant's first and fourth issues deal with ineffective assistance of counsel allegations. This Court has held that direct appeal is not the proper avenue to raise ineffective assistance claims "absent an express, knowing and voluntary waiver of PCRA review." ***Commonwealth v. Barnett***, 25 A.3d 371, 377 (Pa. Super. 2011). Appellant has failed to provide an express, knowing and voluntary waiver of PCRA review, and therefore the claim is dismissed without prejudice.

Appellant next contends that the verdict was against the weight of the evidence as to all three counts. The standard for review of weight of the evidence issues is well settled:

> A claim alleging the verdict was against the weight of the evidence is addressed to the discretion of the

> trial court. Accordingly, an appellate court reviews the exercise of the trial court's discretion; it does not answer for itself whether the verdict was against the weight of the evidence. It is well settled that the jury is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses, and a new trial based on a weight of the evidence claim is only warranted where the jury's verdict is so contrary to the evidence that it shocks one's sense of justice. "In determining whether this standard has been met, appellate 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. Houser, 18 A.3d 1128, 1135 (Pa. Super. 2011).

The voluntary manslaughter statute provides in part:

> A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed would justify the killing under Chapter 5 of this title (relating to general principles of justification), but his belief is unreasonable.

18 Pa.C.S. § 2503(b).

After reviewing the record, we agree with counsel that this issue is frivolous. As such, we find the jury verdict of voluntary manslaughter does not shock one's sense of justice. At trial, several witnesses testified that there were four individuals involved in the fight, Appellant not being one of them. These witnesses further testified that before Appellant fired his gun, the incident was simply a bar fight that did not involve weapons and that no bottles or other sharp objects were introduced into the fight. N.T. 5/6/2010

pp. 9, 37, 52. We find that the record supports a jury verdict of voluntary manslaughter, as Appellant introduced deadly force into an otherwise weapon-free bar fight, killing an individual.

It is undisputed that Appellant was a minor at the time of the incident and was carrying a firearm; therefore, a guilty verdict for Carrying a Firearm without a License and Possession of a Firearm by a Minor is clearly not against the weight of the evidence.

Appellant next challenges the sufficiency of the evidence. The standard for evaluating sufficiency claims is as follows:

> 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 a 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 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 finder 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. Estepp, 17 A.3d 939, 943-944 (Pa. Super. 2011).

The Commonwealth had the burden of proving beyond a reasonable doubt that Appellant killed the victim without justification based on a mistaken, unreasonable belief that the act was justified. ***Commonwealth v. Smith***, 710 A.2d 1218, 1220 (Pa. Super. 1998) (*citing* ***Commonwealth v. Mehmeti***, 501 Pa. 589, 597, 462 A.2d 657, 661 (1983)). After reviewing the record, we find that the Commonwealth provided sufficient evidence for the jury to determine that Appellant killed the victim without justification and that his belief that the killing was justified was mistaken and unreasonable. As stated above, Appellant introduced deadly force into a "typical bar fight" in which Appellant was not a participant. No weapons were used in the fight until Appellant stepped away from the group, pulled out a chrome revolver and fired two shots, one shot fatally wounding the victim. Appellant claimed that he shot the victim while trying to protect his cousin who was involved in the fight, but the Commonwealth presented the jury with sufficient evidence to determine that this belief was unreasonable, and therefore a voluntary manslaughter conviction was appropriate.

For the aforementioned reasons, we find that Appellant's appeal is frivolous.

Counsel's Petition to Withdraw Granted; Judgment of Sentence Affirmed.