

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
DAMON JOHNSON,		
Appellant		No. 173 EDA 2012

Appeal from the Judgment of Sentence December 21, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0003295-2011

BEFORE: BOWES, GANTMAN, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.:

Filed: March 8, 2013

Damon Johnson appeals from the judgment of sentence of one and one-half to four years incarceration imposed after the trial court convicted him of possession of a controlled substance by an inmate, conspiracy to commit possession of a controlled substance by an inmate, possession of a controlled substance (marijuana), possession of a small amount of marijuana, and tampering with evidence.¹ Counsel has filed a petition to withdraw from representation and a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *Commonwealth v. Santiago*, 978 A.2d 349 (Pa.

¹ The trial court also sentenced Appellant to two years of probation and stated probation was to start the day of sentencing; it expressly declined to indicate if that meant probation was consecutive or concurrent.

2009). We deny counsel's petition to withdraw and remand for the filing of a merits brief.

Appellant was incarcerated at a county correctional facility in Philadelphia County. On August 30, 2010, at 10:30 a.m., Kanisha Ellis visited Appellant. County Correctional Officer Mary Hornick observed the two take a picture together, during which time Appellant made several reaching motions behind Ms. Ellis's back. Appellant was warned twice regarding the motions. Officer Hornick then witnessed Appellant place a small object in his jump suit. She informed another officer and two officers escorted Appellant to a search room. Appellant previously had been stripped searched before putting on the jump suit. When officers asked Appellant to remove the suit, he refused. After a brief struggle with the officers, an object fell from Appellant's pant leg. He grabbed the object and put it into his mouth before spitting it out when he was pepper sprayed. The object was a plastic bag containing 9.7 grams of marijuana. A property receipt reflected that the bag was taken from Ms. Ellis.

Appellant waived his right to a jury trial, and denied refusing the search or that marijuana was recovered from his person. The trial court convicted him of the aforementioned charges. This appeal ensued. The court did not order the filing of a Pa.R.A.P. 1925(b) concise statement of errors or author a Pa.R.A.P. 1925(a) decision. Counsel has filed a petition to withdraw and *Anders* brief.

Initially, we note that we may not address the merits of the issue raised on appeal without first reviewing the request to withdraw. ***Commonwealth v. Rojas***, 874 A.2d 638, 639 (Pa.Super. 2005). Therefore, we review counsel's petition at the outset. Our Supreme Court's decision in ***Santiago, supra***, did not alter the procedural requirements counsel must satisfy in requesting to withdraw from representation. Counsel must: 1) petition the court for leave to withdraw stating that, after making a conscientious examination of the record, counsel has determined that the appeal would be frivolous; 2) furnish a copy of the brief to the defendant; and 3) advise the defendant that he or she has the right to retain private counsel or raise additional arguments that the defendant deems worthy of the court's attention. ***Commonwealth v. Lilley***, 978 A.2d 995, 997 (Pa.Super. 2009).

Herein, counsel's petition to withdraw from representation states that he reviewed the record and concluded that there are no issues of merit. Additionally, counsel notified Appellant that he was withdrawing and furnished Appellant with copies of the petition to withdraw and ***Anders*** brief, and advised Appellant of his right to retain new counsel or proceed *pro se* to raise any points he believes worthy of this Court's attention. Accordingly, counsel has satisfied the procedural requirements of ***Anders***.

Having concluded that counsel has complied with the procedural mandates of **Anders**, we now determine whether counsel's **Anders** brief meets the substantive dictates of **Santiago**. According to **Santiago**:

in the **Anders** brief that accompanies court-appointed counsel's petition to withdraw, counsel 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. 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.

Santiago, supra at 361.

Herein, counsel provided the facts and procedural history of the case. Additionally, he refers to the sufficiency of the evidence as an issue that could arguably support the appeal, and concludes that the issue is wholly frivolous. He reasons that the issue is frivolous because our standard of review requires this Court to deem the Commonwealth's witness credible. Since Officer Hornick testified that she observed Appellant take the drugs and conceal them in his mouth when officers attempted to search him, the elements of each charge were satisfied. We agree that the sufficiency of the evidence claim is wholly frivolous.

Our standard and scope of review for a sufficiency claim requires us to view the evidence in a light most favorable to the Commonwealth. **Commonwealth v. Bryant**, 57 A.3d 191 (Pa.Super. 2012). We do not reweigh the evidence or substitute our judgment for that of the fact-finder.

Commonwealth v. Brown, 52 A.3d 320, 323 (Pa.Super. 2012) (quoting *Commonwealth v. Stokes*, 38 A.3d 846, 853-854 (Pa.Super. 2011)). The evidence “need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented.” *Id.* Further, “[t]he Commonwealth’s burden may be met by wholly circumstantial evidence and any doubt about the defendant’s guilt is to be resolved by 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.*

The testimony of Officer Hornick establishes that Appellant possessed the marijuana while incarcerated after being given the drugs by a female friend. In addition, Officer Hornick’s testimony demonstrates that Appellant attempted to destroy the evidence by placing it in his mouth. Accordingly, there was sufficient evidence to prove each element of the crimes charged.² However, our independent review of the record indicates that an issue of potential merit exists, though it admittedly has no effect on Appellant’s sentence.

In *Commonwealth v. Gordon*, 897 A.2d 504 (Pa.Super. 2006), a divided panel of this Court determined that a defendant cannot be convicted

² No post-sentence motion was filed preserving either a weight of the evidence or discretionary sentencing issue in this matter and Appellant’s sentence is within the statutory maximums.

of simple possession of marijuana, 35 P.S. 780-113(a)(16), where the amount of marijuana falls within the ambit of the possession-of-a-small-amount-of-marijuana statute, 35 P.S. 780-113(a)(31). While the court here did not impose a sentence on either Appellant's simple possession or small amount of marijuana conviction, it did convict him of both offenses. In light of *Gordon*, we direct counsel to file a merits brief. Counsel shall file a merits brief within forty-five days of remand of the record. The Commonwealth shall have thirty days from the filing of the merits brief in which to file a response.

Petition to withdraw denied. Case remanded. Panel jurisdiction retained.