NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
SHAWN MATTHEW HICKMAN, Appellant	No. 1739 & 1740 WDA 2013

Appeal from the Judgment of Sentence entered September 30, 2013,
in the Court of Common Pleas of Allegheny County,
Criminal Division at No(s): CP-02-CR-0017304-2006
and CP-02-CR-0010232-2007

BEFORE: PANELLA, DONOHUE, and ALLEN, JJ.

MEMORANDUM BY ALLEN, J.: FILED: May 9, 2014

Shawn Matthew Hickman ("Appellant") is an accomplished burglar with numerous convictions at three different Allegheny County dockets (CC200505149, CC200617304 and CC200710232). On September 24, 2012, Appellant filed a *pro se* PCRA petition. The trial court appointed counsel, who filed an amended PCRA petition on May 10, 2013. The Commonwealth filed a response on July 15, 2013. As a result of the parties' PCRA filings, the trial court convened a resentencing hearing on September 30, 2013, and resentenced Appellant for numerous burglary and burglary-

related convictions at two dockets (CC200617304 and CC200710232). We affirm.[1]

Appellant presents us with three issues on appeal:

> 1. Whether the evidence was insufficient to support the convictions at CP-02-CR-001[7304]-2006 where the prosecution witnesses implicating [Appellant] in the commission of the offenses had pending charges, prior records, had taken part in the illegal activity in which they were implicating [Appellant] but were not prosecuted therefor or had received or expected to receive leniency therefor in exchange for testifying against [Appellant], and/or were otherwise so unreliable or contradictory that it renders a verdict thereon pure conjecture?
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> 2. Whether the prosecution in the instant matter was barred by 18 Pa.C.S. § 110(1)(ii) where they were based upon the same conduct or arose from the same criminal episode as the charges which the subject of the prior prosecution at CP-02-CR-0005149-2005 and where the offenses at CP-02-CR-0017304-2006 were known by the Commonwealth at the time of the prosecution at CP-02-CR-0005149-2005?
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> 3. Whether application of the mandatory minimum sentence provisions of 42 Pa.C.S. § 9712 (relating to visible possession of firearm during commission of crime of violence) renders [Appellant's] sentence at CP-02-CR-0010232-2007 illegal—and violative of his rights to due process of law and a jury trial—where the fact of such visible possession of a firearm was not submitted to the jury and established beyond a reasonable doubt?

Appellant's Brief at 6.

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[1] Appellant has filed an "Application for Relief to Supplement Record with Record at CP-02-CR-0005149-2005." Consistent with our analysis in this Memorandum, we deny the application as moot.

The essence of Appellant's first issue, with respect to his convictions at CC200617304, is that the evidence was insufficient to support his convictions because the Commonwealth witnesses "individually and collectively, were so unreliable or contradictory that the verdicts of guilty returned thereon is [sic] pure conjecture." Appellant's Brief at 36, 44.

The Commonwealth correctly recognizes that Appellant's first issue challenges the weight rather than the sufficiency of the evidence. Our Supreme Court has explained:

> [I]t is necessary to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, whereas a claim challenging the weight of the evidence if granted would permit a second trial.
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> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.
>
> A motion for 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. Thus, the trial court is under no obligation to view the evidence in the light

> most favorable to the verdict winner. An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he [or she] were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

Commonwealth v. Widmer, 560 Pa. 308, 319-20, 744 A.2d 745, 751-52 (2000) (quotations, citations and footnote omitted).

In support of his first issue, Appellant does not assert that the Commonwealth failed to prove any particular element of any crimes for which he was convicted. Rather, Appellant's claim is based upon the credibility of the Commonwealth's witnesses, and Appellant asserts that his guilty verdicts are the product of conjecture. *See, e.g.*, Appellant's Brief at 36, 44. Appellant is therefore challenging the weight of the evidence. ***Commonwealth v. Palo***, 24 A.3d 1050, 1055 (Pa. Super. 2011) (claim directed to the credibility of the Commonwealth's chief witness challenges the weight and not the sufficiency of the evidence).

Pa.R.Crim.P. 607 provides that a claim that a verdict is against the weight of the evidence must be raised with the trial judge in a motion for a new trial 1) orally, on the record before sentencing, 2) in writing, any time before sentencing, or 3) in a post-sentence motion. Failure to comply with

Pa.R.Crim.P. 607 results in waiver. ***See Commonwealth v. Little***, 879 A.2d 293, 300-301 (Pa. Super. 2005). In this case, Appellant did not raise his weight claim orally after the jury and trial court rendered their verdicts (*see* N.T., 11/16-20/09), and the sentencing and resentencing transcripts (*see* N.T., 1/29/10 and 9/30/13) are silent as to any weight claim. Further, the record contains no written or post-sentence motion challenging the weight of the evidence. Appellant's first issue is waived.

We similarly agree with the Commonwealth that Appellant has waived his second issue. Appellant cites 18 Pa.C.S.A. § 110, which provides that a subsequent prosecution is barred when it is based on "the same conduct or arising from the same criminal episode, if known to the appropriate prosecuting officer at the time of the commencement of the first trial." 18 Pa.C.S.A. § 110(1)(ii). Appellant contends that Rule 110 precluded his trial on charges at CC200617304 because the charges "were based on the same conduct or arose from the same criminal episode as the charges which [were] the subject of the prior prosecution at CP-02-CR-0005149-2005 and where the offenses at CP-02-CR-00017304-2006 were known by the Commonwealth at the time of the prosecution at CP-02-CR-0005149-2005." Appellant's Brief at 6, 45-53. Again, we agree with the Commonwealth that this claim is waived. It is axiomatic that issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Pa.R.A.P. 302(a). Although Appellant included this issue in his Pa.R.A.P. 1925(b)

statement, such inclusion does not "resurrect" a waived claim. ***Steiner v. Markel***, 968 A.2d 1253, 1275 (Pa. 2009) (a statement of matters complained of on appeal cannot resurrect an otherwise untimely claim). Accordingly, we deny Appellant's application to supplement the record with the trial court record at CP-02-CR-0005149-2005 as moot.

In his third issue, Appellant claims that he received an illegal sentence at CC200710232, and relies on the United States Supreme Court case of ***Alleyne v. United States***, ---U.S.---, 133 S.Ct. 2151, as well as our recent decision in ***Commonwealth v. Munday***, 78 A.3d 661 (Pa. Super. 2013) to support his contention that he was sentenced to a mandatory minimum relating to visible possession of a firearm during the commission of a crime of violence, where "the fact of such visible possession of a firearm was not submitted to the jury and established beyond a reasonable doubt." Appellant's Brief at 6.

In applying ***Alleyne***, we held that the imposition of a mandatory minimum sentence based upon brandishing a firearm violated a defendant's rights to due process, where the mandatory minimum sentence was based upon "judicial factfinding of a sentencing factor." ***Munday***, 78 A.3d at 666. In ***Munday***, the trial court convicted the defendant of delivery of cocaine, and sentenced the defendant to a mandatory minimum term of 5 years in prison pursuant to 42 Pa.C.S.A. § 9712.1 (sentences for certain drug offenses committed with firearms). On appeal, this Court vacated the

defendant's judgment of sentence and remanded the case based on ***Alleyne,*** and the fact that the trial court treated defendant's possession a firearm at the time of his offense as sentencing factor and not "an element of the offense." ***Munday,*** 78 A.3d at 666.

Here, in contrast to ***Munday***, the trial court did not impose the mandatory minimum term of 5 years in prison.[2] As the Commonwealth explains, the sentencing guidelines "were above the mandatory-minimum term, which led to the trial court's imposition of a standard-range sentence of eight to 16 years." Commonwealth Brief at 29 (footnote omitted). Appellant concedes that his sentence "was 3 years higher than the minimum mandated by statute and was within the mitigated range of the sentencing guidelines." Appellant's Brief at 54. The trial court also explained:

> [Appellant] … assert[s] that the application of the mandatory minimum sentence provision of 42 Pa.C.S. §9712 rendered the sentence imposed illegal because the issue of whether the [Appellant] visibly possessed a firearm during the commission of a crime, beyond a reasonable doubt, was not submitted to the jury at trial in November 2009. The Court however, did not sentence [Appellant] to any applicable mandatory minimum sentence. Rather, the Court imposed the sentence stipulated by both parties. That sentence was in the mitigated range of the sentencing guidelines even though [Appellant] was a RFEL.

Trial Court Opinion, 12/18/13, at 1-2.

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[2] Although the Commonwealth provided notice of its intent to seek the 5 year mandatory minimum pursuant to section 9712, the trial court sentenced Appellant in the standard range.

The trial court's explanation is supported by the record. At the re-sentencing hearing, the trial court stated:

> … there is to be a resentencing on each of these cases, and the attorneys have agreed to that resentencing.
>
> So, the first case is at CC2007-10232. That sentencing, and let me see – I do have one copy of this original sentence. …
>
> Anyway, today, this resentencing is as follows: The judgment of sentence was vacated, the judgment from January 29th, 2010. And he is resentenced as follows:
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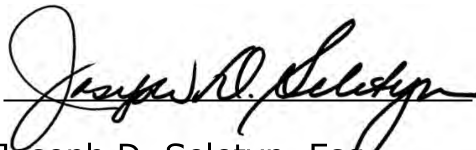
> At Count 1, [Appellant] is to serve not less than 8 years, nor more than 16 years at a state correctional institution.

N.T., 9/30/13, at 3-4.

Given the foregoing, Appellant's third issue is without merit.

Judgment of sentence affirmed. Appellant's application for relief to supplement the record is denied.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/9/2014