NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ACQUIL COOK Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 802 EDA 2013

Appeal from the Judgment of Sentence March 8, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0003961-2011

BEFORE: GANTMAN, P.J., JENKINS, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, P.J.: **FILED JULY 09, 2014**

Appellant, Acquil Cook, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his bench trial convictions for three (3) counts of robbery and one (1) count of possession of an instrument of crime ("PIC").[1] We affirm and grant counsel's petition to withdraw.

In its opinion, the trial court fully and correctly set forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them.

As a preliminary matter, appellate counsel has filed a petition to withdraw his representation pursuant to ***Anders v. California***, 386 U.S.

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[1] 18 Pa.C.S.A. §§ 3701, 907, respectively.

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*Former Justice specially assigned to the Superior Court.

738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and ***Commonwealth v. Santiago***, 602 Pa. 159, 978 A.2d 349 (2009). ***Anders*** and ***Santiago*** require counsel to: 1) petition the Court for leave to withdraw, certifying that after a thorough review of the record, counsel has concluded the issues to be raised are wholly frivolous; 2) file a brief referring to anything in the record that might arguably support the appeal; and 3) furnish a copy of the brief to the appellant and advise him of his right to obtain new counsel or file a *pro se* brief to raise any additional points the appellant deems worthy of review. ***Santiago, supra*** at 173-79, 978 A.2d at 358-61. Substantial compliance with these requirements is sufficient. ***Commonwealth v. Wrecks***, 934 A.2d 1287, 1290 (Pa.Super. 2007). "After establishing that the antecedent requirements have been met, this Court must then make an independent evaluation of the record to determine whether the appeal is, in fact, wholly frivolous." ***Commonwealth v. Palm***, 903 A.2d 1244, 1246 (Pa.Super. 2006) (quoting ***Commonwealth v. Townsend***, 693 A.2d 980, 982 (Pa.Super. 1997)).

In ***Santiago, supra***, our Supreme Court addressed the briefing requirements where court-appointed appellate counsel seeks to withdraw representation:

> Neither ***Anders*** nor ***McClendon***[2] requires that counsel's brief provide an argument of any sort, let alone the type of argument that counsel develops in a merits brief. To

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[2] ***Commonwealth v. McClendon***, 495 Pa. 467, 434 A.2d 1185 (1981).

> repeat, what the brief must provide under ***Anders*** are references to anything in the record that might arguably support the appeal.
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> * * *
>
> Under ***Anders***, the right to counsel is vindicated by counsel's examination and assessment of the record and counsel's references to anything in the record that arguably supports the appeal.

Santiago, supra at 176, 177, 978 A.2d at 359, 360. Thus, the Court held:

> [I]n 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.

Id. at 178-79, 978 A.2d at 361.

Instantly, counsel filed a petition for leave to withdraw representation. The petition states counsel extensively reviewed the record, his previous conversations with trial counsel, police paperwork, and notes of testimony. Counsel indicated in a letter he sent to Appellant that counsel had filed a petition to withdraw as counsel and provided Appellant with a copy of the ***Anders*** brief. The letter also explained Appellant's right to proceed *pro se* or with privately retained counsel and Appellant's right to raise any additional points deemed worthy of consideration. Counsel further informed

Appellant that he must act promptly. Counsel also provided Appellant with case discovery and a copy of the notes of testimony. In his ***Anders*** brief, counsel provides a summary of the facts and procedural history of the case with citations to the record. Counsel refers to evidence in the record that may arguably support the issues raised on appeal, and he provides citations to relevant law. The brief also provides counsel's reasons for his conclusion that the appeal is wholly frivolous. Thus, counsel has substantially complied with the requirements of ***Anders*** and ***Santiago***.

As Appellant has filed neither a *pro se* brief nor a counseled brief with new privately retained counsel, we review this appeal on the basis of the issue raised in the ***Anders*** brief:

> IS THE RECORD DEVOID OF ANY ISSUE HAVING ARGUABLE MERIT THAT COULD BE RAISED ON DIRECT APPEAL…?

(***Anders*** Brief at 6).[3]

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Michael Erdos, we conclude Appellant's issue merits no relief. The trial court opinion comprehensively discusses and properly disposes of the question presented. (***See*** Trial Court Opinion, filed July 11, 2013, at 2-4) (finding: **(1)** Appellant

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[3] In the argument section of the brief, counsel frames the issue Appellant believes has arguable merit as follows: "Was there sufficient evidence to support…Appellant's conviction on the charge of robbery…and sufficient to trigger the mandatory minimum?" (***Anders*** Brief at 10).

and cohort entered victims' home under false pretenses, found victims in bedroom, and Appellant demanded valuables after drawing BB gun; Appellant began to place items belonging to victims into backpack; when victims realized weapon was not actual firearm, they subdued Appellant and called police; by brandishing simulated gun that appeared to be real, Appellant initially instilled in victims fear of serious bodily harm; law does not require victims to know if gun used in robbery was real or operable to sustain conviction of first-degree robbery; evidence was sufficient to convict Appellant of first-degree robbery; verdict does not shock one's conscience; robbery involving replica firearm triggers mandatory minimum sentence per 42 Pa.C.S.A. § 9712).[4] Accordingly, we affirm on the basis of the trial court

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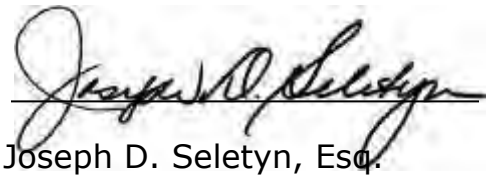
[4] We are mindful of the United States Supreme Court's recent decision in ***Alleyne v. United States***, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), in which the Court expressly held that any fact increasing the mandatory minimum sentence for a crime is considered an element of the crime to be submitted to the fact-finder and found beyond a reasonable doubt. Here, the court imposed the mandatory minimum sentence on Appellant's robbery conviction, per 42 Pa.C.S.A. § 9712 (mandating minimum five (5) year sentence for robbery conviction where defendant visibly possessed firearm or replica of firearm that placed victim in reasonable fear of death or serious bodily injury). Under Section 9712(b), the court determines applicability of the mandatory minimum at sentencing by a preponderance of the evidence (arguably in violation of ***Alleyne***). In the present case, however, the court found Appellant guilty of robbery by means of threatening another with or intentionally putting another in fear of immediate serious bodily injury. ***See*** 18 Pa.C.S.A. § 3701(a)(1)(ii). The only evidence of record indicating Appellant threatened the victims with serious bodily injury was Appellant's act of brandishing what appeared to be a handgun. Accordingly, by virtue of convicting Appellant of robbery under Section 3701(a)(1)(ii), the court found beyond a reasonable doubt that Appellant visibly possessed a replica of a firearm during the commission of a

(Footnote Continued Next Page)

opinion and grant counsel's petition to withdraw.

Judgment of sentence affirmed; counsel's petition to withdraw is granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014

(Footnote Continued) ————————————

crime of violence that placed the victims in fear of immediate serious bodily injury. Therefore, we see nothing to implicate the legality of Appellant's sentence. ***See Commonwealth v. Watley***, 81 A.3d 108 (Pa.Super. 2013) (*en banc*) (holding imposition of mandatory minimum sentence per 42 Pa.C.S.A. § 9712.1—mandating five year minimum sentence for defendant convicted of possession with intent to deliver when at time of offense defendant was in physical possession or control of firearm—was proper, where jury determined beyond reasonable doubt that appellant possessed firearms in connection with drugs); ***Commonwealth v. Edrington***, 780 A.2d 721 (Pa.Super. 2001) (explaining challenge to application of mandatory minimum sentence is non-waivable challenge to legality of sentence which, assuming proper jurisdiction, this Court can raise *sua sponte*).

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSLYVANIA
CRIMINAL TRIAL DIVISION

Commonwealth of Pennsylvania	:	
	:	
v.	:	**CP-51-CR-0003691-2011**
	:	0003961-2011
	:	
Acquil Cook	:	
	:	**802 EDA 2013**

OPINION

ERDOS, J.

Acquil Cook (hereinafter Appellant) appeared before the Court of Common Pleas on January 22, 2013. Following a bench trial, Appellant was found guilty of three felony counts of Robbery and one misdemeanor count of Possession of an Instrument of Crime. Appellant was sentenced to three concurrent terms of incarceration of five to ten years for the Robbery convictions and incarceration of one to two years for possession of an instrument of crime to run concurrent with the Robbery sentences.

This appeal followed.

FACTS

The Appellant entered a plea of not guilty and waived his right to a jury trial, instead opting for a bench trial. The testimony at trial established that on the night of March 17, 2011 at approximately 9:45, Appellant and co-defendant John Mgaza entered the residence at 1926 North Gratz Street and proceeded to the second-story bedroom of Noah Temple. Notes of Testimony, 1/22/13, at 15-16. Testimony differs on exactly what happened next, but all

witnesses agreed that Appellant pulled a black and silver gun out of a backpack. *Id.* at 16. According to one individual's testimony, Appellant demanded money and drugs and attempted to place items from a coffee table into a backpack. *Id.* at 17.

Around this time, the gun switched hands from Appellant to Mgaza. *Id.* at 18-20. Around this time also, one of the perpetrators cocked the gun and the resulting sound made the witnesses believe the gun was not real. *Id.* at 21.

Once the gun was cocked, Noah Temple and his roommate, Andrew Fedetz, jumped at Appellant and his co-defendant, with Temple tackling Appellant. *Id.* Fedetz was hit in the head with the gun and began bleeding. *Id.* at 34, 135. Mgaza managed to escape. *Id.* at 23. During the fight, Melanie Furth, another witness, called the police. *Id.* at 98. The struggle with Appellant traveled down the second-story hallway and ended at a bedroom door. *Id.* at 91. David Hayes, who lived in that bedroom, heard the commotion, exited the bedroom, and helped his housemates. *Id.* at 92. When the police arrived, they observed the three males attempting to subdue Appellant. *Id.* at 160. The police recovered the gun, which was in two pieces because the slide had broken off. *Id.* at 162.

DISCUSSION

On appeal, Appellant claims:

> The verdict is against the weight of the evidence *and* the evidence was insufficient to support the verdict because:
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> > "Appellant should not have been convicted of Robbery F1 and the mandatory sentence for a "gunpoint robbery" should not have been imposed due to the weapon not being a real firearm, and the complainants knew the simulated weapon was not real."

Pennsylvania courts have settled the standard of review for the sufficiency of evidence. The test for determining the sufficiency of the evidence is whether the evidence presented at trial, when viewed in a light most favorable to the Commonwealth and with all reasonable inferences drawn from the evidence in favor of the Commonwealth as verdict-winner, is sufficient to support the findings of all the elements of an offense beyond a reasonable doubt. *Commonwealth v. Griffith*, 32 A.3d 1231, 1232 (Pa. 2011). The test for weight of the evidence is whether the verdict is so contrary to the evidence that it shocks one's sense of justice. *Commonwealth v. Rivera*, 983 A.2d 1211, 1225 (Pa. 2009).

To convict a person of first-degree Robbery, the Commonwealth must prove that the defendant threatened one with, or intentionally put one in fear of, serious bodily harm during the course of committing a theft. *Commonwealth v. Orr*, 38 A.3d 868, 873 (Pa. Super. 2011). In the instant case, the theft at gunpoint provided sufficient evidence to affirm Appellant's conviction. Appellant argues that the evidence was insufficient to sustain a conviction because the complainants knew the gun was not real. However the law does not require that the complainants know whether any weapon used is real or operable. The state of mind of the victims, as opposed to the intent of the perpetrator, is irrelevant to the question. *Commonwealth v. Thomas*, 546 A.2d 116, 118 (Pa. Super. 1988). By brandishing a gun that at first blush appeared to be real, Appellant was trying to instill fear of serious bodily harm in his victims. The evidence is thus sufficient to convict him of first-degree Robbery.[1]

[1] Moreover, the fact that the victims believed the gun was real at the point Appellant first revealed it further shows Appellant's intent. In fact, Detective Brian Newell testified at trial that the gun used in this case was a replica Desert Eagle BB gun. He also stated that if one did not know any better the replica would pass for a real handgun. Notes of Testimony, 1/22/13, at 172-173.

Appellant also argues that the verdict was against the weight of the evidence. The verdict here is not so contrary to the evidence as to shock one's sense of justice. Rather, the testimony reliably established that Appellant entered the home and bedroom of another, pulled out what appeared to be a handgun and attempted to take items which were not his. All the evidence at trial supports Appellant's convictions.

In regard to Appellant's allegation that the mandatory sentence for gunpoint robbery was inapplicable in this case, the sentencing court did not have the discretion to disregard the mandatory minimum sentence under 42 Pa. C.S. §9712(a), which encompasses robbery involving a firearm or a replica firearm. After all, it is mandatory. Once the Court properly convicted Appellant of Robbery and Possession of an Instrument of Crime, it was required to impose a sentence of at least five to ten years incarceration. *Id.*

CONCLUSION

In light of the foregoing, this Court did not err in convicting Appellant of Robbery as a felony of the first-degree. Accordingly, this Court's judgment of sentence should be **AFFIRMED**.

BY THE COURT:

DATE: July 11, 2013

Michael E. Erdos

MICHAEL E. ERDOS, J.