NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ALEXANDER SANTANA Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 893 MDA 2013

Appeal from the Judgment of Sentence August 1, 2012
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0001188-2011

BEFORE: BENDER, P.J., PANELLA, J., and MUSMANNO, J.

MEMORANDUM BY PANELLA, J.: **FILED APRIL 24, 2014**

Appellant, Alexander Santana, appeals from the judgment of sentence entered August 1, 2012, in the Court of Common Pleas of Berks County. Additionally, Santana's court-appointed counsel, Osmer S. Deming, Esquire, has filed an application to withdraw as counsel pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 602 Pa. 159, 978 A.2d 349 (2009). After careful review, we affirm Santana's judgment of sentence and grant counsel's petition to withdraw.

At approximately 5:30 p.m. on March 1, 2011, several deputies in the warrant division of the Berks County Sheriff's Office were dispatched to a residence located at 234 Pear Street in Reading, Pennsylvania, to arrest an individual alleged to reside at that address. ***See*** N.T., Trial, 7/2/13 at 43. Deputy Terry Ely recognized Santana, who had an open scofflaw warrant for

his arrest, standing outside of the residence. ***See id***. at 44.[1] Deputy Ely immediately placed Santana under arrest, and during a search incident to arrest discovered two plastic canisters containing heroin and cocaine. ***See id***. at 45.

Following a jury trial, on July 17, 2012, Santana was convicted of two counts of possession with intent to deliver a controlled substance[2] (heroin and cocaine). Thereafter, on August 1, 2012, the trial court sentenced Santana to eight to 50 years' incarceration. Santana did not file a direct appeal.

On September 19, 2012, Santana filed a *pro se* communication requesting an attorney, which the trial court treated as a petition filed pursuant to the Post Conviction Relief Act (PCRA).[3] The PCRA court appointed Attorney Deming as counsel on October 4, 2012. Attorney Deming subsequently filed an amended PCRA petition seeking reinstatement of Santana's direct appeal rights *nunc pro tunc*, which the PCRA court granted. This timely appeal followed.

Preliminarily, we note that Attorney Deming has requested to withdraw and has submitted an ***Anders*** brief in support thereof contending that Santana's appeal is frivolous. The Pennsylvania Supreme Court has

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[1] Santana was not the person for whom the deputies were originally sent to that address to arrest on an outstanding warrant.
[2] 35 PA.STAT. § 780-113(a)(30).
[3] 42 PA.CONS.STAT.ANN. §§ 9541-9546.

articulated the procedure to be followed when court-appointed counsel seeks to withdraw from representing an appellant on direct appeal:

> [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 arguably believes 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.

Commonwealth v. Santiago, 602 Pa. 159, 178-79, 978 A.2d 349, 361 (2009).

We note that Attorney Deming has complied with all of the requirements of ***Anders*** as articulated in ***Santiago***. Additionally, Attorney Deming confirms that he sent a copy of the ***Anders*** brief to Santana as well as a letter explaining to Santana that he has the right to proceed *pro se* or the right to retain new counsel. A copy of the letter is appended to Attorney Deming's petition, as required by this Court's decision in ***Commonwealth v. Millisock***, 873 A.2d 748 (Pa. Super. 2005), in which we held that "to facilitate appellate review, … counsel *must* attach as an exhibit to the petition to withdraw filed with this Court a copy of the letter sent to counsel's client giving notice of the client's rights." ***Id***., at 749 (emphasis in original).

On March 25, 2014, Santana filed a *pro se* brief in response to Attorney Deming's petition. To the extent the issues raised therein differ

from those raised in the ***Anders*** brief, we will address them in turn. We will now proceed to examine the issues counsel set forth in the ***Anders*** brief:

I. Did the evidence sufficiently support the verdicts?

II. Was counsel ineffective for failing to file an appeal?

III. Was appellant prejudiced by an all[-]Caucasian jury pool?

Anders Brief at 5.

Santana first challenges the sufficiency of the evidence to support Santana's PWID convictions.[4] When determining if evidence is sufficient to sustain a conviction, our standard of review is well-settled:

> 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.

Commonwealth v. Kendricks, 30 A.3d 499, 508 (Pa. Super. 2011) (citation omitted).

> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any

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[4] Santana also challenges the sufficiency of the evidence to support his convictions in his *pro se* brief. ***See*** *Pro Se* Brief at 10.

> 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.

Commonwealth v. Stokes, 38 A.3d 846, 853 (Pa. Super. 2011) (quoting ***Commonwealth v. Mobley***, 14 A.3d 887, 889-890 (Pa. Super. 2011)). "[T]he entire record must be evaluated and all evidence actually received must be considered." ***Stokes***, 38 A.3d at 854.

The Controlled Substance, Drug, Device and Cosmetic Act prohibits the following acts:

> [T]he manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 PA.STAT. § 780-113(a)(30). To sustain a conviction for possession with intent to deliver a controlled substance "all of the facts and circumstances surrounding the possession are relevant and the elements of the crime may be established by circumstantial evidence." ***Commonwealth v. Little***, 879 A.2d 293, 297 (Pa. Super. 2005).

Santana argues that although the Commonwealth undoubtedly established that he possessed the narcotics, it failed to establish the requisite intent to deliver the drugs. "In certain circumstances, the possession of large quantities of a controlled substance may justifiably suggest an inference of an intent to deliver." ***Commonwealth v. Gill***, 490 Pa. 1, 6, 415 A.2d 2, 4 (1980). Where the "quantity of the controlled

substance is not dispositive as to the intent," our Supreme Court has instructed us that "the court may look to other factors." ***Commonwealth v. Ratsamy***, 594 Pa. 176, 183, 934 A.2d 1233, 1237 (2007).

> Other factors to consider when determining whether a defendant intended to deliver a controlled substance include the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and large[] sums of cash found in possession of the defendant. The final factor to be considered is expert testimony. "Expert opinion testimony is admissible concerning whether the facts surrounding the possession of controlled substances are consistent with an intent to deliver rather than with an intent to possess it for personal use."

Id. (citation omitted).

Our review of the surrounding circumstances clearly establishes that Santana possessed the heroin and cocaine with an intent to deliver. At trial, Detective Pasquale Leporace was recognized as an expert in the field of illegal drugs and drug trade. ***See*** N.T., Trial, 7/2/12 at 95. Detective Leporace testified that the canisters discovered on Santana's person contained 43 packets of heroin, 12 bags of crack cocaine, and an "8 ball" of crack cocaine. ***Id***. at 98-102. Detective Leporace also testified that the area in which Santana was arrested is known as an "open-air drug market." ***Id***. at 104. Detective Leporace opined that, based on the quantity and packaging of the heroin and crack cocaine, there was ample evidence to establish possession with intent to deliver. ***See id***. at 103. We agree. The testimony adduced at trial from Detective Leporace and Deputy Ely was

more than sufficient to sustain Santana's conviction for possession with intent to deliver (heroin and cocaine). In light of the overwhelming nature and quantity of the evidence, Santana's claim that the narcotics were merely for his personal use rings hollow.

Santana next argues that trial counsel was ineffective for failing to file a direct appeal.[5] ***Anders*** Brief at 14. It is axiomatic that, "a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." ***Commonwealth v. Grant***, 572 Pa. 48, 67, 813 A.2d 726, 738 (2002). In ***Commonwealth v. Barnett***, 25 A.3d 371 (Pa. Super. 2011), an en banc panel of this court concluded that we "cannot engage in review of ineffective assistance of counsel claims on direct appeal absent an 'express, knowing and voluntary waiver of PCRA review.'" ***Id***., at 377 (quoting ***Commonwealth v. Liston***, 602 Pa. 10, 22, 977 A.2d 1089, 1096 (Castille, C.J., concurring)). Here, Santana has failed to include "an express, knowing and voluntary waiver of PCRA review." ***Id***. Therefore, we find the issue of ineffectiveness of trial counsel is not properly before this Court at this time.

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[5] A curious claim since his direct appeal rights were reinstated *nunc pro tunc*.

The third issue Santana raises on appeal alleges that he was prejudiced by an all-Caucasian jury pool. ***See Anders*** Brief at 15. The requirements for a ***Batson***[6] claim are well-established:

> To establish a prima facie case under ***Batson***, the defendant must prove that: he is a member of a cognizable racial or ethnic group, the State exercised its peremptory challenges to remove members of such group from the venire; and other relevant circumstances raise an inference that the State used peremptory challenges to exclude venirepersons from the same racial or ethnic group … In connection with this inquiry, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate … The necessary prima facie case (i.e., inference of discrimination) may be demonstrated by reference to the totality of relevant circumstances … For example, the inference may derive from a pattern of strikes against minority jurors or from the manner of the prosecution's questions and statements during *voir dire* examination.

Commonwealth v. Uderra, 580 Pa. 492, 509, 862 A.2d 74, 84 (2004). On appeal, this Court has generally enforced the requirement of a "full and complete record of the asserted violation." ***Id***. "The defendant has been required to present a record identifying the race or ethnicity of the venirepersons stricken by the Commonwealth, the race of prospective jurors acceptable to the Commonwealth but stricken by the defense, and the racial composition of the final jury selected." ***Id***. (citations omitted).

Instantly, Santana, who is Hispanic, presents absolutely no evidence of systematic elimination or exclusion of any race from the jury pool. Santana cites to an exchange that occurred during jury selection in which the trial

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[6] ***Batson v. Kentucky***, 476 U.S. 79 (1986).

court requested the Commonwealth withdraw its preemptory challenge to a Hispanic juror. ***See Anders*** Brief at 16-18; N.T., 7/2/12 at 26-29. The Commonwealth indicated that it had issued the challenge because the juror had to attend an important union meeting the following morning. ***See id***. at 26. However, when the trial court noted its concerns with the racial make-up of the jury and the juror indicated she would serve if chosen, the Commonwealth willingly lifted its preemptory challenge. ***See id***. at 27-29.

There is absolutely no indication that the Commonwealth exercised its preemptory challenge to exclude the juror, or indeed any other juror, based upon his or her race. As Santana has failed to establish that he was subjected to discriminatory practices in the selection of the jury at his trial, we find his ***Batson*** claim to be meritless.

Lastly, Santana raises an issue in his *pro se* brief which counsel does not address in the ***Anders*** Brief:

> Appellant's conviction was obtained and sentence imposed in violation of his guaranteed protected constitutional due process right, because the prosecutor perpetrated a falsehood and fraud upon the court, jury and the people of this commonwealth by permitting the false testimony of deputy sheriff Terry Ely to go uncorrected depriving Appellant of his constitutional due process right to a fair trial under Napue v. Illinois, 79 S.Ct. 1173(1959) and Commonwealth v. Romansky, 702 A.2d 1064 (P[a].Super.199[7]).

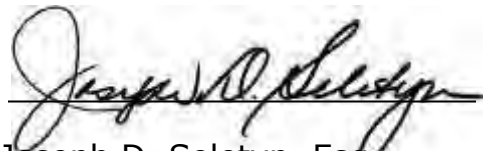
Pro Se Brief at 21. The crux of Santana's argument is that he believes Deputy Ely did not arrest him, but that he was first misidentified as "Raul Ortiz" and arrested by parole officers at 234 Pear Street. ***Id***. at 23. Santana claims that once drugs were discovered on his person, Deputy Ely

was called in as a pretext to arrest Santana on a scofflaw warrant. ***See id***. at 23-24. There is simply no evidence to support this claim. Deputy Ely testified consistently at both a suppression hearing held March 7, 2012, and at trial on July 2, 2012, that he personally identified Santana at the scene and effectuated both the arrest and search incident to the arrest. Santana's claim to the contrary is mere conjecture unsupported by the record. Accordingly, Santana's claim fails.

After examining the issue contained in the ***Anders*** brief, Santana's *pro se* brief and after undertaking our independent review of the record, we concur with counsel's assessment that the appeal is wholly frivolous.

Judgment of sentence affirmed. Permission to withdraw as counsel is granted. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/24/2014