

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ELI O. GOMEZ,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3035 EDA 2016

Appeal from the Judgment of Sentence April 14, 2016
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007943-2014

BEFORE: PANELLA, J., OLSON, J., and FORD ELLIOTT, P.J.E.

CONCURRING MEMORANDUM BY OLSON, J.: **FILED AUGUST 22, 2017**

I agree with the learned Majority that Appellant's judgment of sentence should be affirmed. However, I disagree with my colleagues' decision to find all of Appellant's issues waived for failure to ensure that the certified record contained the trial transcripts. Instead, I would address the merits of Appellant's issues and, after so doing, affirm based upon the thorough and comprehensive opinion issued by the trial court.

The Majority is correct in noting that it is the obligation of the appellant to order transcripts pursuant to Rule 1911(a) of the Rules of Appellate Procedure. Majority Memorandum at 4. Moreover, the local rules of the Philadelphia County Court of Common Pleas require that a transcript order form be filed with the trial court and the appellate court. *Id.* Finally, I agree with the Majority that there is no indication on the docket sheet that

Appellant complied with Pa.R.A.P. 1911 or the trial court's local rules. ***Id.*** at 4-5. However, I do not find that these failures should result in waiver as it is apparent from the trial court's opinion and the briefs filed with this Court by both Appellant and the Commonwealth that the trial transcripts **were** ordered and obtained by the parties and the court.¹ The trial court repeatedly cites to the trial transcripts in its 1925(a) opinion. Trial Court Opinion, 10/28/16 at 2-3, 7. Moreover, the briefs filed by Appellant and the Commonwealth are replete with references to the trial transcripts. Appellant's brief at 4-11; Commonwealth's brief at 2-7. Most importantly, attached to Appellant's brief is Appellant's reproduced record which includes, *inter alia*, the trial transcripts.² Thus, it appears that by some error or accident, the trial transcripts were not included in the certified record. Although the trial transcripts are not included in the certified record, the transcripts clearly exist and this Court could simply direct that a supplemental record which includes the transcripts be certified and transmitted. Pa.R.A.P. 1926(b)(1) ("If anything material to a party is

¹ Appellant's Notice of Appeal, which is part of the certified record, contains a certificate of service that notes that a copy of the notice was sent to the official court stenographer. Below the court stenographer's name and address is the notation "(notes already transcribed)." Notice of Appeal at 3 (unpaginated).

² The entire trial transcript is not attached to Appellant's brief as there are a few pages missing. However, the bulk of the transcripts are attached, including the testimony obtained and arguments made on both January 5, 2017 and January 6, 2017.

omitted from the record by error, . . . , or accident, . . . the omission . . . may be corrected . . . by the appellate court . . . on its own initiative at any time”) **See e.g. Commonwealth v. O’Black**, 897 A.2d 1234, 1238 (Pa. Super. 2006) (in those situations in which there are notes of testimony in the reproduced record or the notes are referred to by the parties thus indicating that the transcripts exist but are not in the certified record, this Court “well might make an informal inquiry to the trial court to see if there was an error in transmission to this Court or otherwise remand to see if the transcript or notes of testimony can be located and transmitted.”) I believe that that would be the most efficient thing to do in this case and, therefore, I would not find Appellant’s issues waived and would address the merits of the claims.

That being said, I have reviewed the briefs of the parties, Appellant’s reproduced record, and the opinion of the trial court. I believe that the trial court did an excellent job in addressing Appellant’s issues and, therefore, I would obtain the trial transcripts and affirm based upon the trial court’s opinion.