NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
DAVID DERRY,	:	
Appellant	:	No. 614 MDA 2017

Appeal from the Judgment of Sentence January 9, 2017
in the Court of Common Pleas of Union County,
Criminal Division at No(s): CP-60-CR-0000078-2016

BEFORE: OLSON, DUBOW, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED DECEMBER 22, 2017**

David Derry (Appellant) appeals from the judgment of sentence of an aggregate term of 42 months to 10 years of incarceration, imposed following multiple convictions by a jury for retail thefts. We affirm.

Briefly, on January 11, 2016, Appellant and two co-conspirators stole merchandise from Walmart on two separate occasions during the same day and used a stolen vehicle to leave the store with the merchandise. Based on these incidents, Appellant was charged with the following: (1) receiving stolen property, (2) conspiracy to receive stolen property, (3) retail theft (amount of $1,935.21), (4) retail theft (amount of $186.48), (5) conspiracy to commit retail theft (amount of $1,935.21), (6) conspiracy to commit retail theft

* Retired Senior Judge assigned to the Superior Court.

(amount of $186.48), 7) theft by unlawful taking, and (8) conspiracy to commit theft by unlawful taking. ***See*** Amended Criminal Information, 3/8/2016.

On March 9, 2016, the Commonwealth filed notice of its intent to consolidate the trials of Appellant and his co-conspirators pursuant to Pa.R.Crim.P. 582(B)(1). After one continuance was granted at Appellant's request, the trial court ordered that jury selection occur on July 25, 2016. Jury selection only for Appellant's case occurred that day. Also on that day, the trial court ordered that trial would begin on September 20, 2016.

On September 20, 2016, 31 minutes prior to trial's commencement, Appellant filed a motion *in limine* arguing, *inter alia*, that because he was not being tried together with his co-conspirators, the "conspiracy charges [should] be dismissed." N.T., 9/20/2016, at 4; ***see also*** Motion *in Limine*, 9/20/2016. The Commonwealth responded that it was the prerogative of the prosecutor to decide whether to try co-conspirators together, and despite its prior notice, the Commonwealth had chosen not to do so in this situation. The Commonwealth also suggested it was too late to raise this issue, as Appellant was aware he was being tried separately at jury selection in July. The trial court denied Appellant's motion *in limine*, and Appellant proceeded to his jury trial. At the conclusion of the jury trial, the trial court granted Appellant's motion for judgment of acquittal as to counts 7 and 8. N.T., 9/20/2016, at

188. The jury found Appellant guilty of the first six counts in the information. The trial court did not schedule sentencing.

On January 4, 2017, Appellant filed a motion to dismiss this case because he was not sentenced within 90 days of his conviction pursuant to Pa.R.Crim.P. 704. On the following day, the Commonwealth filed a motion to request expedited sentencing in this matter. On January 9, 2017, Appellant was sentenced as outlined above. Appellant timely filed a post-sentence motion. The motion was denied by order docketed on March 3, 2017. Appellant timely filed a notice of appeal, and both Appellant and the trial court complied with Pa.R.A.P. 1925.

On appeal, Appellant sets forth three issues for our review.

1. Did error occur where the trial court denied Appellant's request for dismissal of a conspiracy charge, as he was improperly tried separately from a co-defendant and he demonstrated prejudice?

2. Did error occur where the trial court denied his request for dismissal based upon untimely sentencing as he was sentenced after the allowed time frame and he demonstrated prejudice?

3. Was the verdict against the weight of the evidence, as the Commonwealth witnesses destroyed evidence, namely a recording, presented false testimony and false evidence, particularly regarding the location of items and property records regarding same and testified to issues making it clear that law enforcement conducted an illegal search and presented other questionable physical evidence such as inconclusive video footage, all of which prejudiced Appellant?

Appellant's Brief at 5 (suggested answers and unnecessary capitalization omitted).

Appellant first contends that the trial court erred by not dismissing the conspiracy-related charges in this case where the Commonwealth filed notice of its intent to try the co-conspirators together then elected not to do so. Appellant's Brief at 8-9. According to Appellant, he suffered prejudice because one of his co-defendants, who had not yet gone to trial, "would be placed at a distinct advantage….[by having] the opportunity to review what worked and what did not for Appellant." ***Id***. a 9.

The rules governing joinder of defendants provide the following, in relevant part.

> **(A) STANDARDS**
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> ***
>
> (2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.
>
> **(B) PROCEDURE**
>
> (1) Notice that offenses or defendants charged in separate indictments or informations will be tried together shall be in writing and filed with the clerk of courts. A copy of the notice shall be served on the defendant at or before arraignment.
>
> (2) When notice has not been given under paragraph (B)(1), any party may move to consolidate for trial separate indictments or informations, which motion must ordinarily be included in the omnibus pretrial motion.

Pa.R.Crim.P. 582.

Here, the Commonwealth complied with Rule 582(B)(1) on March 9, 2016. However, on July 20, 2016, Appellant, without objection, proceeded to jury selection with respect to his trial only.[1] Two months later, and half an hour before commencement of trial, Appellant requested for the first time that the trial court dismiss the conspiracy-related charges.[2] N.T., 9/20/2016, at 4. Appellant suggested that the co-conspirator who had not yet gone to trial "will be placed at a distinct advantage, as [he] will have the opportunity to review what worked and did not for [Appellant]." Motion *in Limine*, 9/20/2016, at ¶ 8.

The Commonwealth responded that if the trial court were inclined to grant Appellant's motion to dismiss the conspiracy-related charges, it would move for a continuance so that the cases could be tried together. N.T., 9/20/2016, at 7. In the alternative, the Commonwealth argued that it should have the opportunity to sever the cases pursuant to Pa.R.Crim.P. 583.

The trial court offered the following in support of its denying Appellant's motion. "As [Appellant] did not object to being tried separately from his co-

[1] The record is not clear as to why the Commonwealth at this point elected to try Appellant separately. Moreover, there is no procedure in the rules for what must happen when the Commonwealth wants to sever the cases. Rule 583 provides that "[t]he court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together." Pa.R.Crim.P. 583.

[2] At this juncture, Appellant was incarcerated awaiting trial. One co-conspirator had already entered into a plea agreement and had been sentenced, and the other co-conspirator was not incarcerated, but was awaiting trial. Thus, according to the Commonwealth, the cases were "on different procedural tracks." N.T., 9/20/2016, at 7.

[conspirators] in this matter for two (2) months after being provided notice [that he would not be tried with them,] and the fact that [Appellant] could cite no actual prejudice to being tried separately, the [trial c]ourt denied the motion to dismiss." Trial Court Opinion, 5/9/2017, at 3-4.

In considering this issue of whether the trial court properly denied Appellant's motion to dismiss the conspiracy-related charges 30 minutes before trial, we bear in mind that "[i]t is … an appellant's burden to persuade us the trial court erred and relief is due." ***Commonwealth v. Claffey***, 80 A.3d 780, 787 (Pa. Super. 2013). We have found no case law, and Appellant has cited no case law, that convinces us that the trial court erred or abused its discretion in any respect by denying Appellant's motion.

Appellant baldly claims that his "rights were violated" and that his co-conspirator, who had not yet been tried, had an advantage. We cannot agree that either of these situations amounted to prejudice. Instead, Appellant could have objected to the severance at jury selection or moved to re-consolidate the cases pursuant to Pa.R.Crim.P. 582(B)(2).[3] Appellant did not do so. Moreover, to the extent the Commonwealth would be unable to prove a conspiracy, Appellant could move for a judgment of acquittal after the

[3] We recognize that the Commonwealth filed notice of its intent to try these cases together. The rules do not provide for the situation present in this case, where the Commonwealth files a notice then decides not to try the cases together.

Commonwealth presented evidence. Based on the foregoing, we conclude that Appellant is not entitled to relief.

Appellant next argues that the trial court erred by permitting him to be sentenced beyond the 90-day period prescribed by Pa.R.Crim.P. 704. Appellant's Brief at 9-10. The rules provide that a "sentence in a court case shall ordinarily be imposed within 90 days of conviction." Pa.R.Crim.P. 704(A)(1). "When the date for sentencing in a court case must be delayed, for good cause shown, beyond the time limits set forth in this rule, the judge shall include in the record the specific time period for the extension." ***Id***. at (A)(2). "[A] defendant sentenced in violation of [Rule 704] is entitled to a discharge only where the defendant can demonstrate that the delay in sentencing prejudiced him or her." ***Commonwealth v. Dupre***, 866 A.2d 1089, 1109 (Pa. Super. 2005).

There is no question here that Appellant was sentenced beyond the 90 day period. ***See*** Trial Court Opinion, 5/9/2017, at 5 (noting that Appellant "was sentenced 21 days beyond the 90 day requirement"). On appeal, Appellant asserts he was prejudiced "in a variety of ways." Appellant's Brief at 10. These included (1) remaining "imprisoned for the offense," (2) being "precluded from having post-trial and/or appellate relief addressed," and (3) being "prevented [] from pursuing, to the best of his ability, other legal actions, including a civil case where he was a *pro se* plaintiff." ***Id***.

In considering this issue, we point out that this Court has specifically rejected the argument that remaining in prison without a sentence amounts to prejudice so long as the defendant receives credit for time served.[4] ***See Commonwealth v. Adams***, 760 A.2d 33, 38 (Pa. Super. 2000) ("Adams claims he was prejudiced at sentencing in that he had been in the county prison for nearly a year at the time he filed his motion to dismiss. However, he got credit for the time spent, and he did not spend anymore time incarcerated than he would have had the sentence been earlier."). Moreover, we cannot agree that a 21-day delay in filing an appeal from his judgment of sentence amounts to prejudice. In addition, there is no reason Appellant cannot pursue his *pro se* civil action while incarcerated. Accordingly, we hold that Appellant was not prejudiced by this delay, and therefore the trial court did not err in denying Appellant's motion to dismiss.

We now turn to Appellant's contention that the jury verdict was against the weight of the evidence.

> Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

[4] Appellant received credit for all time served prior to sentencing.

> However, the exercise of discretion by the trial court in granting or denying a motion for a new trial based on a challenge to the weight of the evidence is not unfettered. The propriety of the exercise of discretion in such an instance may be assessed by the appellate process when it is apparent that there was an abuse of that discretion.

Commonwealth v. Widmer, 744 A.2d 745, 753 (Pa. 2000) (internal citations omitted).

Here, Appellant argues the following.

> In the case at bar, the Commonwealth witnesses were shown to have destroyed or lost video evidence. [N.T., 9/20/2016, at 58, 104.] Further, property records were shown to be, at best, badly mistaken or at wors[t], falsified. [***Id***. at 80-81, 100-103, 105-106.] Additionally, it became clear during trial that Pennsylvania State Police made a warrantless arrest without probable cause, after illegal entry and search of a motel room. [***Id***. at 142-156.]

Appellant's Brief at 11.

Although Appellant's post-sentence motion and concise statement of errors complained of on appeal set forth a claim that the verdict was against the weight of the evidence, the trial court does not directly address the issue.[5] However, we can infer from the trial court's assessment in its sufficiency-of-the-evidence analysis that it did not believe the jury's verdict was contrary to the weight of the evidence.

[5] The trial court acknowledged Appellant raised the issue, but then addressed only the sufficiency-of-the-evidence issues in Appellant's concise statement. Appellant has abandoned his sufficiency-of-the-evidence issues on appeal. ***See*** Appellant's Brief at 6 ("Appellant preserved five issues and chooses to argue three.").

Appellant first complains about lost or destroyed video evidence. Jeffrey Ramsey, a Walmart asset protection and security employee, testified that he did not keep certain video related to Appellant's co-conspirator because "she didn't do anything that was worth saving the video. When she was in the store, she just rode around in the market cart." N.T., 9/20/2016, at 58. Thus, we agree with the trial court that this "lost video evidence" had no bearing on the outcome of the case.

Appellant also complains about including a drill from the hardware section as an item that was stolen. Ramsey prepared the list of merchandise that was stolen, and that list included a Bostitch drill, worth $148, which is sold at Walmart, but was not seen being taken on the surveillance video. ***Id***. at 51, 80-81. However, the drill was recovered from the getaway vehicle. In addition, Appellant complains about purported inaccuracies in a police report indicating where stolen items, such as this drill, were recovered and when they were returned to Walmart. ***Id***. at 100-106. Once again, we conclude that any lost video or inaccuracies in the police report did not impact the jury verdict. There was ample testimony and video evidence that connected Appellant to the crimes for which he was convicted.

Finally, Appellant complains about an allegedly unlawful entry and search into the motel room where Appellant and his co-conspirators were staying. ***Id***. at 142-156. This issue in no way challenges the weight of the evidence. To the extent Appellant believed that this search was unlawful, he

should have filed a motion to suppress. He did not do so. In sum, we agree with the following assessment by the trial court.

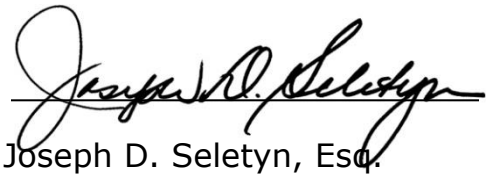
> [T]he defense is extremely upset with the quality of law [enforcement officers'] work in this matter. While [the trial court] agrees that law enforcement officers testifying in this case appeared confused and ill prepared for their testimony, there was still sufficient evidence presented by [Appellant's co-conspirator] and the Wal[mart] Security Officer, Jeff Ramsey[,] that identified [Appellant] and connected him to the items stolen on both occasions.

Trial Court Opinion, 5/9/2017, at 5-6.

Based on the foregoing, Appellant has not convinced us that the trial court abused its discretion in denying Appellant a new trial on his weight-of-the-evidence claim. Accordingly, we affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/22/2017