

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

BRIAN DIAZ,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2288 EDA 2012

Appeal from the Judgment of Sentence Entered August 2, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0009497-2011

BEFORE: BENDER, P.J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY BENDER, P.J.

FILED DECEMBER 17, 2013

Appellant, Brian Diaz, appeals from the judgment of sentence of five to ten years' incarceration, imposed following his conviction for possession with intent to deliver and conspiracy. Appellant contends that the evidence was insufficient to sustain his convictions, and the verdict was against the weight of the evidence. After careful review, we affirm.

Appellant proceeded to a jury trial on March 21, 2012. The facts adduced at trial were as follows:

On August 2, 2011 at approximately 9:00 p.m., Officer [Walter] Bartle was on duty on the 3600 block of North 7th Street in the City and County of Philadelphia. Officer Bartle, as a member of the Narcotics Strike Force for the Philadelphia Police, had set up surveillance on the rooftops on the east side of 7th Street. From his vantage point, Officer Bartle observed [Appellant] and

* Retired Senior Judge assigned to the Superior Court.

another male, Joshua Lopez, standing on the east side of 7th Street. At approximately[] 9:10 p.m. Officer Bartle observed an older black male, later identified as Horace Bonds, approach the two men on a bicycle. Officer Bartle heard [Appellant] say, "Yo, old head, how many you need?" to which Mr. Bonds replied, "Give me two dope." Officer Bartle then heard [Appellant] say, "I only got one left." Officer Bartle then observed Mr. Bonds stop and briefly talk with [Appellant] and Mr. Lopez, and handed them money. [Appellant] then pulled an item out of his shorts pocket and handed it to Mr. Bonds, who rode away on his bicycle. Officer Bartle then radioed the other Officers information about Mr. Bonds' appearance and the direction he was travelling. Mr. Bonds was then stopped and arrested by Officer [Michael] Collins. Officer Collins recovered a plastic baggie from Mr. Bonds that contained a white powder that later tested positive for [heroin].

Approximately ten minutes later, at 9:20 p.m., Officer Bartle observed a black male, later identified as Derek Wayns, approach [Appellant] and Mr. Lopez on the east side of 7th Street. Officer Bartle observed Mr. Wayns have a brief conversation with the two men and handed them money. [Appellant] then crossed 7th [S]treet, removed an item from a trashcan on the sidewalk, and gave that item to Mr. Wayns. Officer Bartle then observed Mr. Wayns get in a car and drive away. Officer Bartle relayed Mr. Wayns' information and direction of travel to his fellow officers in the area. Mr. Wayns was pulled over and arrested by Officer [Gregory] Fagan. In Mr. Wayns' possession were a green tinted bag containing cocaine, a green tinted bag containing marijuana, and a clear plastic bag with teddy bears on it containing marijuana.

Following the arrest of Mr. Wayns, at approximately 9:25 p.m., Officer Bartle called his fellow officers to 7th Street to arrest [Appellant] and Mr. Lopez. Upon arrival on 7th Street, Officer [Michael] Waters arrested [Appellant] and Officer [Derek] Jones arrested Joshua Lopez. Mr. Lopez was found to have fifty dollars on his person. The trashcan on the west side of 7th Street was then searched by Officers [Danny] Wright and [Mark] Wolf. Officer Wright recovered seven green tinted bags containing cocaine and two clear bags, with teddy bears on them, containing cocaine from the trashcan. Officer Wolf recovered two green tinted bags containing marijuana. All of the drugs found tested positive in field tests.

Trial Court Opinion (TCO), 5/8/13, at 2 – 3 (citations to the record omitted).

At the conclusion of Appellant's trial, the jury found him guilty of both charges. On August 2, 2012, Appellant was sentenced to a term of five to ten years' incarceration. Appellant filed a timely notice of appeal. He now presents the following questions for our review:

I. WHETHER THE VERDICTS WERE CONTRARY TO LAW AS TO THE CONVICTIONS FOR CONSPIRACY AND POSSESSION WITH INTENT TO DELIVER?

II. WHETHER THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE?

Appellant's Brief at 8.

On September 7, 2012, the trial court issued an order directing Appellant to file a Rule 1925(b) statement on or before October 8, 2012. Instantly, we note that Appellant filed a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) on February 8, 2013. We have reviewed the docket forwarded by the Clerk of Courts of Philadelphia County and can find no order granting Appellant additional time to file a 1925(b) statement. Thus, it appears that Appellant's Rule 1925(b) statement was untimely. This Court has acknowledged that appellate counsel's failure to file a timely 1925(b) statement is *per se* ineffectiveness. **See Commonwealth v. Burton**, 973 A.2d 428 (Pa. Super. 2009). However, where the trial court had adequate opportunity to prepare an opinion addressing an appellant's issues, this Court may address those issues on the merits. **Id.** Where the trial court did not have that

opportunity, this Court must remand “for the filing of a Statement *nunc pro tunc* and the preparation and filing of an opinion by the judge.” Pa. R.A.P. 1925(c)(3). The trial court in the instant case issued a Rule 1925(a) opinion that attempted to address the issues raised by Appellant. However, we are nonetheless unable to review Appellant’s issues on the merits.

Even if Appellant’s Rule 1925(b) statement had been timely filed, his claim that the verdict was against the weight of the evidence was not preserved in a post-sentence motion. Appellant cites to an unpublished memorandum opinion of this Court, ostensibly for the proposition that “[s]ince [] Appellant was not properly advised of his post-sentence rights, his noncompliance with Rules of Criminal Procedure is excusable.” Appellant’s Brief at 8. This is incorrect. It is well-established that “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a).

In support of his claim that this issue is not waived, Appellant also cites to ***Commonwealth v. Patterson***, 940 A.2d 493 (Pa. Super. 2007), a case discussing the jurisdiction of this Court following the untimely filing of a notice of appeal. ***Patterson*** is inapposite to the situation in the instant case, in which the notice of appeal was timely filed, and there are no questions regarding this Court’s jurisdiction.

Moreover, we note that Appellant concedes he was informed he had “ten days to file a motion to reconsider.” Appellant’s Brief at 8. This statement is nearly identical to language used by the trial court in

Patterson, which this Court concluded was adequate to notify the defendant of the time in which to file his post-sentence motion. Accordingly, this issue is waived, and we may not address it in the instant appeal.

Finally, with regard to Appellant's sufficiency issue, we note that this claim was raised in his untimely-filed Rule 1925(b) statement as follows:

(2) The verdict was contrary to the law as to the charges of conspiracy and possession with intent to deliver. The evidence presented by the Commonwealth was insufficient as a matter of law. The defendant asks that the Court also take notice of the arguments of trial counsel as to why these verdicts were contrary to the law.

Rule 1925(b) Statement, 2/8/13, at 2. We note that Appellant fails to state which elements of the crimes he was convicted of were not established at trial. Rather, Appellant merely proffers the boilerplate assertion that "[t]he evidence presented by the Commonwealth was insufficient as a matter of law."

This Court has noted that

[a]n appellant's concise statement must properly specify the error to be addressed on appeal. In other words, the Rule 1925(b) statement must be "specific enough for the trial court to identify and address the issue [an appellant] wishe[s] to raise on appeal." "[A] [c]oncise [s]tatement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no [c]oncise [s]tatement at all." The court's review and legal analysis can be fatally impaired when the court has to guess at the issues raised. Thus, if a concise statement is too vague, the court may find waiver.

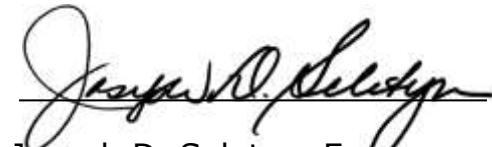
Commonwealth v. Hansley, 24 A.3d 410, 415 (Pa. Super. 2011) (internal citations omitted). Specifically, this Court in **Hansely** found the appellant's

issue was waived when it was raised as follows in his 1925(b) statement: "Was the evidence presented at trial insufficient to prove beyond a reasonable doubt that [Appellant] was guilty of robbery?" ***Id.*** at 414. This is nearly identical to the boilerplate manner in which Appellant's counsel raised the sufficiency claim in the instant case. Accordingly, we conclude that this issue as raised in Appellant's Rule 1925(b) is waived for vagueness.

See Hanley, supra.

Judgment of sentence ***affirmed.***

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/17/2013