

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

HARRY DARBY

Appellant

No. 2372 EDA 2011

Appeal from the Judgment of Sentence August 16, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0001961-2010

BEFORE: MUNDY, J., OTT, J., and PLATT, J.*

MEMORANDUM BY MUNDY, J.:

Filed: January 15, 2013

Appellant, Harry Darby, appeals from the judgment of sentence entered August 16, 2011, imposing an aggregate sentence of seven to 14 years' imprisonment after he pled guilty to aggravated assault, robbery, conspiracy, burglary, possession of a firearm prohibited, firearms not to be carried without a license, and possession of an instrument of crime.¹ After careful review, we affirm the judgment of sentence.

The trial court summarized the relevant facts of this case as follows.

On November 21, 2009, [Appellant] ... along
with [two] co-conspirators ... went to the home of

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. §§ 2702(A), 3701(A)(1)(ii), 903, 3502(A), 6105(A)(1), 6106(A)(1), 907(A).

Shanika Leslie Dressed in dark clothing and ski masks, the three men pounded on her door, yelling "5-0, 5-0. It's the police." Ms. Leslie saw through her peep hole that the three men were wearing masks and were not the police and called 9-1-1. As she called police, [Appellant] and his two co-conspirators kicked Ms. Leslie's door off its hinges and entered her home. Once inside, [Appellant] and his [co-]conspirators detained Ms. Leslie on the couch, demanding to know the whereabouts of both her boyfriend and her money. When Ms. Leslie refused to tell them what they wanted to know, [co-conspirator] Michael Griggs then shot her with a stun-gun ... and Appellant stood nearby holding a handgun. While [] Griggs detained Ms. Leslie on the couch, [Appellant] ... ransacked her apartment, searching for money and repeatedly demanded that she tell them where the money was located.

Police arrived after a short time and [Appellant] and his co-conspirators all attempted to flee the apartment. Officers observed [Appellant] as he ran toward his 1996 Jeep Cherokee used as the getaway vehicle and gave chase, quickly detaining [Appellant]. Once [Appellant was] in custody, officers recovered a black ski mask, ... camera, cell phone and watch belonging to Ms. Leslie. ... [Appellant's co-conspirators] were apprehended after crashing [Appellant's] Jeep Cherokee less than one mile away. After obtaining a search warrant, officers recovered a bag belonging to Ms. Leslie, a shotgun, a .9mm Ruger, a .38 caliber and a .357 firearm, a stun gun, gloves, two (2) ski masks and numerous cell phones. Ms. Leslie later identified [Appellant] and her recovered belongings.

Trial Court Opinion, 11/14/11, at 1-2 (citations omitted).

On February 5, 2010, Appellant was charged with aggravated assault and the aforementioned offenses. Thereafter, on August 16, 2011, Appellant entered a negotiated guilty plea for a recommended aggregate

sentence of seven to 14 years' imprisonment. The trial court accepted the plea and immediately sentenced Appellant in accordance with the plea agreement. This timely appeal followed on August 31, 2011.²

On appeal, Appellant raises the following issue for our review.

1. Were [] [A]ppellant's guilty pleas knowing, intelligent, and voluntary?

Appellant's Brief at 2.

"The entry of a guilty plea constitutes a waiver of all defects and defenses except lack of jurisdiction, invalidity of the plea, and illegality of the sentence." ***Commonwealth v. Main***, 6 A.3d 1026, 1028 (Pa. Super. 2010) (citation omitted). Additionally, "[w]here an appellant fails to challenge his guilty plea in the trial court, he may not do so on appeal. In order to preserve an issue related to the guilty plea, an appellant must either object [] at the sentence colloquy or otherwise rais[e] the issue at the sentencing hearing or through a post-sentence motion." ***Commonwealth v. Tareila***,

² The record reflects that Appellant, while represented by trial counsel, filed a *pro se* notice of appeal. Thereafter, the trial court ordered Appellant to submit a concise statement of errors complained of on appeal pursuant to Pa.R.Crim.P. 1925. Appellant complied, and the trial court filed its 1925(a) opinion on November 14, 2011. Trial counsel David Walker, Esquire (Attorney Walker) was permitted to withdraw, and appellate counsel was appointed on December 9, 2011. On May 2, 2012, this Court remanded to the trial court for a counseled 1925(b) statement and supplemental 1925(a) opinion to be filed within 60 days. Counsel filed a supplemental 1925(b) statement on May 9, 2012. Thereafter, on May 17, 2012, the trial court filed a supplemental 1925(a) opinion in compliance with the May 2, 2012 order of this Court.

895 A.2d 1266, 1270 n.3 (Pa. Super. 2006) (internal quotations and citation omitted).

Herein, the record reveals that Appellant did not object to the guilty plea at sentencing. Thereafter, on August 30, 2011, Appellant, who was at the time represented by Attorney Walker, filed an untimely *pro se* post-sentence motion wherein he sought to withdraw the guilty plea. Accordingly, Appellant's filings were governed by Pa.R.Crim.P. 576(A)(4), which provides as follows.

(4) In any case in which a defendant is represented by an attorney, if the defendant submits for filing a written motion, notice, or document that has not been signed by the defendant's attorney, the clerk of courts shall accept it for filing, time stamp it with the date of receipt and make a docket entry reflecting the date of receipt, and place the document in the criminal case file. A copy of the time stamped document shall be forwarded to the defendant's attorney and the attorney for the Commonwealth within 10 days of receipt.

Pa.R.Crim.P. 576.

The comment to Rule 576 further clarifies that "[t]he requirement that the clerk time stamp and make docket entries of the filings in these cases only serves to provide a record of the filing, and does not trigger any deadline nor require any response." Pa.R.Crim.P. 576 *Comment*. Additionally, we have held that a criminal defendant's *pro se* actions have no legal effect while he or she remains represented by counsel. ***Commonwealth v. Hall***, 476 A.2d 7, 9-10 (Pa. Super. 1984); ***see also***

Commonwealth v. Nischan, 928 A.2d 349, 355 (Pa. Super. 2007) (noting that a defendant's *pro se* filings while represented by counsel are legal nullities), *appeal denied*, 936 A.2d 40 (Pa. 2007).

Accordingly, in the absence of any perfecting actions by Attorney Walker, Appellant's post-sentence motion is a legal nullity, and cannot serve to preserve his claim challenging the validity of his guilty plea.³ Moreover, even if this Court were to conclude that Appellant's post-sentence motion is not a legal nullity, the untimeliness of the motion renders it incapable of preserving Appellant's claim.⁴ Accordingly, Appellant can have no relief on this claim.

Based on the foregoing, we affirm Appellant's August 16, 2011 judgment of sentence.

Judgment of sentence affirmed.

³ We note that Rule 576 was not fully observed in this case. Appellant's *pro se* motion to withdraw guilty plea was entered in the docket, but was not forwarded to defense counsel. However, the noncompliance is of no moment as filing does not trigger any deadline nor require any response. **See** Pa.R.Crim.P. 576 *Comment*.

⁴ Post-sentence motions shall be filed within ten days after a defendant's judgment of sentence. Pa.R.Crim.P. 702. In the instant case, Appellant's *pro se* post-sentence motion was filed 14 days after imposition of sentence.