J-S70005-12

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOHN TARPEH,	:	
	:	
Appellant	:	No. 2822 EDA 2011

Appeal from the Judgment of Sentence May 26, 2011,
Court of Common Pleas, Philadelphia County,
Criminal Division at Nos. CP-51-CR-0014151-2009,
CP-51-CR-0014152-2009 and CP-51-CR-0014153-2009

BEFORE: DONOHUE, OLSON and FITZGERALD*, JJ.

MEMORANDUM BY DONOHUE, J.: Filed: January 14, 2013

Appellant, John Tarpeh ("Tarpeh"), appeals from the judgment of sentence entered on May 26, 2011, following his convictions after a bench trial for third-degree murder, 18 Pa.C.S.A. § 2502(c), and two counts of attempted murder, 18 Pa.C.S.A. § 901, 2502. For the reasons that follow, we affirm the judgment of sentence.

The trial court aptly summarized the evidence presented at trial on February 23-25, 2011 as follows:

> On September 2, 2009, Charles Swinton ["Swinton"] was in front of his home at 6535 Regent Street, Philadelphia, PA with the decedent, Jeanette Anderson, and several of their friends when a woman and her young daughter approached and engaged in a short conversation. As a result of the conversation, Swinton accompanied the women and child around the corner to 66th Street and Kingsessing Avenue where he observed [Tarpeh] and

*Former Justice specially assigned to the Superior Court.

> a few of his friends. N.T. 2/24/21/2012 [*sic*] @ 87-94. Swinton approached [Tarpeh] and after a short discussion a fist fight ensued between them. Id. @ 95-97. Friends of the combatants intervened and stopped the altercation and the two males walked away. Id. @ 98. Swinton's sister, Lekesha Taylor testified that she and Swinton's friends took Swinton back to their home. Id. @ 42. Later that evening[,] Swinton, Taylor, Decedent, and their friends were sitting on the steps in front of his house when [Tarpeh] appeared. Shortly thereafter, [Tarpeh] retrieved a black automatic firearm and began shooting at Swinton. Id. @ 99-104, 145-46. As Swinton fled, [Tarpeh] continued shooting, whereupon Swinton was shot in the back and fell to the ground. Id. @ 105, 146-49. After he was hit, Swinton observed [Tarpeh] flee towards a park nearby. Id. @ 106. Swinton called out to a neighbor, Branch Richardson, whose son, Lamar, had been with Swinton and the others, and who had observed the shooting. Richardson observed the wounded Swinton, the decedent, and his own son who had been shot by [Tarpeh]. Richardson gave a statement to homicide detectives and he positively [identified] [Tarpeh] as the shooter from a photo array. Id. @ 165. Swinton's sister also talked to detectives and gave a description of [Tarpeh].
>
> Detective Timothy Scally interviewed [Tarpeh] who gave a statement admitting to the shooting which killed Anderson and which injured Swinton and Adams. Id. @ 2/24/2012 [*sic*] @ 73. [Tarpeh] explained that he and his friends had fought Swinton and his friends on the day of the shooting. According to [Tarpeh,] the altercation was reignited by a phone call which result in [Tarpeh] returning to Swinton's neighborhood. Id. @ 76. [Tarpeh] told Detective Scally that upon his group's return to Swinton's location a male walked toward his group with a baseball bat at which point [Tarpeh] pulled a gun, shot into the crowd, and fled. Id. @ 73-74. [Tarpeh] stated that he used a 9mm in the shooting. Id. @ 75.

> [Tarpeh] presented the testimony of Dr. Christopher Lorah, an expert in forensic and clinical psychology[,] who testified that tests performed on [Tarpeh] showed that he fell into the low range and borderline range of performance ability and suggested that [Tarpeh] had a learning disorder. N.T. 2/25/2012 [*sic*] @ 18. He questioned the voluntariness of [Tarpeh's] statement, concluding that [Tarpeh] "demonstrated either the need for social approval and confirmation evidenced by tendencies to present himself in a favorable light, or, … marked naivety about psychological matters including deficit in self-insight." @ 25.

Trial Court Opinion, 3/30/2012, at 1-3.

At the conclusion of the bench trial, the trial court found Tarpeh guilty of the above referenced crimes. On May 26, 2011, the trial court sentenced Tarpeh to an aggregate term of incarceration of 30 to 60 years (20-40 years for third-degree murder and 10-20 years concurrent on each count of attempted murder, running consecutively to the sentence for murder). On September 29, 2011, the trial court denied post-trial motions. This timely appeal followed, in which Tarpeh raises the following issues for our consideration and determination:

> 1. Whether the [trial court] erred when it barred the defense from positing a hypothetical question to defense expert Dr. Christopher Lorah that would have supported the defense that [Tarpeh] did not possess the requisite states of mind for murder.
>
> 2. Whether [Tarpeh's] convictions for [t]hird-[d]egree [m]urder and [a]ttempted [m]urder are against the weight and credibility of the evidence.

> 3. Whether [Tarpeh's] convictions for [t]hird-[d]egree [m]urder and [a]ttempted [m]urder are based upon insufficient evidence.
>
> 4. Whether the [trial court's] sentence was excessive given the facts adduced at trial indicating that the victims acted with provocation and given [Tarpeh's] background and age.

Tarpeh's Brief at 6.

For his first issue on appeal, Tarpeh argues that the trial court erred in sustaining the Commonwealth's objection to the following hypothetical question:

> I want you to assume that there's an individual that has [Tarpeh's] IQ and that has [Tarpeh's] cognitive functioning and that measures up in a similar way personality-wise, and I'd like you also to assume that the person is faced with serious and imminent provocation in some way, shape, or form –

N.T., 2/25/2011, at 27. At this point, before defense counsel completed the question, counsel for the Commonwealth objected. After extended argument by both counsel, the trial court sustained the objection. ***Id.*** at 32. The trial court declined Tarpeh's request to finish the hypothetical to preserve the issue more clearly for appellate review. ***Id.*** From the transcript as well as his appellate brief, however, Tarpeh makes clear that the intent of the hypothetical was to illuminate the cumulative effects that a lifetime history of violence had on his state of mind at the time of the shooting. ***Id.*** at 28-31; Tarpeh's Brief at 16-19. According to Tarpeh, the hypothetical question would have assisted in his defense that his state of

mind was consistent with a finding of voluntary manslaughter rather than that of malice required for third-degree murder. Tarpeh's Brief at 17.

Third-degree murder is a killing done with legal malice but without specific intent to kill. ***Commonwealth v. Pitts***, 486 Pa. 212, 219, 404 A.2d 1305, 1308 (1979). "[T]he essence of third degree murder is a homicide which occurs as the unintended consequence of a malicious act." ***Commonwealth v. Clinger***, 833 A.2d 792, 796 (Pa. Super. 2003); ***see also Commonwealth v. Tolbert***, 670 A.2d 1172, 1179 (Pa. Super. 1995) ("[t]hird-degree murder is a killing done with malice that is neither intentional nor committed in the course of a felony"). Malice may be found to exist in an unintentional homicide where a defendant "consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily harm." ***Commonwealth v. Young***, 494 Pa. 224, 228, 431 A.2d 230, 232 (1981). When an individual commits an act of recklessness for which he must reasonably anticipate that death to another is likely to result, he exhibits that "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty" which proved that there was at that time in him "the state or frame of mind termed malice." ***Commonwealth v. Seibert***, 622 A.2d 361, 364 (Pa. Super. 1993) (quoting ***Commonwealth v. Malone***, 354 Pa. 180, 184, 47 A.2d 445, 447 (1946)).

In contrast, a person is guilty of voluntary manslaughter "if at the time of the killing [he or she] reacted under a sudden and intense passion resulting from serious provocation by the victim." ***Commonwealth v. Miller***, 605 Pa. 1, 20, 987 A.2d 638, 649 (2009) (quoting ***Commonwealth v. Ragan***, 560 Pa. 106, 119, 743 A.2d 390, 396 (1999)). Heat of passion includes emotions like anger, rage, sudden resentment or terror that renders the mind incapable of reason. ***Commonwealth v. Mason***, 559 Pa. 500, 511, 741 A.2d 708, 714 (1999). We apply an objective standard to determine whether the provocation was sufficient to support the defense of "heat of passion" voluntary manslaughter. ***Commonwealth v. Laich***, 566 Pa. 19, 35, 777 A.2d 1057, 1066 (2001). Specifically, "[t]he ultimate test for adequate provocation remains whether a reasonable man, confronted with this series of events, became impassioned to the extent that his mind was incapable of cool reflection." ***Commonwealth v. Thornton***, 494 Pa. 260, 268, 431 A.2d 248, 252 (1981) (quoting ***Commonwealth v. McCusker***, 448 Pa. 382, 390, 292 A.2d 286, 289-90 (1972)).

In arguing for a finding of voluntary manslaughter rather than third-degree murder, Tarpeh relies upon the case of ***Commonwealth v. Stonehouse***, 521 Pa. 41, 60, 555 A.2d 772 (1989). In ***Stonehouse***, a plurality of our Supreme Court reaffirmed that "sufficient provocation to support a conviction for manslaughter may be established by the cumulative impact of a series of related events." ***Id.*** at 60-65, 555 A.2d at 782-84

(citing ***McCusker***, 448 Pa. at 389, 292 A.2d at 290). ***Stonehouse*** involved a woman subjected to repeated instances of abuse and violence from a former boyfriend. When she saw him point a gun at her, she shot him. ***Id.*** at 45-55, 555 A.2d at 774-780. A plurality of the Court held that the defendant should have been permitted to introduce testimony from a qualified expert to prove justification for her use of force as a result of being a victim of psychological and physical abuse (sometimes referred to as "battered woman syndrome"). ***Id.*** at 61, 555 A.2d at 782-83. While the Court as a whole did not adopt "battered woman syndrome" as a defense, all members of the Court agreed that the jury should have been instructed that the violent and abusive nature of the relationship could be taken into consideration when determining whether or not she reasonably believed she was in imminent danger of death or serious bodily injury when she saw the gun in his hand. ***Id.*** at 66, 555 A.2d at 785 (Zappala, J., concurring).

In his appellate brief, Tarpeh argues that Dr. Lorah should have been permitted to testify about the effects of a series of violent events from his past (beginning in his home country of Liberia, and then with conflicts between native-born black Americans and foreign-born black Americans in his current neighborhood) on his state of mind at the time of the shooting. Even if we accept that Tarpeh's argument falls within the parameters of ***Stonehouse***, the hypothetical question asked at trial bears little resemblance to this argument. The hypothetical question does not include

any reference to prior instances of violence Tarpeh had experienced, but rather inquires about a person of Tarpeh's IQ, cognitive functioning, and personality. The question was thus not aimed at the relevant legal standard for provocation for voluntary manslaughter, since that test is clearly an objective, "reasonable man" standard. ***Miller***, 605 Pa. at 20, 987 A.2d at 649; ***Laich***, 566 Pa. at 35, 777 A.2d at 1066.

Moreover, and perhaps more importantly, the hypothetical question did not attempt to assist the trier of fact in determining whether sufficient provocation existed for voluntary manslaughter. Instead, the hypothetical question instructed Dr. Lorah to *assume* that "serious and imminent provocation in some way, shape, or form" existed, and then asked him to advise the trial court as to how a person of Tarpeh's IQ, cognitive functioning, and personality would likely react to such a provocation. As the hypothetical question did not assist the trier of fact in determining whether the relevant legal standard for voluntary manslaughter (provocation) was satisfied, the trial court did not err in sustaining the Commonwealth's objection.

For his second issue on appeal, Tarpeh argues that the verdicts were against the weight of the evidence. The applicable standard of review when passing upon a challenge to the weight of the evidence is as follows:

> The weight given to trial evidence is a choice for the factfinder. If the factfinder returns a guilty verdict, and if a criminal defendant then files a motion for a

> new trial on the basis that the verdict was against the weight of the evidence, a trial court is not to grant relief unless the verdict is so contrary to the evidence as to shock one's sense of justice.
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> When a trial court denies a weight-of-the-evidence motion, and when an appellant then appeals that ruling to this Court, our review is limited. It is important to understand we do not reach the underlying question of whether the verdict was, in fact, against the weight of the evidence. We do not decide how we would have ruled on the motion and then simply replace our own judgment for that of the trial court. Instead, this Court determines whether the trial court abused its discretion in reaching whatever decision it made on the motion, whether or not that decision is the one we might have made in the first instance.
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> Moreover, when evaluating a trial court's ruling, we keep in mind that an abuse of discretion is not merely an error in judgment. Rather, it involves bias, partiality, prejudice, ill-will, manifest unreasonableness or a misapplication of the law. By contrast, a proper exercise of discretion conforms to the law and is based on the facts of record.

Commonwealth v. West, 937 A.2d 516, 521 (Pa. Super. 2007) (internal citations omitted), *appeal denied*, 596 Pa. 754, 947 A.2d 737 (2008).

In the present case, the trial court concluded that the verdict was not inconsistent with the evidence presented at trial and that the verdict therefore did not shock one's sense of justice. Trial Court Opinion, 3/30/2012, at 6. Based upon our review of the certified record on appeal, we agree with the trial court. The testimony of witnesses found to be credible by the trial court, in its role as the trier of fact, was that Tarpeh

repeatedly fired a weapon into a crowd of people, killing one and wounding two. Tarpeh's interpretation of the evidence notwithstanding (including that he may have been approached by someone with a baseball bat), we find no basis on which to conclude that Tarpeh established any satisfactory justification for his actions. No relief is due on this issue.

For his third issue on appeal, Tarpeh contends that the evidence presented at trial was not sufficient to establish that he acted with malice. Our standard of review for a sufficiency of the evidence claim is as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Quel, 27 A.3d 1033, 1037-38 (Pa. Super. 2011) (citation omitted).

As defined hereinabove, malice for purposes of third-degree murder exists where a defendant "consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily harm." ***Young***, 494 Pa. at 228, 431 A.2d at 232; ***see also Commonwealth v. Seibert***, 622 A.2d 361, 366 (Pa. Super. 1993) (where defendant placed gun against victim's head, not knowing whether it was loaded, and pulled the trigger, defendant's reckless conduct constituted malice which would sustain a conviction for third degree murder); ***Commonwealth v. Wanamaker***, 444 A.2d 1176, 1179 (Pa. Super. 1982) (defendant's conduct in directing his brother to bring him a loaded rifle and then firing rifle in direction of another person, constituted a conscious disregard of an unjustified and extremely high risk that his actions might cause death or serious bodily injury).

In the case *sub judice*, the evidence presented at trial established that Tarpeh fired at least 11 bullets into a crowd of people on the street. Such conduct clearly reflected a reckless disregard for the risk of death or serious bodily injury resulting therefrom. As a result, we have no hesitation in concluding that the Commonwealth presented sufficient evidence to satisfy the legal standard for malice in this case.

For his fourth and final issue on appeal, Tarpeh contends that his aggregate sentence of 30 to 60 years of imprisonment was excessive, particularly given his age at the time of the crime (15) and the unfortunate circumstances of his upbringing. Our standard of review of the sentencing court's imposition of a sentence was outlined by our Supreme Court in ***Commonwealth v. Walls***, 592 Pa. 557, 926 A.2d 957 (2007). Therein, the Supreme Court observed that this Court's review of the discretionary aspects of a sentence is confined by the statutory mandates of 42 Pa.C.S.A. § 9781(c) and (d), and 9721(b). Section 9781(c) states:

> (c) Determination on appeal.—The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:
>
> > (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
> >
> > (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
> >
> > (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.
>
> In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

42 Pa.C.S.A. § 9781(c).

Section 9781(d) provides that when we review the record, we must have regard for:

> (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
>
> (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
>
> (3) The findings upon which the sentence was based.
>
> (4) The guidelines promulgated by the commission.

42 Pa.C.S. § 9781(d).

Finally, section 9721(b) states in pertinent part:

> [T]he court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing[.]

42 Pa.C.S. § 9721(b).

In the present case, Tarpeh's sentence falls within the applicable sentencing guidelines, and therefore we may reverse the sentence only if application of the guidelines is clearly unreasonable. ***Commonwealth v. Macias***, 968 A.2d 773, 777 (Pa. Super. 2009). In ***Walls***, our Supreme Court indicated that the term "unreasonable" in this regard means a decision that is either irrational or not guided by sound judgment. ***Walls***, 592 Pa. at

568, 926 A.2d at 963. Based upon our review of the certified record on appeal, we discern no basis for reaching such a conclusion here. Before sentencing Tarpeh, the trial court considered a pre-sentence report, a court-prepared mental health evaluation, a psychological evaluation by Dr. Lorah, impact testimony, and the arguments of counsel. N.T., 5/26/2011, *passim*. The trial court considered Tarpeh's age (15 at the time of the crime, 17 at the time of sentencing), ***id.*** at 14, as well as the ages and circumstances of his victims: the decedent (Jeanette Anderson), age 19 and with child at the time of her death; Swinton, age 16 and paralyzed as a result of his wound; and a young boy (Lamar Richardson). ***Id.*** at 25-27.

We must reject Tarpeh's assertion that the trial court failed to weigh either the various mitigation evidence placed before it or Tarpeh's rehabilitative needs. As indicated, the trial court reviewed a wide variety of information before passing sentence in this case, including a pre-sentence report.

> Where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. In order to dispel any lingering doubt as to our intention of engaging in an effort of legal purification, we state clearly that sentencers are under no compulsion to employ checklists or any extended or systematic definitions of their punishment procedure. Having been fully informed by the pre-sentence report, the sentencing court's discretion should not

> be disturbed. This is particularly true, we repeat, in those circumstances where it can be demonstrated that the judge had any degree of awareness of the sentencing considerations, and there we will presume also that the weighing process took place in a meaningful fashion. It would be foolish, indeed, to take the position that if a court is in possession of the facts, it will fail to apply them to the case at hand.

Commonwealth v. Devers, 519 Pa. 88, 101-02, 546 A.2d 12, 18 (1988). According, we find no basis on which to reverse the trial court's sentence in this case.

Judgment affirmed.