

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

GERVIN GLINTON

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 310 EDA 2011

Appeal from the Judgment of Sentence January 10, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007031-2010

BEFORE: PANELLA, J., LAZARUS, J., and WECHT, J.

MEMORANDUM BY PANELLA, J.

Filed: January 30, 2013

Appellant, Gervin Ginton, appeals from the judgment of sentence entered January 10, 2011, by the Honorable Robert P. Coleman, Court of Common Pleas of Philadelphia County. Additionally, Ginton's attorney, Jill Heilman, Esquire, has filed an application to withdraw as counsel pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 602 Pa. 159, 978 A.2d 349 (2009). After careful review, we affirm and grant the petition to withdraw.

The trial court summarized the facts of this case as follows:

On April 26, 2010, [Philadelphia Police] Officer [Timothy] Bogan, Officer [Gina] Jackson, and a confidential informant ("CI") were in the area of Frazier and Whitby [Streets] for the purpose of conducting a controlled drug transaction. The CI was prepped by Officer Bogan and was provided with twenty [dollars of] prerecorded United States currency ("USC"). From twenty feet away, Officer Bogan and Officer Jackson saw [Ginton] approached the CI from 5627 Whitby. Both officers saw a hand-

to-hand transaction in which the CI gave [Glinton] the prerecorded USC in exchange for drugs. After the transaction, the CI approached the two officers and turned over the two clear packets of marijuana and a piece of paper with letters "BLACK" and the phone number (267)582-6162. Officer Bogan testified that he did not lose sight of the CI throughout the transaction.

On May 3, 2010, Officer Bogan and Officer Jackson conducted a second drug transaction using the same CI. On that day, the officers dialed the number received on the first buy and a male's voice answered the phone. The CI and the male engaged in a drug related conversation, and the meeting location was agreed upon. The CI was prepped by Officer B[og]an and was given twenty prerecorded USC. Shortly upon arrival, [Glinton], who was seen wearing a red and black shirt, exited 5627 Whitby and approached the CI. The officers saw a hand-to-hand transaction between [Glinton] and the CI in which the CI exchanged prerecorded USC for drugs. Afterwards, the CI turned over two blue packets of crack cocaine to the officers who were parked across the street.

The next day, the officers set up a third drug transaction. The CI agreed to meet [Glinton] inside a Chinese restaurant. During the transaction, Officer Bogan was in a parked car while Officer Jackson was at the restaurant. Officer Jackson testified that she saw [Glinton], who wore the same shirt from the previous day, approach[] the CI. From fifteen feet away, Officer Jackson saw [Glinton] engage[] the CI in a hand-to-hand transaction. Officer Jackson saw [Glinton] take out a plastic bag from the front of his pants and handed it to the CI once he received the sixty prerecorded USC. Afterwards, Officer Jackson notified backup of the transaction after [Glinton] left the restaurant. Within minutes, [Glinton] was stopped by officers in the area. The officers recovered [\$104.00], including the sixty [dollars of] prerecorded USC, from [Glinton]. Further, the officers recovered a house key and a cell phone, which was later confirmed to be the phone used to set up the previous drug transaction. The officers later determined that the house key worked the front door of 5627 Whitby.

Trial Court Opinion, 6/4/12 at 2-3.

On December 22, 2010, Ginton filed a motion to compel the identity of the CI, which the trial court denied. Following a bench trial, on January 10, 2011, Ginton was convicted of possession with intent to deliver a controlled substance, criminal use of a communication facility, and possession of a controlled substance. Thereafter, the trial court sentenced Ginton to one and one-half to four years' imprisonment. This timely appeal followed.

On March 10, 2011, counsel for Ginton, Jill Heilman, Esquire, filed a Preliminary Statement of Errors Complained of on Appeal raising a single issue: that the trial court erred by denying appellant's pre-trial motion to reveal the identity of the Commonwealth's confidential informant. Attorney Heilman ultimately did not file a supplemental Rule 1925(b) statement, and the trial court issued its Rule 1925(a) opinion on June 4, 2012.¹

Preliminarily, we note that Attorney Jill Heilman has petitioned to withdraw and has submitted an *Anders* brief in support thereof contending that Ginton's appeal is frivolous. The Pennsylvania Supreme Court has articulated the procedure to be followed when court-appointed counsel seeks to withdraw from representing an appellant on direct appeal:

¹ This panel initially remanded the instant matter on November 21, 2012, for the proper filing of counsel's petition to withdraw. At that time, counsel's petition inexplicably did not appear on this Court's certified docket. The panel ultimately granted reconsideration of the instant appeal on January 2, 2013, after counsel provided the prothonotary with a time-stamped copy of the petition to withdraw filed with this Court.

[I]n the **Anders** brief that accompanies court-appointed counsel's petition to withdraw, counsel must: (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel arguably believes supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Commonwealth v. Santiago, 602 Pa. 159, 178-79, 978 A.2d 349, 361 (2009).

We note that Attorney Heilman has marginally complied with all of the requirements of **Anders** as articulated in **Santiago**.² We will now proceed to examine the issues set forth in the **Anders** brief, which Ginton believes to be of arguable merit.

Ginton first argues that the lower court erred when it denied his pre-trial motion to compel the identity of the CI. In **Commonwealth v. Bonasorte**, 486 A.2d 1361 (Pa. Super. 1984), we noted that in order to compel the disclosure of a CI's identity, a defendant must show that the disclosure is material to his defense, reasonable, and in the interest of

² Additionally, Attorney Heilman confirms that she sent a copy of the **Anders** brief to Ginton as well as a letter explaining to Ginton that he has the right to proceed *pro se* or the right to retain new counsel. A copy of the letter is appended to Attorney Heilman's petition, as required by this Court's decision in **Commonwealth v. Millisock**, 873 A.2d 748 (Pa. Super. 2005), in which we held that "to facilitate appellate review, ... counsel *must* attach as an exhibit to the petition to withdraw filed with this Court a copy of the letter sent to counsel's client giving notice of the client's rights." *Id.*, at 749 (emphasis in original).

justice. **See id.**, at 1372. We further held that a defendant must also demonstrate the following: (1) a good faith basis for believing the officer willfully misrepresented the existence of the CI or the information conveyed by the CI; (2) without the information from the CI, no probable cause existed; and (3) production of the CI is the only means of substantiating his claim. **See id.**, at 1374. "The defendant need not predict exactly what the informant will say, but he must demonstrate a reasonable possibility the informant could give evidence that would exonerate him." **Commonwealth v. Belenky**, 777 A.2d 483, 488 (Pa. Super. 2001) (citation omitted). Only after the defendant has met this burden will the court weigh the defendant's proof against the government's need to withhold the CI's identity. **See Bonasorte**, 486 A.2d at 1374. **See also, Commonwealth v. Brown**, 836 A.2d 989, 993-994 (Pa. Super. 2003), **aff'd**, 582 Pa. 573, 873 A.2d 1275 (2005).

Herein, Ginton sought the disclosure of the CI's identity in order to substantiate a defense of misidentification. As noted by the trial court, however, Ginton has not shown that the disclosure of the CI's identity is material to the case, as there was no indicia of misidentification. Trial Court Opinion, 6/4/12 at 5. Officers Bogan and Jackson both observed Ginton from close range during three separate drug transactions. This identification was further corroborated by the recovery of the prerecorded drug money from Ginton, and the fact that Ginton's cell phone number matched the

number provided to the CI and used for a subsequent controlled transaction. Based on the foregoing, we find that the trial court did not err in finding Ginton failed to meet his burden of showing the requested information was material to his defense. As this threshold was not fulfilled, the trial court was not required to balance any competing interests to determine whether disclosure was required, or to consider the danger to the CI of disclosure. **See *Belenkey*, 777 A.2d at 489; *Bonasorte*, 486 A.2d at 1374.** Accordingly, the trial court did not abuse its discretion by denying Ginton's motion to disclose the identity of the CI.

Ginton next challenges the sufficiency of the evidence to support his convictions. However, our review of the record reveals that Ginton did not raise this issue in his Rule 1925(b) statement. "[I]n order to preserve their claims for appellate review, [a]ppellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Rule 1925. Any issues not raised in a 1925(b) statement will be deemed waived." ***Commonwealth v. Lord*, 453 Pa. 415, 719 A.2d 306, 309 (1998).** Accordingly, we are constrained to find this issue waived.

Lastly, Ginton argues that the sentence imposed by the trial court was "illegal or excessive." Appellant's Brief at 16. To the extent Ginton challenges the discretionary aspects of his sentence, this issue was not included in Ginton's Rule 1925(b) statement and is therefore waived. **See *Lord, supra*.** Ginton's challenge to the legality of his sentence, however,

cannot be waived. *Commonwealth v. Williams*, 980 A.2d 667, 672 (Pa. Super. 2009), *appeal denied*, 605 Pa. 700, 990 A.2d 730 (2010). “[T]he determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary.” *Commonwealth v. Hughes*, 986 A.2d 159, 160 (Pa. Super. 2009) (citation omitted).

Our review of Glinton’s sentence does not reveal any illegality. Glinton’s sentence of one and one-half to four years’ imprisonment is well within the statutory limits. No further penalties were imposed on his remaining convictions. Therefore, we find no grounds to disturb the trial court’s sentence.

After examining the issues contained in the *Anders* brief and undertaking our independent review of the record, we concur with counsel’s assessment that the appeal is wholly frivolous.

Application of Jill Heilman, Esquire, to withdraw as counsel is granted. Judgment of sentence affirmed. Jurisdiction relinquished.