NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. SHADARRYL P. JONES, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 533 WDA 2013

Appeal from the Judgment of Sentence entered March 11, 2013,
in the Court of Common Pleas of Erie County,
Criminal Division, at No(s): CP-25-CR-0002596-2012.

BEFORE: BOWES, ALLEN, and LAZARUS, J.

MEMORANDUM BY ALLEN, J.: FILED: December 10, 2013

Shadarryl P. Jones, ("Appellant"), appeals from the judgment of sentence imposed after a jury convicted him of robbery, theft by unlawful taking, recklessly endangering another person, possession of an instrument of crime, and firearms not to be carried without a license.[1] Appellant's appointed counsel seeks to withdraw, citing ***Anders v. California***, 386 U.S. 738 (1967) and ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981). We affirm the judgment of sentence and grant counsel's petition to withdraw.

The trial court summarized the pertinent facts and procedural history as follows:

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[1] 18 Pa.C.S.A. §§ 3704(a)(1)(iii), 3921(a), 2705, 907(a) and 6106(a)(1).

[O]n June 20, 2012, in the City of Erie, at about 6:00 p.m., … [Marcelino] Rivera's car was parked outside the home of Yvette Jennings ("Jennings"), the mother of [their] one-year old baby. Rivera had placed the baby in a car seat in his car as he and Jennings were getting ready to leave Jennings' house to take the baby to the park. Rivera returned to the porch to get Jennings and the diaper bag. Upon turning to return to the car, Rivera saw Appellant entering his car.

When Rivera approached Appellant to stop an apparent theft, Appellant pointed a gun directly at Rivera. Appellant then found Rivera's gun [in the car], which he promptly stole. Appellant [fled on foot] after stealing the gun.

Jennings had known Appellant as a friend for a period of time before the incident and was familiar with his nickname, "Chug." After Appellant started running down the street, Jennings chased after him, calling him by his nickname. Appellant was not wearing a mask or any other forms of concealment. [Jennings was unable to apprehend Appellant.]

[Mr. Rivera then called the police.] When the police arrived, Jennings identified Appellant to the police by accessing Appellant's Facebook profile page. At the police station, Rivera then identified Appellant from a photo line-up of eight individuals. Both Rivera and Jennings testified at trial and unequivocally identified Appellant as the perpetrator.

[Appellant was subsequently arrested and charged with the aforementioned crimes. A jury trial commenced on January 22, 2013 and on January 23, 2013, the jury returned its guilty verdicts.]

Appellant was sentenced on February 27, 2013 to an aggregate sentence of 7½ to 15 years of incarceration, as follows: Count 1: Robbery – 60 to 120 months of incarceration; Count 2: Theft by Unlawful Taking - merged with Count 1; Count 4: Recklessly Endangering Another Person – merged with Count 1; Count 5, Possessing Instruments of Crime – 3 years of probation consecutive to Count 6; and Count 6: Firearms not to be Carried Without a License – 30-60 months of incarceration consecutive to Count 1.

> On March 11, 2012, Appellant filed a Post-Sentence Motion requesting a new trial and reconsideration/modification of sentence. Appellant claimed inadmissible hearsay testimony was used for identification purposes and the [trial] court did not adequately consider the mandatory five-year minimum sentence at Count 1 and/or Appellant's age, rehabilitative potential or family support when imposing the sentence consecutively. The Post-Sentence Motion was denied on March 12, 2013.

Trial Court Opinion and Order, 5/3/13, at 1-3.

Appellant filed a timely notice of appeal. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issue for our review:

> I. Whether the claims advanced by Appellant are supported by a factual and legal basis and whether the verdict was supported by sufficient evidence?

Anders Brief at 5 (unnumbered).

Preliminarily, we note that Appellant's counsel has filed a brief pursuant to ***Anders*** and its Pennsylvania counterpart, ***McClendon***. ***See Anders***, 386 U.S. 738; ***McClendon***, 434 A.2d at 1187. Where an ***Anders/McClendon*** brief has been presented, our standard of review requires counsel seeking permission to withdraw pursuant to ***Anders*** to: (1) petition the court for leave to withdraw stating that after making a conscientious examination of the record it has been determined that the appeal would be frivolous; (2) file a brief referring to anything that might arguably support the appeal, but which does not resemble a "no merit" letter or amicus curiae brief; and (3) furnish a copy of the brief to the defendant and advise him of his right to retain new counsel or raise any additional

points that he deems worthy of the court's attention. ***Commonwealth v. McBride***, 957 A.2d 752, 756 (Pa. Super. 2008). Counsel is required to submit to this Court "a copy of any letter used by counsel to advise the appellant of the rights associated with the ***Anders*** process." ***Commonwealth v. Woods***, 939 A.2d 896, 900 (Pa. Super. 2007). Pursuant to ***Commonwealth v. Santiago***, 978 A.2d 349, 361 (Pa. 2009), an appellant's counsel must state the reasons for concluding that the appeal is frivolous in the ***Anders*** brief. If these requirements are met, this Court may then review the record to determine whether the appeal is frivolous.

In the instant case, by letter dated August 23, 2012, counsel notified Appellant of his intent to file an ***Anders*** brief and petition to withdraw with this Court, and informed Appellant of his rights to retain new counsel and raise additional issues. That same day, Appellant's counsel filed an appropriate petition seeking leave to withdraw. Finally, Appellant's counsel has submitted an ***Anders*** brief to this Court, with a copy provided to Appellant. We are satisfied that counsel has adhered to the technical requirements set forth in ***Anders*** and ***McClendon***, and proceed to address the substantive issue raised in the ***Anders*** brief.

In the ***Anders*** Brief, Appellant argues that the evidence was insufficient to support the jury's verdicts because the two eyewitnesses, Marcelino Rivera and Yvette Jennings, did not see Appellant commit the crimes for which he was convicted. When reviewing a challenge to the sufficiency of the evidence, we are guided by the following principles:

> We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.
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> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Tarrach, 42 A.3d 342, 345 (Pa. Super. 2012).

Here, Appellant was convicted of robbery, theft by unlawful taking, recklessly endangering another person, possessing an instrument of crime, and firearms not to be carried without a license.

An individual is guilty of robbery pursuant to 18 Pa.C.S.A. § 3704(a)(1)(iii) if he "commits or threatens immediately to commit any felony of the first or second degree."

An individual is guilty of theft by unlawful taking at 18 Pa.C.S.A. § 3921(a) if he "unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof."

An individual recklessly endangers another person if he "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." 18 Pa.C.S.A. § 2705.

Pursuant to 18 Pa.C.S.A. 907(a), pertaining to the possession of instruments of crime, "a person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally."

Finally, 18 Pa.C.S.A. § 6106(a)(1) provides: "any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree."

The trial court, finding no merit to Appellant's sufficiency claim, explained:

> There were two eyewitnesses who identified Appellant after observing him in broad daylight: the victim, Marcelino Rivera, and Yvette Jennings, a friend of Appellant.
>
> Rivera saw Appellant steal his gun from his car. Appellant accomplished the robbery by holding Rivera at gunpoint. Rivera was in close proximity to Appellant who did not conceal his appearance and Rivera's attention was focused on Appellant. The one-year-old child was in close proximity in the car seat while Appellant was brandishing his gun.
>
> [Appellant's] counsel was able to argue to the jury any deficiencies in Rivera's identification [of Appellant]. The jury must have found Rivera's testimony credible.
>
> Rivera's girlfriend, Yvette Jennings, also testified at trial. Her testimony corroborated Rivera's identification testimony. She had known Appellant for some time prior to the robbery. She called out Appellant's nickname and chased him down the street. Again, the circumstances were that the crime took place in broad daylight; Jennings was in close proximity to Appellant; and, Jennings had sufficient time in which to recognize Appellant.

> It was apparent to the [trial court] that Jennings bore no ill will toward Appellant and had no motive to fabricate an identification. In fact, Jennings appeared reluctant to testify as she had been friends with Appellant.
>
> Again, trial counsel argued to the jury any deficiencies in her identification testimony. The jury must have found Jennings to be credible.

Trial Court Opinion, 5/3/13 at 4-5.

Our review of record supports the trial court's analysis. Mr. Rivera testified that on June 20, 2012, after he had placed his child inside the car and walked about seven or eight feet back to Ms. Jennings' house, he heard the door of his car open and saw Appellant enter his car. N.T., 1/22/13, at 25-26. Mr. Rivera then saw Appellant pull a gun out of his waistband, point it at him and say, "Don't move or I'll shoot you." *Id*. at 27. Mr. Rivera testified that there was nothing between him and Appellant to obstruct his view, and that he was looking directly at Appellant's face. *Id*. at 27, 45. Mr. Rivera then observed Appellant sit down in the driver's seat and search the console and glove box of the car, and then reach underneath the driver's seat to retrieve Mr. Rivera's gun. *Id*. at 27-34. Mr. Rivera then saw Appellant place both guns in his waistband and walk quickly away, before getting on a bicycle and continuing his flight. *Id*. Subsequently, Mr. Rivera identified Appellant from a photographic lineup. *Id*. at 43.

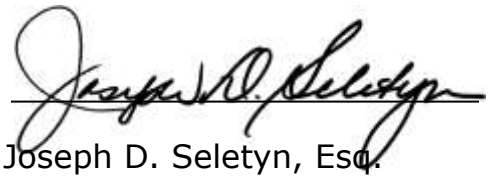
Ms. Jennings testified that she was standing on the porch when Mr. Rivera placed their child in the car. *Id*. at 65. Ms. Jennings then proceeded to cross the street with her mother when she heard a commotion. *Id*. at 66.

She looked behind her and saw Appellant, whom she knew as "Chug," getting onto a bicycle. *Id*. at 71-72. Ms. Jennings then chased Appellant, but was unable to catch him. *Id*. Ms. Jennings subsequently identified Appellant as the person she saw on the bicycle. *Id*. at 68, 74-76.

The jury, as the finder of fact, having heard the testimony of Mr. Rivera and Ms. Jennings, found their testimony to be credible and their identification of Appellant to be reliable. Mr. Rivera's account of the robbery was consistent with that of Ms. Jennings'. We will not disturb such credibility determinations on appeal. ***See Tarrach*** 42 A.3d at 345 ("It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder"). The testimony of Mr. Rivera and Ms. Jennings that Appellant pointed a gun at Mr. Rivera, then stole Mr. Rivera's gun, before fleeing down the street, was sufficient to sustain Appellant's convictions for robbery, theft, reckless endangerment, possession of an instrument of crime, and carrying a firearm without a license. Upon our independent review of the record, we find Appellant's claims frivolous. Therefore, we affirm the judgment of sentence and grant counsel's petition to withdraw.

Judgment of sentence affirmed. Petition to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/10/2013