

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

ZACHARY JULIUS SCOTT

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 609 WDA 2012

Appeal from the Sentencing March 7, 2012
In the Court of Common Pleas of Erie County
Criminal Division at No(s): CP-25-CR-0001102-2011

BEFORE: SHOGAN, J., OTT, J., and COLVILLE, J.*

MEMORANDUM BY OTT, J.

Filed: February 26, 2013

Zachary Julius Scott appeals from the judgment of sentence following his conviction of charges of simple assault and harassment.¹ Scott received an aggregate sentence of two years' probation, 100 hours of community service and \$100.00 restitution. Scott's sole issue on appeal is that the trial court erred in failing to strike a juror who, after being selected, realized she had worked for the victim's father seven years before. Counsel has filed an *Anders*² brief and motion to withdraw as counsel. After a thorough review

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S. §§ 2701(a)(1) and 2709(a)(1), respectively.

² *Anders v. California*, 386 U.S. 738 (1967).

of the official record, Appellant's brief,³ and relevant law, we grant counsel's motion to withdraw and affirm the judgment of sentence.

Recently, our Supreme Court discussed the three requirements that counsel must meet before he or she is permitted to withdraw from representation as follows:

First, counsel must petition the court for leave to withdraw and state that after making a conscientious examination of the record, he has determined that the appeal is frivolous; second, he must file a brief referring to any issues in the record of arguable merit; and third, he must furnish a copy of the brief to the defendant and advise him of his right to retain new counsel or to himself raise any additional points he deems worthy of the Superior Court's attention. Super. Ct. Op. at 2 (citing *Commonwealth v. Ferguson*, 761 A.2d 613, 616 (Pa. Super. 2000)).

Commonwealth v. Santiago, 602 Pa. 159, 978 A.2d 349, 351 (2009). FN6

FN6. We note that the holding in *Santiago* altered the prior requirements for withdrawal under *Anders* as *Santiago* now requires counsel to provide the reasons for concluding the appeal is frivolous; however, our Supreme Court explained that the requirements enumerated in *Santiago* would apply only to cases wherein the briefing notice was issued after August 25, 2009, the date upon which *Santiago* was filed. Since the briefing notice for the within matter was issued after August 25, 2009, the *Anders* requirement set forth in *Santiago* that counsel must state her/his reasons for concluding the appeal is frivolous is required.

Commonwealth v. Garang, 9 A.3d 237, 240 (Pa. Super. 2010).

³ The Commonwealth has filed a letter indicating the belief that a response to the *Anders* brief is not necessary and, therefore, did not file a brief.

Counsel has fulfilled all of the requirements under **Anders** and **Santiago**, including the letter to Scott informing him of his rights,⁴ therefore, we grant the motion to withdraw.

The test for determining whether a prospective juror should be disqualified is whether he is willing and able to eliminate the influence of any scruples and render a verdict according to the evidence, and this is to be determined on the basis of answers to questions and demeanor.... It must be determined whether any biases or prejudices can be put aside on proper instruction of the court.... A challenge for cause should be granted when the prospective juror has such a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses that the court will presume a likelihood of prejudice or demonstrates a likelihood of prejudice by his or her conduct or answers to questions.... *The decision on whether to disqualify is within the discretion of the trial court and will not be reversed in the absence of a palpable abuse of discretion*

Commonwealth v. Koehler, 737 A.2d 225, 238 (Pa. 1999) *quoting Commonwealth v. Wilson*, 672 A.2d 293, 299 (Pa. 1996).

[A] court may properly refuse to excuse a juror when the trial judge believes that the juror would be fair and impartial.

Id., *quoting Commonwealth v. Chambers*, 685 A.2d 96, 107 (Pa. 1996).

The trial court has related the history of the issue in its Pa.R.A.P. 1925(a) Opinion.

In the questioning of the jury pool during voir dire, The Commonwealth and Defense Counsel asked, *inter alia*, whether any of the potential jurors knew the victim. The victim was not present during questioning. No potential juror replied in the affirmative, and Juror #2 was empanelled. However, before the

⁴ Scott has not filed his own response.

start of the trial, when the victim was brought into the courtroom, Juror #2 informed the Court's tipstaff that she was familiar with the victim. The attorneys were allowed to speak with Juror #2 outside the presence of the jury. The juror indicated that she was familiar with the victim due to the fact that she had worked under/with the victim's father at Mercyhurst College North East for approximately six years. Defense Counsel at that time requested permission to have Juror #2 removed. The Court denied the request and informed Defense Counsel that the issue would be revisited at the conclusion of trial.

Trial Court Opinion, 5/16/12 at 1-2.

At the end of trial, and before deliberation, Juror #2 was questioned on the record regarding her ability to be fair and impartial.

THE COURT: I understand that it turns out you worked for Rachel Brown's father at some point in time?

THE JUROR: Yes, sir. Seven years ago.

THE COURT: Co-workers?

THE JUROR: I have an agency – ad agency. I represented Mercyhurst North East about seven years ago.

THE COURT: What did he do?

THE JUROR: He was the Executive Vice President, so I worked –

THE COURT: Was [he] your boss?

THE JUROR: Not really.

THE COURT: Give me some indication, boss, co-worker?

THE JUROR: I guess ultimately, he was my boss.

THE COURT: All right, but removed to some degree?

THE JUROR: Yeah. I worked for a lot of people.

THE COURT: You left there when?

THE JUROR: When Dr. Gamble took over, the contracted service people were eliminated, which eliminated me.

THE COURT: Now, you know Rachel just through him?

THE JUROR: Just seen her at a couple campus events.

THE COURT: That going to affect your ability to sit in judgment? Do you feel hampered one way or another as to your verdicts in this case?

THE JUROR: I don't think so, sir. I –

THE COURT: Well –

THE JUROR: I would have spoken up right off the bat, but I didn't – the name didn't click.

THE COURT: I got you.

THE JUROR: I don't know her.

THE COURT: All right. The lawyers – we have to do this because we have to make a record that we have a fair and impartial juror, so the lawyers may want to ask you a couple questions.

THE JUROR: Okay.

THE COURT: anything?

MS. MIKIELSKI [defense counsel]: So you're saying you don't believe that you think you can be fair and impartial or you can be, correct?

THE JUROR: Oh, no. I can. I'm an intelligent person. I'm not just – I make my own judgments based on what I hear.

MS. MIKIELSKI: Have you had any interaction with the family since?

THE JUROR: No.

MS. MIKIELSKI: No longer with him –

THE JUROR: No.

MS. MIKIELSKI: --on an official basis?

THE JUROR: In years. No. No.

MS. MIKIELSKI: Okay.

THE COURT: Any further inquiry?

MS. MIKIELSKI: No.

THE COURT: You can resume your seat. Thank you. Do you wish to continue with your motion to remove the juror?

MS. MIKIELSKI: Yes, Your Honor.

THE COURT: All right. The motion is overruled. There is an adequate record here that the juror can be fair and impartial. I'm not going to remove the juror under these circumstances.

N.T Trial, 1/20/12 at 144-146.

Our review of the record leads us to agree with both the trial court and appellate counsel that there is no indication Juror #2 was unfit to serve. The law allows for dismissal of a juror where there is a demonstrably close relationship and/or when the jurors answers to questioning indicates a prejudice, bias or inability to remain fair and impartial. The record indicates Juror #2 was a business acquaintance of the victim's father and had nothing more than a passing awareness of the victim. The trial court believed Juror #2 when she testified she could remain fair and impartial. There is nothing of record to indicate the trial court abused its discretion in believing the juror and allowing her to remain seated. Therefore, Scott is not entitled to relief.

Judgment of sentence affirmed. Motion to withdraw as counsel is granted.