

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

EDWIN RODRIGUEZ

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 615 MDA 2012

Appeal from the Judgment of Sentence October 20, 2010
In the Court of Common Pleas of Lebanon County
Criminal Division at No(s): CP-38-CR-0000381-2010

BEFORE: FORD ELLIOTT, P.J.E., PANELLA, J., and ALLEN, J.

MEMORANDUM BY PANELLA, J.

Filed: February 26, 2013

Appellant, Edwin Rodriguez, appeals from the judgment of sentence entered October 20, 2010, by the Honorable Charles T. Jones, Court of Common Pleas of Lebanon County.¹ Additionally, Rodriguez's attorney, Elizabeth Judd, Esquire, has filed an application to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009). After review, we deny counsel's petition and remand for further proceedings.

On July 14, 2005, Rodriguez was charged with two counts of possession with intent to deliver a controlled substance² and two counts of

¹ Although Rodriguez purports to appeal from the jury verdict entered on September 16, 2010, his appeal properly lies from the judgment of sentence entered October 20, 2010. We have amended the caption accordingly.

² 35 PA.CON.S.TAT.ANN. § 780-113(a)(30).

possession of crack cocaine.³ On March 15, 2010, the trial court appointed Elizabeth Judd, Esquire, as Rodriguez's counsel. Prior to trial, on May 28, 2010, Attorney Judd filed a Request to Withdraw as Counsel with the trial court. Attorney Judd sought withdrawal because of Rodriguez's failure to meet with her on two separate dates and his "failure to cooperate." Following a hearing, at which Rodriguez was not present, the trial court permitted Attorney Judd to withdraw her representation and further declined to appoint new counsel due to Rodriguez's alleged conduct. Order, 6/9/10.

With the aid of a court-appointed interpreter, Rodriguez proceeded *pro se* to a jury trial on September 16, 2010. Thereafter, the jury convicted Rodriguez of all counts. On October 20, 2010, the trial court sentenced Rodriguez to four to twenty years' imprisonment. On January 25, 2011, the Lebanon County Office of the Public Defender filed a petition to appeal *nunc pro tunc* and to appoint counsel on Rodriguez's behalf. The trial court ultimately reinstated Rodriguez's appeal rights, and again appointed Attorney Judd as counsel. After the trial court denied Rodriguez's post-sentence motion, this appeal followed.

Preliminarily, we note that Attorney Elizabeth Judd has petitioned to withdraw and has submitted an ***Anders*** brief in support thereof contending that Rodriguez's appeal is frivolous. The Pennsylvania Supreme Court has

³ 35 PA.CON.S.TAT.ANN. § 780-113(a)(16).

articulated the procedure to be followed when court-appointed counsel seeks to withdraw from representing an appellant on direct appeal:

[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, 978 A.2d 349, 361 (Pa. 2009).

We note that Attorney Judd has complied with all of the requirements of **Anders** as articulated in **Santiago**.⁴ We will now proceed to examine the issues set forth in the **Anders** brief, which Rodriguez believes to be of arguable merit.

On appeal, Rodriguez first challenges the sufficiency of the evidence in support of his convictions. Our standard of review is as follows:

The standard we apply in reviewing the sufficiency of evidence is whether, viewing all the evidence admitted at trial in the light

⁴ Additionally, Attorney Judd confirms that she sent a copy of the **Anders** brief to Rodriguez as well as a letter explaining to Rodriguez 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 Judd'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).

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 that of 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. Helsel, 53 A.3d 906, 917, 917-918 (Pa. Super. 2012)

(citation omitted).

Section 780.113(a)(30) of The Controlled Substance, Drug, Device and Cosmetic Act prohibits the following acts:

[T]he manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. § 780.113(a)(30). To sustain a conviction for PWID “all of the facts and circumstances surrounding the possession are relevant and the elements of the crime may be established by circumstantial evidence.”

Commonwealth v. Little, 879 A.2d 293, 297 (Pa. Super. 2005) (citation omitted).

Rodriguez argues that the evidence was insufficient because the Commonwealth failed to prove his identity as the perpetrator. At trial, the Commonwealth presented testimony from two Pennsylvania State Police Troopers that Rodriguez sold crack cocaine directly to them on two occasions. N.T., Jury Trial, 9/16/10 at 19-25; 39-43. One officer identified Rodriguez as the person from whom they had bought the crack cocaine from a photo array immediately following the incident. *Id.* at 25-26. Both officers identified Rodriguez at the time of trial as the individual who had sold them crack cocaine. Additionally, although Rodriguez maintained at trial that he could not have delivered the drugs as he was incarcerated at the time of the incident in 2003, the Commonwealth presented documents from the State Correctional System that indicated that Rodriguez was not incarcerated at the time of the incidents. *Id.* at 4-5. Based on the totality of the evidence established at trial, we find Rodriguez's challenge to the sufficiency of the evidence to support his convictions to be without merit.

Lastly, Rodriguez argues that his convictions were against the weight of the evidence. Appellant preserved this issue by raising it in his post-sentence motion filed on December 14, 2011. Our standard of review is well-settled:

The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses.

As an appellate court, we cannot substitute our judgment for that of the finder of fact. Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. A verdict is said to be contrary to the evidence such that it shocks one's sense of justice when "the figure of Justice totters on her pedestal, or when "the jury's verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience."

Furthermore,

where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Cruz, 919 A.2d 279, 281-82 (Pa. Super. 2007) (citations omitted).

The trial court, after reviewing the record, concluded that the verdict did not shock its conscience. **See** Trial Court Opinion, 3/6/12. In light of the evidence discussed *supra*, we cannot conclude that this decision was an abuse of the trial court's discretion. Accordingly, we conclude that this issue on appeal merits no relief.

Although we agree with trial counsel that the issues Rodriguez wished to raise on appeal have no merit, our inquiry does not end there. "Once counsel has satisfied the [***Anders***] requirements, it is then this Court's duty to conduct its own review of the trial court's proceedings and render an

independent judgment as to whether the appeal is, in fact, wholly frivolous.”
Commonwealth v. Edwards, 906 A.2d 1225, 1228 (Pa. Super. 2006).

Our review of the record does reveal one issue of arguable merit – namely, whether Rodriguez was deprived of the benefit of effective representation of counsel.

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his or her defense. ***Rothgery v. Gillespie County***, --- U.S. ----, 128 S.Ct. 2578, 2583 n. 8, 171 L.Ed.2d 366 (2008). Similarly, Article I, Section 9 of the Constitution of this Commonwealth affords to a person accused of a criminal offense the right to counsel. ***Commonwealth v. McDonough***, 571 Pa. 232, 812 A.2d 504, 506 (2002). However, the constitutional right to counsel of one's own choice is not absolute. ***Commonwealth v. Randolph***, 582 Pa. 576, 873 A.2d 1277, 1282 (2005) (citing and quoting ***Commonwealth v. McAleer***, 561 Pa. 129, 748 A.2d 670, 673-74 (2000)). Rather, the right of an accused individual to choose his or her own counsel, as well as a lawyer's right to choose his or her clients, must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice. ***Randolph, supra*** at 1282. Thus, while defendants are entitled to choose their own counsel, they should not be permitted to unreasonably clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice. ***Id.***

Commonwealth v. Lucarelli, 971 A.2d 1173, 1178-1179 (Pa. 2009).

Instantly, as previously noted, the record indicates that Rodriguez represented himself *pro se* at trial and sentencing despite his weak English language and literary skills. Attorney Judd had been appointed to represent Rodriguez before trial, but sought withdrawal based on Rodriguez's failure to meet with her on two separate dates and his “failure to cooperate.”

Rodriguez was not present at the pre-trial hearing where the trial court permitted Attorney Judd to withdraw and declined to appoint new counsel due to Rodriguez's alleged conduct.

While a defendant may forfeit the right to counsel through "extremely serious misconduct" or "extremely dilatory conduct," *see Lucarelli*, at 1179 (citing *United States v. Thomas*, 357 F.3d 357, 362 (3d Cir. 2004)), the record does not indicate that Rodriguez engaged in such conduct as has been recognized by Pennsylvania courts to warrant forfeiture of his Sixth Amendment rights. *See Lucarelli* (right to counsel forfeited where appellant's failure to retain and maintain counsel despite his means and ability to do so over an eight-month period demonstrated extremely dilatory conduct); *Commonwealth v. Kelly*, 5 A.3d 370 (Pa. Super. 2010) (right to counsel forfeited where defendant repeatedly refused to cooperate with three separate appointed counsel), *appeal denied*, 32 A.3d 1276 (Pa. 2011); *Commonwealth v. Thomas*, 879 A.2d 246 (Pa. Super. 2005) (right to counsel forfeited through defendant's "pattern of serious misconduct, abuse, threats, and utter failure to collaborate in his own defense").

Neither the United States nor the Pennsylvania Supreme Courts have delineated the level of conduct that justifies forfeiture of a defendant's right to counsel. However, review of the above-referenced case law reveals conduct far more egregious than that reflected in the instant record. Accordingly, we are constrained to remand this case for a hearing on whether Rodriguez's conduct justified the forfeiture of his Sixth Amendment

right to counsel. While we are thus constrained to deny Attorney Judd's petition to withdraw at this juncture, we note the possibility that her continued representation at this stage may prove problematic, as Attorney Judd was the attorney who petitioned to withdraw from this matter prior to trial.

Case remanded with instructions. Petition to withdraw as counsel is denied. Jurisdiction relinquished.

Allen, J. concurs in result.