NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. STEVE R. WOODS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 644 EDA 2011

Appeal from the Judgment of Sentence February 28, 2005
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-04062191-2003.

BEFORE: OLSON, WECHT and COLVILLE, * JJ.

MEMORANDUM BY OLSON, J.: Filed: March 7, 2013

Appellant, Steve Woods, appeals from the judgment of sentence entered February 28, 2005, sentencing him to seven and one-half to 15 years' incarceration and two years' probation, for convictions of aggravated assault,[1] terroristic threats,[2] possession of an instrument of crime,[3] simple assault,[4] recklessly endangering another person,[5] and three violations of the Uniform Firearms Act.[6] For the following reasons, we affirm.

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[1] 18 Pa.C.S.A. § 27029(a)(4).

[2] 18 Pa.C.S.A. § 2706.

[3] 18 Pa.C.S.A. § 907.

[4] 18 Pa.C.S.A. § 2701.

[5] 18 Pa.C.S.A. § 2705.

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*Retired Senior Judge assigned to the Superior Court.

The trial court summarized the applicable factual and procedural background of this matter as follows:

> The testimony shows Appellant's convictions resulted from his assault on Complainant Melvin Gary on March 8, 2003 in the city and county of Philadelphia. Complainant at one time purchased drugs from Appellant. On March 8, 2003 at approximately 10:00 a.m., Complainant was standing outside of the Chinese store at 54th and Arlington Streets waiting for his food order when Appellant approached him and told him to leave the corner. They argued, and Appellant told Complainant if he was still there when Appellant returned, he would "F**k him up," then left. When Appellant returned approximately 5-10 minutes later to see Complainant still there, he pulled a handgun and hit Complainant in the face with it. The two men fought, and Complainant fled. Appellant chased Complainant and shot him in the back of his left hip. Complainant fell to the ground, and when Appellant caught up to him, he stood over Complainant and told him, "I'm going to kill you ni***r," and put the gun to Complainant's head. Complainant heard the gun click, but nothing happened. Appellant then got mad and hit Complainant repeatedly in the face and back of the head before a bystander intervened and pulled Appellant off of Complainant. Appellant left with the bystander, leaving Complainant lying in the street.
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> Minutes later, Police Officer Jerome Jackson, on patrol near 53rd and Berks Streets, arrived on the scene and saw neighbors standing around Complainant still lying in the street. The officer observed Complainant had been shot and suffered injuries to his face and head. Complainant told the officer what happened and gave a description of Appellant as a black male approximately 19 years old, weighing approximately 150-160 lbs, and armed with a gun. The officer transported Complainant to the hospital where he was treated for his injuries. Complainant spent two weeks in the hospital, followed by four weeks of physical therapy. The bullet remains lodged in his upper thigh, causing him constant pain, and doctors had to put a rod in his leg.

(Footnote Continued) ––––––––––––––––––––

[6] 18 Pa.C.S.A. §§ 6105, 6106 & 6108.

> At the hospital, Complainant spoke to [d]etectives about the shooting, and gave them a description and street name ("Delli") for Appellant. Complainant told detectives that Appellant lived in the 5200 block of Gainor Road, and that he used to buy drugs from Appellant. From the description given, detectives showed Complainant a photographic array, and Complainant positively identified Appellant as the man who shot him. On March 16, 2003, after obtaining a search warrant for Appellant's address at 5216 Gainor Road in Philadelphia, officers executed a search warrant and arrested Appellant in a second floor bedroom. Pursuant to his arrest, detectives also recovered from the room a BB rifle, a pellet rifle, and 67 packets of marijuana. Recovered from Appellant's pants pockets were 3 p[a]ckets of marijuana. All of the items recovered were placed on property receipts. At trial, the parties stipulated to the following: a seizure analysis of .752 grams of marijuana, non-licensure for both the BB and pellet rifles, and a prior conviction held by Appellant pursuant to [18 Pa.C.S.A.] §6105.

Trial Court Opinion, 2/15/2012, at 1-2.

On June 23, 2004, a bench trial was conducted, at the conclusion of which the court found Appellant guilty of the aforementioned crimes. The trial court found Appellant not guilty of simple possession. The trial court sentenced Appellant on August 18, 2004. However, Appellant filed a post-sentence motion, which the trial court granted on February 7, 2005. On February 28, 2005, the trial court resentenced Appellant, imposing the same sentence that it issued on August 14, 2004.

Appellant did not file an appeal, but did file a timely petition pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546, and, on November 30, 2010, was granted *nunc pro tunc* relief to reinstate his appellate rights. On May 3, 2011, in response to a trial court order, Appellant filed a timely statement of errors complained of on appeal

pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). The trial court filed its Rule 1925(a) opinion on February 15, 2012 (dated February 10, 2012). Therefore, this matter is ripe for our consideration.

Appellant presents the following issues for appeal:

1. Whether [the trial court] erred in not recusing himself when he previously lived in the same neighborhood as the Complainant, and in fact may have known the Complainant.
2. Whether the trial court erred in denying the Appellant relief because the verdict was contrary to law on the charge of aggravated assault.
3. Whether the trial court erred in denying the Appellant a new trial because the verdict was against the weight of the evidence.
4. Whether the trial court imposed an illegal sentence.

Appellant's Brief at 4.

Appellant's first issue on appeal challenges the trial court judge's failure to recuse himself, alleging that, as a former neighbor of the Complainant, the trial court exercised improper bias against Appellant. Appellant's Brief at 12-14. However, because Appellant presents no evidence that he sought a recusal at any time before appeal, we find the issue waived. ***See Commonwealth v. Johnson***, 719 A.2d 778, 790-791 (Pa. Super. 1998) (failing to identify where in the record the appellant sought recusal, Superior Court holds that the appellant's recusal issue was waived); Pa.R.A.P. 302(a) ("[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.")

Appellant's second issue challenges the sufficiency of the evidence for his conviction of aggravated assault. Appellant's Brief at 14-15. We consider sufficiency of the evidence arguments under a well-accepted standard of review:

> The standard we apply in reviewing the sufficiency of 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 factfinder 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 a 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. Muniz, 5 A.3d 345, 348 (Pa. Super. 2010) (internal citations and quotations omitted), *appeal denied*, 19 A.3d 1050 (Pa. 2011).

Appellant's sufficiency of the evidence argument challenges his conviction for aggravated assault, arguing that the evidence produced at trial fails to establish that Appellant attempted to or caused Complainant "**serious** bodily injury." Appellant's Brief at 15 (emphasis added). Though Appellant admits to having shot Complainant in the leg, Appellant argues that "while painful, [a shot in the leg] does not create a substantial risk of

death." ***Id.*** Furthermore, Appellant argues that, because the shot to the Complainant's leg did not cause him to suffer permanent disfigurement, or loss of use of his leg for a significant amount of time, the result was not a "serious bodily injury." ***Id.*** Therefore, Appellant argues that there was insufficient evidence of aggravated assault. ***Id.***

In this matter, Appellant was convicted under sub-section 2702(a)(4) of the aggravated assault statute, which mandates that a person is guilty of aggravated assault if he "attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon." 18 Pa.C.S.A. § 2702(a)(4). Therefore, contrary to Appellant's assertion, Appellant's conviction for aggravated assault did not require proof of an attempt to cause "serious" bodily injury, only evidence that Appellant attempted to cause "bodily injury" with a "deadly weapon." ***See*** 18 Pa.C.S.A. § 2702(a)(4).

Furthermore, pursuant to 18 Pa.C.S.A. § 2301, "bodily injury" is defined as "[i]mpairment of physical condition or substantial pain," and "deadly weapon" is defined as "any firearm, whether loaded or unloaded…." In this matter, Appellant admits that the Commonwealth presented evidence that he shot the victim in the leg, causing the victim substantial pain, a two-week hospital stay, surgery, temporary use of a wheel chair, and weeks of

physical therapy. Such evidence is more than sufficient to substantiate Appellant's conviction for aggravated assault under sub-section 2702(a)(4).[7]

Appellant's third issue on appeal challenges the weight of the evidence. Appellant's Brief at 16-18. Pursuant to Pennsylvania Rule of Criminal Procedure 607:

> A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:
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> (1) orally, on the record, at any time before sentencing;
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> (2) by written motion at any time before sentencing; or
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> (3) in a post-sentence motion.

See Pa.R.Crim.P. 607. Failure to properly raise a weight of the evidence claim pursuant to Rule 607 results in waiver of that claim. ***See*** Pa.R.Crim.P. 607, Comment.

In this matter, though Appellant filed a post-sentence motion, that motion did not raise his weight of the evidence claim. Furthermore, review of the certified record reflects that Appellant did not preserve his weight of

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[7] Additionally, we note that even if Appellant had been convicted under a sub-section of the aggravated assault statute requiring prove of attempt to cause "serious bodily injury" (18 Pa.C.S.A. § 2702(a)(1)), such evidence was present in this matter. Specifically, at trial the Commonwealth presented evidence that, after shooting him in the leg, Appellant tried to shoot the victim in the head, but was unsuccessful because the gun jammed. Thereafter, Appellant pistol whipped the victim so hard that the victim's teeth were knocked out. Consequently, Appellant's sufficiency claim is without merit for these additional reasons.

the evidence claim in any other manner provided by Rule 607. Consequently, Appellant's weight of the evidence claims is waived.

Appellant's final issue on appeal purports to challenge the legality of his sentence. Appellant's Brief at 19-20. Under Pennsylvania law, "an illegal sentence is one that exceeds the statutory limits" or "if no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction." ***Commonwealth v. Bradley***, 834 A.2d 1127, 1131 (Pa. 2003); ***Commonwealth v. Lipinski***, 841 A.2d 537, 539 (Pa. Super. 2004).

In this matter, however, Appellant makes no argument that his sentence is in excess of the statutory limits or without statutory authorization. Rather, Appellant argues that the trial court improperly calculated his offense gravity score and, as such, misapplied the sentencing guidelines. Appellant's Brief at 20. Challenges to the trial court's application of the sentencing guidelines address the discretionary aspects of Appellant's sentence, not its legality. ***See Commonwealth v. Krum***, 533 A.2d 134, 135 (Pa. Super. 1987) (*en banc*); ***Commonwealth v. Archer***, 722 A.2d 203, 209-210 (Pa. Super. 1998) (*en banc*) (case law draws distinction between truly "illegal" sentences, appeal of which may not be waived, and sentences which may have been the product of some type of legal error, which is subject to waiver).

Defendants, however, do not have the automatic right to challenge the discretionary aspects of their sentence. Rather, they must seek permission by setting forth a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence in a separate statement immediately preceding the argument section of their appellate brief. Pa.R.A.P. 2119(f); ***Commonwealth v. Goggins***, 748 A.2d 721, 726 (Pa. Super. 2000) (*en banc*). If an appellant fails to include a Rule 2119(f) statement, or fails to include an issue in his Rule 2119(f) statement, and the Commonwealth objects, then the issue is waived and this Court may not review the claim. ***Commonwealth v. Roser***, 914 A.2d 447, 457 (Pa. Super. 2006).

In this matter, Appellant failed to include a Rule 2119 statement in his appellate brief, and the Commonwealth lodged a proper objection. Commonwealth's Brief at 17. Therefore, we are constrained to find Appellant's final issue waived.

Judgment of sentence affirmed.