

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JUAN PABLO P. DELVALLE

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 694 EDA 2012

Appeal from the Judgment of Sentence January 13, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007912-2010

BEFORE: GANTMAN, J., ALLEN, J., and OTT, J.

MEMORANDUM BY GANTMAN, J.:

FILED MAY 08, 2013

Appellant, Juan Pablo P. Delvalle, appeals from the judgment of sentence entered in the Philadelphia Court of Common Pleas, following his jury trial convictions for first degree murder, attempted murder, criminal conspiracy, carrying firearms without a license, and possession of an instrument of crime ("PIC").¹ We affirm Appellant's convictions, but vacate the judgment of sentence and remand for further proceedings including a new sentencing hearing.

The trial court set forth the relevant facts of this case as follows:

On Sunday, April 27, 2008, at approximately 5:49 p.m., Philadelphia Police Officer Joseph Conrad was flagged down by a male pedestrian while driving northbound on

¹ 18 Pa.C.S.A. §§ 2502(a), 901, 903, 6106(a)(1), and 907, respectively.

Frankford Avenue, who advised the officer that a shooting had just occurred around the corner at Amber and Cambria [Sts]. The officer immediately proceeded to that location where he observed a black male, later identified as Khalif Leslie, the victim herein, laying facedown with blood coming, apparently, from his facial area. The victim was transported to Temple University Hospital where he was pronounced dead at approximately 6:22 p.m. An autopsy of the victim's body revealed he expired from a gunshot wound that entered his back and exited his chest. The medical examiner concluded the manner of death was homicide.

Investigative work by the Philadelphia Police revealed that on April 27, 2008, [Appellant] approached Jason Perry asking him for a ride. After initially telling [Appellant] "No," Perry relented and drove [Appellant] past the corner of Amber and Cambria St. where Perry heard someone call out his (Perry's) name as they drove past. After hearing this, Perry drove the car around the block and back to the same corner where he pulled over. Perry then heard gunshots and drove away as quickly as possible. After driving a few blocks, Perry looked over and saw a gun in [Appellant's] lap. Perry demanded that [Appellant] get out of his car and [Perry] drove off without him.

After the shooting, [Appellant] returned to Tammy Perry's residence, who is Jason Perry's sister. Tammy Perry was inside her room and she told [Appellant], who was standing outside her window, that she was going to call the police. She testified that [Appellant] broke down the door to her room and pointed a gun at her eight-year-old son. Another friend of [Appellant] came into the room and got [Appellant] out before anything else happened. Tammy Perry did not call the police at that time but later gave a statement to homicide detectives outlining what had occurred.

On May 2, 2008, Jason Perry turned himself [in to] police and gave a statement to Detective Pirrone of the Homicide Unit of the Philadelphia Police Department. Following their discussion with Jason Perry, authorities issued an arrest warrant for [Appellant]. Perry later pled guilty, *inter alia*, to third degree murder and criminal conspiracy to commit

murder, which charges arose out of the death of the victim herein. [Appellant] was eventually located in Virginia, arrested and charged with the above crimes.

(Trial Court Opinion, filed July 6, 2012, at 2). A jury convicted Appellant of first degree murder, attempted murder, criminal conspiracy, carrying firearms without a license, and PIC, on January 13, 2012. That same day, the court sentenced Appellant to "mandatory" life imprisonment without the possibility of parole for the first degree murder. The court also sentenced Appellant to concurrent terms of ten (10) to twenty (20) years' incarceration for attempted murder, ten (10) to twenty (20) years' incarceration for criminal conspiracy, three and one-half (3½) to seven (7) years' incarceration for carrying firearms without a license, and two and one-half (2½) to five (5) years for PIC. Appellant did not file post-sentence motions. Appellant filed a timely notice of appeal on February 9, 2012. The court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant complied.

Appellant raises the following issues for our review:

IS THE MANDATORY LIFE SENTENCE IMPOSED IN THIS CASE UNCONSTITUTIONAL AND SHOULD THE CASE BE REMANDED FOR RESENTENCING IN LIGHT OF **MILLER V. ALABAMA**, 123 S.Ct. 2455, 183 L.Ed.3d 407 (2012)?

SHOULD AN ARREST OF JUDGMENT BE GRANTED IN THIS CASE DUE TO A LACK OF SUFFICIENCY IN THE EVIDENCE?

(Appellant's Brief at 6).

For disposition, we initially address Appellant's second issue, where he

claims **he** was the driver of the vehicle involved in the shooting, the passenger inside the vehicle fired the fatal shots, and Appellant was “merely present” at the time of the victim’s murder. Appellant contends he was only boasting when he bragged shortly after the murder that he had shot someone. Appellant insists he was not an active participant in the crime, and the only direct evidence linking him to the shooting was Mr. Perry’s testimony that Appellant had a handgun in the front seat of the car. Appellant asserts Mr. Perry just heard gunshots, but he did not see where they came from. In sum, Appellant maintains mere knowledge of the crime is insufficient to support his conspiracy conviction, he was only the driver of the vehicle involved in the shooting, and he did not shoot the victim. Appellant concludes, the evidence was insufficient to support his first degree murder and conspiracy convictions, and he is entitled to an arrest of judgment. We disagree.

When examining a challenge to the sufficiency of evidence, our standard of review is as follows:

The standard we apply in reviewing the sufficiency of the 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 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 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. Hansley, 24 A.3d 410, 416 (Pa.Super. 2011), *appeal denied*, 613 Pa. 642, 32 A.3d 1275 (2011) (quoting **Commonwealth v. Jones**, 874 A.2d 108, 120-21 (Pa.Super. 2005)).

The Pennsylvania Crimes Code defines first degree murder as follows:

§ 2502. Murder

(a) Murder of the first degree.—A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

18 Pa.C.S.A. § 2502(a). “To find a defendant guilty of first degree murder a jury must find that the Commonwealth has proven that he...unlawfully killed a human being and did so in an intentional, deliberate and premeditated manner.” **Commonwealth v. Sattazahn**, 563 Pa. 533, 540, 763 A.2d 359, 363 (2000), *judgment affirmed*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).

It is the element of a willful, premeditated and deliberate intent to kill that distinguishes first degree murder from all other criminal homicide. Specific intent to kill may be inferred from the defendant’s use of a deadly weapon upon a vital [part] of the victim’s body.

Id. at 540-41, 763 A.2d at 363 (internal citations omitted). Evidence “the

defendant shot the victim in the back with a handgun is sufficient to permit the inference of malice and specific intent to kill.” **Commonwealth v. Cruz**, 919 A.2d 279, 281 (Pa.Super. 2007), *appeal denied*, 593 Pa. 725, 928 A.2d 1289 (2007).

The Crimes Code defines the offense of conspiracy as follows:

§ 903. Criminal conspiracy

(a) Definition of conspiracy.—A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

* * *

18 Pa.C.S.A. § 903(a).

To sustain a conviction for criminal conspiracy, the Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and (3) an overt act was done in furtherance of the conspiracy.

Commonwealth v. Hennigan, 753 A.2d 245, 253 (Pa.Super. 2000) (quoting **Commonwealth v. Rios**, 546 Pa. 271, 283, 684 A.2d 1025, 1030 (1996), *cert. denied*, 520 U.S. 1231, 117 S.Ct. 1825, 137 L.Ed.2d 1032 (1997)).

The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished. Therefore, a conviction for conspiracy requires proof of the existence of a shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation.

Commonwealth v. McCall, 911 A.2d 992, 996 (Pa.Super. 2006) (quoting ***Commonwealth v. Johnson***, 719 A.2d 778, 784-85 (Pa.Super. 1998) (*en banc*), *appeal denied*, 559 Pa. 689, 739 A.2d 1056 (1999)).

Circumstantial evidence may provide proof of the conspiracy. The conduct of the parties and the circumstances surrounding such conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt. Additionally:

An agreement can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode. These factors may coalesce to establish a conspiratorial agreement beyond a reasonable doubt where one factor alone might fail.

Jones, supra at 121-22 (internal citations and quotation marks omitted).

Instantly, with respect to Appellant's sufficiency challenge, the court stated:

By presenting evidence that [Appellant] used a deadly weapon on a vital part of the victim's body, the Commonwealth clearly established that [Appellant] acted with malice and specific intent to kill. The record shows

that the victim was shot when he was only five to eight feet away from [Appellant] and he was shot in the middle of the back with the bullet piercing the victim's lung and heart and exiting through the front of his chest. [Appellant] also fired multiple shots into a group of people standing on a street corner. Such evidence clearly demonstrated that [Appellant] killed the victim and that the killing was committed with specific intent to kill....

* * *

Although Jason Perry maintained that he had no knowledge that [Appellant] was going to shoot anyone, his actions belie his testimony and the jury was free to reject his assertion that he had no clue that [Appellant] intended to shoot anyone when he drove the [Appellant] to the scene. ... Jason Perry not only pleaded guilty, *inter alia*, to third-degree murder and conspiracy to commit murder for the death of the victim herein, he testified that he agreed to drive [Appellant] to the scene and then did drive him to the scene where the incident occurred after which he circled the block twice before [Appellant] shot the victim. [Mr. Perry] then quickly sped away from the scene following the shooting with [Appellant] still sitting in the car. Given these facts, the jury was free to infer from Perry's and [Appellant's] actions that [Appellant] and Perry formed a corrupt confederation the object of which was to shoot and kill the victim....

(Trial Court Opinion at 3-5). The record supports the court's analysis. Mr. Perry gave Appellant a ride on April 27, 2008, to Amber and Cambria Streets, where Appellant spotted Victim. Mr. Perry pulled over and heard numerous gunshots. A witness identified Mr. Perry as the driver, and the passenger as the shooter. Mr. Perry drove for one block, realized Appellant was holding a handgun, and told Appellant to get out of the car. Minutes later, Appellant boasted he had just shot people. An autopsy of Victim's body revealed Appellant's gunshot entered Victim's back, pierced his heart

and lung, and exited his chest; causing death. Thus, the evidence was sufficient to support Appellant's conviction for first degree murder. **See Sattazahn, supra; Cruz, supra.** Further, Mr. Perry drove Appellant to the scene of the murder, circled the block twice, and sped away after the shooting with Appellant in the car. Mr. Perry pled guilty to third degree murder and conspiracy to commit murder. Therefore, the evidence was sufficient to support Appellant's conviction for conspiracy to commit murder. **See McCall, supra; Jones, supra; Hennigan, supra.** Accordingly, we affirm Appellant's convictions.

In his first issue, Appellant argues Pennsylvania's mandatory sentencing scheme, which required the imposition of a sentence of life without possibility of parole for juveniles convicted of first degree murder, constitutes cruel and unusual punishment under **Miller, supra.** Appellant concedes **Miller** allows the sentencing court to impose a sentence of life without parole but requires the court to hold a sentencing hearing and consider certain factors related to the juvenile's youth, immaturity, and the lack of full brain development, along with other traditional sentencing aspects. Appellant insists the court imposed life without the possibility of parole as a mandatory sentence. Appellant concludes this Court should vacate the judgment of sentence and remand for resentencing including consideration of appropriate age-related factors under **Miller.** We agree.

"A claim that implicates the fundamental legal authority of the court to

impose a particular sentence constitutes a challenge to the legality of the sentence.” **Commonwealth v. Catt**, 994 A.2d 1158, 1160 (Pa.Super. 2010) (*en banc*). “Issues relating to the legality of a sentence are questions of law....” **Commonwealth v. Diamond**, 945 A.2d 252, 256 (Pa.Super 2008), *appeal denied*, 598 Pa. 755, 955 A.2d 356 (2008). As with all questions of law on appeal, the standard of review is *de novo* and the scope of review is plenary. **Id.** An illegal sentence must be vacated. **Catt, supra.**

The Pennsylvania Supreme Court recently decided **Commonwealth v. Batts**, ___ A.3d ___, 2013 WL 1200252 (Pa. March 26, 2013), which held that under **Miller**, “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders.” **Batts, supra** at *9. The **Batts** Court also outlined various factors for the court’s consideration at resentencing:

[A]t a minimum it should consider a juvenile’s age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation.

Id. at *10. The Court continued:

We recognize the difference in treatment accorded to those subject to non-final judgments of sentence for murder as of **Miller’s** issuance and those convicted on or after the date of the High Court’s decision. As to the former, it is our determination here that they are subject to a mandatory

maximum sentence of life imprisonment as required by Section 1102(a), accompanied by a minimum sentence determined by the common pleas court upon resentencing.

Id.

In the instant case, Appellant, the Commonwealth, and the trial court agree Appellant is entitled to a resentencing hearing under ***Miller*** because Appellant was seventeen years old when he committed the offenses on April 27, 2008, and he received “mandatory” life imprisonment without parole. Further, Appellant was subject to a non-final judgment of sentence on June 25, 2012, the date the U.S. Supreme Court issued ***Miller***, and the claim was properly preserved on direct appeal. Therefore, Appellant is entitled to a resentencing hearing, including consideration of age-related factors and imposition of a minimum sentence. ***See Batts, supra.*** Accordingly, we affirm Appellant’s convictions but vacate the judgment of sentence and remand for resentencing. ***See Commonwealth v. Williams***, 871 A.2d 254 (Pa.Super. 2005) (reiterating principle that remand for resentencing is proper, if trial court errs in its sentence on one count in multi-count case, so court can restructure its entire sentencing plan).

Judgment of sentence vacated; case remanded for further proceedings. Jurisdiction is relinquished.

J-A08007-13

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Gambett", written over a horizontal line.

Prothonotary

Date: 5/8/2013