NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
SINHUE AMEA JOHNSON,	:	
	:	
Appellant	:	No. 708 MDA 2013

Appeal from the Judgment of Sentence Entered March 5, 2013,
In the Court of Common Pleas of York County,
Criminal Division, at No. CP-67-CR-0006689-2010.

BEFORE: DONOHUE, SHOGAN and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED DECEMBER 31, 2013**

Appellant, Sinhue Amea Johnson, appeals from the judgment of sentence entered on March 5, 2013, in the York County Court of Common Pleas. Counsel for Appellant has filed a petition to withdraw after concluding that the instant appeal is frivolous. Upon review, we grant counsel's petition to withdraw and affirm Appellant's judgment of sentence.

The record reflects that in a criminal complaint filed on September 7, 2010, Appellant was charged with five counts of endangering the welfare of a child. Complaint, 9/7/10. The charges followed an investigation by York County Children and Youth Services ("CYS"). Affidavit of Probable Cause, 9/7/10. CYS received an anonymous tip that Appellant had been living in squalor for years with his five children, ages two to thirteen years old, along

with the children's mother in a house on Duke Street in York. ***Id***. The house that they lived in had been condemned in 2009. ***Id***. A police investigation confirmed the squalid conditions, and the aforementioned charges were filed. ***Id***.; Complaint, 9/7/10. At the time of his arrest, Appellant, the children, and their mother were staying in a motel room in East York. Affidavit of Probable Cause, 9/7/10. On March 5, 2013, following a bench trial, Appellant was found guilty of endangering the welfare of a child with respect to each of his five children resulting in five separate convictions. Sentencing Order, 3/5/13, at 6. Appellant filed a timely post-sentence motion arguing that the verdict was against the weight of the evidence and seeking a new trial. In an order filed on March 20, 2013, the trial court denied Appellant's motion, and this timely appeal followed.

As noted above, Appellant's counsel filed a petition to withdraw. However, counsel erroneously filed a petition to withdraw pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). A petition to withdraw pursuant to ***Turner/Finley*** is appropriate when seeking to withdraw in cases arising under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. ***Commonwealth v. Wrecks***, 934 A.2d 1287, 1288 (Pa. Super. 2007). When counsel seeks to withdraw during the course of a direct appeal, he must file a petition to withdraw pursuant to ***Anders v.***

California, 386 U.S. 738 (1967), ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). However, despite counsel's deficiency, we will endeavor to determine whether the errantly titled petition to withdraw satisfies the ***Anders/McClendon/Santiago*** requirements.

It is well settled that when counsel files a petition to withdraw, this Court may not review the merits of the underlying issues without first passing on the request to withdraw. ***Commonwealth v. Rojas***, 874 A.2d 638, 639 (Pa. Super. 2005). Furthermore, there are clear mandates that counsel seeking to withdraw pursuant to ***Anders/McClendon/Santiago*** must follow.

> In order for counsel to withdraw from an appeal pursuant to ***Anders*** … certain requirements must be met:
>
> > (1) counsel must 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) counsel must 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) counsel must furnish a copy of the brief to defendant and advise him of his right to retain new counsel, proceed pro se or raise any additional points that he deems worthy of the court's attention.

Commonwealth v. Millisock, 873 A.2d 748, 751 (Pa. Super. 2005).

In ***Santiago***, the Supreme Court set forth specific requirements for the brief accompanying counsel's petition to withdraw:

> [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 believes arguably 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.

Santiago, 978 A.2d at 361.

In the case before us, we conclude that although counsel improperly filed a petition to withdraw bearing the title "***Turner/Finley*** Brief," Appellant's counsel has, nevertheless, timely complied with the requirements of ***Santiago***. In addition, counsel has furnished a copy of the brief to Appellant, advised him of his right to retain new counsel, proceed *pro se,* or raise any additional points that he deems worthy of this Court's attention, and has attached to the petition a copy of the letter sent to Appellant as required under ***Millisock***. Counsel also avers specifically, and with respect to each of Appellant's issues, that the appeal is frivolous. Appellant's Brief at 4.

Once we have determined that counsel has met the foregoing obligations, "it then becomes the responsibility of the reviewing court to make a full examination of the proceedings and make an independent

judgment to decide whether the appeal is in fact wholly frivolous." ***Santiago***, 978 A.2d at 355 n.5. Thus, we will now examine the issues set forth by counsel in the brief.

> In the brief, counsel raises the following issues:
>
> I. Whether the Commonwealth presented insufficient evidence to convict appellant of five counts of the crime of endangering the welfare of a child?
>
> II. Whether the trial court's verdict of guilty on the five counts of endangering the welfare of a child was against the weight of the evidence presented at trial?

Appellant's Brief at 4.

When reviewing challenges to the sufficiency of the evidence, we evaluate the record in the light most favorable to the Commonwealth as verdict winner, giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. ***Commonwealth v. Duncan***, 932 A.2d 226, 231 (Pa. Super. 2007) (citation omitted). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." ***Id***. (quoting ***Commonwealth v. Brewer***, 876 A.2d 1029, 1032 (Pa. Super. 2005)). However, the Commonwealth need not establish guilt to a mathematical certainty, and it may sustain its burden by means of wholly circumstantial evidence. ***Id***. Moreover, this Court may not substitute its judgment for that of the factfinder, and where the record contains support for the convictions, they may not be disturbed. ***Id***. Lastly,

we note that the finder of fact is free to believe some, all, or none of the evidence presented. ***Commonwealth v. Hartle***, 894 A.2d 800, 804 (Pa. Super. 2006).

In order for the Commonwealth to prove Appellant endangered the welfare of his five children, it was required to prove that Appellant violated his duty of care, protection, or support for those minor children. 18 Pa.C.S.A. § 4304(a)(1). Pennsylvania courts have established a three-part test that must be satisfied to prove endangering the welfare of a child: "1) The accused was aware of his/her duty to protect the child; 2) The accused was aware that the child was in circumstances that could threaten the child's physical or psychological welfare; and 3) The accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare." ***Commonwealth v. Bryant***, 57 A.3d 191, 197 (Pa. Super. 2012) (citations omitted).

Here, the record reveals that the house the children occupied was dilapidated and falling apart around them. The house had no electricity, no gas, no water, and no heat. N.T., 3/4/13–3/5/13, at 204-24; 296–302.[1] The family had lived this way for a significant period of time, and the house

[1] The record contains numerous exhibits the Commonwealth had admitted into evidence consisting of photos of the children, photos of the house (graphically illustrating the deplorable condition it was in), a photo of the notice of condemnation explaining the house was not fit for human habitation, and a photo revealing that Appellant recently received mail at the Duke Street address. Commonwealth Exhibits, 1-76, 80-81, 3/5/13.

was trash-filled and dirty. ***Id***. The ceilings were falling in or had already fallen. ***Id***. The children collected rainwater to use to flush the toilet because there was no running water. ***Id***. The children huddled together for warmth. ***Id***. There was a camp stove used to cook food. ***Id***. The children had no birth certificates or Social Security numbers, and the children who were of school age, had never been registered for nor attended school. ***Id***. The trial court specifically stated that it found the testimony describing the deplorable living conditions credible. ***Id***. at 300. Additionally, the trial court pointed out that Appellant knew he had a duty to care for these children and he chose not to do so. N.T., 3/4/13 – 3/5/13, at 304. Appellant additionally chose not to avail himself of the resources and shelters available to him. ***Id***. The trial court concluded: "[Appellant] purposely chose not to enroll his children in education, he purposely chose the living environment, and he purposely chose the conditions under which his children were living with him; that is, a very restricted environment within his home." ***Id***. "Obviously, purposeful choice is intent, and that satisfies the definition of the statute."

After reviewing the record in the light most favorable to the Commonwealth, we conclude that there was sufficient evidence to establish that Appellant was aware of his duty to care for and protect his children, he placed the children in a situation that threatened their physical and

psychological welfare, and he failed to take any action to protect the children's welfare. ***Bryant***, 57 A.3d at 197. Accordingly, we conclude that Appellant is entitled to no relief on this issue.

Next, Appellant alleges that he is entitled to a new trial because the verdict was against the weight of the evidence.[2] Our standard of review is as follows:

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, 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. Champney, 832 A.2d 403, 408 (Pa. 2003) (citations omitted). A motion for a new trial based on a weight of the evidence claim concedes that sufficient evidence exists to sustain the jury's verdict. The trial court does not have to view the evidence in the light most favorable to the verdict winner, here, the Commonwealth. ***Commonwealth v. Rosetti***,

[2] In order to preserve a challenge to the weight of the evidence, the appellant must present the challenge to the trial judge in a timely motion for a new trial: "(1) orally, on the record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion." Pa.R.Crim.P. 607(A). Here, Appellant preserved his challenge to the weight of the evidence in his post-sentence motion filed on March 14, 2013.

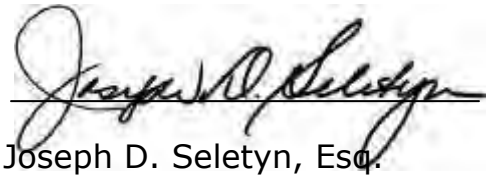
863 A.2d 1185, 1191-1192 (Pa. Super. 2004). "Thus, the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings." ***Commonwealth v. Diggs***, 949 A.2d 873, 879-880 (Pa. 2008).

Here, the trial judge, sitting as the finder of fact, chose to believe the evidence presented by the Commonwealth and to find credible the events as explained by the Commonwealth's witnesses, as was his right. N.T., 3/4/13–3/5/13, at 304-306. As noted above, the trial court explained that Appellant knew he had a duty to care for his children and he chose not to do so. ***Id***. at 304. Appellant chose not to avail himself of the resources and shelters available to him, and he purposely chose the dangerous living environment and conditions under which his children were living with him. ***Id***. The trial judge, sitting as the finder of fact, was free to believe all, part, or none of the evidence against Appellant. ***Champney***, 832 A.2d at 408. The trial judge weighed the evidence, deemed the Commonwealth witnesses' testimony credible, deemed Appellant's version of events incredible, and concluded Appellant intentionally failed to care for and protect his children and placed them in an unsafe situation. We decline Appellant's invitation to assume the role of factfinder and to re-weigh the evidence and credibility of the witnesses. Moreover, we discern no abuse of the trial court's discretion in ruling on Appellant's weight claim.

For the reasons set forth above, we conclude that Appellant's counsel's analysis was accurate and that Appellant's possible issues are frivolous. Furthermore, we have reviewed the record as a whole, and we conclude that there are no other issues of merit for appellate review. Accordingly, we grant counsel's petition to withdraw and affirm the judgment of sentence.

Petition to withdraw granted. Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/31/2013