NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ROGER ERNEST HEARE, SR., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA Nos. 732 & 733 MDA 2012

Appeal from the Judgment of Sentence of November 9, 2011,
in the Court of Common Pleas of Franklin County,
Criminal Division at Nos: CP-28-CR-0001197-2010
CP-28-CR-0001217-2010

BEFORE: MUSMANNO, BENDER and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: Filed: February 12, 2013

This case is a direct appeal from judgment of sentence.[1] Appellant's counsel has filed a brief and a petition to withdraw pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). Appellant's intended issue as set forth in counsel's brief is whether the court erred in holding Appellant's trial in his absence.

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* Retired Senior Judge assigned to the Superior Court.

[1] When this matter was first before us, we remanded it with instructions that Appellant's counsel supplement the record with a transcript from the post-sentence hearing and that counsel file a new brief. Counsel has complied with our instructions, and the case has returned to us. It is now ready for disposition.

Appellant has filed a response to counsel's petition and brief. We affirm the judgment of sentence and grant counsel's request to withdraw.

Charged with various offenses, Appellant appeared during his jury selection on September 12, 2011. On September 15, 2011, the day scheduled for the start of testimony, Appellant's counsel and counsel for the Commonwealth appeared in court. Appellant did not do so. Appellant's counsel advised the court that he had repeatedly tried, on the 15th, to reach Appellant by phone but that counsel was unsuccessful in doing so. At the court's direction, counsel made an additional phone call but still could not reach Appellant. Counsel asserted his belief that Appellant, who was roughly sixty-seven or sixty-eight years of age, was most likely riding a bicycle to the courthouse. It appears the distance from Appellant's residence to the courthouse was approximately thirteen to fifteen miles. It also appears it was raining on September 15, 2011, when the court was deciding the action it would take in light of Appellant's absence.

Based on the likelihood that Appellant was biking to the courthouse, as well as the inclement weather, Appellant's age, and the significant travel distance, Appellant's counsel asked for a continuance of the trial. The court declined counsel's request.

On that same day, September 15, 2011, Appellant was tried *in absentia* and was convicted of two counts each of intimidating a witness, recklessly endangering another person, simple assault and terroristic

threats, and one count of disorderly conduct. On September 16, 2011, Appellant appeared at the courthouse at 8:30 a.m. He was then taken into custody for having missed his trial. Appellant was later sentenced. He filed a post-sentence motion making various allegations, some of which related to what is now his intended contention that the court erred by trying him *in absentia*. His post-sentence motion requested a new trial.

The court later held an evidentiary hearing on Appellant's motion. At the hearing, Appellant admitted that, before September 15, 2011, his counsel told him the trial was scheduled for that date. The context of the testimony indicated counsel advised Appellant more than once that the 15th was the trial date. However, Appellant also testified that, following jury selection on September 12th, his counsel indicated to him that the trial date was September 16th. Appellant claimed his counsel advised him multiple times that the scheduled date was the 16th. Appellant did not ask his counsel why the date was changed from the 15th to the 16th. Appellant also testified he was in poor health, was in his late sixties and had a poor memory, particularly for dates. He testified, "Dates is my worst thing." N.T., 02/06/12, at 19.

At the Commonwealth's request, the court took notice of a pretrial conference order of March 4, 2011. The order indicated, *inter alia*, that Appellant was present during the conference and that a number of facts were discussed and agreed upon. One of those facts was the trial date of September 15, 2011.

The court denied Appellant's motion. Appellant filed this appeal.

Counsel's petition and brief substantially comply with the dictates of ***Anders***/***Santiago*** and, therefore, we have conducted our own review of this matter. ***See Santiago***, 978 A.2d at 354-55, 361 (discussing ***Anders*** process). Having done so, we find this matter to be frivolous for the following reasons.

A defendant has a federal and state constitutional right to be present at trial. ***Commonwealth v. Wilson***, 712 A.2d 735, 737 (Pa. 1998). However, that right may be waived either expressly or implicitly by the defendant's words and/or actions. ***Id.*** To be valid, the waiver must be knowing and voluntary. ***Id.***

In the past, we have explained that a defendant who appears at the start of trial and then voluntarily fails to appear for later parts of that trial has waived the right to be present. ***Id.*** A jury trial has certainly started by the time jury selection takes place. ***Commonwealth v. Graham***, 375 A.2d 161, 162 (Pa. Super. 1977); Pa.R.Crim.P. 602(A). Accordingly, a defendant who appears for jury selection, and thereby knows the trial has commenced, may be found to have waived the right to be present at trial by not appearing for the remaining trial proceedings. ***Graham***, 375 A.2d at 162.

When a defendant waives the right to be present at trial and/or otherwise is absent without cause, the court may proceed with the trial in

the defendant's absence. ***Wilson***, 712 A.2d at 737; Pa.R.Crim.P. 602(A). The decision to proceed rather than to grant a continuance to secure the defendant's presence rests within the trial court's discretion. ***Wilson***, 712 A.2d at 737. Absent an abuse of discretion, we will not disturb the trial court's decision. ***Id.*** at 739. An abuse of discretion is not a mere error in judgment but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law. ***Commonwealth v. Riley***, 19 A.3d 1146, 1149 (Pa. Super. 2011).

An appellate court does not make or substitute credibility determinations in place of those made by the factfinder. ***Commonwealth v. Spotz***, 870 A.2d 822, 836 (Pa. 2005).

In its opinion, the court indicated it did not believe Appellant's testimony that his counsel told him the trial date was September 16, 2011. The court expressed its belief that Appellant was advised of the correct date and then simply forgot it. Along these lines, the court referenced Appellant's testimony that he had a poor memory for dates. Additionally, the court relied on the pretrial conference order as evidence that Appellant knew the trial date of September 15th.

For Appellant to obtain relief on his intended argument, he would need, at a minimum, to persuade this Court to reject the trial court's credibility determinations and then to substitute contrary credibility assessments in place thereof. This Court simply does not do so. Therefore,

keeping in mind the aforementioned principles governing trials *in absentia*, Appellant cannot succeed in demonstrating that the trial court acted with bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law in determining Appellant was absent without cause and/or had waived his right to be present at trial. As such, Appellant cannot establish that the court abused its discretion by trying Appellant *in absentia* rather than continuing the trial date. Indeed, for Appellant to attempt to do so would be frivolous.

As we mentioned earlier in this memorandum, Appellant has filed a response to counsel's petition and brief. Much of the response is undecipherable, both because it is largely illegible and seemingly unfocused. To the extent we are able to ascertain its contents, we believe Appellant is trying to argue the position that he took at the PCRA hearing—namely, that his counsel misinformed him of the trial date. We have already explained that, to grant relief on that position, we would have to discard the PCRA court's credibility determinations. We cannot do so.

Based on our foregoing discussion, we find this appeal to be frivolous. As such, we affirm the judgment of sentence and grant counsel's petition to withdraw.

Judgment of sentence affirmed. Counsel's petition to withdraw granted.