NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DAYRON MALLOY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 92 WDA 2010

Appeal from the Judgment of Sentence of September 10, 2009,
in the Court of Common Pleas of Allegheny County,
Criminal Division at No. CP-02-CR-0008991-2007

BEFORE: FORD ELLIOTT, P.J.E., ALLEN and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: **FILED DECEMBER 02, 2013**

This is an appeal from a judgment of sentence. In addition, Appellant has filed in this Court a "Petition to Strike Supplement to Original Record." We affirm.

The trial court summarized the background underlying this matter in the manner that follows.

> In April of 2007[,] Appellant purchased a .38 caliber revolver "off the street" for $200. The purchase was made from a friend of victim Brian Kurpil, and Appellant did not know the first or last name of the seller. At the time[,] Kurpil was living in the home of Michael Derrick [on] Arlington Avenue, Pittsburgh, Allegheny County. Kurpil and Appellant were known to each other as Appellant often visited and stayed at the nearby home of [Lenora] Maiola who was a close friend of Kurpil. Kurpil, Maiola, and a second victim, Robert Simons, used drugs on a daily basis.

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*Retired Senior Judge assigned to the Superior Court.

> After purchasing the weapon, Appellant kept the gun at Kurpil's residence on Arlington Avenue. A dispute arose about the total purchase price for the gun, and on or about April 1[6], 2009[,] Kurpil gave the gun back to the seller because the money Appellant paid was not sufficient. In the early evening hours of April 1[6]th[,] Appellant was at the Maiola's residence with a third person, Johnny Kolb. Appellant was upset about the gun and stated in Maiola's presence that if the gun was gone he was going to go back and get another gun and "take care" of Kurpil.
>
> Appellant left Maiola's residence between 7:20 and 8:20 P.M. At approximately 10 P.M.[,] Appellant and his cousin, Tawan Watley, went to [Kurpil's residence on Arlington Avenue] to confront Kurpil about the weapon. They entered the living room of the residence where Kurpil and Simon[s] were present, seated on the couch and chair respectively.
>
> For several minutes[,] Appellant and Watley confronted Kurpil about the missing weapon and his response apparently did not satisfy Appellant or Watley. As a result[,] Watley first turned and shot Simons three times in the head[;] he then shot Kurpil three times in the head. Appellant and Watley fled together, and Michael Derrick discovered the horrific scene a few moments later when he returned home. Derrick called 911[,] and police and medics arrived shortly thereafter. Kurpil was pronounced dead at the scene[,] and Simons was hospitalized with massive head trauma.
>
> Brian Kurpil suffered three gunshot wounds to the head and associated massive internal trauma to his brain. Kurpil was immediately incapacitated and died of gunshot wounds to his head/brain. Robert Simons miraculously survived but suffered severe head and brain injury, and one of the bullets remains dangerously lodged in his brain.
>
> The police investigation led first to the identification and arrest of Watley and later to the identification and arrest of Appellant. . . .

Trial Court Opinion, 07/13/12, at 7-9 (citations omitted).

> [Appellant] was charged by Criminal Information (200708991) with: Criminal Homicide, Criminal Attempt (Homicide),

> Aggravated Assault, Recklessly Endangering Another Person, [and] Criminal Conspiracy.
>
> Appellant proceeded to a jury trial with co-defendant Tawan Watley on June 3, 2009. On June 8, 2009, Watley pled guilty to Third Degree Murder and related charges. [O]n June 11, 2009[, Appellant] was found guilty of First Degree Murder, Criminal Attempt (Homicide), Criminal Conspiracy (first degree murder), and Aggravated Assault.
>
> Appellant was sentenced on September 10, 2009[,] to consecutive periods of incarceration as follows:
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> First Degree Murder – Life without the possibility of parole;
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> Criminal Attempt – 7 ½ - 15 years;
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> Aggravated Assault – no further penalty.
>
> Post sentence motions were filed and denied. [Appellant timely filed a notice of appeal.]

Id. at 2-3.

The trial court directed Appellant to comply with Pa.R.A.P. 1925(b). After several extensions of time were granted to allow Appellant to comply with this direction, Appellant filed a Pa.R.A.P. 1925(b) statement.

In his brief to this Court, Appellant asks us to consider the following questions.

> I. Whether the evidence was sufficient to convict [Appellant] on Count 9 – Criminal Conspiracy (First-Degree Murder) when the Commonwealth failed to prove, beyond a reasonable doubt, that he entered into an agreement with Watley, to commit or aid in a criminal act, with a shared criminal intent?
>
> II. Whether the evidence was sufficient to convict [Appellant] on Count 4 – Aggravated Assault, Count 7 – First Degree Murder, and Count 8 – Criminal Attempt (First-Degree Murder) when the

> Commonwealth failed to prove, beyond a reasonable doubt, that he to [sic] promote any of these offenses, and that he actively participated in any of these offenses by soliciting, aiding, or agreeing to aid Watley?
>
> III. Whether [the trial court] abused its discretion in not granting [Appellant's] request for a continuance, after the Commonwealth rested its case, given the circumstances surrounding the unavailability of Houghton – i.e., Houghton was going to be a witness for both the Commonwealth and [Appellant], Houghton was *the* critical witness for the defense, the prosecutor promised [Appellant], as well as [the trial court], that he would take the necessary steps to ensure that Houghton was available for trial, the prosecutor failed to honor his promise, and Houghton could not be found?
>
> IV. Whether [the trial court] abused its discretion in not granting [Appellant's] motion for a mistrial, which was made after Watley entered a guilty plea in the middle of the proceedings, as well as through post-sentence motions, based on the jury's inability to disregard the fate of Watley, and because the Commonwealth was solely to blame for the fact that Houghton, *the* critical witness for the defense, was unavailable for trial?

Appellant's Brief at 6 (suggested answers omitted).

Under his first two issues, Appellant raises challenges to the sufficiency of the evidence presented by the Commonwealth at trial.

> In reviewing sufficiency of evidence claims, we must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all the elements of the offense. Additionally, to sustain a conviction, the facts and circumstances which the Commonwealth must prove, must be such that every essential element of the crime is established beyond a reasonable doubt. Admittedly, guilt must be based on facts and conditions proved, and not on suspicion or surmise. However, entirely circumstantial evidence is sufficient so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt.

> 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 fact finder is free to believe all, part, or none of the evidence presented at trial.

Commonwealth v. Eckrote, 12 A.3d 383, 385-86 (Pa. Super. 2010) (citations omitted).

Appellant's argument under his first issue can be summarized as follows.

> The evidence was insufficient to convict [Appellant] on Count 9 – Criminal Conspiracy (First-Degree Murder). The Commonwealth failed to prove, beyond a reasonable doubt, that [Appellant] entered into an agreement with Watley, to commit or aid in a criminal act, with a shared intent. There was no evidence whatsoever of a conspiratorial agreement between [Appellant] and Watley to murder Kurpil. When Watley suddenly pulled out a gun and opened fire on Kurpil and Simons, he was acting alone; [Appellant] just happened to be present. Consequently, the conviction must be reversed, and the Judgment of Sentence in this regard must be vacated.

Appellant's Brief at 17.

The Commonwealth counters this argument by contending that it presented sufficient evidence at trial to prove that Appellant and Watley entered into an agreement to murder Kurpil. We agree with the Commonwealth.

The following law applies:

> . . . In the case of first-degree murder, a person is guilty when the Commonwealth proves that: (1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with specific intent to kill. An intentional killing is a killing by

> means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing. The Commonwealth may prove that a killing was intentional solely through circumstantial evidence. The finder of fact may infer that the defendant had the specific intent to kill the victim based on the defendant's use of a deadly weapon upon a vital part of the victim's body.
>
> To prove conspiracy, the trier of fact must find that: 1) the defendant intended to commit or aid in the commission of the criminal act; 2) the defendant entered into an agreement with another to engage in the crime; and 3) the defendant or one or more of the other co-conspirators committed an overt act in furtherance of the agreed upon crime. In most cases of conspiracy, it is difficult to prove an explicit or formal agreement; hence, the agreement is generally established via circumstantial evidence, such as by the relations, conduct, or circumstances of the parties or overt acts on the part of co-conspirators. In the case of a conspiracy to commit homicide, each member of the conspiracy can be convicted of first-degree murder regardless of who inflicted the fatal wound.

Commonwealth v. Johnson, 985 A.2d 915, 920 (Pa. 2009) (citations and quotation marks omitted).

The Commonwealth presented testimony from Detective George Satler. The detective testified that he interviewed Appellant after the shooting. N.T., 06/03/09-06/10/09, at 386-87. Appellant informed the detective that, before the shooting incident, he had purchased a .38 revolver from Kurpil's friend and stored the firearm in a garbage bag outside of the Arlington residence. ***Id.*** at 388-89. The gun went missing, Appellant confronted Kurpil about the missing revolver, and Kurpil informed Appellant that, because Appellant did not pay the seller of the gun enough money for the gun, Kurpil gave it back to the seller. ***Id.*** at 389.

According to Maiola, while at her home on April 16, 2007, she heard Appellant discuss a gun he had left at Kurpil's house. ***Id.*** at 249-50. Ms. Maiola testified that Appellant told her that "[i]f [the gun] comes up gone, I'm going back and I'm killing them." ***Id.*** at 250.

Simons testified that he and Kurpil arrived at the Arlington residence around 10 p.m. on April 16, 2007. ***Id.*** at 150. About twenty minutes later, two men entered the room. ***Id.*** at 151. A brief conversation took place between the two men and Kurpil. One of the men then began shooting Kurpil and Simons. ***Id.*** at 151-54. Simons identified Watley as the man that shot him and Kurpil; Simons identified Appellant as the person that entered the room with Watley. ***Id.*** at 154. Kurpil died as a result of the shooting, and Simons sustained serious injuries due to the shooting.

When this evidence is viewed in a light most favorable to the Commonwealth, we conclude that it was sufficient to allow the jury to draw a reasonable inference that: Appellant intended to commit or aid Watley in the commission of the intentional and unlawfully killing of Kurpil; Appellant entered into an agreement with Watley to engage in that crime; and Watley committed an overt act in furtherance of the agreed upon crime by shooting Kurpil in the head. For these reasons, we conclude that the evidence was sufficient to prove that Appellant conspired to commit first-degree murder.

Under his second issue, Appellant contends that the Commonwealth failed to offer sufficient evidence to support his convictions for aggravated assault, first-degree murder, and attempted first-degree murder. Appellant's argument can be summarized as follows.

> There was no evidence whatsoever of a conspiratorial agreement between [Appellant] and Watley, and the testimony unquestionably established that Watley was the shooter. Consequently, [Appellant's] convictions on Count 4 – Aggravated Assault, Count 7 – First-Degree Murder, and Count 8 – Attempted Murder (First-Degree Murder) can only be sustained under the theory of accomplice liability. However, the Commonwealth failed to prove, beyond a reasonable doubt, that [Appellant] intended to promote any of these offenses, and that he actively participated in any of these offenses by soliciting, aiding, or agreeing to aid Watley. Consequently, the convictions must be reversed, and the Judgment of Sentence in this regard must be vacated.

Appellant's Brief at 36.

Appellant does not dispute that Watley's actions on April 17, 2009, could have led Watley to be convicted of aggravated assault, first-degree murder, and attempted murder. Rather, the foundation of Appellant's argument is that the Commonwealth failed to present any evidence to establish a conspiracy between Appellant and Watley. ***Id.***; ***id.*** at 39 ("As thoroughly discussed above, however, [Appellant's] conviction for the crime of Criminal Conspiracy requires reversal because there was absolutely no evidence of such an agreement."). Because we already have rejected this argument, Appellant's argument under this issue necessarily fails and, thus, warrants no relief.

Appellant's final two issues were not addressed by the trial court in its Pa.R.A.P. 1925(a) opinion because the trial court found them to have been waived due to the lengthy manner in which Appellant stated them in his Pa.R.A.P. 1925(b) statement. Specifically, the trial court explained:

> Appellant's seventh claim totals 39 lines and 308 words. Appellant's eighth claim totals 36 lines and 296 words. The

> lengths of these two claims are flagrantly violative of Pa.R.A.P. 1924[(b)](4)(iv) (requirements; waiver) (the statement should not be redundant or provide lengthy explanation as to any error).

Trial Court Opinion, 07/13/12, at 16.

> Rule 1925(b) provides, in pertinent part:
>
> (4) Requirements; waiver.
>
> (ii) The Statement shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge. . . .
>
> . . .
>
> (iv) The Statement should not be redundant or provide lengthy explanations as to any error. Where non-redundant, non-frivolous issues are set forth in an appropriately concise manner, the number of errors raised will not alone be grounds for finding waiver.
>
> . . .
>
> (vii) Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.

Pa.R.A.P. 1925(b)(4)(ii, iv, vii).

We cannot say that the trial court improperly found these two issues[1] to be violative of Rule 1925(b)(iv) and thus to be waived pursuant to

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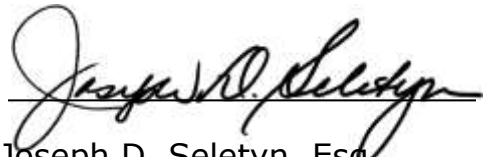
[1] The trial court addressed Appellant's remaining eight claims in its 1925(a) opinion.

Pa.R.A.P. 1925(b)(vii). Appellant is not entitled to appellate relief on these claims.

Judgment of sentence affirmed. Petition to Strike Supplement to Original Record denied.

President Judge Emeritus Ford Elliott concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/2/2013