J-S04016-14

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
VITALIY SIVCHUK,	:	
	:	
Appellant	:	No. 489 EDA 2013

Appeal from the Judgment of Sentence Entered January 18, 2013,
In the Court of Common Pleas of Bucks County,
Criminal Division, at No. CP-09-SA-0000842-2012.

BEFORE: BENDER, P.J., SHOGAN and FITZGERALD*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED APRIL 15, 2014**

Appellant, Vitaliy Sivchuk, appeals from the judgment of sentence entered in the Bucks County Court of Common Pleas following his guilty plea to the summary offense of exceeding the speed limit.[1] We affirm.

The trial court summarized the factual and procedural history as follows:

> [Appellant] was stopped on Buck Road in Upper Southampton Township, Bucks County by police officer Andrew Brown ("Officer Brown") of the Upper Southampton Police Department on November 9, 2012. According to the citation issued by Officer Brown, [Appellant] was observed traveling 65 mph in a 25 mph speed limit. Officer Brown was able to determine [Appellant's] speed with Robic Acutrak system using a distance of .019 miles and a time of 1.04 seconds. Officer Brown issued [Appellant] a

*Former Justice specially assigned to the Superior Court.

[1] 75 Pa.C.S.A. § 3362(a)(3).

> citation for violating 75 Pa.C.S.A. §3362(a)(3), Exceeding the Speed Limit Established, by 40 mph.
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> [Appellant] pled not guilty to the citation on November 16, 2012. A hearing was held before Magisterial District Judge William Benz on December 13, 2012. Judge Benz found [Appellant] guilty. [Appellant] then filed a summary appeal with [the Court of Common Pleas of Bucks County] on December 14, 2012. A hearing was held on January 18, 2013. It appears, based on our notes from the day, that [Appellant] entered into a negotiated agreement and plead guilty to exceeding the speed limit established by 20 mph. We accepted the plea agreement and imposed the statutory fine.
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> * * *
>
> [Appellant] filed his notice of appeal on February 11, 2013. On February 13, 2013, [the Court of Common Pleas] ordered [Appellant] to file, within 21 days of our order, a Concise Statement of Matters Complained of on Appeal as required by Pa.R.A.P. 1925(b). [Appellant] subsequently filed his [*pro se*] Statement of Matters Complained of on Appeal on March 6, 2013.

Trial Court Opinion, 3/13/13, at 1-2.

The trial court filed an opinion pursuant to Pa.R.A.P. 1925(a) on March 13, 2013. In that opinion, the trial court sought to quash the appeal due to Appellant's failure to order the notes of testimony from the January 18, 2013 hearing. Trial Court Opinion, 3/13/13, at 2. On March 22, 2013, the trial court filed a supplemental opinion indicating that after the original opinion had been issued, Appellant had ordered the transcript from the January 18, 2013 hearing, and the transcript was made part of the record.

On March 26, 2013, Appellant filed a *pro se* Motion to Supplement the Record, seeking to have the trial court include a copy of both the original citation issued to Appellant and the citation relied upon by the lower court in the certified record. The trial court did not rule on the *pro se* motion and certified the record to this Court on April 8, 2013.

On May 8, 2013, Appellant's current counsel filed with this Court a motion for remand pursuant to Pa.R.A.P. 1925(c) and 42 Pa.C.S.A. § 706. We granted the application on May 29, 2013, remanded the matter to the trial court to allow Appellant to file a supplemental statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and directed the trial court to prepare a supplemental opinion. ***Commonwealth v. Sivchuk***, 489 EDA 2013, (Pa. Super. filed May 29, 2013), Order. We retained jurisdiction. ***Id.***

Appellant filed a counseled, supplemental concise statement in the trial court on June 26, 2013. Contemporaneously, Appellant's counsel filed a motion for correction or modification of the record. In the motion, counsel renewed Appellant's request to have the trial court include in the certified record a "true and correct copy" of the citation issued to Appellant. The trial court filed a second supplemental opinion on July 10, 2013. Appellant's petition for modification of the record was denied. Trial Court Opinion, 7/10/13, at 2.

Appellant presents the following issues for our review:

> 1. Did the lower court err in denying Appellant's motion to supplement the record where the citation presented to Appellant at the time his vehicle was stopped [differed] in material respects to the citation presented to the Court and where such material difference was not identified until after Appellant had entered into a plea of guilty?
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> 2. Was the Appellant's guilty plea to driving 20 mph over the posted speed limit a knowing and voluntary plea where the trial court failed to conduct any colloquy whatsoever and where a proper colloquy would have uncovered substantial, material differences between the ticket issued to [Appellant] [and] that presented to the trial court[,] which differences result in a difference in calculation of [Appellant's] speed of approximately 20 miles per hour?

Appellant's Brief at 4.

Appellant first alleges that the trial court erred in denying his motion to supplement the record with the speeding citation provided to Appellant by the Officer. Appellant's Brief at 11. Appellant maintains that the citation he received from the Officer differs in material respect from the one apparently relied upon by the trial court with regard to the values used in computing Appellant's speed. ***Id.*** at 12. On the citation Appellant received, the citation indicated that Appellant had traveled a distance of .019 miles in 1.4 seconds. ***Id.*** at 5. These values, using the regulatory formula set forth at 67 Pa.Code § 105.95(a)(7), results in a calculation that Appellant was traveling forty-eight miles per hour. ***Id.*** at 7. The citation relied upon by the court, however, reflected values of distance traveled .019 miles in 1.04 seconds. ***Id.*** These values, again using the calculation at 67 Pa. Code

§ 105.95(a)(7), resulted in a calculated speed of sixty-five miles per hour. ***Id.*** Appellant asserts that he was not aware that the citation relied upon by the trial court differed from the one he received until the trial court issued its Pa.R.A.P. 1925(a) opinion and explicitly set forth the figures used in computing Appellant's speed. ***Id.*** at 12. As a result, Appellant asserts that his plea was involuntary. ***Id.*** The differences in citations reflect a mistake of fact that can only be resolved if both citations are included in the record. ***Id.*** Thus, Appellant alleges that the trial court erred in refusing to supplement the record with the citation Appellant had received, pursuant to Pa.R.A.P. 1926(a). ***Id.*** at 11.

"[T]he entry of a guilty plea results in the waiver of all defects and defenses, except for those that challenge the jurisdiction of the court, the validity of the guilty plea, or the legality of the sentence." ***Commonwealth v. Flick***, 802 A.2d 620, 623 (Pa. Super. 2002). Appellant's claim raises a defect in the evidence. Such claim was waived by Appellant's entry of a guilty plea. However, even if we were to liberally construe it as a challenge to the validity of the guilty plea, we would conclude that the trial court did not err in refusing to supplement the record.

The trial court provided the following explanation for denying Appellant's motion to supplement the record:

> [T]he [Appellant] had an attorney to represent him when he pled guilty before us. He pled guilty to a reduced charge of driving

45 mph in a 25 mph zone. Neither the [Appellant] nor his attorney attempted to introduce into the record a version of the citation that differs from the copy that was part of the official record. One can only presume the attorney gave him proper counsel and his "advice was within the range of competence demanded of attorney's [sic] in criminal cases." *Commonwealth v. Wah*, 42 A.3d 335, 338-339 (Pa. Super. 2012).

[Appellant] is now arguing that his copy of the citation as opposed to the official copy reflects timing information that calculates to his only travelling at 48 mph in a 25 mph zone and that if he had known that alleged fact, he would not have accepted the offer to plea to going 20 mph over the lawful speed limit. He is essentially saying that even though based on his alleged facts he still was allowed to plea to a lesser violation tha[n] one he actually committed, he thinks the deal was not good enough. Of course his version of the facts is not supported by the official record. Therefore there is no merit to his argument.

We should also note that in addition to his Supplemental Statement, [Appellant] also filed in our court a Petition for Correction or Modification of the Record Pursuant to PA.R.A.P. §1926 ("Petition") requesting to add [Appellant's] copy of the citation in question to the certified record of this case.

According to Pa. R.A.P. §1926;

> "If any difference arises as to whether the record truly discloses what occurred in the lower court, the difference shall be submitted to and settled by that court after notice to the parties and opportunity for objections, and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the lower court either before or after the record is transmitted to the appellate court, or the appellate court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other

> questions as to the form and content of the record shall be submitted to the appellate court."
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> We have declined to grant [Appellant's] Petition for Correction or Modification of the Record.
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> We interpret Rule 1926 to address an issue where evidence or testimony was presented at trial or where something was filed with or otherwise done in the lower court but for some reason does not appear in the certified record. As the [Appellant] did not introduce or admit his alleged copy of the ticket at trial, it was never before us. Therefore, [Appellant's] Petition for Correction or Modification of the Record is inappropriate. The record correctly reflects everything that took place in our court. [Appellant] wants to add something that was never before our court. Since he alleges that he was given the copy of the citation that he now wants to add to the record at the time he was first issued it by the police officer, there is no excuse for him or his attorney not even attempting to bring it to [the trial court's] attention until after he filed an appeal to the sentence imposed after his counseled guilty plea to a reduced charge.

Trial Court's Second Supplemental Opinion, 7/9/13, at 1-3. We agree.

Further, we note that even accepting Appellant's "true" speed as 48 mph, he would have been exceeding the speed limit of 25 mph by 23 mph. He pled guilty to only exceeding the speed limit by 20 mph. Appellant's first issue clearly lacks merit.

In his second issue, Appellant argues that the trial court erred because it "failed to conduct any colloquy of the Appellant whatsoever." Appellant's Brief at 15. As a result, Appellant maintains that his guilty plea was not entered knowingly and voluntarily. ***Id.*** Appellant further asserts that if the trial court had conducted a colloquy, it would have uncovered material

differences between the ticket issued to the Appellant and the ticket relied upon by the trial court. ***Id.*** at 14.

We must first consider whether this issue is waived. On remand, Appellant's counsel filed a "Supplemental Concise Statement of Errors Complained of on Appeal," raising one issue in addition to the issue raised in Appellant's *pro se* "statement of errors." Appellant's *pro se* "Statement of Errors" stated:

> 1. Guilt, plea not knowing and intelligent because of attorney incompetence.
>
> a. Citation alleged speed was 65 mph when calculated speed on citation computed to 48 mph
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> b. Had I known trued speed was 48 mph instead of 65 mph, would not have pled guilty .
>
> c. Using figures set forth by police officer in citation, .019 miles timed at a time of 1.40 seconds yields a speed of 48 mph when calculated pursuant to 67 Pa Code 105.95 (a)(7).

Appellant's *pro se* "Statement of Errors," 3/6/13 (*verbatim*). Appellant's counseled statement of errors raised the following additional issue:

> Appellant Sivchuk's plea of guilty to exceeding the speed limit by 20 miles per hour was not entered into knowingly and voluntarily where the ticket which was submitted to the trial court differed in substantial, material aspects from the ticket issued to Sivchuk and where the difference between the ticket issued and the ticket relied upon at the guilty plea proceedings resulted in a difference in calculation of [Appellant's] speed of approximately 20 miles per hour.

"Supplemental Concise Statement of Errors Complained of on Appeal," 6/26/13, at 1-2.

"Any issues not raised in a Pa.R.A.P. 1925(b) statement will be deemed waived." ***Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998).

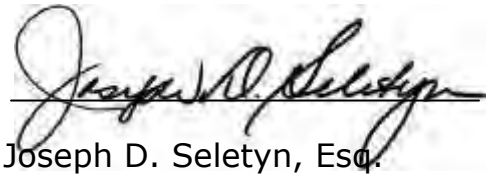
> The absence of a trial court opinion poses a substantial impediment to meaningful and effective appellate review. Rule 1925 is intended to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal. Rule 1925 is thus a crucial component of the appellate process.

Id. at 308. Moreover, the Supreme Court has held that "waiver under Rule 1925 is automatic." ***Commonwealth v. Butler***, 812 A.2d 631, 633 (Pa. 2002).

Appellant failed to raise, in either of his Pa.R.A.P. 1925(b) statements, the claim he now presents in his appellate brief: that Appellant's plea was not entered knowingly and voluntarily because the trial court failed to conduct a colloquy of Appellant. Thus, pursuant to ***Lord*** and its progeny, we decline to review this issue because it has been waived.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014