

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

MICHAEL C. HULTZAPPLE

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 513 MDA 2015

Appeal from the Judgment of Sentence February 23, 2015
in the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-0005593-2014

BEFORE: PANELLA, J., LAZARUS, J., and JENKINS, J.

MEMORANDUM BY JENKINS, J.:

FILED FEBRUARY 02, 2016

Appellant Michael C. Hultzapple ("Appellant") appeals from the February 23, 2015 judgment of sentence in the York County Court of Common Pleas following his jury trial conviction for retail theft.¹ Appellant's counsel has filed an **Anders**² brief, together with a petition to withdraw as counsel. We affirm the judgment of sentence and grant counsel's petition to withdraw.

On May 10, 2014, a Giant food store security guard standing 8-10 feet from Appellant witnessed Appellant approach a condom display, remove some K-Y liquid jelly lubricant ("lubricant") from its box, return the empty

¹ 18 Pa.C.S. § 3929(a)(1).

² **Anders v. California**, 386 U.S. 738 (1967).

box to the display, and place the lubricant into his sock.³ The security officer then observed Appellant checkout without paying for the lubricant. When confronted by the security guard, Appellant began yelling obscenities. The security guard asked Appellant to leave the store. A second security guard photographed Appellant's license plate number as he left the parking lot.

When questioned by police, Appellant admitted initially taking and intending to steal the lubricant. However, Appellant claimed that at the last minute, he had a change of heart and placed the lubricant back on a shelf somewhere in the same aisle of the store. In Appellant's presence, the police telephoned the security guard, who informed police that, following a search of the aisle, only the empty lubricant box was recovered. Appellant then changed his story and indicated that he had tossed the lubricant into the produce aisle. The security guard informed the police that he had followed Appellant from the condom aisle to the checkout area, and did not see him throw anything into the produce aisle. Further, a search confirmed no lubricant was present in the produce aisle.

Following a one day trial, on January 15, 2015, a jury returned a verdict of guilty against Appellant for retail theft. On February 23, 2015, the trial court sentenced Appellant to 18 months' intermediate punishment, with

³ Store security camera video confirmed the security guard's version of the events.

the first 90 days to be served under intensive supervision.⁴ Appellant appealed on March 16, 2015, and filed his court-ordered Pa.R.A.P. 1925(b) statement of matters complained of on appeal on April 2, 2015. The trial court filed its Pa.R.A.P. 1925(a) Opinion on June 26, 2015.

As previously noted, Appellant's counsel has filed an application seeking to withdraw from representation pursuant to ***Anders v. California*** and its Pennsylvania counterpart, ***Commonwealth v. Santiago***.⁵ Before addressing the merits of Appellant's issue presented, we must first pass on counsel's petition to withdraw. ***Commonwealth v. Goodwin***, 928 A.2d 287, 290 (Pa.Super.2007) (*en banc*).

Prior to withdrawing as counsel on a direct appeal under ***Anders***, counsel must file a brief that meets the requirements established by our Supreme Court in ***Santiago***. The brief 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.

⁴ The trial court further sentenced Appellant to 200 hours' community service.

⁵ 978 A.2d 349 (Pa.2009).

Santiago, 978 A.2d at 361. Counsel must also provide a copy of the **Anders** brief to the appellant, together with a letter that advises the appellant of his or her right to “(1) retain new counsel to pursue the appeal; (2) proceed *pro se* on appeal; or (3) raise any points that the appellant deems worthy of the court’s attention in addition to the points raised by counsel in the **Anders** brief.” **Commonwealth v. Nischan**, 928 A.2d 349, 353 (Pa.Super.2007). Substantial compliance with these requirements is sufficient. **Commonwealth v. Wrecks**, 934 A.2d 1287, 1290 (Pa.Super.2007). “After establishing that the antecedent requirements have been met, this Court must then make an independent evaluation of the record to determine whether the appeal is, in fact, wholly frivolous.” **Commonwealth v. Palm**, 903 A.2d 1244, 1246 (Pa.Super.2006).

Instantly, counsel filed a petition to withdraw. The petition states counsel “has determined, upon a conscientious examination of the entire record, including all notes of testimony, that a direct appeal would be frivolous.” Petition to Withdraw as Counsel, p. 2.⁶ Counsel notified Appellant of the withdrawal request, supplied him with a copy of the **Anders** brief, and sent him a letter explaining his right to proceed *pro se* or with new, privately-retained counsel to raise any additional points or arguments that Appellant believed had merit. **See** Letter to Appellant, August 24,

⁶ The pagination of the petition to withdraw as counsel begins with page 2.

2015, attached to Petition to Withdraw as Counsel. In the **Anders** brief, counsel provides a summary of the facts and procedural history of the case with citations to the record, refers to evidence of record that might arguably support the issue raised on appeal, provides citations to relevant case law, and states her conclusion that the appeal is wholly frivolous and her reasons therefor. **See generally, Anders** Brief. Accordingly, counsel has substantially complied with the requirements of **Anders** and **Santiago**.

As Appellant filed neither a *pro se* brief nor a counseled brief with new, privately-retained counsel, we review this appeal based on the issues of arguable merit raised in the **Anders** brief:

I. [Whether] the Commonwealth failed to present sufficient evidence in order to convict Appellant beyond a reasonable doubt of [r]etail [t]heft because the Commonwealth failed to prove that Appellant carried away merchandise where Appellant was not seen leaving the store with merchandise in his possession for which he had not paid?

II. [Whether] the Commonwealth failed to present sufficient evidence in order to convict Appellant beyond a reasonable doubt of [r]etail [t]heft because the Commonwealth failed to prove that Appellant had the intent to deprive the merchant of any merchandise without payment where Appellant was not seen leaving the store with merchandise in his possession for which he had not paid?

Anders Brief, p. 4. These claims lack merit.

When examining a challenge to the sufficiency of evidence, this Court's 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. Smith, 97 A.3d 782, 790 (Pa.Super.2014).

The Crimes Code defines retail theft, in relevant part, as follows:

(a) Offense defined.--A person is guilty of retail theft if he:

(1) takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof[.]

18 Pa.C.S. § 3929(a)(1). Further, "[t]o the extent that there is other competent evidence to substantiate the offense, the conviction shall not be avoided because the prosecution cannot produce the stolen merchandise."

18 Pa.C.S. § 3929(c.1).

We note that "intent can be proven by direct or circumstantial evidence; it may be inferred from acts or conduct or from the attendant

circumstances.” **Commonwealth v. Franklin**, 69 A.3d 719, 723 (Pa.Super.2013). Further, in cases of retail theft, the Crimes Code expressly provides:

Any person intentionally concealing unpurchased property of any store or other mercantile establishment, either on the premises or outside the premises of such store, shall be prima facie presumed to have so concealed such property with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof within the meaning of subsection (a)[.]

18 Pa.C.S. § 3929(c); **see also Commonwealth v. Martin**, 446 A.2d 965, 969 (Pa.Super.1982).

The trial court analyzed the merits of Appellant’s sufficiency claims as follows:

The jury heard from [the security guard] that the Appellant secreted the [lubricant] upon his person that was offered for sale by Giant food store. The jury saw video in which the Appellant bends down over an item that [the security guard] identifies as the [lubricant], which upon the Appellant re-standing is no longer in view. [The security guard] testified that he followed the Appellant from the scene of concealment, through checkout in which the Appellant did not purchase the lubricant, and until the time of confrontation. Though the Appellant told the officer that he had left the item within the store, it was not located in any of the places Appellant said that he had discarded it. The element of carrying away was clearly met.

. . .

The Appellant made a supposed confession to the officer that he had been intending to steal the [lubricant] yet thought better of it before leaving the store. Frankly, we view this matter of credibility as immaterial because the Appellant was seen to conceal the [lubricant] and was followed past the point of checkout at which he did not pay for that lubricant.

. . .

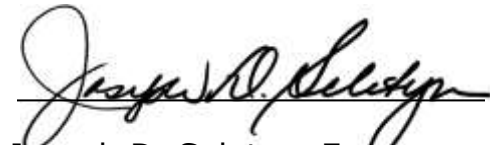
[T]he lubricant, here, is unlikely to have disappeared into some hypothetical alternate dimension. There was little if any chance for the Appellant to dispose of the lubricant within the store. A thorough search of the areas where the [lubricant] could have conceivably been left was made and a subsequent search of the produce section, which the store employee was sure the Appellant had not entered after concealing the [lubricant], was accomplished with negative results. In the light most favorable to the verdict-winning Commonwealth, sufficient evidence of intent was presented. The Commonwealth presented evidence that the Appellant could have and likely did remove the item from the store and the intent element was, in this [c]ourt's view, supplied by the Appellant's seeming concealment of the [lubricant] upon his person.

1925(a) Opinion, pp. 6-7.

We agree with the trial court that this evidence, viewed in the light most favorable to the Commonwealth as verdict winner, sufficiently enabled the jury to find every element of attempted retail theft beyond a reasonable doubt.

Judgment of sentence affirmed. Petition to withdraw as counsel granted.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/2/2016