NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. OLIVER BURBAGE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 777 EDA 2013

Appeal from the Judgment of Sentence November 29, 2012
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0006364-2011

BEFORE: BOWES, DONOHUE, and MUNDY, JJ.

MEMORANDUM BY BOWES, J.: **FILED JULY 23, 2014**

Oliver Burbage appeals from the aggregate judgment of sentence of eleven and one-half to twenty-three years incarceration imposed by the trial court after a jury found him guilty of burglary, conspiracy to commit burglary, aggravated assault, conspiracy to commit aggravated assault, criminal trespass, conspiracy to commit criminal trespass, criminal mischief, conspiracy to commit criminal mischief, theft by unlawful taking, conspiracy to commit theft by unlawful taking, receiving stolen property, conspiracy to commit receiving stolen property, propulsion of missiles onto roadways, conspiracy to commit propulsion of missiles onto roadways, recklessly endangering another person ("REAP"), conspiracy to commit REAP, fleeing or attempting to elude police, and failure to stop at a red light. We affirm.

The trial court detailed the salient facts as follows.

On April 9, 2010, Trooper Anthony Mincer of the Pennsylvania State Police was on patrol in northern Bucks County with his partner Kenneth Johansson. Around 2 a.m., the troopers were on stationary patrol in the center median of Route 309 observing traffic when they noticed a minivan travel past their vehicle at a high rate of speed and skid through a red light. The troopers activated the emergency signals in their marked car and proceeded to follow the minivan. The minivan accelerated to fifty to sixty miles per hour and entered a residential area that had a twenty-five mile per hour speed limit. It failed to stop for additional stop signs and continued to pick up speed. The conditions were dark and rainy.

After driving over several ditches and curbs, the minivan and the troopers re-entered Route 309 and quickly reached speeds of 110 miles per hour. The troopers tried to stay behind the minivan to identify it, and the minivan continued to drive through red lights without stopping. At some point, the driver of the minivan turned off its headlights, making it more difficult for the troopers to observe it. The vehicles were traveling at speeds of 110 to 120 miles per hour at this point.

The troopers sought assistance from local municipalities and requested "spike strips" to stop the minivan. As the vehicles continued south, Troopers Mincer and Johansson heard a very loud bang and felt something strike their vehicle. Initially, the troopers thought their vehicle had hit the spike strips, but then they observed the passenger of the minivan throwing large items out of the vehicle toward the patrol car. The pursuit was continuing at 100 or 110 miles per hour at that point. Troopers Mincer and Johansson were able to see that the items were being ejected from a sliding door on the passenger side of the van, although they were not able to identify who was throwing the items. Troopers Mincer and Johansson feared for their safety as well as that of the public at large. The camera on the dash of the troopers' vehicle recorded the chase. The recording was marked as Commonwealth Exhibit 1, admitted into evidence, and shown to the jury.

Hilltown police deployed spike strips and the minivan ran over them, slowing to roughly thirty or forty miles per hour before the troopers rammed it from behind. After additional maneuvers, the minivan came to a stop. A black male ran from the passenger side of the vehicle and was followed on foot by

Trooper Johansson. The suspect ran across the highway, down an embankment and into a car yard, where he touched a car. Both the suspect and Trooper Johansson jumped over several fences, two of which were electrified. Trooper Johansson terminated the foot pursuit when he lost sight of the suspect, since the suspect could have been hiding in a car.

Because of the impact between the two vehicles, Trooper Mincer had to force his way out of the vehicle in order to pursue the driver of the minivan, who had jumped over the median and was fleeing on foot. Trooper Mincer had to disengage after a short chase, but was able to observe that he had been chasing a black male who appeared to be in his twenties or thirties. Trooper Mincer observed the passenger who ran in a different direction to be a black male in his twenties or thirties.

Once the pursuit had been discontinued, the troopers observed that a suitcase-sized generator was lodged undemeath their vehicle. The vehicles were then towed to a secure location, Kirk's Auto Body.

Thomas Gibson, the manager of the hydraulic department at Sterner's Hardware, arrived at the store around 7:00 a.m. on April 9, 2010 to find that the alarm system had been activated. Gibson observed that an entire show room window pane had been smashed and taken out. He called 911 and reported the break-in to the police. Thomas Steele, the owner of Sterner's Hardware, was then summoned to the store. When he arrived, he found the store missing four cut-quick saws and five high-end generators. The burglars used a blanket to get over the broken glass on the front windowsill, and they took the highest-quality generators and saws that the store carried. Steele testified that Burbage did not have permission to be in the store. The serial numbers on the items ejected from the minivan during the car chase matched those of equipment missing from the store. All of the items that were recovered were beyond repair and could not be resold.

A number of law enforcement officials participated in the investigation that followed the pursuit. Corporal Louis Gober, who is part of the Pennsylvania State Police's Forensic Services Unit, was assigned to the investigation. He went to Kirk's Auto Body, where the minivan and troopers' vehicle had been towed, to process the vehicles for evidence. No usable fingerprints were

> obtained from the minivan. Five items from that vehicle were tested for DNA. Of the five items tested, two of them, fabric from the driver's side airbag and a black Chicago White Sox cap, had genetic material that was a preliminary match for Burbage. Another item taken from the minivan, a green tea container, was a preliminary match to Burbage's co-defendant Thomas Ellis.
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> Following the preliminary match, a search warrant was obtained for Burbage's DNA. Dr. Alex Glessner, who was received as an expert in the field of DNA profiling, testified as to the tests that were done to compare Burbage's DNA to the evidence obtained from the minivan. Five items were tested, and three had usable amounts of DNA material on them, two of which matched Burbage. Specifically, the DNA from the White Sox hat matched a known sample from Oliver Burbage on sixteen of sixteen loci tested, and the DNA from the air bag fabric matched him on fifteen of sixteen loci, as there was insufficient genetic material to test on the sixteenth. Dr. Glessner stated that Burbage's DNA material could not have reached the airbag fabric through an intact steering column, but must have come into contact with the surface of the exposed airbag itself. He further opined that the odds of the profile described by the DNA report belonging to someone other than Burbage were one in eight quintillion from the Caucasian population, one in 600 quadrillion from the African-American population, and one in 580 quadrillion from the Hispanic population. It should be noted that Mr. Burbage is a black male born on May 30, 1968.
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> Trooper Roberts testified that the VIN of the minivan was 5FNRL3H97AB060427. This VIN matched that of a minivan taken from Turnersville Auto Mall on March 30, 2010.
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> Steven Bailey testified that he had seen Burbage and co-defendant Thomas Ellis in February of 2011 in Bensalem, PA, five feet apart and facing each other. It appeared to him that they knew each other.

Trial Court Opinion, 12/20/13, at 1-5 (internal citations and footnote omitted).

The jury returned guilty verdicts on the aforementioned charges, and acquitted Appellant of an additional aggravated assault and conspiracy to commit aggravated assault count. The court sentenced Appellant consecutively to three to six years imprisonment for burglary and fleeing and eluding and three and one-half to seven years for aggravated assault, and two to four years for criminal mischief. Appellant filed a timely post-sentence motion to modify his sentence. After a hearing, the court denied that motion. This timely appeal ensued.

The trial court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the trial court authored its opinion. The matter is now ready for our review. Appellant presents four issues for this Court's consideration.

A. Was the evidence insufficient to convict Appellant of aggravated assault by physical menace if the Commonwealth failed to prove beyond a reasonable doubt that Appellant entered into an agreement with the co-defendant to commit aggravated assault by physical menace?

B. Was the evidence insufficient to convict Appellant if the Commonwealth failed to establish beyond a reasonable doubt that Appellant committed the crimes charged when a description of the perpetrator did not match Appellant's description and the sole evidence linking Appellant to the crimes was a DNA match?

C. Was the aggregate sentence of 11 ½ to 23 months manifestly excessive in light of the criminal conduct involved?

D. Did the trial court err by imposing a sentence of 42 months to 84 months for Appellant's aggravated assault by physical menace conviction when the standard range of the sentencing guidelines called for 27 to 40 months imprisonment?

Appellant's brief at 4.

Appellant's first two claims pertain to the sufficiency of the evidence. In considering a sufficiency claim, "[w]e must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt." ***Commonwealth v. Brown***, 52 A.3d 320, 323 (Pa.Super. 2012). The Commonwealth may establish its burden "by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances." ***Id***. This Court cannot "re-weigh the evidence and substitute our judgment for that of the fact-finder." ***Id***. Further, "the entire record must be evaluated and all evidence actually received must be considered." ***Id***.

"Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail." ***Brown***, ***supra*** at 323. "The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented." ***Id***.

Appellant first argues that his mere presence in the stolen minivan does not prove that he agreed with the other occupant of the vehicle to

commit aggravated assault by physical menace or conspiracy to commit the same. Disregarding our standard of review, Appellant maintains that the evidence only "shows that Appellant made a spontaneous and impulsive attempt to elude an investigatory detention and Appellant's co-conspirator acted independently by ejecting merchandise from the minivan in an attempt to disrupt police vehicles and/or discard the evidence." Appellant's brief at 13. In Appellant's view, since he was driving and did not throw the objects from the vehicle, his aggravated assault conviction must be based on conspiracy liability.[1] Appellant sets forth that the Commonwealth did not show an explicit or implicit agreement with his co-defendant.

Appellant's initial sufficiency claim is devoid of merit. A person is guilty of aggravated assault by physical menace if he attempts to place an officer in fear of imminent serious bodily injury while the officer is performing his duties. ***See*** 18 Pa.C.S. § 2702(a)(6). To establish a conspiracy, the Commonwealth must prove that the defendant, with the intent to promote or facilitate aggravated assault by physical menace, agreed with another person that he or another person would engage in conduct that constitutes such a crime or agreed to aid the person in the planning or commission of the crime.

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[1] Since the trial court did not instruct the jury on accomplice liability, it could not have found Appellant guilty of the aggravated assault charged as an accomplice.

The Commonwealth must show "an overt act was done in furtherance of the conspiracy." ***Commonwealth v. Feliciano***, 67 A.3d 19, 26 (Pa.Super. 2013) (*en banc*). "The conduct of the parties and the circumstances surrounding such conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt." ***Id.*** The conspiratorial agreement "can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode." ***Id.***

Here, the circumstances and conduct of the parties, viewed in a light most favorable to the Commonwealth, are sufficient to establish that Appellant conspired with his co-defendant to throw items from the stolen vehicle at police in an attempt to elude capture. Appellant drove the van in a manner that allowed his co-defendant to propel the items at the police. These items were thrown at police while Appellant was engaged in a high speed chase with police. These facts are sufficient to demonstrate an attempt to place the officers in fear of imminent serious bodily injury by physical menace. The logical inferences and circumstantial evidence in the instant matter is not so weak and inconclusive that no probability of fact can be drawn therefrom.

Appellant's second sufficiency claim is that his mere presence in the minivan does not link him to the crimes related to the hardware store.

Appellant also contends that because Trooper Mincer initially described a male approximately twenty years of age fleeing from the driver's side of the van, and he was over forty, that insufficient evidence was produced by the Commonwealth. Here, DNA evidence conclusively established Appellant as the driver of the fleeing stolen minivan. The serial numbers of the items discarded from the stolen vehicle matched those of the equipment stolen from the hardware store. This evidence and the reasonable and logical inferences derived therefrom, as well as Appellant's actual flight, are sufficient to establish Appellant's guilt.

Appellant's third and fourth issues challenge the discretionary aspects of his sentence. To adequately preserve a discretionary sentencing claim, the defendant must present the issue in either a post-sentence motion or raise the claim during the sentencing proceedings. ***Commonwealth v. Cartrette***, 83 A. 3d 1030, 1042 (Pa.Super. 2013) (*en banc*). Further, the defendant must "preserve the issue in a court-ordered Pa.R.A.P. 1925(b) concise statement and a Pa.R.A.P. 2119(f) statement." ***Id***.

Importantly, "There is no absolute right to appeal when challenging the discretionary aspect of a sentence." ***Id***. "[A]n appeal is permitted only after this Court determines that there is a substantial question that the sentence was not appropriate under the sentencing code." ***Id.*** In determining whether an appellant presents a substantial question for our review, "we look to whether the appellant has forwarded a plausible

argument that the sentence, when it is within the guideline ranges, is clearly unreasonable. Concomitantly, the substantial question determination does not require the court to decide the merits of whether the sentence is clearly unreasonable." ***Commonwealth v. Dodge***, 77 A.3d 1263, 1270 (Pa.Super. 2013).

Appellant preserved his initial discretionary sentencing claim that his aggregate sentence was excessive in both his post-sentence motion and Rule 1925(b) statement. In addition, Appellant has included a 2119(f) statement in his brief. However, he failed to raise a specific claim relative to his aggravated assault conviction in his post-sentence motion. Therefore, Appellant's final issue is waived. ***See Cartrette***, ***supra*** at 1042-1043 (where defendant raised Eighth Amendment cruel and unusual punishment claim in post-sentence motion, his claim that the court did not properly consider 42 Pa.C.S. § 9721 was not preserved).

With respect to Appellant's preserved sentencing challenge, we find that he is not entitled to relief. Appellant in his 2119(f) statement contends that he has raised a substantial question because no citizen or police officer was injured and only property damage resulted from his crimes. According to Appellant, the sentence was "excessively disproportionate to the protection of the public, the gravity of the offense and the rehabilitative needs of Appellant." Appellant's brief at 21. Appellant maintains that his

sentencing claim is not a bald excessiveness challenge and that the court did not comply with 42 Pa.C.S. § 9721(b), in fashioning its sentence.

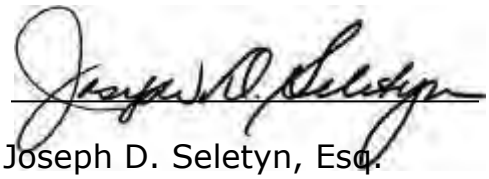
The Commonwealth rejoins that Appellant has not presented a substantial question for review. In the alternative, it replies that the trial court considered the relevant sentencing factors in fashioning its sentence. In this respect, it notes that Appellant was convicted of multiple crimes, damaged police cars, put the safety of the police and other motorists in danger by engaging in a high-speed chase, fled from police, and broke into and stole equipment from a hardware store. The Commonwealth continues that Appellant has a lengthy criminal history and is a repeat felony offender under the sentencing guidelines. According to the Commonwealth, only by luck was an individual not injured based on Appellant's actions.

Although we find that Appellant has presented a substantial question for review, ***see Dodge***, ***supra***, we agree with the Commonwealth that his sentence was more than reasonable. Here, Appellant and his co-defendant broke the window to a hardware store, stole high-end equipment, engaged police in a high speed chase, threw items at police from the vehicle during the chase to elude capture, and then fled from police after their stolen vehicle was stopped. Appellant also has a lengthy criminal history demonstrating an inability to be rehabilitated or that he is deserving of a lesser sentence. The court had the aid of a presentence report, which it considered; therefore, we must presume it properly weighed the appropriate

sentencing factors. ***Dodge***, ***supra*** at 1275. Consecutive sentences in the standard range were appropriate in this matter. ***See generally id***.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/23/2014