NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ANDY BUXTON,	:	
	:	
Appellant	:	No. 8 WDA 2014

Appeal from the Judgment of Sentence entered on December 2, 2013
in the Court of Common Pleas of Allegheny County,
Criminal Division, No. CP-02-CR-0001413-2013

BEFORE: PANELLA, JENKINS and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED JULY 28, 2014**

Andy Buxton ("Buxton") appeals from the judgment of sentence imposed following his conviction of aggravated assault, resisting arrest, and disorderly conduct.[1] We affirm.

The trial court set forth the underlying facts as follows:

> On January 13, 2013, Officer [Ilija] Tubin ["Officer Tubin"], a police officer for the City of Mckeesport, was working a security detail at Pap's Sportsman's Bar. In order for a patron to enter the bar, the patron was required to undergo a pat-down performed by Officer Tubin. Shortly before 2:00 a.m. on that day, [Buxton] attempted to enter the bar. Officer Tubin conducted a pat-down of [Buxton] and discovered a bulge in the right watch pocket of [Buxton]'s pants. Officer Tubin asked [Buxton] about the bulge and [Buxton] quickly grabbed the watch pocket from the outside of his pants, protecting it from Officer Tubin's reach. Officer Tubin noticed that a plastic bag was sticking out from the pocket. Relying on his training and experience, Officer Tubin believed that the baggie contained narcotics. He removed the item from [Buxton]'s pants and

[1] 18 Pa.C.S.A. §§ 2702(a)(3), 5104, 5503(a)(4).

determined there were ten white pills in the baggie. [Buxton] became disorderly, yelling that the pills were his "vikes." [Buxton] continued screaming and carrying on. [Buxton] became aggressive and Officer Tubin feared that [Buxton] was going to assault him. Due to [Buxton]'s disorderly conduct, he arrested [Buxton] and placed [him] in handcuffs. He then requested a police transport from the police station. The pills were later determined to be Vicodin, a schedule III controlled substance.

While waiting for the police transport to arrive, [Buxton] continued to be unruly. Sergeant [Daniel] Rich ["Sergeant Rich"] soon arrived on scene and [Buxton] was placed in the rear of the police vehicle to be transported to the McKeesport police station. Trial testimony indicated that Sergeant Rich is 5'11" and approximately 245 pounds. He has been a weightlifter. Sergeant Rich testified at trial that [Buxton] was "irate" when he arrived on the scene. [Buxton] was resisting efforts by Officer Tubin and another officer, Officer Eastman, to place [Buxton] into the police vehicle. Assistance was required to get [Buxton] into the police vehicle. Once [Buxton] was finally in the police vehicle, Sergeant Rich transported [Buxton] to the police station.

When he arrived at the police station, Sergeant Rich attempted to remove [Buxton] from the police vehicle. [Buxton] was still irate. Sergeant Rich attempted to explain to [Buxton] that he did not arrest him and he was just transporting him. After [Buxton] was removed from the police vehicle, [Buxton] repeatedly attempted to spin and pull away from Sergeant Rich. Sergeant Rich had to use what he termed an "arm bar" to gain control over [Buxton]. Sergeant Rich was required to place his arm under [Buxton]'s arms where they were handcuffed against his back. This enabled Sergeant Rich to better control [Buxton] as he escorted him into the police station. However, as they entered the police station, [Buxton] tried to pull away from Sergeant Rich. Just as Sergeant Rich was about to enter the doorway of the police station, [Buxton] attempted to pull away from Sergeant Rich again. Sergeant Rich, still applying the arm bar, became stuck between a second door and [Buxton]. [Buxton] then made a very quick turn to his right causing an injury to Sergeant Rich's shoulder area. Sergeant Rich immediately released [Buxton] and began experiencing substantial pain. At this point, Officer [Julian] Thomas ["Officer Thomas"] responded to assist Sergeant Rich. [Buxton] was

> placed in a holding cell. Sergeant Rich then went to the hospital for his injuries. He was diagnosed with a torn rotator cuff.
>
> Officer Thomas testified that he observed [Buxton] resisting Sergeant Rich's efforts to move [Buxton] toward the holding cell. He testified that [Buxton] attempted to push Sergeant Rich into the wall as he was being escorted down the steps of the station. After Officer Thomas became involved in the escort, [Buxton] attempted to "go limp" and not cooperate with the officers. Because of [Buxton]'s actions, both Sergeant Rich and Officer Thomas were required to get [Buxton] into the cell.

Trial Court Opinion, 2/21/14, at 1-4.

After a non-jury trial, Buxton was convicted of aggravated assault, resisting arrest, and disorderly conduct. Buxton was sentenced to an aggregate prison term of 11½ months to 23 months, followed by three years of probation. Buxton filed a timely Notice of Appeal.

On appeal, Buxton raises the following questions for our review:

> 1. Should [Buxton's] conviction for Aggravated Assault be set aside owing to the Commonwealth's failure to prove [], beyond a reasonable doubt, (A) that [Buxton] was attempting to inflict bodily injury upon the complainant; (B) [] intentionally inflicted bodily injury upon the complainant; or (C) [] knowingly inflicted bodily injury upon the complainant?
>
> 2. Should [Buxton]'s sentence be vacated owing to the fact it was based in part upon the [t]rial [c]ourt's misconstruction of the evidence, with the [t]rial [c]ourt erroneously concluding that the mere fact that [Buxton] became angry at the police officers who illegally arrested him meant that he lived his life with a hostile attitude toward all law enforcement officers?

Brief for Appellant at 3.

In his first claim, Buxton contends that there was insufficient evidence presented to support the conclusion that he committed aggravated assault.

Id. at 19-33. Buxton argues that he was convicted even though the Commonwealth failed to prove beyond a reasonable doubt that he intentionally or knowingly injured the officer. ***Id***. at 21.

In reviewing a challenge to the sufficiency of the evidence, we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Commonwealth v. Bibbs***, 970 A.2d 440, 445 (Pa. Super. 2009) (citation omitted).

> Evidence will be deemed sufficient to support the verdict when it established each element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty, and may sustain its burden by means of wholly circumstantial evidence. Significantly, [we] may not substitute [our] judgment for that of the factfinder; if the record contains support for the convictions they may not be disturbed.

Id. (citation and quotation marks omitted). "Any doubt about the defendant's guilt is to be resolved by the factfinder 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." ***Commonwealth v. Scott***, 967 A.2d 995, 998 (Pa. Super. 2009).

The Crimes Code defines aggravated assault, in relevant part, as follows: "A person is guilty of aggravated assault if he attempts to cause or intentionally or knowingly causes bodily injury to [an] [officer[] … while in the performance of duty." 18 Pa.C.S.A. § 2702(a)(3); ***see also Commonwealth v. Marti***, 779 A.2d 1177, 1182-83 (Pa. Super. 2001)

(stating that a simple assault committed on a police officer constitutes aggravated assault under this subsection.) Bodily injury is defined as "impairment of physical condition or substantial pain." 18 Pa.C.S.A. § 2301.

The trial court addressed Buxton's first claim as follows:

> The evidence in this case was clearly sufficient to convict [Buxton] of aggravated assault. Sergeant Rich suffered bodily injury, a torn rotator cuff, while he was performing his duties as a police officer. [Buxton] does not challenge that this injury constitutes bodily injury. Additionally, the torn rotator cuff occurred as Sergeant Rich was transporting [Buxton] to a holding cell after he had been arrested. …
>
> From the point of Sergeant Rich's first interaction with [Buxton], [Buxton] had been acting aggressively and "irate." Despite Sergeant Rich's efforts to calm [Buxton], [Buxton] engaged in a pattern of resistance that forced Sergeant Rich to use an arm bar to control [him]. [Buxton] was certainly aware that Sergeant Rich's arm was placed in a position under his handcuffed arms for the purpose of controlling him. [Buxton] was clearly aware that he was being taken to the police station and/or to a holding cell. [Buxton] was aware that he had Sergeant Rich's arm in a position that he could attempt to injure it. [Buxton] is a large person. He made a sudden maneuver with great force knowing that his actions were likely to cause bodily injury to Sergeant Rich. [Buxton] made the sudden maneuver when he and Sergeant Rich were in a confined area in which Sergeant Rich's ability to move was restricted. [The trial court] believes that these facts amply demonstrate that [Buxton] intentionally and knowingly caused bodily injury to Sergeant Rich while he was performing his duties as a police officer. Accordingly, the evidence was sufficient to convict [Buxton] of aggravated assault.

Trial Court Opinion, 2/21/14, at 5-6. We agree with the sound reasoning of the trial court and conclude that the evidence was sufficient to convict Buxton of aggravated assault. ***See id***.

In his second claim, Buxton contends that his sentence should be vacated because it was based in part upon the trial court's misconstruction of the evidence. Brief for Appellant at 34. He argues that the trial court erred when it found that he had a hostile attitude toward law enforcement, and, according to Buxton, his sentence was based in large part upon that erroneous conclusion. ***Id***.

Buxton's claim implicates the discretionary aspects of sentencing. ***See Commonwealth v. Dowling***, 990 A.2d 788, 792 (Pa. Super. 2010) (stating that a sentencing court's mischaracterization of evidence at sentencing implicates discretionary aspects of sentencing).

> An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:
>
> > [We] conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42. Pa.C.S.A. § 9781(b).

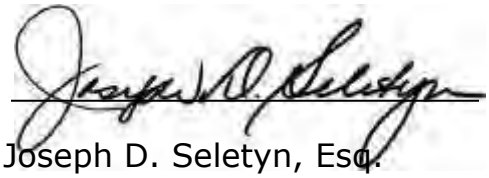
Commonwealth v. Moury, 992 A.2d 162, 170 (Pa. Super. 2010) (quotation marks and some citations omitted).

Here, Buxton did not properly preserve this issue at sentencing or in a post-sentence motion. Therefore, his second claim is waived. ***See Commonwealth v. Reeves***, 778 A.2d 691, 692-93 (Pa. Super. 2001)

(stating that when appellant failed to specifically raise the claim that the trial court did not provide sufficient support for his sentence on the record in a post-sentence motion, the trial court was deprived of an opportunity to consider the claim and the claim was waived on appeal).[2]

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/28/2014

[2] We note that the trial court did not take into consideration Buxton's hostile attitude toward all law enforcement; instead, it only considered Buxton's attitude toward the officers in the case at bar. ***See*** N.T., 12/2/13, at 4; ***see also*** Trial Court Opinion, 2/14/13, at 9. Further, at sentencing, the trial court set forth its reasoning for imposing the above-mentioned sentence. ***See*** N.T., 12/2/13, at 11-15.