NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOHNATHAN SIMMONS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 766 WDA 2011

Appeal from the Judgment of Sentence April 13, 2011
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0016835-2009

BEFORE: BENDER, ALLEN, and MUSMANNO, JJ.

MEMORANDUM BY BENDER, J.: Filed: February 11, 2013

Johnathan Simmons (Appellant) appeals from the judgment of sentence of an aggregate term of 5 to 10 years' incarceration followed by 2 years' probation imposed after he was convicted by a jury of robbery, robbery of a motor vehicle, carrying a firearm without a license, terroristic threats, recklessly endangering another person, simple assault, and criminal conspiracy. We affirm.

The trial court set forth the following recitation of facts of this case in its opinion filed pursuant to Pa.R.A.P. 1925(a):

> On July 21, 2009, at approximately 11:00 a.m., Rodney Harris (victim), a jitney driver, was standing on the corner of Penn and Wood Avenues in Wilkinsburg across the street from the Dollar General store. Walter Ferguson (co-defendant) approached the victim and asked him to drive him to the intersection of Rebecca and Ella streets. The co-defendant directed Appellant to "come on, let's go" and they both got into the car. The co-defendant who was in the passenger seat

directed the victim to pull the car over when nearing the previously requested intersection. The co-defendant got out of the car and said, "I think--I suggest you give him all your money. I don't want to see you get shot." The victim turned toward Appellant in the back seat and was told, "don't turn back."

The victim saw Appellant in the rearview mirror with a gun and he handed over his valuables. Appellant and the co-defendant took the victim's wallet, keys, $30 cash and items from the back of his vehicle. Appellant searched through the wallet and found a Citizen's Bank credit card and said, "hey, let's take him to the mac machine." Appellant ordered the victim into the backseat with him. As the co-defendant was coming around the vehicle to get into the driver's seat, the victim got out of the car slamming the door behind him and ran away. The victim asked a young lady sitting on a porch to call the police, as well as an elderly couple driving up the street. The victim hid between homes until the police arrived a few minutes later.

Officer Larry Langham of the Wilkinsburg Police Department transported the victim back to the police station. While [i]n route, the victim saw Appellant standing by Mike's Corner Store smoking a cigarette. The victim told the police officer, "wait a minute, that's the guy right there." The officer turned into the parking lot to speak to Appellant but he ran away. The officer was unable to chase Appellant in the police car as there were children on bicycles in the parking lot of the store.

On September 1, 2009, the victim was walking up Penn Avenue near a CVS store when he spotted Appellant and his girlfriend walking along the sidewalk. The victim made eye contact with Appellant and immediately called the police, who arrived within two minutes. The police approached Appellant in the CVS store and the victim identified Appellant saying, "that's him." Appellant aggressively moved toward the victim stating, "just you wait and see, bitch!" Appellant told police that he had a .32 caliber snub[-]nose revolver in his possession at the time of arrest along with additional bullets.

Trial Court Opinion (T.C.O.), 7/9/12, at 5-7 (citations to the record omitted).

After a jury trial, Appellant was found guilty of all charges. Following sentencing, Appellant filed a post-sentence motion that was denied. He then filed the instant appeal and a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant now raises three issues for our review:

> 1. Whether the Trial court erred in refusing to grant Appellant a new trial based upon ineffective assistance of counsel?
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> 2. Whether the Trial Court erred in not instructing the jury to disregard any inference of the burglary charge[]] allegedly filed against Appellant and referred to by [the] Commonwealth because of the Commonwealth's failure to provide any competent evidence supporting any alleged burglary?
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> 3. Whether the Trial Court erred in refusing to grant the Appellant's Motion for Acquittal because the evidence offered by the Commonwealth was inconsistent as to allow [a] finding of guilt beyond a reasonable doubt?

Appellant's brief at 4.

Appellant first argues that he should have been granted a new trial because trial counsel was ineffective for a plethora of reasons, such as failing: (1) to offer evidence of Appellant's physical condition that prevented him from running from the scene of the robbery, (2) to obtain Appellant's criminal record to rebut and object to the Commonwealth's reference to his past criminal history, (3) to call character witnesses, (4) to investigate and interview witnesses who were present at the scene of the robbery, and (5) to investigate and call any alibi witnesses.

Specifically, Appellant's brief discusses the Pennsylvania Supreme Court's rule set forth in ***Commonwealth v. Grant***, 813 A.2d 726, 738 (Pa. 2002), that provided "that, as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review[,]" and attempts to convince this Court that we need not defer all such issues. Appellant has overlooked the decision in ***Commonwealth v. Barnett***, 25 A.3d 371 (Pa. Super. 2011), wherein this Court reviewed the Supreme Court's decisions filed since the ***Grant*** case was handed down and concluded that:

> Based on the opinion of a majority of participating justices in [***Commonwealth v. Wright***, 961 A.2d 119 (Pa. 2008),] and [***Commonwealth v. Liston***, 977 A.2d 1089 (a. 2009),] this Court cannot engage in review of ineffective assistance of counsel claims on direct appeal absent an "express, knowing and voluntary waiver of PCRA review." ***Liston***, 602 Pa. at 22, 977 A.2d at 1096 (Castille, C.J., concurring). With the proviso that a defendant may waive further PCRA review in the trial court, absent further instruction from our Supreme Court, this Court, pursuant to ***Wright*** and ***Liston***, will no longer consider ineffective assistance of counsel claims on direct appeal.

Barnett, 25 A.3d at 377. Since Appellant has not indicated that he has waived his post-conviction review rights, nor does the record reveal such waiver, we conclude that Appellant's ineffective assistance of counsel claims must be dismissed without prejudice to raise them in a subsequent post-conviction proceeding along with any other post-conviction claims he may wish to raise.

Appellant next argues that the trial court erred "in not instructing the jury to disregard any inference of the burglary charge allegedly filed against Appellant and referred to by the Commonwealth because the Commonwealth was unable to provide any evidence supporting an alleged arrest for a burglary charge." Appellant's brief at 13. Essentially, Appellant's claim is that during cross-examination the Commonwealth referenced a burglary charge that appeared on Appellant's rap sheet that he stated he knew nothing about. ***See*** N.T. Trial, 1/12/11, at 47, 67. Appellant emphasized that he had never been arrested until the instant case. ***Id.*** Although he acknowledges that his attorney did not object to the Commonwealth's questioning, Appellant claims the trial court should have given what is termed an adverse inference instruction as to the alleged burglary charge.

In its opinion, the trial court responded to this claim, finding it waived because no objection was lodged as required by Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").[1] However, what is most curious about Appellant's discussion with regard to this issue is a lack of any argument to support an omission by the court to provide the adverse inference instruction. Rather,

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[1] In the alternative, the trial court discussed the admissibility of the evidence of other crimes as set forth in 42 Pa.C.S. § 5918. The court noted that Appellant had "opened the door regarding his prior arrests having testified that he had never been arrested prior to the present case." T.C.O. at 11. The trial court concluded that "[t]he prosecutor simply impeached him with … his prior arrest record." ***Id.***

Appellant states that "[t]he Trial Judge instructed the jury after the Appellant finished testifying that they were not to draw any adverse inference that the Appellant actually committed the burglary." Appellant's brief at 13. Simply stated, Appellant answers his own question. The transcript from Appellant's trial provides the following statement by the court to the jury:

> Ladies and gentlemen, in reference to the burglary you are not to draw any adverse inference regarding that the defendant actually committed the crime of burglary. The only purpose that that testimony was admitted was that the defendant's representation to you that he had never been arrested before. Mr. Pietragallo confronted him with some paperwork that may have indicated that he was arrested. That would only go to his credibility if, in fact, you should find that he was actually the person arrested on that burglary charge.
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> So you can't draw any inference that he has a conviction for burglary, certainly. And, again, the only thing that [it] is admitted for is in terms of evaluating the defendant's credibility if, in fact, it is established that you find that he was the person who was arrested for that burglary.

N.T. Trial, at 67-68. Accordingly, we conclude that not only did Appellant waive this issue for failing to object, but, more importantly, the court did in fact provide the jury instruction that Appellant claims was omitted. Thus, Appellant's second issue is without merit.

With regard to Appellant's final issue, he argues that the evidence was insufficient to support the robbery conviction and that, therefore, his motion for a judgment of acquittal should have been granted. The basis of Appellant's argument is an attack on the victim's credibility as to his

identification of Appellant. Instead, Appellant relies on his own testimony and the testimony of his witness, a jitney driver named Demetrius Washington, who Appellant claims was present at the time of the robbery and gave credible evidence that only Appellant's co-defendant got into the jitney.

Our standard of review when we consider a motion for judgment of acquittal is as follows:

> A motion for judgment of acquittal challenges the sufficiency of the evidence to sustain a conviction on a particular charge, and is granted only in cases in which the Commonwealth has failed to carry it burden regarding that charge.

Commonwealth v. Foster, 33 A.3d 632, 635 (Pa. Super. 2011) (quoting ***Commonwealth v. Hutchinson***, 947 A.2d 800, 805-06 (Pa. Super. 2008)).

Here, Appellant's assertions are solely requests that this Court should reassess the credibility of the witnesses and substitute our judgment for that of the fact finder. Thus, Appellant is challenging the weight of the evidence, not the sufficiency of the evidence.[2] In reviewing a weight challenge, we are guided by the following:

> An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. ***Commonwealth v. Dupre***, 866 A.2d 1089, 1101 (Pa. Super. 2005), *appeal denied*, 583 Pa. 694, 879 A.2d 781 (2005) (citing ***Commonwealth v. Sullivan***, 820 A.2d 795, 805-806 (Pa.

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[2] Appellant preserved this issue by raising it in a post-sentence motion. ***See*** Pa.R.Crim.P. 607 (weight of evidence claims must be raised before the trial court in a motion for a new trial to be preserved for appellate review).

> Super. 2003), *appeal denied*, 574 Pa. 773, 833 A.2d 143 (Pa. 2003) (quoting ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 751-752 (2000)). The Pennsylvania Supreme Court has explained that "[a]ppellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence." ***Widmer***, 744 A.2d at 753 (citation omitted). To grant a new trial on the basis that the verdict is against the weight of the evidence, this Court has explained that "the evidence must be 'so tenuous, vague and uncertain that the verdict shocks the conscience of the court.'" ***Sullivan***, 820 A.2d at 806 (quoting ***Commonwealth v. La***, 433 Pa. Super. 432, 640 A.2d 1336, 1351 (1994), *appeal denied*, 540 Pa. 597, 655 A.2d 986 (1994)).
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> … [I]t is well settled that we cannot substitute our judgment for that of the trier of fact. ***Commonwealth v. Holley***, 945 A.2d 241, 246 (Pa. Super. 2008). Further, the finder of fact was free to believe the Commonwealth's witnesses and to disbelieve the witness for the Appellant. ***See Commonwealth v. Griscavage***, 512 Pa. 540, 517 A.2d 1256 (1986) (the finder of fact is free to believe all, none, or part of the testimony presented at trial).

Commonwealth v. Manley, 985 A.2d 256, 262 (Pa. Super. 2009). "A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict." ***Commonwealth v. Sullivan***, 820 A.2d 795, 806 (Pa. Super. 2003) (quoting ***Widmer***, 744 A.2d at 751).

As we noted above, Appellant is essentially attacking the fact finder's credibility determinations and is asking this Court to conclude that the victim's testimony was not to be believed and that Appellant's and his witness's testimony should have been credited instead. That we cannot and will not do. Although the trial court's opinion provided a lengthy sufficiency of the evidence discussion, it also indicated that Appellant's argument that

the Commonwealth's evidence was inconsistent was without merit. T.C.O. at 15. After conducting our own review, we conclude that the trial court did not abuse its discretion by so concluding. We agree that the evidence here is not so tenuous or vague that it would shock a trial court's conscience.

Accordingly, we conclude that Appellant's ineffective assistance of counsel claims were properly dismissed without prejudice to raise them in the context of a post-conviction proceeding. We further conclude that Appellant's second and third issues are without merit. Therefore, we affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.