

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
THOMAS ANTHONY SCOTT,	:	
	:	
Appellant	:	No. 1582 WDA 2011

Appeal from the Judgment of Sentence August 29, 2011,
Court of Common Pleas, Allegheny County,
Criminal Division at No. CP-02-CR-0003918-2011

BEFORE: DONOHUE, OLSON and MUSMANNO, JJ.

MEMORANDUM BY DONOHUE, J.: FILED: June 18, 2013

Thomas Anthony Scott ("Scott") appeals from the judgment of sentence entered following his convictions of assault of a law enforcement officer, aggravated assault and recklessly endangering another person.¹ We affirm.

The trial court summarized the facts underlying this appeal as follows:

City of Pittsburgh Police Sergeant Jason Snyder, a narcotics detective, testified that on March 9, 2011, he was on patrol in a high crime area of Pittsburgh while in an unmarked police vehicle with Detective Jeddiah Pollock. Detectives Ed Fallert and Mark Goob were trailing him in a second unmarked vehicle. Sergeant Snyder heard multiple gunshots to his right. He turned and saw a male in dark clothing in an alley firing a handgun. Sergeant Snyder, who testified he was wearing his badge around his neck, exited his vehicle and loudly declared, 'Pittsburgh

¹ 18 Pa.C.S.A. §§ 2702.1, 2702, 2705.

Police, drop your weapon.' The assailant, identified by the Sergeant as [Scott], immediately turned and fired more than eight rounds at the Sergeant. Sergeant Snyder returned fire and hit [Scott], causing him to fall face forward.

Detective Mark Goob also testified that he observed [Scott] shoot at Sergeant Snyder. He heard the shots and saw the muzzle flash. After [Scott] was hit, Detective Goob approached him to determine if [Scott] remained a threat and to render medical aid if possible. During his cautious approach, Detective Goob repeatedly instructed [Scott] to drop the weapon which the Detective could see in [Scott's] hand. Instead, while Detective Goob was approximately five yards away, [Scott] turned, pointed his gun at Detective Goob and started to fire again. Detective Goob heard the gun discharge and returned fire, hitting [Scott] in the leg. The Officer saw the slide of [Scott's] gun lock back, an indication that [Scott] was out of bullets. [Scott] then said words indicating that he quit or was done and dropped his gun.

Detective Edward Fallert testified similarly to having observed [Scott] turn and fire at Sergeant Snyder. Once Sergeant Snyder shot [Scott] to the ground, Detective Fallert heard Detective Goob repeatedly shout to [Scott] to drop the gun. Instead of complying with the Officer's demand, Detective Fallert observed [Scott] roll with gun in hand toward Detective Goob. After getting shot by Detective Goob, Detective Fallert saw [Scott] drop the gun and surrender, the gun in slide-lock, open chamber position. Detective Fallert also noted an odor of alcohol emanating from [Scott].

Detective Jeffrey Palmer recovered the Glock pistol, .40 caliber belonging to [Scott] and testified that the gun was recovered with the slide in the locked position.

Detective Scott Evans arrived after the shooting and recovered shell casings at the scene. Eight of the casings were brass in color, which would not have been consistent with police-issued ammunition. Other casings recovered at the scene matched in caliber, make and color with standard issue police 'duty ammo.' Detective Evans concluded that some casings were fired by police-issued weapons and others were not. Upon further research, Detective Evans discovered that the gun found at the scene was owned by [Scott] who did not have a license to carry a firearm on his person.

Trial Court Opinion, 9/12/12, at 3-4 (citation to notes of testimony omitted).

At the conclusion of a three-day trial, the jury found Scott guilty of the above-mentioned offenses and the trial court sentenced him to an aggregate term of 40 to 80 years of imprisonment. No post-sentence motions or direct appeal were filed. Scott subsequently filed a petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546, seeking reinstatement of his direct appeal rights *nunc pro tunc*. The PCRA court granted Scott's petition, following which Scott filed this timely appeal. He presents two issues for our review, which we have reordered for our discussion:

1. Was the evidence presented sufficient to establish that Mr. Scott fired shots in the direction of the police officers?
2. Was Mr. Scott's Pennsylvania and United States' [sic] Constitutional right to counsel violated when his attorney of record was allowed to withdraw on August 29, 2011, effectively denying Mr. Scott the right to counsel for post-sentence motions?

Appellant's Brief at 5.

With regard to the challenge to the sufficiency of the evidence, we begin by noting our standard of review: "In reviewing a sufficiency of the evidence claim, we must determine whether the evidence, and all reasonable inferences therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all the elements of the offenses beyond a reasonable doubt." ***Commonwealth v. Maerz***, 879 A.2d 1267, 1269 (Pa. Super. 2005).

Scott posits that all three of the crimes of which he was convicted required a finding that he fired his gun at the police officers, but that the Commonwealth presented insufficient evidence to establish that he did so. **See** Appellant's Brief at 24, 31, 33.² This assertion is belied by the evidence of record, as Sergeant Snyder, Detective Goob and Detective Fallert all testified that they saw Scott fire at Sergeant Snyder. N.T., 8/24/11, at 53, 100, 149; N.T., 8/25/11, at 349. Sergeant Snyder and Detective Goob also testified that they observed Scott fire at Detective Goob when he approached Scott as he lay on the ground. N.T., 8/24/11, at 57, 109, 155, 157. This testimony, when viewed in the light most favorable to the

² At the beginning of his argument on this issue, Scott also posits that "the Commonwealth failed to present sufficient evidence to establish that [] Scott attempted to cause serious bodily injury to the police or in fact that he knew they were police[.]" Scott did not raise these claims in his Pa.R.A.P. 1925(b) statement of matters complained of on appeal, and so they have been waived. ***Commonwealth v. Castillo***, 585 Pa. 395, 403, 888 A.2d 775, 780 (2005) ("Any issues not raised in a Pa.R.A.P. 1925(b) statement will be deemed waived."); Pa.R.A.P. 1925(b)(4)(vii).

Commonwealth, is sufficient to establish that Scott fired his firearm at police officers.

Much of Scott's argument on this issue is that the jury should have accepted his testimony about the events of the night in question over the testimony of the Commonwealth's witnesses.³ **See id.** at 26-30. This is an argument addressed to the weight, not the sufficiency of the evidence. **Commonwealth v. Gibbs**, 981 A.2d 274, 281 (Pa. Super. 2009). As Scott has not challenged the weight of the evidence underlying his convictions, this argument is misplaced.

In his second issue, Scott argues that the trial court violated his Sixth Amendment right to counsel because "his attorney of record was allowed to withdraw on August 29, 2011, effectively denying [him] the right to counsel for post-sentence motions." Appellant's Brief at 20. As support for his position, Scott points to the Comment to Pa.R.Crim.P. 120(B), which provides as follows:

Although there are many factors considered by the court in determining whether there is good cause to permit the withdrawal of counsel, when granting leave, the court should determine whether new counsel will be stepping in or the defendant is proceeding without counsel, and that the change in attorneys will not delay the proceedings or prejudice the defendant, particularly concerning time limits. In

³ At trial, Scott testified that he was discharging his firearm into a mound of dirt when the police shot him, and that he did not fire his gun at any person. N.T., 8/26/11, at 607-616.

addition, case law suggests other factors the court should consider, such as whether (1) the defendant has failed to meet his or her financial obligations to pay for the attorney's services and (2) there is a written contractual agreement between counsel and the defendant terminating representation at a specified stage in the proceedings such as sentencing. **See, e.g., Commonwealth v. Roman. Appeal of Zaiser**, 549 A.2d 1320 (Pa. Super.[]) 1988).

Pa.R.Crim.P. 120, Cmt.

Scott claims that the trial court failed to consider any of factors mentioned in the Comment to Pa.R.Crim.P. 120 when permitting trial counsel to withdraw. Appellant's Brief at 22. Contrary to Scott's assertion, our review of the record reveals that the trial court did take these factors into consideration. In response to the trial court's questioning, Scott's trial counsel indicated that he does not do appellate work and that his fee agreement with Scott was for trial only. The trial court also considered the deadline for the filing of post-sentence motions in its decision to allow trial counsel to withdraw and to appoint counsel for Scott. N.T., 8/29/11, at 758-60.

However, and more to the point, our review of the record reveals that the trial court did appoint counsel in time for the filing of post-sentence motions. Scott was sentenced on August 29, 2011, and so he had until September 8, 2011 to file post-sentence motions. **See** Pa.R.Crim.P. 720(A) (providing that post-sentence motions must be filed within 10 days of the

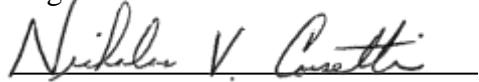
imposition of sentence). At sentencing on August 29, 2011, the trial court ascertained that Scott's counsel would be withdrawing, and so it stated that it would appoint counsel for Scott. ***Id.*** at 759. The trial court issued an order appointing counsel for Scott four days later, on September 2, 2011. This order was docketed on September 7, 2011. Thus, while the trial court's procedure (specifically, the delay in entering the order appointing counsel) was less than ideal, it did appoint counsel prior to the expiration of the period in which to file post-sentence motions.

While we may agree with Scott that the trial court could have taken a "more prudent" course of action in the appointment of counsel, Appellant's Brief at 23, we note that Scott's appointed counsel could have employed a more prudent approach as well, by seeking an extension of time in which to file post-sentence motions. Scott offers no explanation as to why his appointed counsel did not, or could not, have sought such an extension. Moreover, as the trial court points out, Scott could have, but did not, seek the reinstatement of his right to file post-sentence motions in the PCRA petition that sought the reinstatement of his appellate rights. Following our disposition here, Scott will have the right to file another PCRA petition. ***Commonwealth v. Barnett***, 25 A.3d 371, 373 n.7 (Pa. Super. 2011), ("Upon restoration of direct appeal rights *nunc pro tunc*, a subsequent PCRA petition will be considered a first petition for timeliness purposes."). Therefore, if Scott is entitled to the relief he seeks (the right to file post-

sentence motions *nunc pro tunc*), it would come from the successful allegations of ineffective assistance of counsel in such a petition. We note that we express no opinion on the validity of such a PCRA claim.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Nicholas V. Caselli". The signature is fluid and cursive, with "Nicholas" and "V." on the first line and "Caselli" on the second line.

Deputy Prothonotary

Date: 6-18-13