NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TYRONE PEELE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 180 EDA 2013

Appeal from the Judgment of Sentence December 4, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-0013145-2011

BEFORE: GANTMAN, J., DONOHUE, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. **FILED AUGUST 19, 2013**

Appellant, Tyrone Peele, appeals from the judgment of sentence entered following his jury conviction of intimidation of a witness and simple assault.[1] Appellant's counsel has filed a brief and a petition to withdraw under ***Anders v. California***, 386 U.S. 738 (1967) and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009), alleging that the appeal is wholly frivolous. We affirm the judgment of sentence and grant counsel's petition to withdraw.

The underlying facts in this matter are taken from the October 10, 2012 notes of trial testimony.

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 4952(a)(1) and 2701(a)(1), respectively.

During the afternoon of October 8, 2011, Arva Brown was watching television when she heard noises outside of her home. She looked outside and saw two men fighting. Brown called the police, who asked if she knew the men; Brown initially said she did not, but then realized that one of the men was her nephew, Appellant. Appellant looked up and saw Brown on the phone, and urged her not to call the police. Brown continued to speak to the police; however, by the time the police arrived, the men had fled.

Later that evening, Appellant, who was living with Brown and her now-deceased aunt, returned home. When Appellant entered the home, all "[h]oly hell broke loose." (N.T. Trial, 10/10/12, at 52). Appellant cursed Brown and punched her in the face three to four times. Appellant told Brown he was going to kill her because she called the police, and choked her. Brown suffered injuries to her head, nose, teeth, and left eye. Appellant ripped off Brown's bloody clothing and left the house, saying, "You're not going to get my DNA." (***Id.*** at 62).

Following his arrest, on October 12, 14, and 19, 2011, Appellant contacted Brown from prison, telling her not to come to court. Brown testified that she was frightened by the calls because she believed Appellant would kill her if she testified against him, even though she conceded that Appellant stated that he would not do anything to her. (***See id.*** at 72). All the phones calls occurred prior to the preliminary hearing in this matter. (***See id.*** at 103-04).

On October 11, 2012, the jury convicted Appellant of the aforementioned charges and acquitted him of other related charges. On December 4, 2012, the trial court sentenced Appellant to an aggregate term of incarceration of not less than eleven nor more than twenty-two years.

Appellant filed a timely notice of appeal on December 31, 2012. On January 11, 2013, the trial court directed Appellant to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Upon being informed that trial counsel was going to withdraw, the trial court orally appointed new counsel and sent him the Pa.R.A.P. 1925(b) order on January 15, 2013. However, a written appointment order was not sent to new counsel until February 22, 2013. On March 27, 2013, the trial court issued a 1925(a) opinion finding all issues waived on appeal because of counsel's failure to file a timely 1925(b) statement. On April 2 and 3, 2013, in lieu of filing a Rule 1925(b) statement, Appellant's counsel filed a request to file a *nunc pro tunc* Rule 1925(b) statement and an untimely statement of intent to file an ***Anders***[2] brief.

On appeal, the ***Anders*** brief raises the issue of the sufficiency of the evidence underlying Appellant's conviction of intimidation of a witness. (***See Anders*** Brief, at 11-14).

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[2] ***See Anders***, ***supra***; ***see also***, ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981).

Prior to addressing Appellant's claim, we must first decide if he has properly preserved it for appeal. Pennsylvania Rule of Appellate Procedure 1925 provides in pertinent part:

> **(b) Direction to file statement of errors complained of on appeal; instructions to the appellant and the trial court.—** If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").
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> (2) *Time for filing and service.*—The judge shall allow the appellant at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement. Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an amended or supplemental Statement to be filed. In extraordinary circumstances, the judge may allow for the filing of a Statement or amended or supplemental Statement *nunc pro tunc*.

Pa.R.A.P. 1925(b)(2). In ***Commonwealth v. Lord***, 719 A.2d 306 (Pa. 1998), *superseded by rule on other grounds as stated in* ***Commonwealth v. Burton***, 973 A.2d 428, 430 (Pa. Super. 2009) (*en banc*), the Pennsylvania Supreme Court held that "in order to preserve their claims for appellate review, Appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Rule 1925." ***Lord***, ***supra*** at 309. In ***Commonwealth v. Castillo***, 888 A.2d 775 (Pa. 2005), *superseded by rule on other grounds as stated in* ***Commonwealth v. Burton***, 973 A.2d 428, 430 (Pa. Super. 2009) (*en banc*), our Supreme Court

reaffirmed that failure to file a timely 1925(b) statement, regardless of the length of the delay, results in an automatic waiver. ***See Castillo***, ***supra*** at 779-80.

Following the enactment of the 2007 Amendments to Pa.R.A.P. 1925, this Court has modified its approach in accordance with the amended rule, finding that both the failure to file a 1925(b) statement and the failure to file a timely 1925(b) statement constitute *per se* ineffective assistance of counsel. ***See Burton***, ***supra*** at 432-33. Thus, in cases where an attorney fails to file a timely 1925(b) statement, this Court will either remand the case for the filing of a timely 1925(b) statement *nunc pro tunc* and a new trial court opinion, or in cases where a Rule 1925(b) statement is filed late and the trial court has addressed the merits of Appellant's claims, this Court will also address the merits of the appeal. ***See Commonwealth v. Thompson***, 39 A.3d 335, 340 (Pa. Super. 2012).

Here, the trial court initially issued an order directing Appellant to file a 1925(b) statement within twenty-one days of January 11, 2013. Nevertheless, as discussed above, confusion ensued because while the trial court orally informed new counsel he would be appointed and sent him the 1925(b) order in mid-January 2013, a written appointment order did not issue until late-February 2013. (***see*** Trial Court Opinion, 3/27/13, at 1 n.4; Appellant's Request to File 1925(b) Statement *[Nunc] Pro Tunc*, 4/2/13, at 1-2). Even if we were to deem February 23, 2013, as the date the 1925(b)

calendar began to run, Appellant had until March 18, 2013,[3] to file the 1925(b) statement. Appellant did not file his statement of intent to file an ***Anders*** brief until April 3, 2013, thus it was still untimely. Given that, the trial court found all claims on appeal waived in its 1925(a) opinion, we would ordinarily remand this matter for the filing of a new 1925(b) statement and 1925(a) opinion in this matter.

Then again, counsel did not file an untimely Rule 1925(b) statement but rather an untimely statement of intent to file an ***Anders*** brief. ***See*** Pa.R.A.P. 1925(c)(4). Thus, to remand the matter, where counsel has identified no issues of merit in his statement, would be an elevation of form over substance. Accordingly, we will review this matter without remand, in the interest of judicial economy.

Here, Appellant's court-appointed counsel has petitioned for permission to withdraw and has submitted an ***Anders*** brief, which is procedurally proper for counsel seeking to withdraw on direct appeal. Court-appointed counsel who seeks to withdraw from representing an appellant on direct appeal on the basis that the appeal is frivolous 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,

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[3] The twenty-first day, March 16, 2013, was a Saturday.

> controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Santiago, ***supra*** at 361. When we receive an ***Anders*** brief, we first rule on the petition to withdraw and then review the merits of the underlying issues. ***See Commonwealth v. Garang***, 9 A.3d 237, 240-41 (Pa. Super. 2010). In addition, "[p]art and parcel of ***Anders*** is our Court's duty to review the record to insure no issues of arguable merit have been missed or misstated." ***Commonwealth v. Vilsaint***, 893 A.2d 753, 755 (Pa. Super. 2006).

In the instant matter, counsel has substantially complied with all the requirements of ***Anders*** and ***Santiago***. Specifically, he has petitioned this Court to withdraw on grounds of frivolity. In addition, after his review of the record, he filed a brief with this Court that provides a summary of the procedural history and facts with citations to the record, refers to any facts or legal theories that arguably support the appeal, and explains why he believes the appeal is frivolous. (***See Anders*** Brief, at 7-9, 11-14). Lastly, he has attached as an exhibit to the petition to withdraw a copy of the letter sent to Appellant giving notice of his rights and including a copy of the ***Anders*** brief and the petition. ***See Commonwealth v. Millisock***, 873 A.2d 748, 751 (Pa. Super. 2005). Appellant has not responded. Because counsel has expressly complied with the dictates of ***Anders***, ***Santiago***, and ***Millisock***, we will examine the issues set forth in the ***Anders*** brief that counsel believes have arguable merit. ***See Garang***, ***supra***, at 240-41.

The ***Anders*** brief asserts that the evidence was not sufficient to sustain Appellant's conviction for intimidation of a witness because "there was no threat of violence or direct intimidation[.]" (***Anders*** Brief, at 11). The ***Anders*** brief posits that the evidence was insufficient because Brown never felt "truly threatened or intimidated" because Appellant was incarcerated. (***Id.*** at 13).

Our standard for reviewing the sufficiency of the evidence is well-settled.

> The standard we apply when 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. Furthermore, when reviewing a sufficiency claim, our Court is required to give the prosecution the benefit of all reasonable inferences to be drawn from the evidence.
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> However, the inferences must flow from facts and circumstances proven in the record, and must be of such volume and quality as to overcome the presumption of innocence and satisfy the jury of an accused's guilt beyond a reasonable doubt.

> The trier of fact cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fail even under the limited scrutiny of appellate review.

Commonwealth v. Bostick, 958 A.2d 543, 560 (Pa. Super. 2008), *appeal denied*, 987 A.2d 158 (Pa. 2009) (quoting ***Commonwealth v. Smith***, 956 A.2d 1029, 1035-36 (Pa. Super. 2008) (*en banc*)).

> An individual is guilty of witness intimidation if he:
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> . . . with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to:
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> > (1) Refrain from informing or reporting to any law enforcement officer, prosecuting official or judge concerning any information, document or thing relating to the commission of a crime.

18 Pa.C.S.A. § 4952(a)(1). In ***Commonwealth v. Brachbill***, 527 A.2d 113, 117 (Pa. Super. 1987), *vacated on other grounds*, 555 A.2d 82 (Pa. 1989), this Court squarely held that the presence of a threat is not a necessary element of the offense of intimidation. In ***Brachbill***, two prison guards sexually assaulted the victim. Following the victim's release, an investigation of the incidents ensued; the guards told the victim to keep silent and to report to them every other day. ***See Brachbill***, ***supra*** at 115. One of the guards offered to purchase clothing for the victim and his family, and take them out to dinner; he gave the victim a small amount of money. ***See id.*** Following their convictions for witness intimidation, the guards argued that the trial court should have instructed the jury that threat was a

necessary element of witness intimidation. ***See id.*** This Court disagreed, stating:

> First, the statute's basic purpose suggests that it was designed to punish any knowing or intentional conduct designed to obstruct justice. The word "threat" is found nowhere in the definition of the offense, 18 Pa.Cons.Stat.Ann.Sec. 4952(a). Quite rightly, the legislature intended that the statute was to be read broadly so as to include conduct likely to cause public harm.
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> Second, our interpretation conforms to the statutory directives of Section 4952. Under subsection (b), the offense of intimidation is graded as a misdemeanor unless one of five different circumstances are present. In particular, subsection (b)(1) provides that where the defendant uses "force, violence or deception, or **threatens** to employ force or violence," the offense is elevated to a felony. 18 Pa.Cons.Stat.Ann.Sec. 4952(b)(1). In our view, the legislature intended to punish **any** intimidating behavior, whether or not a threat forms the basis of that behavior. Where, however, the intimidating behavior is by threat of force or violence, the punishment is more severe.
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> Third, the dictionary definition of "intimidate" is not restricted by the word "threat." In general, intimidation is any "(u)nlawful coercion; extortion; duress (or) putting in fear." Black's Law Dictionary, 5th ed. at 737 (1979). Webster's Ninth New Collegiate Dictionary at 634 (1984) defines "intimidate" as "to compel or deter by **or as if** by threat." (emphasis added). Certainly, the use of a threat is, quite frequently, the common means of intimidation. Still, the legal and common definitions of intimidation invoke a notion of conduct which is directed toward affecting future behavior whether or not a threat is part of that conduct.
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> Fourth, our decision has some basis in case law. In ***Commonwealth v. Fontana***, 490 Pa. 7, 415 A.2d 4 (1980), the defendant made no actual threat to the witness in attempting to deter the latter from testifying. Nevertheless, the Supreme Court upheld the conviction for tampering.[a] Obviously, proof of an actual threat was not a prerequisite to a conviction. We believe the same rule holds true here.

> [a] ***Fontana*** was decided under the predecessor statute to Section 4952 which provided:
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> (a) Offense defined.—A person commits an offense if, believing than an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a witness or informant to;
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> (1) testify or inform falsely;
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> (2) withhold any testimony, information, document or thing except on advice of counsel;
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> (3) elude legal process summoning him to testify or supply evidence; and
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> (4) absent himself from any proceeding or investigation to which he has been legally summoned.
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> (b) Grading.—The offense is a felony of the third degree; if the actor employs force, deception, threat or offer of pecuniary benefit. Otherwise it is a misdemeanor of the second degree.
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> 18 Pa.Cons.Stat.Ann.Sec. 4907, *repealed by*, 18 Pa.Cons.Stat.Ann.Sec. 4952. In our view, threatening conduct is not an element under either provision; it is simply too tenuous to presume the legislature intended to make such a substantial change merely by changing the operative word from "induce" to "intimidate."

> In sum, our interpretation seems better to carry out the legislature's intent in enacting this statute without unduly restricting its application. At the same time, that interpretation is consistent with dictionary definitions of intimidation which we accept as the legal and common usage, and with case law. For these reasons, we conclude that the definition of intimidation found in Section 4952(a) does not contain an element of threatening conduct.

Id. at 116-117 (emphases in original). While the Supreme Court did not discuss the issue in detail, they agreed, "Appellants' assertion that the offense of intimidation as defined in the Code requires proof of threats to support a conviction is meritless. ***Brachbill***, ***supra*** at 84. Thus, in this

case, Appellant's claim that the evidence was insufficient to sustain his conviction for intimidation of a witness because he did not threaten Brown lacks merit.

Appellant also alleges the evidence was insufficient to sustain the conviction for intimidation of a witness because Brown never felt intimidated or threatened because Appellant was incarcerated. (***See Anders*** Brief, at 13). We disagree.

In discussing the elements of intimidation of a witness, this Court has stated:

> From [the definition of the offense of intimidation of a witness] it is apparent that actual intimidation of a witness is not an essential element of the crime. The crime is committed if one, with the necessary mens rea, "**attempts**" to intimidate a witness or victim. Thus, it was not essential to a conviction that [the victim] actually receive the threatening letter before she testified. The letter was written and mailed on the eve of appellant's trial and before his accuser had given testimony. The trier of the facts, therefore, could find that appellant attempted to intimidate his accuser and that he did so intending or, at least, having knowledge that his conduct was likely to, impede, impair or interfere with the administration of criminal justice.

Commonwealth v. Collington, 615 A.2d 769, 770 (Pa. Super. 1992), *appeal denied*, 625 A.2d 1191 (Pa. 1993) (emphasis in original).

Here, the evidence at trial demonstrated that on three separate occasions, prior to the preliminary hearing, Appellant called the victim and told her not to testify. (***See*** N.T. Trial, 10/10/12, at 72-80). The victim also testified that the calls frightened her. (***See id.*** at 76). This evidence was sufficient to sustain a conviction for witness intimidation, ***see Collington***,

supra at 770; ***Brachbill***, ***supra*** at 117. The claim that the evidence was insufficient to sustain Appellant's conviction for witness intimidation because the witness did not feel threatened or intimidated lacks merit.

We agree with counsel that the issue raised in the ***Anders*** brief is wholly frivolous. (***See Anders*** Brief, at 11-14). Further, this Court has conducted an independent review of the record as required by ***Anders*** and ***Santiago*** and finds that no non-frivolous issues exist.

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

Judgment Entered.

Prothonotary

Date: 8/19/2013