NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. KHARIS BRAXTON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1387 EDA 2012

Appeal from the Judgment of Sentence December 28, 2009
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0013687-2008

BEFORE: MUNDY, J., OTT, J., and PLATT, J.*

MEMORANDUM BY OTT, J.: Filed: April 18, 2013

Kharis Braxton appeals *nunc pro tunc* by permission of the trial court, from a judgment of sentence imposed on December 28, 2009, by the Philadelphia County Court of Common Pleas. At the conclusion of a bifurcated bench trial on May 18, 2009 and July 29, 2009, the trial court convicted Braxton of theft by unlawful taking, receiving stolen property, persons not to possess a firearm, firearms not to be carried without a license, and carrying firearms on public streets in Philadelphia.[1] On December 28, 2009, the trial court sentenced Braxton to an aggregate term of six to 12 years' imprisonment. On appeal, he raises the following claims:

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 3921(a), 3925(a), 6105(a)(1), 6106(a)(1), and 6108.

(1) there was insufficient evidence to convict Braxton of violating the Uniform Firearm Act ("VUFA") under Section 6106(a)(1); (2) the trial court erred by not reinstating Braxton's right to file post-sentence motions; and (3) the court erred in finding Braxton was not entitled to a new sentencing hearing. After reviewing the official record, submissions by the parties, and relevant law, we affirm the judgment of sentence.

The trial court set forth the facts as follows:

> On August 1, 2008 the complainant, Anthony Williams, agreed to give a ride to [Braxton], whom he had known for many years. When both men got into the car, [Braxton] observed Mr. Williams remove a gun from his person and place it in the center console of the car. Mr. Williams had a permit to carry the weapon at the time. At a certain point [Braxton] opened the console and removed Mr. Williams' gun, at which time he exited the car and ran away.
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> Mr. Williams reported the incident to the police immediately and was soon shown a group of computer photos by a Detective Hopkins. At that time no identification was made. Less than two weeks later, on August 13, 2008, Mr. Williams was shown another group of photos, and this time he was able to pick out the photo of [Braxton], which was not in the first group. Detective Ruth was the individual who showed Mr. Williams the second group of photos. Detective Ruth testified that Mr. Williams "immediately picked out Mr. Braxton as the male who stole his firearm."
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> Exhibits introduced into evidence at trial included [Braxton]'s criminal extract, showing that he had been convicted of certain enumerated offenses concerning the VUFA 6015 charge; a certificate of non-licensure, showing that [Braxton] had no license to carry a firearm; and the complainant's original August 1, 2008 interview with Detective Hopkins, showing that he told the detective that [Braxton] put the gun in his pocket and ran down the street.

Trial Court Opinion, 6/5/2012, at 2 (record citations omitted).

On July 29, 2009, after a bifurcated trial, the trial court convicted Braxton of the above-stated crimes. On December 29, 2009, the trial court sentenced Braxton to a term of five to ten years' imprisonment for the firearms not to be carried without a license conviction, a consecutive sentence of one to two years' incarceration for the theft by unlawful taking offense, and concurrent terms of three and one-half to seven years' and two and one-half years to five years' for the firearms not to be carried without a license and carrying firearms on public streets in Philadelphia convictions, respectively. The court did not impose a further penalty with regard to the receiving stolen property offense. Braxton did not file post-sentence motions or a direct appeal.

On July 21, 2010, Braxton filed a *pro se* petition pursuant to the Post-Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Counsel was appointed and an amended PCRA petition was filed on March 21, 2011, requesting that Braxton be permitted to file post-sentence motions and an appeal from the judgment of sentence *nunc pro tunc*. On May 1, 2012, the PCRA court entered an order, which granted Braxton relief in part by reinstating his direct appeal rights but the court denied his request to file post-sentence motions. This appeal followed.[2]

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[2] The court did not order Braxton to file a concise statement of errors complained of on appeal under Pa.R.A.P. 1925(b). Nevertheless, he filed a
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In Braxton's first issue, he claims there was insufficient evidence to support his VUFA conviction pursuant to Section 6106(a)(1) because the victim did not testify that Braxton concealed the firearm on or about his person. Braxton states while the victim gave a statement to police that Braxton put the firearm in his pocket when he stole it from the victim, the victim testified at trial that Braxton took the firearm and then ran down the street but did not mention placing the gun in his pockets.

> The standard we apply in 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 [finder] 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.

Commonwealth v. Brooks, 7 A.3d 852, 857 (Pa. Super. 2010) (citation omitted).

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concise statement on May 11, 2012. The trial court issued an opinion under Pa.R.A.P. 1925(a) on June 5, 2012.

The crime of "firearms not to be carried without a license" is defined, in pertinent part, as follows:

> (1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

18 Pa.C.S. § 6106(a)(1). "In order to convict a defendant for carrying a firearm without a license, the Commonwealth must prove: '(a) that the weapon was a firearm, (b) that the firearm was unlicensed, and (c) that where the firearm was concealed on or about the person, it was outside his home or place of business.'" ***Commonwealth v. Parker***, 847 A.2d 745, 750 (Pa. Super. 2004) (citation omitted).

Turning to the present matter, the record reveals the following: At trial, the victim, Williams, testified that on August 1, 2008, while he was outside his deceased father's home, Braxton asked him for a ride and Williams agreed. Williams stated that after reaching the destination and while he was attempting to shake Braxton's hand, Braxton removed Williams' gun from the center console of the car, got out of the car, and ran down the street. Williams testified that "he yelled to him, "[Braxton], I'm going to call the cops. You know me, you know I'm going to call the cops. Why would you do something stupid like that?' And [Braxton]'s just laughing, running down the street." N.T., 5/18/2009, at 14.

As the Commonwealth points out in its brief, during the second day of trial, defense counsel asked the Commonwealth to stipulate to the contents of Williams' August 1, 2008 statement to police regarding the incident. N.T., 7/29/2009, at 24. The Commonwealth agreed and the document was entered into evidence as Defense Exhibit #3. The trial court asked if it could read the entire document and defense counsel agreed. ***Id.*** The Commonwealth subsequently quoted the following from the document:

> Question 6: "When [Braxton] took the gun, did he point it at you or threaten you?
>
> [Williams:] No, he just put it in his pocket and ran down the street laughing."

Id. at 36.

The Commonwealth introduced into evidence a certificate of nonlicensure that indicated Braxton did not have a license to carry a firearm. ***Id.*** at 23.

Based on the above testimony and stipulation of Williams' statement to police, we conclude the evidence was sufficient for the trial court to convict Braxton of Section 6106(a)(1) where Braxton carried a concealed weapon in his pocket, stolen from Williams, on a public street and he did not possess a license to carry the gun.[3] ***See Commonwealth v. Woods***, 638 A.2d 1013

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[3] To expound upon the effect of a stipulation, we note "[p]arties are free to bind themselves by stipulation on all matters not affecting the jurisdiction and prerogatives of the court, and the court has the power to enforce those
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(Pa. Super. 1994) (opining there was sufficient evidence to convict the defendant of Section 6016 where the defendant testified that he concealed in a gun in his pocket as he talked to his children during a domestic dispute with his estranged wife). Therefore, the trial court did not err in upholding this conviction. Accordingly, Braxton's first argument fails.

In his second argument, he claims the PCRA court erred in denying his motion to file post-sentence motions *nunc pro tunc*. He states the court misinterpreted case law by requiring him to prove prejudice in order to secure the reinstatement of his post-sentence motion rights. He argues ***Commonwealth v. Liston***, 977 A.2d 1089 (Pa. 2009) "does not require that the defendant prove that he would have won his post sentence motions if he would have been allowed to file them[,] he must plead that he was deprived of his right to file the motions." Braxton's Brief at 10.

Initially, we note that when Braxton originally raised this claim with the PCRA court, the issue was couched in terms of ineffective assistance of counsel. Generally, in reviewing claims of ineffective assistance of counsel, our courts must consider whether there is arguable merit to the underlying

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stipulations." ***Wayda v. Wayda***, 576 A.2d 1060 (Pa. Super. 1990). ***See also Commonwealth v. Fiebiger***, 810 A.2d 1233, 1237 (Pa. 2002) (concluding there was sufficient evidence to impose a death sentence where there was a finding of least one aggravating factor, which was based upon the Commonwealth relying entirely upon a stipulation incorporating all evidence presented in the guilty phase into the penalty phase and the stipulation included a statement by the defendant to police that he killed the victim in order to prevent her from identifying him).

claim, whether counsel had a reasonable basis for his or her action or inaction, and whether the petitioner was prejudiced by counsel's ineffectiveness. ***See Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987); ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

In ***Commonwealth v. Reaves***, 923 A.2d 1119 (Pa. 2007),[4] the Pennsylvania Supreme Court Court explained that in limited situations, the prejudice inquiry "is not required because there are certain circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." ***Id.*** at 1128 (citation and quotation marks omitted). Nevertheless, the ***Reaves*** Court held that the failure to file post-sentence motions is not one of those situations, stating that whether "counsel can be deemed ineffective, then, depends upon whether [the defendant] has proven that a motion to reconsider sentence, if filed. . ., would have led to a different and more favorable outcome at the [violation of probation] sentencing." ***Id.*** at 1131-1132.

Subsequently, and contrary to Braxton's argument, the ***Liston*** Court reaffirmed the ***Reaves*** decision that a petitioner must demonstrate the prejudice prong by rejecting a panel of this Court's holding that would have required an automatic reinstatement of the right of file a post-sentence

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[4] Braxton overlooks the court's reliance on ***Reaves*** in support of its denial of not reinstating Braxton's right to file post-sentence motions.

motion *nunc pro tunc* whenever a court granted the reinstatement of appellate rights *nunc pro tunc*. ***Liston***, 977 A.2d at 1093-1094.

Turning the present matter, the court found Braxton "has made no attempt to show prejudice, the alleged error asserted does not meet the required legal standard and clearly does not at all indicate that a timely-filed post sentence motion would have been successful." Trial Court Opinion, 6/5/2012, at 4-5.

We agree with the court's finding. Braxton has not demonstrated that was prejudiced by counsel's ineffectiveness and merely contends that all he must prove was that he was deprived of his right to file the post-sentence motions. Moreover, even if Braxton attempted to argue actual prejudice, this argument would fail as aptly explained by the trial court:

> There were no sentencing errors committed by this Court during the sentencing hearing of December 28, 2009. The instant sentence was imposed after a review of [Braxton]'s extensive criminal record and in light of the many signs that he is a poor candidate for rehabilitation. At the sentencing hearing[,] the Court explained that it had reviewed the presentence investigation as well as the prior record history of [Braxton]. Note that the lead offense, VUFA Section 6105, by itself carried a standard range guideline recommendation of a minimum sentence of 60-72 months plus or minus 12 months. The Court imposed a sentence at the lower edge of the standard range, and by no stretch of logic could such a sentence be considered an abuse of discretion. [Braxton]'s own trial counsel recommended a sentence of 4-10 years, and the prosecutor recommended a total of 7-14 years. When this Court added a consecutive term of 1-2 years for Theft, [Braxton]'s total sentence became 6-12 years, a total that is still squarely within the standard range of the Sentencing Guidelines. [Braxton]'s argument that the sentences for Theft and VUFA Section 6105

> were the maximums is irrelevant under [the] analysis of the guidelines for [Braxton].
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> Note that [Braxton] accumulated 12 arrests and seven convictions before reaching the age of 30. There was nothing in the presentence report concerning his age, family history or rehabilitative needs that came close to countering the obvious fact that [Braxton] is in need of the structure of state prison if he is ever to mature enough to become a crime-free citizen. See page 3 of the presentence report, where [Braxton] is described as having "no appreciable or verifiable work history", but "a significant criminal history." Again on page 4 we learn that [Braxton] "seems to identify with elements within the community that have strong anti-social and criminal tendencies." All of this was duly noted by the Court in preparation for [Braxton]'s sentencing hearing.
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> When allocution was offered at sentencing the entirety of [Braxton]'s comment was "I'm sorry for what I did". [Braxton] is a long-term criminal actor with many failed attempts to right himself, including previous probations that were violated by the instant offense. The cavalier manner in which this crime was committed shows a complete indifference to the norms of society. The sentence imposed was within the guidelines and was appropriate under the circumstances.

Trial Court Opinion, 6/5/2012, at 4 (record citations omitted). For these reasons, Braxton has failed to meet his burden of proving actual prejudice. ***See Reaves***, ***supra***. Accordingly, the court did not err in denying Braxton's request to reinstate the right to file post-sentence motions *nunc pro tunc*. Therefore, Braxton's second argument fails as well.

In his final argument, Braxton claims the trial court abused its discretion with respect to the sentence imposed on the theft offense because (1) it was imposed consecutive to the firearms not to be carried without a license sentence, (2) it was the maximum sentence and was in the

aggravated range of the sentencing guidelines, and (3) the court did not state that it considered the sentencing guidelines at sentencing or in its Rule 1925(a) opinion.

"A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute." ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa. Super. 2004). Issues challenging the discretionary aspects of sentencing must be preserved pursuant to Pennsylvania Rule of Criminal Procedure 720, either by raising the claim at sentencing or in a motion to reconsider and modify sentence; if not, they are waived. ***Commonwealth v. Cook***, 941 A.2d 7, 11 (Pa. Super. 2007) (citation omitted).

In the present matter, because we have concluded that the PCRA court acted properly in denying Braxton's request to reinstate the right to file post-sentence motions *nunc pro tunc*, Braxton has not properly preserved his discretionary sentencing claim pursuant to Rule 720. Therefore, he has waived this final argument.

Judgment of sentence affirmed.