

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :
 :
 vs. : No. 285 CR 2011
 :
 PATRICIA E. GADALETA, :
 Defendant/Appellant :

Jean A. Engler, Esquire Counsel for Commonwealth
Assistant District Attorney

Kent D. Watkins, Esquire Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - February 27, 2013

The Defendant, Patricia E. Gadaleta, has appealed from the judgment of sentence imposed on November 30, 2012, raising several issues outlined in her concise statement filed in response to this Court's Pennsylvania Rules of Appellate Procedure 1925 Order of December 14, 2012.¹ This Memorandum Opinion is filed in accordance with Pennsylvania Rules of Appellate Procedure 1925(a).

FACTUAL AND PROCEDURAL BACKGROUND

The Defendant was charged with identify theft, a violation of 18 Pa.C.S.A. § 4120(a), theft by unlawful taking, a violation

¹ By Order of Court dated January 4, 2013, the Court granted Defendant's request to extend the time to file the concise statement to January 25, 2013, due to the transcript not being completed.

of 18 Pa.C.S.A. § 3921(a), theft by deception, a violation of 18 Pa.C.S.A § 3922(a)(2), theft by receiving stolen property, a violation of 18 Pa.C.S.A § 3925(a), forgery, a violation of 18 Pa.C.S.A. § 4101(a)(3), and forgery, a violation of 18 Pa.C.S.A § 4101(a)(2). A trial by jury was held on May 11, 2012, after which the Jury returned guilty verdicts on the identify theft, theft by deception, and two forgery charges.² However, the Jury Foreperson had difficulty reading the verdict slip, so much that at times he was assisted in the pronunciation of certain words by the Clerk of Courts and the Court itself. The Jury Foreperson readily admitted that he was "slightly illiterate." (N.T. 5/11/12 at 205-207). As a precaution, and at the request of the Defendant's trial counsel, the Court questioned the Jury as a whole to see if any juror disagreed with the recitation of the verdict slip in finding the Defendant guilty on those four charges. None of the jurors indicated that they disagreed with the verdict as read. (N.T. 5/11/12 at 209).

After the conclusion of the trial, Defendant thereafter filed timely post-trial motions and later a supplemental post-trial motion, requesting, in the alternative, a mistrial, a new trial, or to set aside the verdict based on the perceived

² On the first day of trial, the Commonwealth withdrew count two, theft by unlawful taking, (N.T. 5/10/12 at 3-4), and at the conclusion of the Commonwealth's case, the Court granted Defendant's motion to dismiss count four, theft by receiving stolen property. (N.T. 5/11/12 at 136-138).

difficulty of the Jury Foreperson to not only read the verdict, but understand and comprehend the testimony and evidence present during trial. Further, Defendant filed a motion for judgment of acquittal as to the theft by receiving stolen property charge, identified as count three on the information, on the basis that the evidence submitted was insufficient to sustain the guilty verdict rendered against the Defendant.

Initially, argument was held on all the motions, however, the Court determined that it was necessary to conduct an evidentiary hearing in regards to the Jury Foreperson issue, with said hearing being conducted on November 16, 2012.³ At the hearing, the Jury Foreperson testified that he can read and understand the spoken words of the English language, and fully understood every document presented at trial. The Jury Foreperson explained that his difficulty in reading the verdict slip was due to him being nervous. (N.T. Special Relief Hrg. 11/16/12 at 7).

On November 30, 2012, this Court held sentencing in this matter.⁴ Prior thereto, the Court issued an order granting Defendant's motion for judgment of acquittal as to the theft by

³ The hearing was delayed until November as Defendant's trial counsel had filed a petition to withdraw as counsel, to which the Court granted and appointed new counsel for the Defendant. However, Defendant's new counsel was unavailable until this date.

⁴ Sentencing in this case occurred along with sentencing in another case, docket number 975-CR-2011, on charges that the Defendant was convicted of at a trial subsequent to the trial in this case.

deception charge; however, the Court denied the remaining motions as they related to the Jury Foreperson matter.

As a result, the Court imposed the following sentences for each remaining offense Defendant was convicted of: 1) identify theft, identified as count one on the information: not less than twelve months nor more than four years in a state correctional institution with credit for six hundred twenty-one (621) days; 2) forgery, identified as count five of the information: not less than six months nor more than twelve months in a state correctional institution to run consecutive to the sentence imposed on count number one of the information of this case; and 3) forgery, identified as count six of the information: not less than six months nor more than twelve months in a state correctional institution to run concurrent to the sentence imposed on count number five in this matter. Therefore, the total sentence in this case was for a period of incarceration in a state correctional institution of not less than eighteen months nor more than five years.⁵ The sentence imposed on case index number 975-CR-2011 was then imposed and ran consecutive to this sentence.

On December 10, 2012, Defendant filed post-sentencing motions claiming that trial counsel was ineffective and arguing

⁵ This was the first case Defendant was sentence on that day.

that the sentences imposed by this Court were excessive and not just given the needs of the Defendant. Nonetheless, before the Court had an opportunity to address said motions, Counsel for the Defendant filed this appeal.

Three of the issues raised on appeal are identical to those Defendant argues in her post-sentencing motions. In addition, the fourth issue raised is based upon this Court's Order dated November 30, 2012, denying Defendant's request for a new trial predicated on the Jury Foreperson's perceived illiteracy. Accordingly, this Court asks the Appellate Court to quash Defendant's appeal as it relates to the ineffective assistance of counsel claims, numbers one and two of Defendant's concise statement, and the excessive sentence claim, and remand these issues back to the Trial Court to allow this Court to properly address Defendant's outstanding post-sentence motions. As to the Defendant's fourth issue raised on appeal concerning the Jury Foreperson's perceived illiteracy, we would ask that the Court affirm our decision rendered on that post-trial motion.

DISCUSSION

Defendant's first three issues raised in her concise statement should be quashed for lack of jurisdiction of the Appellate Court. Defendant appealed this Court's Order of Sentence dated November 30, 2012, asserting such sentence as

excessive, and in addition, alleges her trial counsel erroneously advised her about the Commonwealth's ability to incriminate Defendant with her criminal record if she were to testify.

The initial determination the Appellate Court must make is whether the judgment of sentence is properly appealable so that the Court has obtained jurisdiction over the matter. See, *Motheral v. Burkhardt*, 583 A.2d 1180, 1184 (Pa. Super. Ct. 1990); *Commonwealth v. Rosario*, 615 A.2d 740, 741-42 (Pa. Super. Ct. 1992) *aff'd*, 538 Pa. 400 (1994); *Commonwealth v. Borrero*, 692 A.2d 158, 160 (Pa. Super. Ct. 1997). Pursuant to the Judicial Code, the Superior Court obtains exclusive appellate jurisdiction of appeals from final orders of the Courts of Common Pleas, with certain exceptions. 42 Pa.C.S.A. § 742. Appellate jurisdiction cannot be established by an agreement of the parties, or silence on behalf of parties where it is otherwise nonexistent. *Commonwealth v. Morgenthaler*, 466 A.2d 1091, 1092 (Pa. Super. Ct. 1983).

In a criminal case that has advanced through the sentencing stage, "the appeal lies from the entry of the final judgment of sentence." *Commonwealth v. Borrero*, 692 A.2d at 159 (citing *Commonwealth v. Alvarado*, 650 A.2d 475, 476 (Pa. Super. Ct. 1994)). The determination of whether a judgment of sentence is final and appealable is predicated on whether the defendant has

filed optional post-sentence motions. *Id.*

If a defendant does not file post-sentence motions, the judgment of sentence becomes a final order and thus appealable as it relates to appellate jurisdiction. Pa. R. Crim. P. 720(A)(3). The consequence of such is that an appeal must be perfected within thirty days from the date of imposition of the sentence. *Id.* On the other hand, if such post-sentence motions are filed, the judgment of sentence is not final for purposes of an appeal and remains so until the trial court disposes of the motion, or the motion is deemed denied by operation of law. Pa. R. Crim. P. 720(B)(3)(a); *Commonwealth v. Chamberlain*, 658 A.2d 395, 397 (Pa. Super. Ct. 1995), *appeal quashed*, 543 Pa. 6 (1995).

As explained more directly in the comments to Pa. R. Crim. P. Rule 720, "[n]o direct appeal may be taken by a defendant while his or her post-sentence motion is pending." Comments to Pa. R. Crim. P. 720. In following the *Borrero* Court, which analyzing the same law and involving a similar fact pattern, application of these authorities assures this Court that at the time Defendant filed her notice of appeal, the judgment of sentence had not been made final by reason of her post-sentence motion having not be resolved either by a court order granting or denying said motion or by operation of law.

In this case, Defendant was sentence on November 30, 2012,

and thereafter filed a proper post-sentence motion on December 10, 2012. Yet, before this Court could address the merits of the post-sentence motion, Defendant filed this premature appeal. As such, this Court asks the Superior Court to quash Defendant's appeal as it relates to the issues listed as one through three on her concise statement for lack of jurisdiction and allow this Court to properly decide Defendant's post-sentence motions.

The final issue raised by the Defendant in this appeal deals with the perceived illiteracy of the Jury Foreperson.⁶ At the conclusion of Defendant's trial, the Jury Foreperson was instructed by the Court to stand up and read the Jury's verdict. In having difficulty in reading the verdict, the Jury Foreperson stated he is "slightly illiterate." As such, the Clerk of Court and the Court itself aided the Jury Foreperson in reading the verdict in open court. After Defendant filed her post-trial motion seeking a new trial based upon the Foreperson's self-proclaimed semi-illiteracy, the Court held a hearing to determine if the perceived illiteracy of the Foreperson prevented him from properly deliberating on the evidence present at trial and thus abridging Defendant's fundamental right of due process.

⁶ Unlike the first three issues raised in Defendant's appeal, the appeal as it pertains to the Jury Foreperson's perceived illiteracy is an appeal of this Court's Order dated November 30, 2012, denying her post-trial motion request for a new trial. Since Defendant's post-trial motion has been disposed of by this Court, it is now ripe for an appeal, and within the appellate jurisdiction of the Superior Court.

At the hearing, the Jury Foreperson stated he has an eighth grade reading level, but he has no issues or difficulty understanding the English language. The Foreperson went on to proclaim that the reason he struggled reading the verdict was that he was nervous as he had to stand in open court and announce the verdict. When he was asked pointedly if he understood everything that was stated during the trial and comprehended what was written, the Jury Foreperson sternly replied "perfectly." (N.T. Special Relief Hrg. 11/16/12 at 5-8).

In this Commonwealth every citizen who is of the required minimum age to vote for state or local officials and resides in the county is qualified to serve as a juror unless such citizen "is unable to read, write, speak and understand the English language." 42 Pa.C.S.A § 4502(a)(1). As the Second Circuit Court of Appeals stated in *United States v. Silverman*, 449 F.2d 1341 (2d Cir. 1971), "the inclusion in the panel of a disqualified juror does not require reversal of a conviction unless there is a showing of actual prejudice." *Id.* at 1344. Prejudice exists, and thus requires the Court to reverse a conviction, where the claim of a disqualified juror based on his inability to fairly, adequately, and intelligently deliberate on the evidence presented at trial adversely affected Defendant.

In *Silverman*, defendant was convicted of five counts of

attempted income tax evasion. The evidence presented by the Government was defendant's tax returns for the calendar years of 1961-65. Defendant challenged his conviction as illegal claiming one of the jurors on the panel that convicted him could not read or write English, and thus the juror could not adequately deliberate upon the evidence. The Appellate Court, in denying defendant's appeal, reasoned that the majority of the exhibits presented at trial were presented in conjunction with oral testimony and pertinent only for the numbers, and that the juror had no difficulty in understanding oral testimony. *Id.*

Similarly, in the present case, the Jury Foreperson was required to examine various documents and determine if such documents were forged, and if so, whether such forgery was perpetrated by the Defendant.⁷ For example, the Commonwealth presented the testimony of Patricia Spillman who is the payroll tax coordinator at Lehigh Valley Health Network who testified that the earnings statement bearing Lehigh Valley Health Network's name and which was found in the filing cabinet of Defendant's residence was not an authentic statement. (N.T. 5/10/12 at 61-62). Ms. Spillman went on to explain the

⁷ If for example, the Jury was given the task of interpreting a contract, then the Court's ultimate conclusion of whether the Defendant was adversely affected by the Jury Foreperson's reading skills might be different. However, the Jury was required to examine a social security card in determining if it was tampered with, and whether the earnings statement found in Defendant's residence was authentic or as they say, a product of being "cut and pasted" together.

differences between a genuine earnings statement of Lehigh Valley Health Network and the exhibit. (N.T. 5/10/12 at 62-67). The differences were obvious once one examined the exhibit and did not require a heightened level of literacy to make such a determination.

In considering the evidence presented both oral testimony and exhibits admitted, along with the Jury Foreperson's unequivocal answers that he understood and comprehended such evidence presented, this Court concluded Defendant was not prejudiced by reason of any inability on the part of the Jury Foreperson to read and understand English. *See, Commonwealth v. Bullock*, 558 A.2d 535 (Pa. Super. Ct. 1989) (Appellate Court affirmed the conviction of defendant even though a juror of the panel could not read nor write as the evidence presented at trial was almost entirely oral testimony, and therefore, the deliberations of the juror could not have been affected in a significant way.)⁸

Accordingly, this Court requests the Superior Court to quash Defendant's appeal as it relates to issues one through three in her concise statement for lack of jurisdiction and remand the matters back to the Trial Court for disposition. Further, we respectfully recommend that our Order of Court dated

⁸ It must also be noted, as were the circumstances in *Silverman*, the evidence presented by the Commonwealth were virtually uncontested.

November 30, 2012, denying Defendant's post-trial motion be affirmed.

BY THE COURT:

Joseph J. Matika, J.