

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
:
v. :
:
:
NATHAN HOWARD :
:
Appellant : No. 772 WDA 2019

Appeal from the Judgment of Sentence Entered July 21, 2015
In the Court of Common Pleas of Erie County Criminal Division at No(s):
CP-25-CR-0001876-2014

BEFORE: NICHOLS, J., MURRAY, J., and MUSMANNO, J.

MEMORANDUM BY MURRAY, J.:

FILED MARCH 27, 2020

Nathan Howard (Appellant) appeals *pro se* from the judgment of sentence imposed after a jury convicted him of one count each of drug delivery resulting in death and possession of a controlled substance by an inmate, and three counts of contraband/controlled substance to a confined person prohibited.¹ We affirm.

The trial court summarized:

After the execution of a search warrant on April 26, 2014, at the El Patio Motel, [Appellant] was arrested. He was charged with various drug offenses and incarcerated in the Erie County Prison. The decedent, Stephen Burkhart, was an inmate at the time on B Block where [Appellant] was assigned.

On May 2, 2014, Burkhart collapsed and was transported to Hamot Hospital from the prison. On May 5, 2014, Burkhart was declared brain dead. The cause was determined to be drug

¹ 18 Pa.C.S.A. §§ 2506(a), 5123(a.2) and (a).

toxicity. A subsequent investigation determined that [Appellant] had provided Burkhart, while in the prison, with the drugs which killed him.

[Appellant] was charged at Count One: Drug Delivery Resulting in Death, a felony of the first degree; Count Two: Possession of a Controlled Substance/Contraband by an Inmate, a felony of the second degree; and at Counts Three, Four and Five, one charge at each count of Contraband, Controlled Substance to a Confined Person Prohibited, all felonies of the second degree.

A jury trial was held from May [18-21], 2015, on the five allegations against [Appellant]. The jury found [Appellant] guilty of all charges. [Appellant] was sentenced by this [c]ourt on July 21, 2015. The sentences of incarceration at each count, except Count Five which merged with Count One for sentencing purposes, were in the aggravated range and as follows: Count One: 126 months to 360 months; Count Two: 36 months to 72 months consecutive to Count One; Count Three: 36 month to 72 months consecutive to Count Two; Count Four: 36 months to 72 months consecutive to Count Three.

Trial Court Opinion, 4/26/19, at 1-2.

Appellant did not file a timely post-sentence motion or notice of appeal. However, Appellant filed a timely petition pursuant to the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546, and the court reinstated his direct appeal rights *nunc pro tunc*. Order, 2/27/19. Appellant subsequently expressed a desire to proceed *pro se*, and on August 2, 2019, this Court remanded the case to the trial court for a hearing pursuant to ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998). The trial court conducted a hearing on September 9, 2019, after which it ordered that Appellant be permitted to proceed *pro se*.

Appellant presents the following three issues for our review:

1. WHETHER THE SUFFICIENCY OF THE EVIDENCE WAS LACKING AS IT PERTAINS TO THE TWO (2) PRINCIPLE ELEMENTS OF THE CRIMINAL STATUE 18 Pa.C.S. §2506(a) DRUG DELIVERY RESULTING IN DEATH, (i) [I]NTENTIONALLY ADMINISTERING, DISPENSES, DELIVERING, GIVES, PRESCRIBES, SELLS OR DISTRIBUTES ANY CONTROLLED SUBSTANCE AND (ii) DEATH CAUSED (RESULTING IN) THE USE OF THAT DRUG. THE COMMONWEALTH FAILED [TO MEET] ITS BURDEN TO PROVE EACH AND EVERY ELEMENT BEYOND A REASONABLE DOUBT, BY THE ALLEGED ACTIONS OF [APPELLANT], VIOLATING THE DUE PROCESS CLAUSE OF PA CONST. ART. 1, §9, & THE 14TH AMENDMENT OF THE U.S. CONST.

2. WHETHER THE STATE COURT ERRED IN DISMISSING [APPELLANT'S] POST-SENTENCING MOTION/MOTION IN ARREST OF JUDGMENT/ACQUITAL AND/OR NEW TRIAL, AS IT PERTAINS TO DR. ERIC VEY'S LACK OF AN AUTOPSY TO PROVE THE ELEMENT OF CAUSATION - THE STATE COURT ABUSED ITS DISCRETION IN ITS MISAPPLICATION [OF] STATE CASE LAW [AND] DEPRIVED [APPELLANT] OF THE PROCEDURAL DUE PROCESS GUARANTEED BY STATE & FEDERAL LAW UNDER THE SUBSTANTIVE PRINCIPLES OF ART. 1, §9 OF PA CONST. & THE 14TH AMENDMENT OF THE U.S. CONST.

3. WHETHER THE STATE COURT ERRED IN DISMISSING [APPELLANT'S] POST-SENTENCING MOTION/MOTION IN ARREST OF JUDGMENT/ACQUITAL AND/OR NEW TRIAL, AS IT PERTAINS TO THE COURT'S ABUSE OF DISCRETION IN THE ALLOWANCE OF EVIDENCE AND POLICE OFFICER Lieutenant (Lt.) NOLAN'S TESTIMONY OF [APPELLANT'S] CONVICTION AT DOCKET NO. 1240 OF 2014 UNDER Pa.R.E. 404(b)(2) DURING TRIAL, THAT WAS SO FUNDAMENTALLY UNFAIR, VIOLATING THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE U.S. CONST.

Appellant's Brief at 4-5.²

² In his second and third issues, Appellant references the trial court's "dismissal of [his] post-sentencing motion/motion in arrest of judgment/acquittal and/or new trial . . ." Our review of the record, particularly the docket and the notes of testimony from the third and fourth days of trial, when the parties rested and the jury reached its

In his first issue, Appellant challenges the sufficiency of the evidence supporting his conviction of drug delivery resulting in death. We recently explained:

A challenge to the sufficiency of the evidence requires this Court to determine “whether the evidence admitted at trial, and all the reasonable inferences derived therefrom viewed in favor of the Commonwealth as verdict winner, supports the jury’s finding of all the elements of the offense beyond a reasonable doubt.” **Commonwealth v. Packer**, 641 Pa. 391, 168 A.3d 161, 163 n.3 (2017) (citation and quotation marks omitted).

The provision criminalizing a drug delivery resulting in death is set forth under Chapter 25 of the Crimes Code, which relates to homicide. Section 2506 states, in relevant part:

(a) Offense defined.—A person commits a felony of the first degree if the person intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance in violation of section 13(a)(14) or (30) of the act of April 14, 1972 (P.L. 233, No. 64),^[1] known as The

verdicts, reveals no oral motions, and Appellant’s counsel did not file a post-sentence motion on Appellant’s behalf. Although the docket shows *pro se* correspondence from Appellant seeking post-sentence relief, (stamped July 24, 2015 and mailed to Appellant’s counsel on July 27, 2015 from the Deputy Clerk of Records), that filing was a legal nullity with no effect. **Commonwealth v. Nischan**, 928 A.2d 349, 355 (Pa. Super. 2007) (discussing a *pro se* post-sentence motion filed by a petitioner who had counsel). When a counseled defendant files a *pro se* document, it is noted on the docket and forwarded to counsel pursuant to Pa.R.Crim.P. 576(A)(4), but no further action is to be taken. Moreover, a *pro se* filing has no tolling effect. **See** Pa.R.Crim.P. 576 cmt. (“The requirement that the clerk time stamp and make docket entries of the filings in these cases only serves to provide a record of the filing, and does not trigger any deadline nor require any response.”). **Commonwealth v. Williams**, 151 A.3d 621, 623 (Pa. Super. 2016).

Controlled Substance, Drug, Device and Cosmetic Act, and another person dies as a result of using the substance.

18 Pa.C.S. § 2506. Section 2506 “consists of two principal elements: (i) [i]ntentionally administering, dispensing, delivering, giving, prescribing, selling or distributing any controlled substance or counterfeit controlled substance and (ii) death caused by (‘resulting from’) the use of that drug.” **Commonwealth v. Kakhankham**, 132 A.3d 986, 991-92 (Pa. Super. 2015) (citation and footnote omitted).

Commonwealth v. Peck, 202 A.3d 739, 743-44 (Pa. Super. 2019) (footnotes omitted), **appeal granted in part**, 218 A.3d 374 (Pa. 2019).

[T]he current version of Section 2506 does not expressly classify drug delivery resulting in death as a recognized category of homicide. **See** 18 Pa.C.S. § 2506(a); **see also** 18 Pa.C.S. § 2501(b) (indicating that “[c]riminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter.”). Therefore, under the present version of Section 2506, the Commonwealth must demonstrate that a defendant was at least “reckless” as to the death caused by the use of an illicitly delivered drug. **Commonwealth v. Kakhankham**, 132 A.3d 986, 995 (Pa. Super. 2015). Because “the dangers of heroin are so great and well-known,” this Court has concluded that a delivery of heroin alone satisfies the recklessness requirement when a death occurs as a result of the sale.” **Commonwealth v. Storey**, 167 A.3d 750, 757 (Pa. Super. 2017) (citation omitted).

Id. at 744, n.5.

Appellant makes two sufficiency arguments. First, he argues that the evidence was insufficient to support a finding that he delivered a controlled substance to the decedent, Stephen Burkhart. Appellant’s Brief at 13-15. Second, he argues that the evidence was insufficient to prove that Mr. Burkhart’s death was the result of a drug overdose. **Id.** at 16-23. Both claims are meritless. Appellant disregards the well-settled precept that the jury, as

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