Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

NEILCON K. ST. LOUIS	)	**S. Ct. Crim. No. 2007-086**
	)	
Appellant/Defendant,	)	Re: Super. Ct. Crim. No. 138/2006
	)	
v.	)	
	)	
PEOPLE OF THE VIRGIN ISLANDS	)	
	)	
Appellee/Plaintiff.	)	
	)	

On Appeal from the Superior Court of the Virgin Islands
Considered: July 11, 2008
Filed: October 10, 2008

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Debra S. Watlington, Esq.
Office of the Territorial Defender
St. Thomas, U.S.V.I.
Attorney for Appellant

MEMORANDUM OPINION

PER CURIAM.

This matter is before the Court on the motion to withdraw as appellate counsel, brought by Appellant's court-appointed attorney, Debra S. Watlington, Esquire. Counsel's motion was accompanied by an *Anders*[1] brief stating that there are no non-frivolous issues for this appeal. For the following reasons, we will deny counsel's motion to withdraw, but will remand the case to the trial court to correct an illegal split sentence.

[1] *See Anders v. California*, 386 U.S. 738 (1967).

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 26, 2006, at approximately 2:00 a.m., Neilcon K. St. Louis ("St. Louis" or "Appellant") was involved in a single car auto accident in St. Thomas. The police investigation concluded, and an eyewitness to the crash stated, that St. Louis was racing another vehicle, traveling about 70 miles per hour, when he hit a log on the side of the road. The front seat passenger, who was also St. Louis's girlfriend, died at the scene from the injuries she suffered when she was ejected from the car. St. Louis claims that prior to the accident he was traveling at a speed of approximately 30-35 miles per hour when his car hit a pothole, breaking the CV joint axle in his car and causing him to lose control of his vehicle. A visual inspection, however, did not reveal any damage to the car's axle.

A jury convicted St. Louis of negligent homicide by means of a motor vehicle. On May 30, 2007, the Superior Court entered a Judgment and Commitment, sentencing St. Louis to four years incarceration and two years probation.

On June 8, 2007, St. Louis filed his Notice of Appeal. On March 18, 2008, St. Louis's counsel filed a Motion to Withdraw and an *Anders* brief in support of the motion. On March 25, 2008, this Court allowed St. Louis twenty days to address counsel's motion, but the Court received no response.

II. DISCUSSION

A. Jurisdiction and Standard of Review

"The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees [and] final orders of the Superior Court . . . ." V.I. CODE ANN. tit. 4, § 32(a) (2006).

When a court-appointed counsel determines, in a first appeal of right in a criminal case, that there are no non-frivolous grounds for appeal, said counsel shall submit an *Anders* brief which

demonstrates that counsel has thoroughly examined the record in search of appealable issues and explains why any such issues are frivolous. *See U.S. v. Youla*, 241 F.3d 296, 299 (3d Cir. 2001). "A copy of counsel's brief should [then] be furnished [to] the indigent and time allowed him to raise any points that he chooses; the court - not counsel - then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Anders v. California*, 386 U.S. 738, 744 (1967). If the *Anders* brief initially appears adequate on its face, and the appellant has not submitted a *pro se* brief in response, the proper course "'is for the appellate court to be guided in reviewing the record by the *Anders* brief itself.'" *Youla*, 241 F.3d at 301 (quoting *U.S. v. Wagner*, 103 F.3d 551 (7th Cir. 1996)).

B. The Only Non-Frivolous Issue for Appeal is whether the Sentence Imposed Was Excessive.

Attorney Watlington's *Anders* brief suggests the following potential errors for appeal: (1) there was not substantial evidence to convict beyond a reasonable doubt; (2) the trial court improperly admitted the autopsy report; (3) the trial court improperly admitted the investigating officer's sketch of the accident scene; (4) the sentence imposed was excessive; and (5) St. Louis received ineffective assistance of counsel. Although she suggests ineffective assistance of counsel, Attorney Watlington does not elaborate on this issue in her *Anders* brief.

1. <u>There Is Substantial Evidence to Convict Beyond a Reasonable Doubt.</u>

Based on our review of the record, the People of the Virgin Islands (hereafter "the People") presented substantial evidence to convict St. Louis beyond a reasonable doubt. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept to support a conclusion. It is evidence affording a substantial basis of fact from which the fact in issue can be reasonably inferred." *U.S. v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979) (citing *U.S. v. Green*, 548 F.2d 1261, 1266 (6th Cir. 1977)); *see also Consolidated Edison Co. v. NLRB*, 305

U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938).

At trial, St. Louis claimed that he was traveling at 35 miles per hour, that his car hit a pothole which broke the CV joint causing him to lose control of the vehicle, and that his passenger was wearing a seatbelt. On the contrary, the People presented evidence in conflict with St. Louis's testimony, including pictures of the vehicle and the crash scene, as well as the eyewitness testimony of Gregory Williams, Sr., who testified that he heard and then saw two cars "screaming" down the road in a westward direction towards the University of the Virgin Islands, traveling at a speed of approximately 70 miles per hour. (Trial Tr. vol. I, 81-82, Feb. 6, 2007.) The eyewitness described seeing a black-colored 1995 Honda and a silver-colored 1992 Honda going head-to-head when the black Honda hit a log, turned left, then right, and flipped three or four times, causing "something" to fall out of the car. (Trial Tr. 84.) He later discovered that "something" to be St. Louis's passenger. The eyewitness estimated that her body lay about fifty feet from where St. Louis's car stopped. On cross examination, the defense elicited testimony from the eyewitness that he drank two beers prior to witnessing the accident.

Also in contrast to St. Louis's testimony, Officer Marjorie Wheatley, a traffic accident investigator and trained accident reconstructionist, testified that she did not see a pothole when she walked the road near the accident and that, when she inspected St. Louis's car, all four wheels were intact. She also stated that the lighting conditions were poor and that the posted speed limit was 35 miles per hour According to Officer Wheatley's measurements, the body of St. Louis's passenger was about 35 feet from the car, and the longest striation mark on the road was 63 feet, while the shortest was 29 feet. Officer Wheatley also testified that a car traveling 35 miles per hour could hit a log and flip but it would not have continued rolling nor would it have landed on the fence as St. Louis's car did. In addition, she testified that the passenger was not wearing a seat belt.

After hearing the conflicting evidence, the jury reasonably believed the testimony of the eyewitness and Officer Wheatley over that of St. Louis. Moreover, the physical evidence also supported the testimony of the eyewitness and Officer Wheatley.

2. The Autopsy Report Was Properly Admitted.

St. Louis's trial attorney objected to the admission of the autopsy report because the defense had not been provided with a copy of the report in advance of trial; the attorney admitted, however, that he had received a similar report. The People countered that they had faxed the autopsy report, notes, and sketch to St. Louis's attorney on January 31, 2007. The record before the Court does not reflect the differences between the report St. Louis received and one which was admitted at trial. Importantly, St. Louis does not argue that he suffered any prejudice as a result of the delay in receiving the report, nor does our review of the record indicate any such prejudice. Without a showing of prejudice, the error, if any, is harmless. *See Michigan v. Kearney*, 248 N.W.2d 687, 689 (Mich. App. 1976).

3. The Sketch of the Accident Scene Was Properly Admitted.

At trial Officer Wheatley testified that, while at the accident scene, she made a rough sketch of the scene which she finished three days later using the measurements taken on the evening of the incident. St. Louis objected to the sketch because it was not created until three days after the accident. A diagram is admitted as evidence provided that it fairly and accurately represents that which it purports to depict. *See Pennsylvania v. Serge*, 896 A.2d 1170, 1177 (Pa. 2006). In this case, St. Louis did not attack the accuracy of the diagram. Moreover, irrespective of when the diagram was completed, the measurements were taken at the scene on the night of the incident. A temporal delay in finishing a sketch alone is not grounds to deny its admission when it is an accurate depiction of the subject matter.

4. The Sentence Imposed Is Illegal.

The trial court sentenced St. Louis to four years of incarceration followed by two years of probation and ordered him to pay a fine of $200.00 and $75.00 in court costs. As a possible issue for appeal, Attorney Watlington argues that a sentence of four years of incarceration and two years of probation is excessive because St. Louis's total sentence is six years but the maximum sentence of incarceration for negligent homicide by means of a motor vehicle has been statutorily set at five years. *See* 20 V.I.C. § 504.

Attorney Watlington also points out that the Superior Court's authority to split a sentence is found in title 5, section 3711(a) of the Virgin Islands Code,[2] which limits custodial incarceration to six months when a split sentence – a sentence comprised of a period of probation after a term of incarceration – is imposed. Here, the trial court sentenced St. Louis to more than six months of incarceration without suspending any portion of the sentence. "[A] split sentence that imposes

[2] (a) [*Judgment of conviction*.] Upon entering a judgment of conviction of any offense against the laws of the Virgin Islands not punishable by life imprisonment, the district court or a Superior Court, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense against the laws of the Virgin Islands not punishable by life imprisonment, if the maximum punishment provided for such offense is more than six months, the district court or a Superior Court, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or informations, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant-

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

probation without suspending a portion of the sentence is illegal." *Gov't of the V.I. v. Martinez*, 239 F.3d 293, 297 (3d Cir. 2001) ((citing *U.S. v. Stupak*, 362 F.2d 933, 934 (3d Cir. 1966) ("[T]he court may not require a defendant to submit to probationary supervision unless the execution of part of his prison term is suspended. . . . Absent such a suspension the authority of the court over the defendant during the period of probation is lacking. . . . The probation order was therefore invalid."); *see also Rivera v. Gov't*, 42 V.I. 203, 211 (D.V.I. App. Div. 2000). Accordingly, St. Louis's sentence is illegal, and an appeal of this issue is not frivolous.

"The [Superior] [C]ourt may correct an illegal sentence at any time . . . ." Super. Ct. R. 136. Although this case is before this Court in an *Anders* brief, we are permitted to immediately remand for resentencing rather than requiring the parties to fully brief the non-frivolous issue raised. *See, e.g., U.S. v. Williams*, No. 07-2334, 2008 WL 2428410, at *3 (3d Cir. June 17, 2008) (remanded arguable issue of sentence reduction because issue was appropriate for the trial court to consider in the first instance); *Ohio v. Boyd*, No. L-04-1147, 2006 WL 2320964, at *4 (Ohio Ct. App. Aug. 11, 2006) ("We recognize that pursuant to *Anders*, if we find any of the legal points presented by appellate counsel arguable on their merits we are to afford appellant's new counsel the opportunity to argue the appeal. However, because appellant's sentence is clearly contrary to law . . . we find that justice requires an immediate remand to the trial court for resentencing."). Accordingly, we remand this case to the Superior Court to correct the illegal sentence by imposing a legal split sentence or vacating the provision for probation. *See Martinez*, 239 F.3d at 302.

5. Appellant Did Not Receive Ineffective Assistance of Counsel.

As a final potential issue for appeal, Attorney Watlington raises the issue of ineffective assistance of counsel.

> To succeed on a claim of ineffective assistance of counsel, a defendant must show both that i) the performance of counsel fell below an objective standard of

> reasonableness and ii) the errors of counsel prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 691-92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish the first prong a defendant must "establish . . . that counsel's performance was deficient." *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir.2001). "This requires showing that counsel was not functioning as the 'counsel' guaranteed defendant by the Sixth Amendment." (*Id.*)

Jansen v. U.S., 369 F.3d 237, 244 (3d Cir. 2004).

Nothing in the record before us indicates that counsel's performance fell below a reasonable standard or was deficient. Although afforded the opportunity, St. Louis never raised any claims against his trial attorney. Because there is nothing in the record that readily reflects ineffective assistance of counsel, we see no conflict in the Office of the Territorial Defender continuing to litigate this matter. Accordingly, we deny Attorney Watlington's motion to withdraw.

III. CONCLUSION

Other than the illegal sentence imposed, the Court finds no non-frivolous issues for appeal. Accordingly, we affirm St. Louis's conviction, but we remand to the trial court for a new sentencing consistent with our holdings herein. In addition, Attorney Watlington's motion to withdraw is denied.

Dated this 10th day of October, 2008.

ATTEST:
GLENDA L. LAKE, Esq.
Acting Clerk of the Court