

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ASHLEY RYAN HAREFORD,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2050 EDA 2013

Appeal from the Judgment of Sentence April 16, 2013
in the Court of Common Pleas of Delaware County
Criminal Division at No.: CP-23-CR-0000566-2013

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

MEMORANDUM BY PLATT, J.

FILED FEBRUARY 18, 2014

Appellant, Ashley Ryan Hareford, appeals from the judgment of sentence imposed after a negotiated guilty plea. Counsel has filed a petition to withdraw from representation and a brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). We grant counsel's petition to withdraw and affirm the judgment of sentence.

On April 16, 2013, Appellant entered a negotiated guilty plea to one count of involuntary deviate sexual intercourse (IDSI), one count of aggravated indecent assault, and one count of corrupting the morals of a minor. The charges arose out of an episode during which Appellant, a

* Retired Senior Judge assigned to the Superior Court.

Virginia resident, then twenty years of age, came to Delaware County and had several sexual encounters with the victim, then age thirteen, before they both left the Commonwealth. Appellant was apprehended with the victim in the Washington, D.C. area, a few days after the victim's father reported her missing.

After a written and oral guilty plea colloquy, the trial court immediately¹ sentenced him to the agreed aggregate sentence of not less than fifteen nor more than thirty years' incarceration, to be followed by seven years' (eighty-four months') probation.² Appellant is also subject to lifetime registration as a sexual offender under Megan's Law.

After sentencing, on April 23, 2013, although represented, Appellant filed a *pro se* motion for reconsideration of sentence. Appellant asserted he was "unaware of what he was agreeing to," claiming to suffer from diminished mental capacity.³ (Defendant's Motion for Reconsideration of Sentence, 4/23/13, at 1 ¶ 3). He also claimed he was intimidated and misled by his counsel. (**See id.**). Counsel then filed a motion to withdraw the plea, alleging it was not a "voluntary, knowing, and intelligent waiver of

¹ Appellant waived a presentence investigation report.

² As part of the negotiated plea bargain, numerous other charges arising out of the same course of events were dropped by the Commonwealth.

³ Appellant, who dropped out of high school in the eleventh grade, claimed to suffer from ADHD and depression. (**See** N.T. Hearing, 6/07/13, at 5, 7).

his right to a trial.” (Motion Challenging Validity of Guilty Plea, 4/24/13). After a hearing on June 7, 2013, the trial court denied the motion, on June 19, 2013. (**See** Order, 6/19/13). This timely appeal followed. In lieu of a statement of errors, counsel filed a notice of intent to file an **Anders** brief.⁴ **See** Pa.R.A.P. 1925(c)(4). Counsel filed an **Anders** brief and a petition to withdraw.

In the **Anders** brief, counsel sets forth one issue that is of arguable merit:

Whether the sentence imposed on [Appellant] should be vacated since he was denied his right of allocution?

(**Anders** Brief, at 1).

Initially, we note that we may not address the merits of the issue raised on appeal without first reviewing the request to withdraw. **See Commonwealth v. Rojas**, 874 A.2d 638, 639 (Pa. Super. 2005). Therefore, we review counsel’s petition at the outset. Our Supreme Court’s decision in **Santiago, supra**, did not alter the procedural requirements counsel must satisfy in requesting to withdraw from representation. Counsel must: 1) petition the court for leave to withdraw stating that, after making a conscientious examination of the record, counsel has determined that the appeal would be frivolous; 2) furnish a copy of the brief to the defendant;

⁴ The trial court filed its opinion on September 5, 2013. **See** Pa.R.A.P. 1925(a).

and 3) advise the defendant that he or she has the right to retain private counsel or raise additional arguments that the defendant deems worthy of the court's attention. **See Commonwealth v. Lilley**, 978 A.2d 995, 997 (Pa. Super. 2009).

Here, the petition to withdraw from representation states that counsel thoroughly examined the record and determined that the appeal would be wholly frivolous. (**See** Application to Withdraw Appearance, 10/09/13, at 1). Additionally, counsel notified Appellant that he was seeking permission to withdraw and furnished Appellant with copies of the petition to withdraw and the **Anders** brief, and advised Appellant of his right to retain new counsel or proceed *pro se* to raise any points he believes worthy of this Court's attention.⁵ Accordingly, we conclude that counsel has satisfied the procedural requirements of **Anders**.

Next, we determine whether counsel's **Anders** brief meets the directives of **Santiago, supra**. According to **Santiago**:

[I]n the **Anders** brief that accompanies court-appointed counsel's petition to withdraw, counsel 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, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

⁵ Appellant has not responded.

Santiago, supra at 361.

In his brief, counsel has provided a short factual and procedural history of the case. (**See Anders** Brief, at 2). Additionally, the **Anders** brief refers to an issue that could arguably support the appeal, the right of allocution, and concludes that the issue is wholly frivolous. (**See id.** at 3). Accordingly, we find that counsel has complied with the minimum requirements of **Anders/Santiago**.

We now examine the issue raised on appeal. Preliminarily, we note that our standard of review for a denial of a post-sentence motion to withdraw a guilty plea is well-settled.

“[P]ost-sentence motions for withdrawal are subject to higher scrutiny since courts strive to discourage entry of guilty pleas as sentence-testing devices.” [**Commonwealth v.**] **Flick**, 802 A.2d [620, 623 (Pa. Super. 2002)]. A defendant must demonstrate that manifest injustice would result if the court were to deny his post-sentence motion to withdraw a guilty plea. **Id.**, citing **Commonwealth v. Gunter**, 565 Pa. 79, 771 A.2d 767 (2001); [**Commonwealth v.**] **Kirsch**, 930 A.2d at 1284. “Manifest injustice may be established if the plea was not tendered knowingly, intelligently, and voluntarily.” **Commonwealth v. Hodges**, 789 A.2d 764, 765 (Pa. Super. 2002), citing **Commonwealth v. Persinger**, 532 Pa. 317, 615 A.2d 1305 (1992). In determining whether a plea is valid, the court must examine the totality of circumstances surrounding the plea. **Commonwealth v. Flanagan**, 578 Pa. 587, 854 A.2d 489, 500 (2004).

A deficient plea does not *per se* establish prejudice on the order of manifest injustice. **Commonwealth v. Carter**, 540 Pa. 135, 656 A.2d 463 (1995); **Commonwealth v. Yager**, 454 Pa. Super. 428, 685 A.2d 1000 (1996), *appeal denied*, 549 Pa. 716, 701 A.2d 577 (1997).

Commonwealth v. Broaden, 980 A.2d 124, 129 (Pa. Super. 2009), *appeal denied*, 992 A.2d 885 (Pa. 2010).

Here, the ***Anders*** brief questions whether Appellant was denied his right of allocution. (***See Anders*** Brief, at 3). We conclude that Appellant's issue is waived.

Counsel reasons that the issue is frivolous because no objection was raised to the lack of a pre-sentence opportunity for allocution, and the claim was not raised in a post-sentence motion. (***See id.***).

On review, we find the facts of record support counsel's contention, and we agree with counsel's conclusion. ***See Commonwealth v. Jacobs***, 900 A.2d 368, 376-77 (Pa. Super. 2006), *appeal denied*, 917 A.2d 313 (Pa. 2007) (holding denial of right of allocution does not create non-waivable challenge to legality of sentence; appellant's allocution claim waived because it was not raised with trial court); ***see also*** Pa.R.A.P. 302(a), **Requisites for Reviewable Issue** ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

Moreover, on review of the totality of circumstances, it is abundantly clear that the trial court properly determined that the plea was entered knowingly, intelligently, and voluntarily. The true essence of Appellant's objection is that his sentence was too long:

[Counsel]: Okay. Could you indicate to the Court what happened subsequent to that plea that had you—[sic] or write up a Motion to withdraw that plea?

[Appellant]: I did a little research, and found out that 15 to 30 years was a little too much for my—what I have—was looking at. [sic]

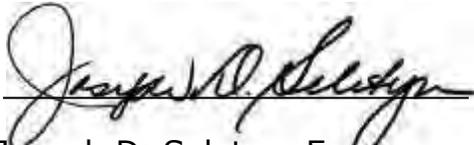
(N.T. Hearing, 6/07/13, at 6).

The trial court properly denied Appellant's post-sentence motion to withdraw his guilty plea. Appellant's allocution claim is waived. Appellant failed to plead and prove that his guilty plea was not entered knowingly, intelligently, and voluntarily. He therefore has failed to meet the standard of manifest injustice. ***See Broaden, supra*** at 129.

Finally, on independent review, we find no other issues which are not wholly frivolous.

Judgment of sentence affirmed. Petition to withdraw granted.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/18/2014