

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
DEVONA D. CARTER,	:	
Appellant	:	No. 111 WDA 2012

Appeal from the Judgment of Sentence Entered December 19, 2011,
In the Court of Common Pleas of Indiana County,
Criminal Division, at No. CP-32-CR-0000193-2011.

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
DEVONA D. CARTER,	:	
Appellant	:	No. 112 WDA 2012

Appeal from the Judgment of Sentence Entered December 19, 2011,
In the Court of Common Pleas of Indiana County,
Criminal Division, at No. CP-32-CR-0000342-2011.

BEFORE: SHOGAN, OTT and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.:

Filed: February 8, 2013

Appellant, Devona D. Carter, appeals from the judgments of sentence entered following her convictions of intent to deliver controlled substances. Counsel has filed a petition to withdraw and brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), ***Commonwealth v. McClendon***, 495 Pa.

*Retired Senior Judge assigned to the Superior Court.

467, 434 A.2d 1185 (1981), and *Commonwealth v. Santiago*, 602 Pa. 159, 978 A.2d 349 (2009). Upon review, we grant counsel's petition to withdraw and affirm Appellant's judgments of sentence.

The trial court stated the factual and procedural history as follows:

On December 19, 2011, at No. 193 Crim 2011, this Court sentenced the Defendant on the charge of Possession With Intent to Deliver a Controlled Substance, specifically 170.8 grams of cocaine, to pay costs in the amount of \$362.50, to pay a fine in the amount of \$25,000.00 and to undergo incarceration at a State Correctional Institution for a period of not less than four (4) years nor more than ten (10) years. The Court also granted credit for time served as allowed by law.

Prior to sentencing the Court considered the Pre-Sentence Report as prepared by the Indiana County Adult Probation Department, the facts of the case, the statement of the Defendant and defense counsel, as well as the sentencing guidelines.

The District Attorney of Indiana County at No. 193 Crim 2011 had filed a notice indicating his intention to seek the mandatory minimum sentence of a fine of \$25,000.00 and a minimum sentence of four (4) years pursuant to 18 Pa.C.S.A. §7508(a)(3)(iii). This Court was therefore required to impose a minimum sentence of four (4) years incarceration. The Court also notes that under the sentencing guidelines the offense gravity score is eleven (11), the Defendant's prior record score is zero (0) and the standard range of sentencing is thirty-six (36) to fifty-four (54) months. The mandatory minimum sentence was therefore within the standard range of the guidelines.

The statutory maximum for this offense, which is an ungraded felony under the Controlled Substance, Drug, Device and Cosmetic Act, is a \$100,000.00 fine and ten (10) years incarceration. The sentence imposed is within the statutory limits.

Also on December 19, 2011, at No. 342 Crim 2011 the Defendant was sentenced on the offense of possession with

intent to deliver a controlled substance, specifically 8.74 grams of heroin, to pay costs of \$362.50 and to undergo incarceration at a State Correctional Institution for a period of not less than one (1) year nor more than ten (10) years. The Court granted credit for time served as allowed by law. This sentence was to run concurrently with the sentence imposed at No. 193 Crim 2011.

Prior to sentencing the Court considered the Pre-Sentence Report as prepared by the Indiana County Adult Probation Department, the facts of the case, the statement of the Defendant and defense counsel, as well as the sentencing guidelines. There was no mandatory sentence in this matter.

The offense gravity score is seven (7) and the Defendant's prior record score is zero (0). The standard range for a minimum sentence is six (6) to fourteen (14) months. The Court sentenced the Defendant to one (1) year to ten (10) years which is within the standard range of the guidelines. The statutory maximum sentence for this offense is fifteen (15) years imprisonment and a \$250,000.00 fine. The sentence was within the statutory maximum.

* * *

The Court finds that the Defendant's pleas were entered voluntarily. This Court conducted a lengthy plea colloquy with the Defendant. In addition, a written plea colloquy was presented by counsel for the Defendant and entered into the record.

Trial Court Opinion, 2/8/12, at 1-3.

At the outset, we note that "[w]hen faced with a purported **Anders** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw." **Commonwealth v. Rojas**, 874 A.2d 638, 639 (Pa. Super. 2005). Furthermore, there are clear mandates

that counsel seeking to withdraw pursuant to **Anders**, **McClendon**, and **Santiago** must follow.

In order for counsel to withdraw from an appeal pursuant to **Anders** ... certain requirements must be met:

(1) counsel must petition the court for leave to withdraw stating that after making a conscientious examination of the record it has been determined that the appeal would be frivolous;

(2) counsel must file a brief referring to anything that might arguably support the appeal, but which does not resemble a “no merit” letter or *amicus curiae* brief; and

(3) counsel must furnish a copy of the brief to defendant and advise him of his right to retain new counsel, proceed pro se or raise any additional points that he deems worthy of the court’s attention.

Commonwealth v. Millisock, 873 A.2d 748, 751 (Pa. Super. 2005).

In **Santiago**, the Supreme Court set forth specific requirements for the brief accompanying counsel’s petition to withdraw:

[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.

Santiago, 978 A.2d at 361.

In the case before us presently, Appellant's counsel has complied with the requirements of **Santiago**, and our review of counsel's petition to withdraw, supporting documentation, and **Anders** brief reveals that counsel has satisfied all of the foregoing requirements. Counsel has furnished a copy of the brief to Appellant; advised her of her right to retain new counsel, proceed *pro se*, or raise any additional points that she deems worthy of this Court's attention; and has attached a copy of the letter sent to the client as required under **Millisock**.¹ Counsel also avers that the appeal is frivolous. **Anders** Brief at 26.

Once counsel has met his obligations, "it then becomes the responsibility of the reviewing court to make a full examination of the proceedings and make an independent judgment to decide whether the appeal is in fact wholly frivolous." **Santiago**, 978 A.2d at 355 n.5. Thus, we will now examine the issues set forth by counsel in the **Anders** brief.

Counsel set forth the following issues:

- I. Was the Appellant's plea voluntary?

¹ We note that on July 31, 2012, Appellant's counsel filed an **Anders** brief with this Court, as well as a motion to withdraw as counsel. However, upon review of the petition to withdraw, it was evident to this Court that counsel failed to attach a copy of the required letter used by counsel to advise Appellant of the rights associated with the **Anders** process. By Order of September 27, 2012, counsel was directed to file a copy of the notice letter previously sent to Appellant. By letter dated October 11, 2012, counsel for Appellant complied, attaching the July 30, 2012 letter and a supplemental letter of October 11, 2012 to Appellant advising her of her rights. Appellant has not responded to the petition to withdraw as counsel.

II. Did the trial court properly sentence Appellant in both actions?

Anders Brief at 6. We will address these issues in the order presented.

Appellant first argues that she is entitled to have her guilty plea withdrawn because her plea was not voluntarily entered. A defendant who pleads guilty waives all claims except lack of jurisdiction, validity of the plea, and legality of the sentence. **Commonwealth v. Tareila**, 895 A.2d 1266, 1267 (Pa. Super. 2006). "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). In order to preserve an issue related to the guilty plea, an appellant must either "object[] at the sentence colloquy or otherwise raise the issue at the sentencing hearing or through a post-sentence motion." **Commonwealth v. D'Collanfield**, 805 A.2d 1244, 1246 (Pa. Super. 2002). Where an appellant fails to challenge his guilty plea in the trial court, he may not do so on appeal. **Commonwealth v. Watson**, 835 A.2d 786, 791 (Pa. Super. 2003).

Our review of the record reveals that Appellant never challenged her guilty plea in the trial court before raising her claim before this Court. Accordingly, this issue is waived. Moreover, our law does not require that a defendant be totally pleased with the outcome of his or her decision to plead guilty, only that his decision be voluntary, knowing and intelligent. **Commonwealth v. Baldwin**, 760 A.2d 883, 885 (Pa. Super. 2000).

In *Commonwealth v. McCauley*, 797 A.2d 920 (Pa. Super. 2001),

we explained that:

[o]nce a defendant has entered a plea of guilty, it is presumed that he was aware of what he was doing, and the burden of proving involuntariness is upon him. Therefore, where the record clearly demonstrates that a guilty plea colloquy was conducted, during which it became evident that the defendant understood the nature of the charges against him, the voluntariness of the plea is established. A defendant is bound by the statements he makes during his plea colloquy, and may not assert grounds for withdrawing the plea that contradict statements made when he pled.

Commonwealth v. Stork, 737 A.2d 789, 790-791 (Pa. Super. 1999), *appeal denied*, 564 Pa. 709, 764 A.2d 1068 (2000) (citations and quotations omitted). Determining whether a defendant understood the connotations of his plea and its consequences requires an examination of the totality of the circumstances surrounding the plea. [*Commonwealth v. Yager*, 685 A.2d 1000 (Pa. Super. 1996)].

[I]n order to determine the voluntariness of the plea and whether the defendant acted knowingly and intelligently, the trial court must, at a minimum, inquire into the following six areas:

- (1) Does the defendant understand the nature of the charges to which he is pleading guilty?
- (2) Is there a factual basis for the plea?
- (3) Does the defendant understand that he has a right to trial by jury?
- (4) Does the defendant understand that he is presumed innocent until he is found guilty?

(5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged?

(6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Commonwealth v. Young, 695 A.2d 414, 417 (Pa. Super. 1997).

McCauley, 797 A.2d at 922 (citations omitted).

This Court has long stated that “even if there is an omission or defect in the guilty plea colloquy, the guilty plea will not be deemed invalid if the circumstances surrounding the entry of the plea reveal that the defendant fully understood the nature and consequences of his ... plea and that he ... knowingly and voluntarily decided to plead guilty.” **Commonwealth v. Blackwell**, 647 A.2d 915, 921-922 (Pa. Super. 1994) (citing **Commonwealth v. Fluharty**, 632 A.2d 312 (Pa. Super. 1993)).

A defendant may knowingly and voluntarily plead guilty as a matter of strategy or expedience even though he or she is unable or unwilling to admit guilt regarding the crime(s) charged. **Blackwell**, 647 A.2d at 922. Thus, a trial court’s inquiry should focus on whether the appellant understood what he was doing by specifically looking at the plea colloquy to determine whether he did or did not understand the plea. **Id.**

Our review of the record on appeal belies any assertion that Appellant was induced to enter her plea involuntarily. Appellant signed a thorough

written guilty plea colloquy, which set forth the proposed terms of the plea agreement, *i.e.*, mandatory four-year sentence on the possession with intent to deliver cocaine charge, as well as the Commonwealth's agreements to recommend that the sentences run concurrently, that the Commonwealth will not file related firearms/gun charges in either case, that the Commonwealth will *nolle pros* all remaining charges. Written Guilty Plea Colloquies (Docket Entries at Nos. 7). In addition, the written plea colloquies indicated the individual maximum penalties and fines as well as the total possible maximums that the trial court was free to impose at the time of sentencing. *Id.* The written plea colloquies also explained Appellant's various pre-trial, trial and appellate rights. *Id.* During the plea colloquy conducted in open court, Appellant confirmed that she: had some college education, could read and write English, and reviewed the written plea colloquy with defense counsel. N.T., 9/30/11, at 6-11. Appellant also confirmed that she understood all the maximum fines and penalties associated with the crimes. *Id.* at 9-10. The record also indicates that the factual basis for each of the charges was read to Appellant, after which she entered her pleas of guilty. *Id.* at 12-14. Therefore, the record supports our conclusion that Appellant acknowledged she understood the nature of the charges, the factual basis supporting the charges, her constitutional rights, and the permissible penalties and fines.

We emphasize that the law does not require that Appellant be completely satisfied with the outcome of her decision to plead guilty. *Baldwin*, 760 A.2d at 885. The law only requires that a plea be voluntary, knowing, and intelligent. *Id.* Thus, this Court, in examining the totality of circumstances surrounding the entry of the plea, is satisfied that Appellant had a full understanding of the nature and consequences of her plea and that she knowingly and voluntarily decided to enter the plea. Accordingly, her claim in this regard is waived, and even if preserved, would lack merit.

In her second issue, Appellant argues that the trial court erred in sentencing Appellant. Specifically, she challenges the mandatory minimum sentence for her conviction of selling cocaine, as well as the sentences imposed for selling cocaine and heroin, which were within the standard ranges of the sentencing guidelines.

The relevant provisions of the statute requiring mandatory minimum sentences for cocaine trafficking provide as follows:

§ 7508. Drug trafficking sentencing and penalties

(a) General Rule.--Notwithstanding any other provisions of this or any other act to the contrary, the following provisions shall apply:

* * *

(3) A person who is convicted of violating section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act where the controlled substance is coca leaves or is any salt, compound, derivative or preparation of coca leaves or is any salt, compound, derivative or preparation

which is chemically equivalent or identical with any of these substances or is any mixture containing any of these substances except decocainized coca leaves or extracts of coca leaves which (extracts) do not contain cocaine or ecgonine shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:

* * *

(iii) when the aggregate weight of the compound or mixture of the substance involved is at least 100 grams; four years in prison and a fine of \$ 25,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity;

18 Pa.C.S.A. § 7508(a)(3)(iii).²

² In addition, we note that the Commonwealth could have sought the statutory mandatory minimum sentence for heroin trafficking, which provides, in relevant part, as follows:

(7) A person who is convicted of violating section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act where the controlled substance or a mixture containing it is heroin shall, upon conviction, be sentenced as set forth in this paragraph:

* * *

(ii) when the aggregate weight of the compound or mixture containing the heroin involved is at least 5.0 grams but less than 50 grams; a mandatory minimum term of three years in prison and a fine of \$ 15,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; however, if at the time of sentencing the defendant has been convicted of another drug trafficking offense: a mandatory minimum term of five years in prison and \$ 30,000 or such larger amount as is sufficient to exhaust the

Moreover, we are mindful that,

[t]he initial determination of whether the Commonwealth proves that the mandatory minimum applies under Section 7508 is reserved by statute for the sentencing court. Thus, resolving whether the weight of the drug triggers application of the mandatory minimum requires the judge to sit as a fact-finder, necessitating credibility determinations. If the court then finds the requirements of section 7508 are established, it does not have the discretion to impose a sentence less severe than that mandated by the legislature.

Commonwealth v. Perez, 931 A.2d 703, 710 (Pa. Super. 2007) (quoting ***Commonwealth v. Myers***, 554 Pa. 569, 576, 722 A.2d 649, 652 (1998)) (emphasis removed).

The trial court, which sentenced Appellant to a term of incarceration of four to ten years on the cocaine trafficking offense, offered the following apt summary of the evidence regarding the weight of the drugs triggering application of the mandatory minimum and its conclusion as to the credibility of the evidence:

In considering the maximum sentence of ten years for these offenses the Court considered the facts of the case, that the Defendant is not a resident of Indiana County, that she

assets utilized in and the proceeds from the illegal activity; . . .

18 Pa.C.S.A. § 7508(a)(7)(ii). Pursuant to the plea agreement, the Commonwealth did not seek the mandatory minimum sentence for the trafficking of heroin. Having thoroughly reviewed the certified record before this Court, we note that the trial court applied the portion of the statute pertaining to the trafficking of cocaine, which we have set forth in the body of this memorandum. **See** Docket Entries at Nos. 15, Sentencing Guideline Form.

possessed two different controlled substances for distribution, **the quantity of the cocaine** and the Court came to the conclusion that the Defendant's only purpose in traveling to Indiana County was to engage in drug distribution. A significant period of parole is required to insure that the Defendant shall refrain from further drug sales and to provide the Defendant supervision in an effort to help her avoid future entanglements with those intending to distribute drugs.

Trial Court Opinion, 3/2/09, at 8 (emphasis added).

Our review of the record supports the trial court's conclusion as to the applicability of the mandatory sentencing provision for selling cocaine. At the guilty plea hearing, Appellant admitted to being in possession of 170.8 grams of cocaine. N.T., 9/30/11, at 13-14. Likewise, at the sentencing hearing, the trial court noted the weight of the cocaine possessed for trafficking and noted that Appellant was subject to the mandatory sentence as set forth in 18 Pa.C.S.A. § 7508(a)(3)(iii). N.T., 12/19/11, at 5-6. Accordingly, the trial court properly sentenced Appellant pursuant to section 7508, and Appellant's contrary claim lacks merit. Furthermore, we have reviewed the sentencing guideline forms used by the sentencing court and observe that each sentence imposed was within the standard range of the guidelines. **See** Docket Entries at Nos. 13 and 15. Thus, Appellant's contention that her sentences were improper lacks merit.

In summary, it is our determination that Appellant's counsel has complied with the requirements of **Anders** and that an appeal in this case would be wholly frivolous. Furthermore, we have conducted our own,

independent review of the record. We do not discern any non-frivolous issues that Appellant could have raised. In light of the foregoing, we grant counsel's petition to withdraw and affirm the judgments of sentence.

Petition to withdraw granted. Judgments of sentence affirmed. Jurisdiction relinquished.