

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
RASHAN JAMARI JOHNSON,	:	
Appellant	:	No. 1182 EDA 2011

Appeal from the Judgment of Sentence April 5, 2011
In the Court of Common Pleas of Delaware County
Criminal Division No(s).: CP-23-CR-0000464-2009

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
RASHAN JAMARI JOHNSON,	:	
Appellant	:	No. 1183 EDA 2011

Appeal from the Judgment of Sentence April 5, 2011
In the Court of Common Pleas of Delaware County
Criminal Division No(s).: CP-23-CR-0000829-2010

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
RASHAN JAMARI JOHNSON,	:	
Appellant	:	No. 1184 EDA 2011

Appeal from the Judgment of Sentence April 5, 2011
In the Court of Common Pleas of Delaware County
Criminal Division No(s).: CP-23-CR-0003253-2010

BEFORE: GANTMAN, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

Filed: January 9, 2013

Appellant, Rshan Jamari Johnson, appeals from the judgment of sentence imposed after the Delaware County Court of Common Pleas revoked earlier sentences of probation and parole.¹ Appellant's counsel, Patrick J. Connors, Esq., has filed a petition to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *Commonwealth v. McClendon*, 434 A.2d 1185 (Pa. 1981). We affirm at 1182 EDA 2011 and 1183 EDA 2011 and grant counsel's petition. We quash the appeal at 1184 EDA 2011.²

The trial court summarized the procedural posture of the case:

[On February 6, 2009, Appellant] entered a counseled, open guilty plea to Information A—Receiving Stolen Property, a third degree felony [under docket No. CP-23-CR-0000464-09 (“464-09”). Appellant] was then sentenced consistent with the Pennsylvania Sentencing Guideline's applicable standard range to two (2) years of restrictive intermediate punishment as follows: Twenty-two (22) days incarceration with credit being afforded for the twenty-two (22) days [Appellant] had already served in Juvenile Detention, seventy (70) days of electronic

* Former Justice specially assigned to the Superior Court.

¹ These appeals were consolidated by *per curiam* order of this Court.

² At the revocation hearing, the Commonwealth stated that there was no violation of CP-23-CR-0003253-2010 (“3253-10”), the appeal from which is our docket number 1184 EDA 2011. N.T., 4/5/11, at 4. The court reiterated that this case was not a violation. *Id.* at 9-10. “While a *Gagnon II* Hearing was scheduled for April 5, 2011, in No. 3253-10 alone with such proceedings in Nos. 464-09 and [CP-23-CR-0000829-2010 (“829-10”)], . . . , this listing concerning No. 3253-10 was erroneous and discontinued.” Trial Ct. Op., 12/2/11, at 8 n.29.

home monitoring with balance of the term being probationary oversight followed by one (1) year of county probation to be served consecutively to the sentence of restrictive intermediate punishment.

* * *

No post-sentence pleadings . . . were filed by [Appellant]. No direct appeal was lodged . . . to the Pennsylvania Superior Court from the Judgment of Sentence.

In No. 829-10, a Criminal Complaint was filed on November 11, 2009, charging [Appellant] with Receiving Stolen Property, 18 Pa.C.S. § 3925. . . .

* * *

A counseled, negotiated Guilty Plea was entered into by [Appellant] on April 5, 2010, to Information A—Receiving Stolen Property, a First Degree Misdemeanor. [Appellant] on this same date . . . was sentenced by the Court consistent with the attorneys' agreement to a term of incarceration of time served, four (4) days, through twenty-three (23) months with this sentence to run consecutive to [the previous case].

* * *

No post-sentence pleadings . . . were filed by [Appellant]. No direct appeal was lodged . . . to the Pennsylvania Superior Court from the Judgment of Sentence.

On April 12, 2010, a Criminal Complaint was filed in No. [CP-23-CR-0004598-2010 ("4598-10")]. . . charging [Appellant] with Possessing Instruments of Crime, 18 Pa.C.S. § 907; Persons Not to Possess . . . Firearms, 18 Pa.C.S. § 6105; Firearms Not to be Carried Without a License, 18 Pa.C.S. § 6106; and Receiving Stolen Property, 18 Pa.C.S. § 3925.

Delaware County Adult Probation and Parole Services Supervisor, Maribeth DePalis, and Frank Shannon,

[Appellant's] assigned Probation-Parole Officer, on April 27, 2010, made application in Nos. 464-09. and 82[9]-10, that the Court issue Bench Warrants for [Appellant's] failure to comply with his rules and regulations of probation-parole alleging, *inter alia*, [his] arrest on April 12, 2010 in No.4598-10. . . .

* * *

On September 27, 2010, [Appellant] entered a counseled, negotiated Guilty Plea before this Court to Information A—Persons Not to Possess . . . Firearms, 18 Pa.C.S. § 6105. [at 4598-10]. Pursuant to the attorneys' agreement, the Court on that same date [] sentenced [Appellant] to a term of incarceration of thirty-six (36) to seventy-two (72) months at a State Correctional Facility with credit for time served of one hundred sixty-nine (169 days)

By Applications to the Court dated February 22, 2011, the Probation and Parole Office requested the scheduling of *Gagnon II* Hearings in Nos. 464-09 and 829-10. . . .

At the resulting *Gagnon II* proceeding of April 5, 2011, . . . appropriate notice as to the date, time, location and purpose of the *Gagnon II* Hearing was established. . . .

[Appellant] through counsel agreed to the violations of his parole-probation

At No. 464-09, Information A—Theft by Receiving Stolen Property, a third degree felony, the Court found [Appellant] to be in violation of his previously granted probation, revoked that probation, and resentenced [Appellant] to a minimum of one (1) year to two (2) years incarceration, this sentence to run consecutive to the state sentence in 4598-10 and concurrent with Nos. 3253-10 and 829-10. Regarding No. 829-10, Information A—Receiving Stolen Property, the Court again found [Appellant] to be in violation of previously granted parole, revoked that parole, and resentenced [Appellant] to his full back time of 685 days to be served consecutive to the

state sentence in No. 4598-10 and concurrent with Nos. 464-09 and 3253-10.

Trial Ct. Op., 12/2/11, at 4-10 (citations to record and footnotes omitted).

At the hearing, Appellant requested that the court clarify his sentence. He stated:

The only thing I have to say is I don't understand how much time I will—I will be doing before I'm able to go home. That's the only thing I don't understand by the consecutives and—and the parole and the probation. I don't—I don't understand.

* * *

The Court: All right. [The Commonwealth] is recommending you do an additional 685 days beyond your sentence of three to six years in your most recent case.

[Appellant]: Okay. So when I—I asked my attorney—I asked him—so all that—three to six plus the 685 days is five years, right?

The Court: Give or take, approximately yes.

[Counsel for Appellant]: Yeah.

The Court: Yes.

[Appellant] Okay.

The Court: Is there any . . .

[Appellant]: And so . . .

The Court: Go ahead, please.

[Appellant]: That's—so if I was—if I was eligible to make parole in three years, I will have to stay for the two years, am I—is that right?

The Court: You would be incarcerated for an additional 685 days.

[Appellant]: Yes.

N.T. at 6-8. A discussion ensued regarding whether he would serve his time in a state or county facility. Appellant then stated: "That's all I have. That's all—I understand." *Id.* at 9. Appellant did not raise any objection to the sentence at sentencing, nor did he file a post-sentence motion.

Appellant filed a timely notice of appeal. Appellant was ordered to file a Pa.R.A.P. 1925(b) statement of matters complained of on appeal. Counsel filed a statement of intent to file an *Anders* brief in lieu of filing a 1925(b) statement. *See* Pa.R.A.P. 1925(c)(4). The court filed a responsive opinion.

First, we examine whether counsel complied with the requirements of *Anders, supra*, and *McClendon, supra*, as clarified by the Pennsylvania Supreme Court in *Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009). "When faced with a purported *Anders* brief, this Court may not review the merits of any possible underlying issues without first examining counsel's request to withdraw." *Commonwealth v. Wimbush*, 951 A.2d 379, 382 (Pa. Super. 2008) (citation omitted). The Pennsylvania Supreme Court held

that in 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.

Instantly, counsel's application for leave to withdraw and appellate brief comply with the technical requirements of ***Anders*** and ***Santiago***. ***See id.*** The application and brief set forth a sentencing issue, cite relevant legal authority, and conclude that the appeal is frivolous. The record also establishes that Appellant was served a copy of the brief as well as a letter advising him of the rights to retain new counsel, proceed *pro se*, and raise additional issues to this Court.

Once the requirements pursuant to counsel's request to withdraw are satisfied, "[t]his Court must then conduct its own review of proceedings and make an independent judgment to decide whether the appeal is in fact wholly frivolous." ***Commonwealth v. Heron***, 674 A.2d 1138, 1139 (Pa. Super. 1996).

The ***Anders*** brief raises the following issue for our review: "Whether the new sentences imposed upon [Appellant] are harsh and excessive where, in the aggregate, they require him to serve 685 days in prison, and, after that, another 42 days on parole?" ***Anders*** Brief at 1.

As a prefatory matter, we consider whether Appellant has waived his challenge to the discretionary aspects of his sentence. "Issues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing

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proceedings.” *Commonwealth v. Rhoades*, 8 A.3d 912, 915 (Pa. Super. 2010) (citations omitted), *appeal denied*, 25 A.3d 328 (Pa. 2011), *cert. denied*, 132 S. Ct. 1746 (2012).

It is well-established that

issues pertaining to discretionary aspects of sentencing are only reviewed at the discretion of this Court if the following four-part test is met: (1) the appellant preserved the issue either by raising it at the time of sentencing or in a post-sentence motion; (2) the appellant filed a timely notice of appeal; (3) the appellant set forth a concise statement of reasons relied upon for the allowance of his appeal pursuant to Pa.R.A.P. 2119(f); and (4) the appellant raises a substantial question for our review. The failure to raise a challenge to the discretionary aspects of sentencing before the trial court results in waiver of that issue on appeal.

Commonwealth v. Stein, 39 A.3d 365, 370 (Pa. Super. 2012) (citations omitted). Instantly, Appellant did not challenge the discretionary aspects of his sentence at sentencing or in a post-sentence motion. Therefore, the issue is waived on appeal. *See id.*

A review of the record reveals no other meritorious issue that could provide relief.

Judgments of sentence at 1182 EDA 2010 and 1183 EDA 2011 affirmed. Counsel’s petition to withdraw granted. Appeal at 1184 EDA 2011 quashed.