

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DWAINE BEASON

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1220 WDA 2012

Appeal from the Judgment of Sentence July 18, 2012  
In the Court of Common Pleas of Erie County  
Criminal Division at No(s): CP-25-CR-0002106-2011

BEFORE: DONOHUE, J., MUNDY, J., and PLATT, J.\*

MEMORANDUM BY MUNDY, J.:

Filed: March 14, 2013

Appellant, Dwaine Beason, appeals from the July 18, 2012 judgment of sentence of 24 to 48 months' imprisonment, to be followed by ten years' probation, imposed after he was found guilty of unlawful delivery of a controlled substance.<sup>1</sup> Contemporaneously with the filing of this appeal, counsel is requesting leave to withdraw in accordance with *Anders v. California*, 386 U.S. 738 (1967), and its progeny. After careful review, we grant counsel's petition to withdraw and affirm the judgment of sentence.<sup>2</sup>

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> 35 Pa.C.S. § 780-113(a)(30).

<sup>2</sup> We note that the Commonwealth has not filed a brief in this case.

The relevant facts and procedural history of this case may be summarized as follows. On April 28, 2011, Appellant was arrested and charged with one count each of criminal conspiracy<sup>3</sup> and unlawful delivery of a controlled substance. On May 17, 2012, following a two-day jury trial, Appellant was found guilty of unlawful delivery of a controlled substance. The conspiracy charge resulted in a hung jury, however, and was subsequently *nolle prosequed*. Thereafter, on July 18, 2012, the trial court imposed the aforementioned sentence of 24 to 48 months' imprisonment, to be followed by ten years' probation.

On July 19, 2012, the court permitted Appellant's privately retained counsel to withdraw. Subsequently, on August 3, 2012, Tina Fryling, Esquire (Attorney Fryling) was appointed to represent Appellant, and on August 6, 2012, Attorney Fryling filed a timely notice of appeal.<sup>4</sup> Thereafter, on November 26, 2012, Attorney Fryling filed with this Court a petition to withdraw her representation and a brief in accordance with *Anders, supra*. Appellant did not file a response for this Court's consideration.

In her *Anders* brief, counsel raises the following issue on Appellant's behalf.

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<sup>3</sup> 18 Pa.C.S.A. § 903.

<sup>4</sup> On September 10, 2012, Attorney Fryling filed a statement of intent to file an *Anders* brief in lieu of filing a Rule 1925(b) statement. *See* Pa.R.A.P. 1925(c)(4). The trial court did not file a 1925(a) opinion.

1. Was the sentence in this case manifestly excessive and clearly unreasonable, and not individualized as required by law, and did the court fail to consider mitigating circumstances?

**Anders** Brief at 1.

Prior to addressing the merits of Appellant's claims, we must first consider counsel's request to withdraw. "When presented with an **Anders** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw." **Commonwealth v. Titus**, 816 A.2d 251, 254 (Pa. Super. 2003) (citation omitted). For cases where the briefing notice was issued after August 25, 2009, as is the case here, an **Anders** brief shall comply with the requirements set forth by our Supreme Court in **Commonwealth v. Santiago**, 978 A.2d 349 (Pa. 2009).

[W]e hold 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.

**Id.** at 361. Additionally, counsel must furnish the appellant with a copy of the brief, advise him in writing of his right to retain new counsel or proceed *pro se*, and attach to the **Anders** petition a copy of the letter sent to appellant as required under **Commonwealth v. Millisock**, 873 A.2d 748,

751 (Pa. Super. 2005). *See Commonwealth v. Daniels*, 999 A.2d 590, 594 (Pa. Super. 2010) (holding that, “[w]hile the Supreme Court in *Santiago* set forth the new requirements for an *Anders* brief, ... the holding did not abrogate the notice requirements set forth in *Millisock* that remain binding legal precedent”) (footnote omitted). “After counsel has satisfied these requirements, we must conduct our own review of the trial court proceedings and independently determine whether the appeal is wholly frivolous.” *Titus, supra* at 254 (citation omitted).

In the instant matter, we conclude that counsel’s *Anders* brief sufficiently complies with the aforementioned requirements. As a result, we proceed to conduct an independent review to ascertain if the appeal is indeed wholly frivolous. Instantly, Appellant avers that the trial court abused its discretion by sentencing Appellant to serve an unreasonably lengthy sentence considering the circumstances of the offense. *Anders* Brief at 3-4. Specifically, Appellant avers that his sentence is “manifestly excessive and clearly unreasonable” in light of the fact that he was convicted of “a fairly minor drug offense.”<sup>5</sup> *Id.* at 4.

We first note that any contention that the trial court misapplied the Sentencing Guidelines constitutes a challenge to the discretionary aspects of

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<sup>5</sup> The record reveals that Appellant sold one-tenth gram of cocaine to an undercover informant during a controlled buy. Affidavit of Probable Cause, 8/25/11, at 4.

Appellant's sentence. **See *Commonwealth v. Wilson***, 829 A.2d 1194, 1198 (Pa. Super. 2003).

Prior to reaching the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine the following.

(1) [W]hether appellant has filed a timely notice of appeal, **see** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

***Commonwealth v. Prisk***, 13 A.3d 526, 532 (Pa. Super. 2011).

Applying the four-factor test to the present matter, we conclude that Appellant has failed to comply with the second requirement. The record reveals that Appellant failed to raise this sentencing claim during the sentencing proceedings. Furthermore, he did not file a post-sentence motion addressing the claim. "Absent such efforts, an objection to a discretionary aspect of a sentence is waived." ***Commonwealth v. Kittrell***, 19 A.3d 532, 538 (Pa. Super. 2011), *appeal denied*, 32 A.3d 1276 (Pa. 2011). Accordingly, we conclude that Appellant's claim is waived.

Based on the foregoing, we agree with counsel that Appellant's appeal is "wholly frivolous." ***Titus, supra*** at 254. Accordingly, we grant counsel's petition to withdraw and affirm the trial court's July 18, 2012 judgment of sentence.

Judgment of sentence affirmed. Petition to withdraw granted.