NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KHALIL TURPIN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1267 EDA 2012

Appeal from the Judgment of Sentence March 8, 2012
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s):
CP-39-CR-0003610-2010
CP-39-CR-0003991-2007

BEFORE: FORD ELLIOTT, P.J.E., BENDER, J., and SHOGAN, J.

MEMORANDUM BY BENDER, J.: Filed: January 28, 2013

Appellant, Khalil Turpin, appeals from the judgment of sentence imposed after the court revoked his terms of probation and parole that Appellant was serving in two separate cases. On appeal, Appellant challenges his new sentence. Additionally, his counsel seeks permission to withdraw from representing Appellant pursuant to ***Anders v. California***, 386 U.S. 738 (1967), as elucidated by our Supreme Court in ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981), and amended in ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). Upon review, we conclude that Appellant's sentencing claim is frivolous and ascertain no other issues he could arguably raise on appeal. Accordingly, we affirm his judgment of sentence and grant counsel's petition to withdraw.

The rather confusing procedural history of Appellant's case can be summarized as follows. In November of 2007, in case number 3991 of 2007 ("case 3991"), Appellant pled *nolo contendere* to possession of a controlled substance and criminal conspiracy. He was sentenced to an aggregate term of three years' probation. While serving that term of probation, Appellant was charged in case number 3610 of 2010 ("case 3610") with theft. He pled guilty to that offense on August 13, 2010, and, while the court sentenced him to twelve months' imprisonment, Appellant was granted immediate parole.

On September 2, 2010, Appellant's probation sentence in case 3991 was revoked based on his conviction in case 3610. He was resentenced to a term of imprisonment of "time served" to twenty-three months, followed by twelve months' probation. The record indicates that Appellant served approximately five months' incarceration before being released on parole in case 3991.

Therefore, in the spring of 2011, Appellant was serving two terms of parole concurrently in cases 3991 and 3610. In May of that year, he was arrested and charged in two new cases, 2139 of 2011 ("case 2139") and 2404 of 2011 ("case 2404"). His offenses in those cases included aggravated assault, resisting arrest, and terroristic threats. Some of these charges stemmed from a physical altercation between Appellant and Lehigh County Parole Officers during which Appellant struck one officer in the face and threatened to kill another officer and his family. Appellant ultimately

was convicted in those cases[1] and was sentenced to an aggregate term of eight to twenty-three months' imprisonment, followed by twelve months' probation.

Based on these new convictions, a ***Gagnon II***[2] hearing was conducted on March 8, 2012. At the close thereof, the court revoked Appellant's terms of parole and probation in cases 3991 and 3610. The court re-sentenced Appellant to concurrently serve the remainder of his terms of imprisonment in both cases, followed by twelve months' probation. Additionally, the court directed that his parole/probation revocation sentences be served consecutively to the aggregate sentence imposed in cases 2139 and 2404.

Appellant filed a timely notice of appeal, as well as a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). On August 1, 2012, Appellant's counsel, Michael E. Brunnabend, Esquire, filed with this Court a petition to withdraw as counsel pursuant to ***Anders/Santiago***. "When 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

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[1] It is unclear for which precise offenses Appellant was convicted.

[2] ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973) (a "***Gagnon II***" hearing entails an assessment of two questions: (1) whether the facts warrant revocation of parole/probation, and (2) should the parolee/probationer be recommitted to prison).

(Pa. Super. 2005) (quoting ***Commonwealth v. Smith***, 700 A.2d 1301, 1303 (Pa. Super. 1997)). In ***Santiago***, our Supreme Court altered the requirements for counsel to withdraw under ***Anders***. Thus, pursuant to ***Anders/Santiago***, in order to withdraw from representing an appellant in an appeal, counsel now must:

> (1) provide a summary of the procedural history and facts, with citations to the record;
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> (2) refer to anything in the record that counsel believes arguably supports the appeal;
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> (3) set forth counsel's conclusion that the appeal is frivolous; and
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> (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.

Commonwealth v. Daniels, 999 A.2d 590, 593 (Pa. Super. 2010) (citing ***Santiago***, 978 A.2d at 361). This Court must then conduct its own review of the record and independently determine whether the appeal is in fact wholly frivolous. ***See id.*** at 594.

Instantly, Attorney Brunnabend's ***Anders*** brief provides a summary of the factual and procedural history of Appellant's case. It also includes a thorough discussion of the sentencing issue Appellant desires that Attorney Brunnabend raise on appeal. Additionally, Attorney Brunnabend sets forth his conclusion that an appeal on Appellant's behalf would be wholly frivolous and explains his reasons underlying that determination. He supports his

rationale with citations to relevant case law. Therefore, we conclude that Attorney Brunnabend has complied with the requirements of ***Anders/Santiago***. Accordingly, we will now independently review whether Appellant's sentencing issue is frivolous, and also assess whether there are any other claims that Appellant could arguably raise on appeal. ***See Daniels***, 999 A.2d at 594.

First, as set forth in Attorney Brunnabend's ***Anders*** brief, Appellant specifically seeks to challenge the court's decision to impose his parole/probation revocation sentence to run consecutively to the sentence he received in cases 2139 and 2404. Appellant alleges that the court abused its discretion in regard to the consecutive nature of the court's sentence, which results in Appellant's being required to serve his term of incarceration in a state penitentiary, rather than a county prison.

This claim is frivolous. An allegation that the sentencing court erred in imposing consecutive rather than concurrent sentences challenges the discretionary aspects of sentence. ***See Commonwealth v. Mastromarino***, 2 A.3d 581, 585 (Pa. Super. 2010) (citation omitted). This Court has concluded that such a claim only presents a substantial question permitting our review where "the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case." ***Id.*** at 587. This is not so in the present case. For his 2011 assault-related offenses in cases 2139 and 2404, Appellant received an aggregate sentence of eight to twenty-

three months' incarceration, followed by twelve months' probation. Therefore, running his parole/probation revocation sentences consecutively equates to Appellant serving a maximum aggregate term of imprisonment of forty-six months, followed by twenty-four months' probation. This is not a facially excessive aggregate sentence considering that it involves four separate cases and repeated violations by Appellant of his terms of probation/parole. Thus, Appellant's challenge to the consecutive nature of his sentences does not raise a substantial question for our review.

Moreover, even if it did, we would conclude that the court did not abuse its discretion in fashioning this sentence. It is well-settled that, in imposing sentence, a trial judge has the discretion to determine whether, given the facts of a particular case, a given sentence should be consecutive to, or concurrent with, other sentences being imposed." ***Commonwealth v. Rickabaugh***, 706 A.2d 826, 847 (Pa. Super. 1997). Here, the court imposed Appellant's parole/probation revocation sentence to run consecutively to his sentence in cases 2139 and 2404 so that Appellant would serve his time in a state penitentiary rather than in the county prison. ***See*** N.T. Hearing, 3/8/12, at 20-21. In its Pa.R.A.P. 1925(a) opinion, the court explains that in fashioning this sentence, it considered the fact that Appellant had four "major" misconducts while incarcerated at Lehigh County Prison, and that his behavior towards his parole officers was "appalling." Trial Court Opinion (T.C.O.), 5/23/12, at 5-6. Specifically, Appellant's parole officer testified at the ***Gagnon II*** hearing that Appellant was involved in two

physical altercations with his parole officers, one of which required seven officers to subdue him. ***Id.*** at 6 (citing N.T. Hearing, 3/8/12, at 6). In light of this conduct, Appellant's parole officer concluded that Appellant "is a danger to himself, society and our department," and recommended that Appellant be incarcerated in state prison. ***Id.*** (quoting N.T. Hearing, 3/8/12, at 6). The court agreed, explaining that "Appellant's inability to comply with his parole conditions made it impossible for [him] to remain under county supervision." ***Id.*** Finally, the court determined that "there are mental health facilities that are part of the state correctional system where [Appellant] can be adequately served." ***Id.*** at 6-7 (quoting N.T. Hearing, 3/8/12, at 21). Based on the court's rationale, we ascertain no abuse of discretion in its decision to impose Appellant's parole/probation revocation sentences to run consecutively to the sentences imposed in cases 2139 and 2404 so that Appellant will serve his time in state prison.

Consequently, the sentencing claim that Appellant desires Attorney Brunnabend to raise on appeal does not present a substantial question for our review and, even if it did, we would conclude that the court did not err in imposing consecutive sentences. Furthermore, after reviewing the record, we ascertain no other issues that Appellant could arguably raise on appeal. As such, we affirm Appellant's judgment of sentence and grant Attorney Brunnabend's petition to withdraw.

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