NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
JASON PAUL HUGE,	:	
Appellant	:	No. 1267 WDA 2012

Appeal from the Judgment of Sentence entered on July 17, 2012
in the Court of Common Pleas of Erie County,
Criminal Division, No. CP-25-CR-0000557-2000

BEFORE: BENDER, ALLEN and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: April 29, 2013

Jason Paul Huge ("Huge") appeals from the judgment of sentence imposed following the trial court's revocation of his parole and probation. Additionally, Huge's counsel, Tina M. Fryling, Esquire ("Attorney Fryling"), has filed a Petition to withdraw as counsel and a brief pursuant to ***Anders v. California***, 386 U.S. 738, 744 (1967). We affirm Huge's judgment of sentence and grant Attorney Fryling's Petition to withdraw as counsel.

Following a jury trial in May 2000, Huge was convicted of attempted burglary, theft by unlawful taking, and criminal conspiracy to commit burglary (hereinafter "conspiracy conviction" or "Count 3"). The trial court sentenced Huge to serve five to ten years in prison, plus a consecutive probationary term of ten years.[1]

[1] The trial court imposed sentence only upon the conspiracy conviction.

In January 2010, Huge was released from state prison, as he had served his maximum sentence. Upon his release, Huge commenced serving the ten-year probationary term. Shortly thereafter, Huge violated the terms of his probation and a bench warrant was issued for his arrest. Following Huge's apprehension, the trial court conducted a violation of probation ("VOP") hearing on August 2, 2010. At the close of this hearing, the trial court found Huge in violation of his probation and revoked it. The court sentenced Huge to serve a split sentence of 6 to 23 months in the Erie County Jail, followed by five years of probation (hereinafter "first VOP sentence").

Approximately eight months later, on June 10, 2011, Huge was released on parole. While Huge was out on parole, but before the probationary period had commenced, a warrant was issued for Huge's arrest, as he had absconded and violated several terms of his parole. Pursuant to the warrant, Huge was taken into custody on April 20, 2012. On July 17, 2012, the trial court conducted a "Parole/Probation Revocation" hearing. At this hearing, Huge conceded that he had violated three terms of his parole. Based upon these uncontested violations, the trial court revoked Huge's parole. ***See*** N.T., 7/17/12, at 12. At the close of the hearing, the trial court sentenced Huge as follows:

> [A]t Count 3, at docket 557 of 2000, I'll reimpose the six to twenty-three months on that. I'll give [Huge] credit for the time period [from] August 2nd, 2010[,] through June 10th of 2011. And [Huge] also [will receive credit] from April 20th[, 2012,] to today's date[, July 17, 2012.]

> As to the five years [of] probation, I'll order a period of incarceration of six to twenty-three and [one-]half months, [and] make that effective today, followed by three years [of] probation. I'll strip [Huge] of any street time[2] at this count. I'll make [this sentence] concurrent to the six to twenty-three months[, *i.e.*, to which Huge was recommitted for his parole violation]. So that will keep it at the County level.

Id. at 22 (footnote added) (hereinafter "second VOP sentence"). In other words, the trial court (1) revoked Huge's parole and recommitted him to serve the remainder of his six to twenty-three-month jail term imposed as to the first VOP sentence, minus time served; and (2) revoked Huge's five-year term of probation, and imposed a new sentence of six to twenty-three and one-half months, followed by three years of probation. ***See*** Parole and Probation Revocation Order, 7/17/12.

Huge timely filed a Motion for reconsideration of sentence, which the trial court denied. In response to Huge's timely Notice of appeal, Attorney Fryling filed a Statement of Intent to file an ***Anders*** brief, based upon her conclusion that Huge's claims were wholly frivolous and there were no meritorious issues to raise on appeal. In November 2012, Attorney Fryling filed with this Court an ***Anders*** Brief and a Petition requesting permission to

[2] Time on parole is known as "street time," *i.e.*, the time a parolee spends at liberty on parole. ***Dorsey v. Pa. Bd. of Prob. & Parole***, 854 A.2d 994, 996 n.3 (Pa. Cmwlth. 2004).

withdraw as counsel.[3, 4]

Before addressing Huge's issues on appeal, we must determine whether Attorney Fryling has complied with the dictates of ***Anders*** and its progeny in petitioning to withdraw from representation. Pursuant to ***Anders***, when counsel believes that an appeal is frivolous and wishes to withdraw from representation, she must do the following:

> (1) petition the court for leave to withdraw stating that after making a conscientious examination of the record and interviewing the defendant, counsel has determined the appeal would be frivolous, (2) file a brief referring to any issues in the record of arguable merit, and (3) furnish a copy of the brief to defendant and advise him of his right to retain new counsel or to raise any additional points that he deems worthy of the court's attention. The determination of whether the appeal is frivolous remains with the [appellate] court.

Commonwealth v. Burwell, 42 A.3d 1077, 1083 (Pa. Super. 2012) (citations omitted).

Additionally, the Pennsylvania Supreme Court has explained that a proper ***Anders*** brief 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

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[3] The record shows that Huge did not retain alternate counsel for this appeal, file a *pro se* brief, or respond to Attorney Fryling's Petition to withdraw.

[4] We note that the Commonwealth did not file an appellate brief, nor did the trial court issue a Pa.R.A.P. 1925(a) Opinion, complicating our review of this matter.

> case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Commonwealth v. Santiago, 978 A.2d 349, 361 (Pa. 2009).

Our review of Attorney Fryling's ***Anders*** Brief and Petition to withdraw reveals that she has substantially complied with the requirements of ***Anders***/***Santiago***.[5] ***See Commonwealth v. O'Malley***, 957 A.2d 1265, 1267 (Pa. Super. 2008) (stating that substantial compliance with the requirements to withdraw as counsel will satisfy the ***Anders*** criteria). The record further reflects that Attorney Fryling has (1) provided Huge with a copy of both the ***Anders*** Brief and Petition to withdraw; (2) sent a letter to Huge advising him of his right to retain new counsel, proceed *pro se*, or raise any additional points that he deems worthy of this Court's attention; and (3) attached a copy of this letter to the Petition to withdraw, as required under ***Commonwealth v. Millisock***, 873 A.2d 748, 751-52 (Pa. Super. 2005). Accordingly, we next examine the record and make an independent determination of whether Huge's appeal is, in fact, wholly frivolous.

The ***Anders*** Brief raises the following issues for our review:

> I. Did the trial court abuse its discretion in giving [Huge] two separate sentences during revocation?
>
> II. Did the trial court err in failing to credit [Huge] for the time he spent in confinement prior to his resentencing[?]

Anders Brief at 2 (issues renumbered; capitalization omitted).

[5] Attorney Fryling's ***Anders*** brief fails to cite to relevant case law in support of her assertion that Huge's claims are wholly frivolous.

Huge first argues that (1) the trial court erred in "sentenc[ing him] to two separate terms of confinement at the same count[;]" and (2) that "it was unduly harsh for the judge to sentence him in that manner." ***Id.*** at 3.

Initially, to the extent that Huge challenges the discretionary aspects of his sentence, this claim is misplaced and does not entitle him to relief. It is well established that "[t]he sentencing guidelines do not apply to sentences imposed as a result of … revocation of probation, intermediate punishment or parole." 204 P.S. § 303.1(b); ***Commonwealth v. Coolbaugh***, 770 A.2d 788, 792 (Pa. Super. 2001). Moreover, we have carefully reviewed the record in this matter and are convinced that the trial court was clearly aware of and properly considered the appropriate factors in fashioning Huge's sentence.

Huge's claim that the trial court lacked the authority to impose the second VOP sentence raises a challenge to the legality of the sentence. ***See Commonwealth v. Bowen***, 55 A.3d 1254, 1265 (Pa. Super. 2012). "Issues relating to the legality of a sentence are questions of law to which our standard of review is *de novo* and our scope of review is plenary." ***Id.*** An illegal sentence is one that exceeds the statutory maximum. ***Id.***

This Court's decision in ***Commonwealth v. Ware***, 737 A.2d 251 (Pa. Super. 1999), is closely analogous to this case and guides our analysis. The panel in ***Ware*** was faced with the question of whether the sentence imposed by the trial court upon revocation of the defendant's parole and probation was illegal. ***Id.*** at 252. The defendant had initially entered a guilty plea to

retail theft and received a split sentence of 8 to 23 months in the Lancaster County Jail (with credit for time served), followed by a consecutive two-year probationary term. ***Id.*** Less than two weeks after sentence was imposed, the defendant was released on parole. ***Id.*** Approximately six weeks later, the defendant committed retail theft in another county and was sentenced to serve a short jail term. ***Id.*** When authorities in Lancaster County learned about the defendant's new conviction, the trial court convened a probation and parole violation hearing. ***Id.*** At the conclusion of the hearing, the trial court revoked the defendant's probation and parole and imposed a new sentence of 32½ to 74½ months in prison. ***Id.***

On appeal, the defendant correctly pointed out that upon revocation of parole, the law provides that the only sentencing option available is recommitment to serve the balance of the prison term initially imposed. ***Id.*** at 253. To elaborate upon this point, the ***Ware*** Court stated as follows:

> [an] order revoking parole does not impose a new sentence; it requires appellant, rather, to serve the balance of a valid sentence previously imposed. ***See Commonwealth v. Carter***, 336 Pa. Super. 275, 281 n.2, 485 A.2d 802, 805 n.2 (1984). Moreover, such a recommittal is just that -- a recommittal and not a sentence. ***Abraham v. Dept. of Corrections***, 150 Pa. Commw. 81, 97, 615 A.2d 814, 822 (1992). Further, at a "Violation of Parole" hearing, the court is not free to give a new sentence. The power of the court after a finding of violation of parole in cases not under the control of the State Board of Parole is "to recommit to jail…." ***See Commonwealth v. Fair***, 345 Pa. Super. 61, 64, 497 A.2d 643, 645 (1985), *citing* 61 P.S. § 314. There is no authority for giving a new sentence with a minimum and maximum. [***Fair***,] 497 A.2d at 645.

> ***Commonwealth v. Mitchell***, 429 Pa. Super. 435, 632 A.2d 934, 936 (Pa. Super. 1993).

Ware, 737 A.2d at 253.

However, the Court in ***Ware*** pointed out that the facts in that case involved not merely revocation of parole, but also revocation of the defendant's probation. ***Id.*** Initially, the ***Ware*** Court stated that

> the [trial] court had the authority to revoke [the defendant's] probation despite the fact that, at the time of revocation of probation, [the defendant] had not yet begun to serve the probationary portion of her split sentence and even though the offense upon which revocation of probation was based occurred during the parole period and not the probationary period.

Id. (citing, *inter alia*, ***Commonwealth v. Wendowski***, 420 A.2d 628, 630 (Pa. Super. 1980) (providing that "[i]f, at any time before the defendant has completed the maximum period of probation, *or before he has begun service of his probation*, he should commit offenses of such nature as to demonstrate to the court that he is unworthy of probation and that the granting of the same would not be in subservience to the ends of justice and the best interests of the public, or the defendant, the court could revoke or change the order of probation.") (emphasis in original; citation omitted)). According to the panel in ***Ware***,

> it is clear that the [trial] court in the instant matter had the proper authority to revoke not only [the defendant's] parole, but also to revoke [the defendant's] probation. Moreover, once the court revoked [the defendant's] probation, it had the same sentencing options available that existed at the time of the original sentencing. ***Commonwealth v. Smith***, 447 Pa. Super. 502, 669 A.2d 1008, 1011 (Pa. Super. 1996).

Ware, 737 A.2d at 254. Finally, the Court held that since the defendant's parole/probation revocation sentence did not exceed the statutory maximum penalty that the trial court could have imposed at the original sentencing, the sentence was lawful. ***Id.***

In the instant case, the trial court originally convicted Huge of criminal conspiracy, graded as a first-degree felony, an offense punishable by up to 20 years in prison. ***See*** 18 Pa.C.S.A. § 903(a); ***id.*** § 1103(1) (maximum penalty for first-degree felony is twenty years). Each time that Huge violated his probation, upon revocation, he was placed in the same position that he was in at the time of the initial sentencing, less any time already served. ***See Ware, supra***. So long as Huge's total sentence did not exceed the statutory maximum of 20 years, then the sentence is lawful. Moreover, at the time of imposition of the second VOP sentence, the trial court had the authority to revoke Huge's probation despite the fact that he was on parole at the time that he committed the technical parole violations and had not yet begun his probationary term. ***See Ware***, 737 A.2d at 253; ***see also Commonwealth v. Sierra***, 752 A.2d 910, 912 (Pa. Super. 2000) (citing ***Ware*** and holding that technical parole violations alone are sufficient to revoke future probation). Here, it is clear from the record that the second VOP sentence did not exceed the statutory maximum penalty that the trial court could have imposed at the original sentencing. Accordingly, Huge's challenge to the legality of his sentence lacks merit. ***See Ware***, 737 A.2d at 254; ***see also McCray v. Pa. Dept. of Corr.***, 872 A.2d 1127, 1132 (Pa.

2005) (the defendant violated his probation while out on parole; upon revocation, the trial court's probation revocation sentence, combined with the time previously served on the original sentence, was within the statutory maximum for the underlying offenses; accordingly, the sentence was legal).

Huge next argues that the trial court erred in failing to award him credit for time served prior to sentencing. ***See Anders*** Brief at 5. This issue implicates the legality of Huge's sentence. ***Commonwealth v. Johnson***, 967 A.2d 1001, 1003 (Pa. Super. 2009). Attorney Fryling explains Huge's claim as follows:

> [Huge] argues that he was not given as credit towards his sentence the 89 days that he was imprisoned following the lodging of the detainer against him and his resentencing [following the revocation of his parole/probation] …. [Huge] was credited his time served prior to sentencing (60 days), the days served between his detainer and his revocation date (89 days, between April 20, 2012[,] and July 17, 2012)[,] and the 313 days he served from his sentencing date of August 2, 2010[,] to his parole date of June 10, 2011. [Huge] may be arguing that this credit should have been given to him twice, as two sentences were imposed, and [] Huge also [contends] … that his street time has been [improperly] stripped. [Huge] seems to argue that since the sentences were imposed concurrently originally, the time credit he receives should also be imposed concurrently, on both sentences.

Anders Brief at 5 (footnote added).

After review of the record and the applicable law, we discern no error by the trial court. The court awarded Huge credit for the 89 days that he had spent in jail prior to sentencing and applied it toward his second VOP sentence. ***See*** N.T., 7/17/12, at 22; ***see also McCray***, 872 A.2d at 1136 (Castile, J. concurring) ("[A] VOP judge adequately 'credits' a defendant for

'time spent in custody' so long as he does not impose a VOP sentence which, when combined with the initial sentence, exceeds the statutory maximum."). Huge does not have the right to receive double credit. ***See, e.g., Jackson v. Vaughn***, 777 A.2d 436, 438 (Pa. 2001) (holding that a convicted parole violator is not entitled to double credit where the time served had been credited toward his VOP sentence). Likewise, after review, we determine that Huge's other challenges to the trial court's award of time served are without merit.

Accordingly, because we conclude that both of Huge's issues on appeal are wholly frivolous, and discern no non-frivolous issues that Huge could raise on appeal, Huge's counsel, Attorney Fryling, is entitled to withdraw as counsel under the precepts of ***Anders***.

Judgment of sentence affirmed; Petition for leave to withdraw as counsel granted.