

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DONNA LYNN SPENCER

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1275 EDA 2013

Appeal from the Judgment of Sentence March 26, 2013  
In the Court of Common Pleas of Chester County  
Criminal Division at No(s): CP-15-CR-0002077-2007

BEFORE: GANTMAN, J., DONOHUE, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.:

**FILED DECEMBER 19, 2013**

Appellant, Donna Lynn Spencer, appeals from the judgment of sentence entered in the Chester County Court of Common Pleas, following revocation of her probation. We affirm and grant counsel's petition to withdraw.

The relevant facts and procedural history of this appeal are as follows. On November 15, 2007, Appellant pled guilty to aggravated assault.<sup>1</sup> Immediately following the entry of the plea, the court sentenced Appellant to eleven and one-half (11½) to twenty-three (23) months' incarceration, followed by three (3) years' probation. Appellant did not file post-sentence

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<sup>1</sup> 18 Pa.C.S.A. § 2702.

motions or a notice of appeal. On February 25, 2008, the court granted parole effective March 7, 2008.

Appellant subsequently violated the terms and conditions of her parole. On May 4, 2010, the court revoked parole and ordered Appellant to serve the balance of her original sentence, which amounted to thirteen (13) months, with parole eligibility after seven (7) months. The court also reinstated the consecutive term of three (3) years' probation. Appellant did not file post-sentence motions or a notice of appeal. On November 24, 2010, the court granted parole effective December 4, 2010.

Appellant subsequently violated the terms and conditions of her probation. On June 8, 2012, the court issued a bench warrant due to technical violations including drug use and failing to report to the probation department. Following the issuance of the bench warrant, Appellant pled guilty to a new robbery charge in Montgomery County, receiving a sentence of two and one-half (2½) to six (6) years' incarceration. On March 26, 2013, the court conducted a probation violation hearing. After receiving testimony from Appellant and her probation officer, the court revoked probation and re-sentenced Appellant to one and one-half (1½) to three (3) years' incarceration, consecutive to the Montgomery County sentence. On April 5, 2013, Appellant timely filed a motion for reconsideration, alleging the imposition of a violation sentence consecutive to Appellant's Montgomery

County sentence was unduly harsh. The court denied the reconsideration motion on April 11, 2013.

Appellant timely filed a notice of appeal on April 24, 2013. On April 25, 2013, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Counsel subsequently filed a statement of intent to file a brief pursuant to ***Anders v. California***, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

As a preliminary matter, appellate counsel seeks to withdraw his representation pursuant to ***Anders*** and ***Commonwealth v. Santiago***, 602 Pa. 159, 978 A.2d 349 (2009). ***Anders*** and ***Santiago*** require counsel to: 1) petition the Court for leave to withdraw, certifying that after a thorough review of the record, counsel has concluded the issues to be raised are wholly frivolous; 2) file a brief referring to anything in the record that might arguably support the appeal; and 3) furnish a copy of the brief to the appellant and advise her of her right to obtain new counsel or file a *pro se* brief to raise any additional points the appellant deems worthy of review. ***Santiago, supra*** at 173-79, 978 A.2d at 358-61. Substantial compliance with these requirements is sufficient. ***Commonwealth v. Wrecks***, 934 A.2d 1287, 1290 (Pa.Super. 2007). "After establishing that the antecedent requirements have been met, this Court must then make an independent evaluation of the record to determine whether the appeal is, in fact, wholly frivolous." ***Commonwealth v. Palm***, 903 A.2d 1244, 1246 (Pa.Super.

2006) (quoting **Commonwealth v. Townsend**, 693 A.2d 980, 982 (Pa.Super. 1997)).

In **Santiago, supra**, our Supreme Court addressed the briefing requirements where court-appointed appellate counsel seeks to withdraw representation:

Neither **Anders** nor **McClendon**<sup>[2]</sup> requires that counsel's brief provide an argument of any sort, let alone the type of argument that counsel develops in a merits brief. To repeat, what the brief must provide under **Anders** are references to anything in the record that might arguably support the appeal.

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Under **Anders**, the right to counsel is vindicated by counsel's examination and assessment of the record and counsel's references to anything in the record that arguably supports the appeal.

**Santiago, supra** at 176, 177, 978 A.2d at 359, 360. Thus, the Court held:

[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.

**Id.** at 178-79, 978 A.2d at 361.

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<sup>2</sup> **Commonwealth v. McClendon**, 495 Pa. 467, 434 A.2d 1185 (1981).

Instantly, appellate counsel filed a petition for leave to withdraw representation. The petition states counsel conducted a conscientious review of the record and determined the appeal is wholly frivolous. Counsel indicates he notified Appellant of the withdrawal request. Counsel also supplied Appellant with a copy of the brief and a letter explaining Appellant's right to proceed *pro se* or with new privately retained counsel to raise any additional arguments that Appellant believes have merit. In the **Anders** brief, counsel provides a summary of the facts and procedural history of the case. Counsel refers to evidence in the record that may arguably support the issue raised on appeal, and he provides citations to relevant law. The brief also provides counsel's reasons for his conclusion that the appeal is wholly frivolous. Therefore, counsel has substantially complied with the requirements of **Anders** and **Santiago**.

As Appellant has filed neither a *pro se* brief nor a counseled brief with new privately retained counsel, we review this appeal on the basis of the issue raised in the **Anders** brief:

DOES IMPOSITION OF A STATE PRISON SENTENCE ON A PROBATION VIOLATION IN AN ASSAULT CASE RAISE A SUBSTANTIAL QUESTION THAT THE SENTENCING CODE WAS VIOLATED BY THE TRIAL COURT, WHO IMPOSED THE SENTENCES AFTER A DECISION THAT [APPELLANT] HAD FAILED TO MEET TERMS OF THE COURT'S SUPERVISION BY ACCRUING A NEW ROBBERY CONVICTION? IS SUCH A SENTENCE AN ABUSE OF THE JUDGE'S DISCRETION?

(**Anders** Brief at 3).

On appeal, Appellant claims her behavior improved while on probation, and a violation sentence of total confinement will not facilitate her rehabilitation. Appellant also complains that the court imposed the violation sentence consecutive to the Montgomery County sentence, and the lengthier term of confinement will make it more difficult for her to become a productive member of society upon her release. Appellant concludes the court abused its discretion by imposing a manifestly excessive and clearly unreasonable sentence. Appellant challenges the discretionary aspects of her sentence. **See Commonwealth v. Lutes**, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing).

When reviewing the outcome of a revocation hearing, this Court is limited to determining the validity of the proceeding and the legality of the judgment of sentence imposed. **Commonwealth v. Heilman**, 876 A.2d 1021 (Pa.Super. 2005). Notwithstanding the stated scope of review suggesting only the legality of a sentence is reviewable, an appellant may also challenge the discretionary aspects of a sentence imposed following revocation. **Commonwealth v. Sierra**, 752 A.2d 910 (Pa.Super. 2000). **See also Commonwealth v. Cappellini**, 690 A.2d 1220 (Pa.Super. 1997) (addressing discretionary aspects of sentence imposed following revocation of probation).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. **Sierra, supra** at 912. Prior to reaching the merits of a discretionary sentencing issue:

[W]e conduct a four-part analysis to determine: (1) whether 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. Evans**, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in her brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. **Commonwealth v. Mouzon**, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to **exceptional** cases." **Commonwealth v. Phillips**, 946 A.2d 103, 112 (Pa.Super. 2008), *cert. denied*, 556 U.S. 1264, 129 S.Ct. 2450,

174 L.Ed.2d 240 (2009) (quoting ***Commonwealth v. Williams***, 562 A.2d 1385, 1387 (Pa.Super. 1989) (*en banc*)) (emphasis in original).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830 A.2d 1013 (Pa.Super. 2003). A substantial question exists “only when the appellant advances a colorable argument that the sentencing judge’s actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.” ***Sierra, supra*** at 912-13. A claim that a sentence is manifestly excessive might raise a substantial question if the appellant’s Rule 2119(f) statement sufficiently articulates the manner in which the sentence imposed violates a specific provision of the Sentencing Code or the norms underlying the sentencing process. ***Mouzon, supra*** at 435, 812 A.2d at 627. A boilerplate challenge to the imposition of a consecutive rather than a concurrent sentence does not raise a substantial question. ***Commonwealth v. Marts***, 889 A.2d 608 (Pa.Super. 2005).

Moreover, “[U]pon sentencing following a revocation of probation, the trial court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence.” ***Commonwealth v. Coolbaugh***, 770 A.2d 788, 792 (Pa.Super. 2001). A court can sentence a defendant to total confinement after revoking probation if the defendant was convicted of another crime, the defendant’s conduct



indicates that it is likely that she will commit another crime if she is not imprisoned, or such a sentence is essential to vindicate the court's authority. ***Commonwealth v. Crump***, 995 A.2d 1280 (Pa.Super. 2010), *appeal denied*, 608 Pa. 661, 13 A.3d 475 (2010). Additionally, the Sentencing Guidelines do not apply to sentences imposed following a revocation of probation. ***Commonwealth v. Ferguson***, 893 A.2d 735 (Pa.Super. 2006), *appeal denied*, 588 Pa. 788, 906 A.2d 1196 (2006).

Instantly, Appellant's boilerplate challenge to the imposition of consecutive sentences does not raise a substantial question. ***See Marts, supra***. Further, the court revoked probation and re-sentenced Appellant in light of technical violations and a new conviction; thus, a sentence of total confinement was proper. ***See Crump, supra***. The court also imposed a sentence of one and one-half to three years' imprisonment, which did not exceed the maximum sentence that the court could have imposed originally.<sup>3</sup> ***See Coolbaugh, supra***. Under these circumstances, Appellant is not entitled to relief. Accordingly, we affirm the judgment of sentence and grant counsel's petition to withdraw.

Judgment of sentence affirmed; counsel's petition to withdraw is granted.

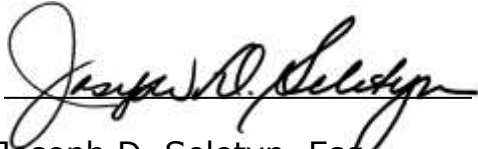
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<sup>3</sup> The offense of aggravated assault, graded as a second degree felony, carried a statutory maximum term of ten (10) years' imprisonment. 18 Pa.C.S.A. § 1103(2).

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\*JUDGE OLSON CONCURS IN THE RESULT.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/19/2013