

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MICHAEL A. COLLAZO,	:	
	:	
Appellant	:	No. 1324 WDA 2012

Appeal from the Judgment of Sentence December 1, 2008,
 Court of Common Pleas, Erie County,
 Criminal Division at Nos. CP-25-CR-0003041-2007
 and CP-25-CR-0003222-2007

BEFORE: DONOHUE, MUNDY and PLATT*, JJ.

CONCURRING MEMORANDUM BY DONOHUE, J.: Filed: April 29, 2013

I cannot agree with the learned Majority that Appellant, Michael A. Collazo ("Collazo"), failed to preserve for appellate review any issues related to the discretionary aspects of his sentence. However, because I believe that Collazo's challenge to the discretionary aspects of his sentence is frivolous, I concur in the result reached by the Majority on this issue.

The Majority concludes that Collazo waived any opportunity to assert discretionary sentencing issues on appeal because his *pro se* post-sentence motion was a legal nullity since he was represented by counsel at the time of its filing. In ***Commonwealth v. Cooper***, 611 Pa. 437, 27 A.3d 994 (2011), our Supreme Court ruled that such filings are not legal nullities. In ***Cooper***, the defendant, without advising his counsel, filed a *pro se* notice of appeal immediately after his sentencing. The clerk of courts failed to mail a copy of

*Retired Senior Judge assigned to the Superior Court.

this *pro se* notice of appeal to defendant's counsel, who filed a post-sentence motion raising issues related to the discretionary aspect of the sentence. When this post-sentence motion was denied, counsel then filed a notice of appeal. This Court dismissed counsel's notice of appeal as duplicative of the previously filed *pro se* notice of appeal, and the Commonwealth then sought dismissal of the *pro se* notice of appeal because it was a legal nullity pursuant to ***Commonwealth v. Ellis***, 534 Pa. 176, 626 A.2d 1137 (1993) and its progeny. The Supreme Court disagreed, ruling that the *pro se* notice of appeal was "definitely was not a 'nullity,'" even though the defendant was represented by counsel at the time of its filing. ***Cooper***, 611 Pa. 437, 27 A.3d at 1005. Instead, the *pro se* notice of appeal was "a premature appeal that was perfected upon the trial court's proper consideration and denial of the counseled post-sentence motions." ***Id.***

In ***Cooper***, the Supreme Court recognized an important difference between how *pro se* filings by represented litigants are treated by appellate courts as opposed to trial courts. ***Id.*** at 1007-08. Pursuant to Rule 3304 of the Pennsylvania Rules of Appellate Procedure, "[w]here a litigant is represented by an attorney before the Court and the litigant submits for filing a petition, motion, brief or any other type of pleading in the matter, it shall not be docketed but forwarded to counsel of record." Pa.R.A.P. 3304. Because the *pro se* document is not filed on the appellate court's docket and is instead merely forwarded to counsel for appropriate action (if any), its

submission has no legal effect. For this reason, in ***Ellis*** our Supreme Court ruled that this Court did not err in refusing to consider a *pro se* appellate brief filed by a represented party. ***Ellis***, 534 Pa. at 183, 626 A.2d at 1141; ***see also Commonwealth v. Jette***, 611 Pa. 166, 23 A.3d 1032 (2011); ***Commonwealth v. Ali***, 608 Pa. 71, 10 A.3d 282, 293 (2010).

In trial courts, Rule 576(A)(4) of the Pennsylvania Rules of Criminal Procedure establishes a different approach for documents filed, *pro se*, by litigants represented by counsel. Rule 576(A)(4) provides as follows:

(4) In any case in which a defendant is represented by an attorney, if the defendant submits for filing a written motion, notice, or document that has not been signed by the defendant's attorney, the clerk of courts shall accept it for filing, time stamp it with the date of receipt and make a docket entry reflecting the date of receipt, and place the document in the criminal case file. A copy of the time stamped document shall be forwarded to the defendant's attorney and the attorney for the Commonwealth within 10 days of receipt.

Pa.R.Crim.P. 576(A)(4). When a represented litigant submits on his or her own behalf, a document for filing to a trial court, the clerk of courts accepts it for filing and records it on the docket. In contrast to appellate Rule 3304, under criminal procedural Rule 576(A)(4) the document is filed and memorialized on the trial court's docket. While it is true that the comment to Rule 576 provides that such a filing does not "trigger any deadline nor require any response," Pa.R.Crim.P. 576 *Cmt*, it nevertheless has the legal status of a filed document and is thus not a "legal nullity." As the Supreme

Court made clear in *Cooper*, the filing of the document and its service on the litigant's counsel begins a process through which counsel may then take appropriate action to resolve the situation. *Cooper*, 611 Pa. 437, 27 A.3d at 1007-08. In *Cooper*, the Supreme Court noted that if counsel had timely received a copy of the notice of appeal from the clerk of court, he could have moved to withdraw it (and thus avoided the procedural morass that followed). *Id.* In other cases, counsel may decide to present the motion to the trial court for resolution, or (if appropriate) take no action.

In the present case, Collazo's *pro se* motion was accepted for filing. While the clerk of courts failed to forward a copy of the motion to Collazo's counsel, the trial court nevertheless considered and disposed of the issues raised therein. For these reasons, in my view the issues in Collazo's *pro se* motion were sufficiently raised in the trial court to preserve them for appeal. See Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

For the reasons set forth in footnote 3 of the Majority's Memorandum, I agree that Collazo's claim that his sentence was excessive is frivolous on its merits. Majority Memorandum at 9 n.3. Given his prior record score, the sentence imposed was in the standard range under the sentencing guidelines, and the trial court provided a thorough explanation of its reasons for its imposition of consecutive sentences.

Accordingly, I concur in the result on this issue. I join in the remainder of the Majority's decision, including its resolution of the constitutional claim raised in the *Anders* brief.