NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

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

Appeal from the Judgment of Sentence December 1, 2008
In the Court of Common Pleas of Erie County
Criminal Division at No(s): CP-25-CR-0003041-2007
CP-25-CR-0003222-2007

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

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

Appellant, Michael A. Collazo, appeals *nunc pro tunc* from the December 1, 2008 aggregate judgment of sentence of 78 to 216 months' incarceration entered following Appellant's guilty pleas, under two criminal informations, to conspiracy to commit robbery and conspiracy to commit burglary.[1] Additionally, counsel has filed with this Court a petition for leave to withdraw as counsel together with a brief in accordance with ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). After a careful review, we grant counsel's petition to withdraw and affirm Appellant's judgment of sentence.

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. § 903 (3502/3701).

The protracted procedural history of this case, as discerned from the certified record is as follows. On August 10, 2007, Appellant was charged in a criminal complaint with burglary, receiving stolen property, carrying a loaded weapon, and conspiracy to commit burglary stemming from events occurring on August 7, 2007. Pursuant to a conditional plea agreement, Appellant waived his preliminary hearing and only the conspiracy charge was bound over for court at CP-25-CR-0003041-2007. On August 24, 2007, the Commonwealth filed "Allegations of Delinquency" against Appellant at CP-25-JV-0001101-2007, alleging he committed the offenses of robbery, conspiracy to commit robbery, simple assault, theft by unlawful taking, and receiving stolen property, stemming from events occurring on July 29, 2007. Appellant's 18th birthday was August 2, 2007. On December 12, 2007, The Commonwealth petitioned the juvenile court to transfer the offenses at JV-0001101-2007 to the court's criminal division to try Appellant as an adult. That same day, the juvenile court granted the Commonwealth's petition to transfer. On January 24, 2008, the Commonwealth filed an information containing the transferred charges at CP-25-CR-0003222-2007.

On October 28, 2008, Appellant entered a plea of guilty to one count of conspiracy to commit burglary at CR-0003041-2007 and one count of conspiracy to commit robbery at CR-0003222-2007. On the conspiracy to commit burglary charge, the trial court sentenced Appellant to incarceration for a term of 36 to 108 months. The trial court sentenced Appellant to a consecutive term of incarceration of 42 to 108 months on the conspiracy to

commit robbery charge for an aggregate sentence of 78 to 216 months. On December 4, 2008, Appellant filed a *pro se* motion to modify sentence.[2] No direct appeal was filed.

On March 30, 2009, Appellant filed a *pro se* petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. The trial court appointed counsel, who, on June 22, 2009, filed a petition to withdraw and letter in accordance with ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). The next day, the trial court granted counsel's petition to withdraw and issued its notice to dismiss pursuant to Pa.R.Crim.P. 907(1). The trial court dismissed Appellant's PCRA petition on July 22, 2009. Appellant appealed *pro se*, and this Court affirmed on October 13, 2010. ***See Commonwealth v. Collazo***, 15 A.3d 525 (Pa. Super. 2010) (unpublished memorandum).

On January 6, 2012, Appellant filed a *pro se* "Petition for Modification or Reconsideration of Sentence." On January 10, 2012, the trial court denied the motion as untimely under Pa.R.Crim.P. 720(a)(1). Meanwhile, Appellant filed a *pro se* petition for writ of habeas corpus in the United

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[2] The record does not reveal compliance with Pa.R.Crim.P. Rule 576. Rather, the trial court denied Appellant's *pro se* motion on December 5, 2007. ***See Commonwealth v. Jette,*** 23 A.3d 1032 (Pa. 2011) (stating that, where appellant is represented by counsel, proper response to any *pro se* pleading is to refer pleading to counsel); ***see also*** discussion ***infra***.

States District Court for the Western District of Pennsylvania. On July 5, 2012, the District Court, based on a stipulation of the parties, granted Appellant's writ but stayed the order for 90 days to permit the Court of Common Pleas of Erie County to reinstate Appellant's direct appeal rights *nunc pro tunc*. On July 10, 2012, the trial court, upon review of the U.S. District Court's order, reinstated Appellant's direct appeal rights *nunc pro tunc* and appointed counsel to represent Appellant. The trial court directed any notice of appeal to be filed within 30 days of its order. No direct appeal *nunc pro tunc* was filed within the 30 days.

On August 21, 2012, Appellant filed a *pro se* PCRA petition, in which he raised a constitutionality-based legality of sentencing issue. On the same day, counsel who had been appointed on July 10, 2012, filed a motion to reinstate Appellant's appellate rights, acknowledging that the failure to timely file the *nunc pro tunc* appeal was occasioned "by the sole error and oversight of counsel." Motion to Reinstate Appellate Rights, 8/21/12, at 2, ¶14. The trial court treated counsel's motion as a PCRA petition and, on August 22, 2012, once again reinstated Appellant's direct appeal rights *nunc pro tunc*. On August 24, 2012, Appellant filed a notice of appeal. The trial court ordered Appellant to file a concise statement of errors complained of on appeal in accordance with Pa.R.A.P. 1925(b), and Appellant timely complied. The trial court issued its Rule 1925(a) memorandum opinion on September 14, 2012.

On December 6, 2012, counsel filed with the Prothonotary of this Court an ***Anders*** brief, followed on December 11, 2012 by an application to withdraw. In response, Appellant filed a *pro se* "amendment" to his brief on December 31, 2012.

In her ***Anders*** Brief, counsel raises for our consideration the following issue on Appellant's behalf.

> Whether [] [A]ppellant's aggregate sentence comprised of consecutive sentences is manifestly excessive, clearly unreasonable and inconsistent with the objectives of the Sentencing Code?

Anders Brief at 3.

As a preliminary matter, we must review counsel's petition 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. Daniels***, 999 A.2d 590, 593 (Pa. Super. 2010) (citation omitted). Additionally, we review counsel's ***Anders*** brief for compliance 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. If counsel's ***Anders*** brief is compliant, "we must conduct our own review of the trial court proceedings and independently determine whether the appeal is wholly frivolous." ***Commonwealth v. Titus***, 816 A.2d 251, 254 (Pa. Super. 2003).

Instantly, we are satisfied that counsel has complied with the requirements of ***Anders*** and ***Santiago***. Counsel carefully summarized the pertinent procedural history and made appropriate references to the record. She described her own review of the record, articulated an issue that could arguably support an appeal with references to supporting material, and stated her conclusion that the appeal is frivolous. Further, she set forth the reasons upon which she based that conclusion. Specifically, counsel noted that Appellant, who at the age of 18 had acquired a prior record score of repeat felony offender, received sentences in the standard range of the guidelines, and that the trial court had considered the factors listed in the Sentencing Code, 42 Pa.C.S.A. § 9721(b). Counsel is also compliant with the notification requirements described in ***Commonwealth v. Millisock***, 873 A.2d 748 (Pa. Super. 2005) and its progeny. We therefore proceed with our independent review of the record and the issue presented on Appellant's behalf to determine if the appeal is wholly frivolous. Additionally, we will assess the claim raised by Appellant in his *pro se* amendment to counsel's ***Anders*** brief.

A claim that a consecutive sentence is manifestly excessive implicates the discretionary aspects of sentencing. "A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute." ***Commonwealth v. Lamonda***, 52 A.3d 365, 371 (Pa. Super. 2012) (citation omitted).

> An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:
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> [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 …; (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. Moury, 992 A.2d 162, 170 (Pa. Super. 2010) (internal quotation marks and citations omitted).

Instantly, Appellant's discretionary aspect of sentence issue was not preserved below. Appellant did not preserve any issues at sentencing. Neither did Appellant file any cognizable post-sentence motion. Appellant's *pro se* post-sentence motion filed while he was represented by counsel is not sufficient to preserve his sentencing issues. There is no constitutional right to "hybrid representation," where a defendant represents himself while he is simultaneously represented by counsel. ***Commonwealth v. Ellis***, 626 A.2d

1137, 1138 (Pa. 1993). A trial court may, in its discretion, permit hybrid representation. ***Id.*** at 1139. Since such permission was not afforded in this case, Appellant's *pro se* post-sentence motion was governed by Pa.R.Crim.P. 576(A)(4) which 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. The comment to Rule 576 further clarifies that, "[t]he requirement that the clerk time stamp and make docket entries of the filings in these cases only serves to provide a record of the filing, and does not trigger any deadline nor require any response." ***Id.*** *Cmt.* Rule 576(A)(4) was not observed in this case inasmuch as the Clerk of Courts docketed Appellant's post-sentence motion, but failed to indicate that it forwarded a copy of the motion to defense counsel. In any event, defense counsel took no action on Appellant's behalf after sentencing.

In addition to Rule 576, in light of Supreme Court precedent disfavoring hybrid representation, we have held that a criminal defendant's *pro se* actions have no legal effect while he or she remains represented by counsel. ***Commonwealth v. Hall***, 476 A.2d 7, 9-10 (Pa. Super. 1984); ***see***

also Commonwealth v. Nischan, 928 A.2d 349, 355 (Pa. Super. 2007) (noting that a defendant's *pro se* post-sentence motion while represented by counsel is a legal nullity). The trial court's disposition of Appellant's post-sentence motion, therefore, is also without legal effect.

Having failed to preserve his discretionary aspect of sentencing issue, it is waived, and we are precluded from granting an allowance of appeal. ***Moury***, ***supra*** at 170. Accordingly, we conclude Appellant's appeal on this issue is frivolous.[3]

We turn next to the issue Appellant raises in his *pro se* response to counsel's ***Anders*** Brief via his *pro se* amended brief.[4] Appellant articulates his issue as follows.

> Whether [] [A]ppellant's constitutional rights were violated when [] [A]ppellant was certified, convicted and sentenced as an adult as opposed to a juvenile[?]

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[3] Even if not waived, we agree with counsel that Appellant's claim that his sentence was excessive is frivolous on its merits. Appellant received consecutive sentences in the standard range of the guidelines. Appellant had a prior record score of repeat felony offender, although he was only 18 years old, including violent offenses as a juvenile. Additionally, Appellant absconded from the jurisdiction while on bail and fled to Florida while these charges were pending and had to be returned, and the trial court, with the benefit of a presentence report, fully stated its reasons for imposing the sentence.

[4] "When a *pro se* ... brief [in response to counsel's ***Anders*** brief and petition to withdraw] has been filed within a reasonable amount of time, however, the Court should then consider the merits of the issues contained therein and rule upon them accordingly." ***Commonwealth v. Baney***, 860 A.2d 127, 129 (Pa. Super. 2004), appeal denied, 877 A.2d 459 (Pa. 2005).

Appellant's *Pro Se* Amended Brief at 1.

Here, Appellant specifically argues that the United States Supreme Court's recent decision in ***Miller v. Alabama***, ___ U.S. ___, 132 S.Ct. 2455 (2012) renders his sentences unconstitutional. Appellant's *Pro Se* Amended Brief at 2.

> [A]ppellant contends that in light of the recent [United States] Supreme Court decision in ***Miller v. Alabama***[,___ U.S. ___, 132 S.Ct. 2455 (2012)] and their new creation of an Eighth Amendment right that it is no longer legal to hold a juvenile to the same legal standards and sentencing provisions as an adult because of the lack of mental maturity, ability to remove one-self from potentially dangerous situations, decision making capabilities and ability to be rehabilitated of a juvenile compared to an adult.
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> ...
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> Altogether, the state statutes cited by U.S. Supreme Court in [***Roper v. Simmons***, 543 U.S. 551, (2005) (prohibiting the death penalty for defendants convicted of a murder they committed before the age of 18)] offer no support for maintaining 18 as the age of adulthood, in the face of uncontroverted neurological brain scans – hard evidence – that the brain is immature until age 25. The [U.S.] Supreme Court has since given those brain studies the force of law. The fact is, no one is an adult until age 25, at the earliest.

Id. at 2-3.

"[A]n appellant who challenges the constitutionality of his sentence of imprisonment on a claim that it violates his right to be free from cruel and unusual punishment raises a legality of the sentencing claim."

Commonwealth v. Knox, 50 A.3d 732, 741 (Pa. Super. 2012), *quoting* ***Commonwealth v. Yasipour***, 957 A.2d 734, 740 n. 3 (Pa. Super. 2008), *appeal denied*, 980 A.2d 111 (Pa. 2009).

> The determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary. If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated.

Commonwealth v. Hughes, 986 A.2d 159, 160-161 (Pa. Super. 2009) (internal quotation marks and citations omitted), *appeal denied*, 15 A.3d 489 (Pa. 2011).

Appellant ascribes holdings to ***Miller*** and ***Roper*** that those cases simply do not contain. The United States Supreme Court in ***Miller*** specifically held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" ***Miller***, ***supra*** at 2461. ***Miller*** clearly applies only to mandatory life sentences without parole. ***Id.*** The holding in ***Miller*** "does not mean that it is unconstitutional for a juvenile actually to spend the rest of his life in prison, only that the mandatory nature of the sentence, determined at the outset, is unconstitutional." ***Commonwealth v. Devon Knox***, 50 A.3d 732, 745 (Pa. Super. 2012); ***see also Commonwealth v. Jovan Knox***, 50 A.3d 749 (Pa. Super. 2012).

In ***Roper***, the United States Supreme Court "recognized the emerging body of sciences confirming the distinct emotional, psychological, and neurological status of youth." ***D. Knox***, ***supra*** at 741 (citation omitted). In light of that scientific consensus, the ***Roper*** court applied its holding relative to capital punishment to defendants under the age of 18. It did not expand the definition of juvenile to defendants under the age of 25. Similarly, the holding in ***Miller*** applies only to defendants under the age of 18 at the time they committed their offense. ***Miller***, ***supra*** at 2461.

Instantly, Appellant was 18 years old when he perpetrated the conspiracy to commit burglary offense at CR-0003041-2007. Additionally, Appellant was only days shy of his 18th birthday when he perpetrated the conspiracy to commit robbery offense at CR-0003222-2007, for which he was properly certified to criminal court after due consideration of his age, maturity, and other factors reflecting on his amenability to treatment in juvenile court. Appellant did not face or receive a mandatory sentence of any length, let alone a life sentence without parole. Therefore, the holdings in ***Miller***, ***Roper***, ***D. Knox***, ***J. Knox***, and other cases cited by Appellant do not implicate Appellant's sentence or render it unconstitutional. Accordingly, we conclude Appellant's legality of sentencing claim is frivolous and affords him no relief.

For the reasons discussed above, our independent review of the record leads us to conclude that Appellant's appeal is wholly frivolous. Therefore,

we affirm Appellant's December 1, 2008 judgment of sentence. Moreover, we agree with counsel's assessment of the appeal, and conclude counsel has satisfied the requirements for withdrawal. Accordingly, we grant counsel's petition to withdraw.

Judgment of sentence affirmed. Petition to withdraw granted.

Judge Donohue files a Concurring Memorandum.