

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
JORDAN RYAN SMUCKER,	:	No. 1387 MDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, June 28, 2012,
in the Court of Common Pleas of Lancaster County
Criminal Division at No. CP-36-CR-0000809-2011

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., AND OLSON, J.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MAY 23, 2013**

Appellant, Jordan Ryan Smucker, appeals from the judgment of sentence of June 28, 2012 entered in the Court of Common Pleas of Lancaster County. Appointed counsel, Diana C. Kelleher, Esq., has filed a petition to withdraw accompanied by an **Anders** brief.¹ We grant counsel's withdrawal petition and affirm.

This matter stems from an incident in the early morning hours of January 9, 2011 where appellant was observed by a police officer violating the Motor Vehicle Code. Appellant was charged with driving under the influence of alcohol or controlled substance ("DUI")- minors, DUI, DUI-general impairment, no headlights, and failure to use safety belt system.

Appellant appeared before the Honorable Louis J. Farina on June 28, 2012 and entered a negotiated guilty plea to the DUI charges. The no headlights and safety belt counts were ***nol prossed***. Appellant was sentenced immediately thereafter. Counts two and three merged with count one for sentencing purposes. Judge Farina imposed the agreed upon sentence of 48 hours to 6 months' incarceration. As a condition of parole, appellant was ordered to complete drug and alcohol counseling and treatment, alcohol highway safety classes, a CRN evaluation and a 12-month license suspension. This appeal followed.

On August 21, 2012, counsel filed a "Statement of Intent to File Anders/McClendon Brief in Lieu of Statement of Errors Complained of on Appeal." Counsel has subsequently filed a petition for leave to withdraw and an ***Anders*** brief with this court. Appellant has not responded to the petition to withdraw. The Commonwealth has indicated by letter that it will not be filing a responsive brief.

"When presented with an ***Anders*** brief, this [c]ourt 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), citing ***Commonwealth v. Goodwin***, 928 A.2d 287, 290 (Pa.Super. 2007) (***en banc***) (citation omitted).

¹ ***See Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. McClendon***, 495 Pa. 467, 434 A.2d 1185 (1981).

In order for counsel to withdraw from an appeal pursuant to **Anders**, certain requirements must be met, and 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., quoting **Commonwealth v. Santiago**, 602 Pa. 159, 178-179, 978 A.2d 349, 361 (2009).

We note that the holding in **Santiago** altered prior requirements for withdrawal under **Anders**. **Santiago** now requires counsel to provide the reasons for concluding the appeal is frivolous. The Supreme Court explained that the requirements set forth in **Santiago** would apply only to cases where the briefing notice was issued after the date that the opinion in **Santiago** was filed, which was August 25, 2009.

Id. As the briefing notice in this case followed the filing of **Santiago**, its requirements are applicable here.

Our review of Attorney Kelleher's application to withdraw, supporting documentation, and **Anders** brief reveals that she has complied with all of

the foregoing requirements. We note that counsel also furnished a copy of the brief to appellant, advised 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 attached to the **Anders** petition a copy of the letter sent to appellant as required under **Commonwealth v. Millisock**, 873 A.2d 748, 751 (Pa.Super. 2005). **See Daniels**, 999 A.2d at 594 ("While the Supreme Court in **Santiago** set forth the new requirements for an **Anders** brief, which are quoted above, the holding did not abrogate the notice requirements set forth in **Millisock** that remain binding legal precedent."). As we find the requirements of **Anders** and **McClendon** are met, we will proceed with our review.

Instantly, counsel advises he was unable to find any arguable appellate issues; however, he discusses appellant's guilty plea. (**Anders** brief at 7.) Because this case involved a negotiated guilty plea, we will review the circumstances surrounding the guilty plea. Appellant did not move to withdraw his guilty plea, either at the sentencing hearing or via a timely post-sentence motion. **See** Pa.R.Crim.P., Rule 720(A)(1), (B)(1)(a)(i) (providing motion to withdraw plea must be made in post-sentence motion filed within ten days of imposition of sentence). Accordingly, appellant has waived the issue on appeal. **See Commonwealth v. Tareila**, 895 A.2d 1266, 1270 n.3 (Pa.Super. 2006)

(noting “[w]here an appellant fails to challenge his guilty plea in the trial court, he may not do so on appeal.”).

Even if the issue were not waived, there is no merit to any claim that the sentence was not voluntary or knowingly entered. In the **Anders** brief, counsel notes this case involved a negotiated guilty plea. When a defendant enters a guilty plea, we presume that he was aware of what he was doing; it is his burden to prove otherwise. **See Commonwealth v. McCauley**, 797 A.2d 920, 922 (Pa.Super. 2001). Where the record demonstrates that the trial court conducted a guilty plea colloquy and the defendant understood the nature of the charges against him, the plea is voluntary. **Id.** On appeal, this court looks at the totality of the circumstances when determining whether a defendant understood the nature and consequences of his plea. **Id.** In order to determine the voluntariness of the plea and whether the defendant acted knowingly and intelligently, the trial court must, at a minimum, inquire into the following six areas:

- (1) Does the defendant understand the nature of the charges to which he is pleading guilty?
- (2) Is there a factual basis for the plea?
- (3) Does the defendant understand that he has a right to trial by jury?
- (4) Does the defendant understand that he is presumed innocent until he is found guilty?
- (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged?

- (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Id. (citation omitted). Further, “[a] person who elects to plead guilty is bound by the statements he makes in open court while under oath and may not later assert grounds for withdrawing the plea which contradict the statements he made at his plea colloquy.” **Commonwealth v. Yeomans**, 24 A.3d 1044, 1047 (Pa. Super. 2011) (citation omitted).

The record indicates appellant signed a written guilty plea colloquy and the trial court conducted a thorough on-the-record colloquy before accepting his guilty plea. (**See** certified record, document #6; notes of testimony, 6/28/12 at 2-7.) Additionally, appellant signed a plea agreement which indicated what he was pleading to and what his sentence would be. (**See** certified record, document #6.) The sentence appellant received was exactly the same sentence contained in the plea agreement.

Additionally, it is well-established that “[u]pon entering a guilty plea, a defendant waives his right to challenge on appeal all non-jurisdictional defects except the legality of his sentence and the validity of his plea.” **Commonwealth v. Passmore**, 857 A.2d 697, 708-709 (Pa.Super. 2004) (citation omitted). Thus, “[w]here the plea agreement contains a negotiated sentence which is accepted and imposed by the sentencing court, there is no authority to permit a challenge to the discretionary aspects of that

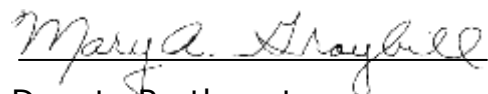
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sentence.” **Commonwealth v. Reichle**, 589 A.2d 1140, 1141 (Pa.Super. 1991). Therefore, because the trial court imposed the sentence negotiated as a part of appellant’s guilty plea, appellant cannot now argue that his sentence is unreasonable.

Furthermore, our independent review of the record reveals no other issue of arguable merit. **See Santiago**, 978 A.2d at 354 n.5. Accordingly, we conclude that the appeal is frivolous and grant counsel’s petition for leave to withdraw.

Petition for leave to withdraw granted. Judgment of sentence affirmed.

Judgment Entered.


Deputy Prothonotary

Date: 5/23/2013