

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
HARVEY DUNCAN,	:	
	:	
Appellant	:	No. 1452 WDA 2011

Appeal from the Judgment of Sentence entered on August 10, 2011  
in the Court of Common Pleas of Allegheny County,  
Criminal Division, No. CP-02-CR-0013113-2008

BEFORE: MUSMANNO, BOWES and WECHT, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: February 12, 2013

Harvey Duncan ("Duncan") appeals from the judgment of sentence entered following the revocation of his two-year probationary term imposed following his conviction of retail theft.<sup>1</sup> We affirm.

In its Opinion, the trial court summarized the history underlying the instant appeal as follows:

This case involves [Duncan's] violations of probation at case CC No. 200813113. In that case, [Duncan] pled guilty to one count of retail theft on June 1, 2009[,] and was sentenced to a term of two years of probation.<sup>[FN]</sup> [Duncan] was later arrested on February 23, 2010[,] for another retail theft occurring on February 23, 2010. He was incarcerated on the date of his arrest and did not post bail in this case. After being advised of the new arrest, [the trial c]ourt issued a probation detainer on February 25, 2010. The new case, docketed at CC No. 201003907, proceeded to a jury trial before the Honorable Edward Borkowski and, on June 24, 2010, [Duncan] was convicted of felony retail theft and providing false identification

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<sup>1</sup> 18 Pa.C.S.A. § 3929.

to law enforcement officers. A hung jury resulted as to one count of simple assault. On October 4, 2010, Judge Borkowski sentenced [Duncan] to a term of imprisonment of not less than 11 ½ months nor more than 23 months. [Duncan] was credited for the time he served in jail from February 23, 2010 (a period of 224 days) and he was paroled forthwith.

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[<sup>FN</sup>] [Duncan] pled guilty to at least five other counts of retail theft, two counts of simple assault and one count of resisting arrest on that same date. In all, there were six separate cases and [Duncan] received probationary sentences on each case. Only the probation imposed at CC No. 200813113 is relevant to this appeal.

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[The trial court in the instant case] convened a probation violation hearing on May 19, 2011. During that hearing, defense counsel raised issues concerning the mental status of [Duncan]. [The c]ourt had some concern as to [Duncan's] mental status as well. Defense counsel requested, and [the c]ourt granted, a continuance to permit [Duncan] to be evaluated by the Behavior Assessment Unit of the Allegheny County Pretrial Services Department as well as to permit the preparation of a Presentence Report.

Trial Court Opinion, 1/18/12, at 1-2 (footnote in original).

Upon receiving the presentence investigation report, the trial court reconvened its violation of probation hearing. At the conclusion of the hearing, the trial court considered Duncan's conviction before Judge Borkowski to be a violation of the terms of his probation. After considering the presentence investigation report prepared for Duncan's case before Judge Borkowski, the presentence investigation report prepared in relation to Duncan's violation of probation in the instant case and the arguments of counsel, the trial court sentenced Duncan to a prison term of not less than

11 months and 29 days, nor more than 23 months and 28 days.

Thereafter, Duncan filed the instant timely appeal.

Duncan now presents the following claim for our review:

Should the [trial] court have allowed [] Duncan, or informed [] Duncan, that he could choose to represent himself at his May and/or August 2011, probation revocation hearings, that he was unhappy with his counsel and felt that he was not representing him to a satisfactory degree?

Brief for Appellant at 5.

Duncan claims that he expressed his dissatisfaction with his probation revocation counsel to the trial court at the May 19, 2011 hearing. *Id.* at 10. Duncan states that he had conveyed to the trial court “that he had requested counsel to obtain his medical records and counsel did not.” *Id.* at 11 (citation omitted). Duncan also argues that on July 6, 2011, he filed a *pro se* Motion to represent himself, but the trial court never ruled on that Motion. Duncan also points out that his counsel presented Duncan’s own handwritten sentencing memorandum to the trial court. *Id.* Duncan directs our attention to case law regarding the right of self-representation. *Id.* at 15-21.

Our review of the record discloses that Duncan’s July 6, 2011 *pro se* Motion requested the appointment of new counsel, or, *in the alternative*, that he be permitted to proceed *pro se*. Motion, 7/6/11, at 3 (unnumbered). Thus, Duncan’s *pro se* Motion makes it clear that he was aware of his right to proceed *pro se*.

During the revocation hearing held on May 19, 2011, Duncan testified on his own behalf. In his testimony, Duncan expressed his dissatisfaction with his prior trial counsel in the proceedings before Judge Borkowski. N.T., 5/19/11, at 11-12. Duncan stated that he had filed a Petition for relief pursuant to the Post Conviction Relief Act (“PCRA”)<sup>2</sup> in that matter, claiming ineffective assistance of his trial counsel. *Id.* During the revocation hearing, the revocation hearing judge made it clear to Duncan that the judge had read Duncan’s *pro se* filings. *Id.* at 11. As Duncan had disputed some of the factual matters presented, the hearing judge continued the hearing to allow further investigation, a pre-sentence investigation, and a behavioral evaluation. *Id.* at 15-16.

At the beginning of the August 10, 2011 hearing, the hearing judge, in Duncan’s presence, stated to Duncan’s counsel that “the last time we were all together, he wasn’t too happy with you, right?” N.T., 8/10/11, at 6. Notwithstanding, Duncan did not express his dissatisfaction with counsel during that hearing. During the hearing, Duncan’s counsel presented Duncan’s *pro se* sentencing memorandum to the court. *Id.* at 8-9. In addition, the hearing judge stated that he had read and considered everything sent to him by Duncan. *Id.* at 9, 14.

While Duncan claims that the trial court violated his constitutional rights by failing to inform him of his right to proceed *pro se*, Duncan’s July 6,

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<sup>2</sup> 42 Pa.C.S.A. §§ 9541-9546.

2011 Motion confirms Duncan's awareness of his right to proceed *pro se*. Motion, 7/6/11, at 3. Although Duncan may have grievances with his revocation counsel, they are more properly addressed in the context of a petition for relief filed pursuant to the PCRA. **See Commonwealth v. Grant**, 813 A.2d 726, 738 (Pa. 2002) (wherein the Supreme Court held that claims of ineffective assistance of counsel are to be deferred until collateral review, pursuant to the PCRA).

Finding no support in the record for Duncan's claim that he was unaware of his right to proceed *pro se*, we affirm the judgment of sentence. **See Commonwealth v. Upshur (Appeal of WPXI, Inc.)**, 924 A.2d 642, 653 (Pa. 2007) (declining to address a constitutional claim where the matter could be decided on non-constitutional grounds); **P.J.S. v. Pennsylvania State Ethics Com'n**, 723 A.2d 174, 176 (Pa. 1999) (stating that "a court should not reach the constitutional issue if the case can properly be decided on non-constitutional grounds."); **In re Fiori**, 673 A.2d 905, 909 (Pa. 1996) (stating that "courts should avoid constitutional issues when the issue at hand may be decided upon other grounds.").

Judgment of sentence affirmed.