

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
FRANCIS A. KAMARA,	:	
	:	
Appellant	:	No. 1620 MDA 2012

Appeal from the Judgment of Sentence July 24, 2012,
Court of Common Pleas, Berks County,
Criminal Division at No. CP-06-CR-0005056-2011

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
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Appellee	:	
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FRANCIS A. KAMARA,	:	
	:	
Appellant	:	No. 1621 MDA 2012

Appeal from the Judgment of Sentence July 24, 2012,
Court of Common Pleas, Berks County,
Criminal Division at No. CP-06-CR-0005057-2011

BEFORE: DONOHUE, ALLEN and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED MAY 07, 2013

Appellant, Francis A. Kamara (“Kamara”), appeals from the judgments of sentence following his negotiated guilty plea at docket number CP-06-CR-0005057-2011 for one count of delivery of a controlled substance, 35 P.S. § 113(a)(30), and his negotiated *nolo contendere* plea at docket number CP-

*Retired Senior Judge assigned to the Superior Court.

06-CR-0005056-2011 to two counts of possession with the intent to deliver a controlled substance, 35 P.S. § 113(a)(30).¹ Kamara's appointed counsel has filed a motion to withdraw from representation pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and ***Commonwealth v. Santiago***, 602 Pa. 159, 978 A.2d 349 (2009). For the reasons that follow, we grant counsel's petition to withdraw and we affirm the judgment of sentence.

Upon the entry of his pleas on July 24, 2012, the trial court sentenced Kamara that same day to an aggregate term of incarceration of two to four years, with boot camp and Recidivism Risk Reduction Incentive ("RRRI") program eligibility. Because Kamara's sentence included a two year mandatory minimum sentence pursuant to 18 Pa. C.S.A. § 6317(a) for delivering and possessing with the intent to deliver controlled substances within one thousand feet of a school zone, his sentence was the minimum sentence that the trial court could impose. On August 6, 2012, Kamara's appointed counsel ("Attorney Billman") filed a post-sentence motion asking for a sentence modification to allow him to serve his state sentence in a county facility. On August 7, 2012, the trial court denied this motion.

Without consultation with Attorney Billman, Kamara filed his own *pro se* post-sentence motion. Dated August 2, received by the Clerk of Courts on August 7, and filed on the docket on August 9, Kamara's post-sentence

¹ On October 4, 2012, this Court ordered the consolidation of the two above-captioned appeals.

motion requested permission to withdraw his pleas on the grounds that Attorney Billman had not properly educated him regarding the nature of the proceedings or the consequences of his pleas, and had coerced him into entering them by threats of statutory maximum sentences. Motion to Withdraw Guilty Plea, 8/2/12, at ¶ 3, 4, 6. Upon receipt of Kamara's motion from the Clerk of Courts, Attorney Billman sought permission to withdraw from representation. On August 21, 2012, the trial court granted this request and appointed new counsel ("Attorney Rigdon") to represent Kamara. At the next scheduled court conference on September 7, 2012, Attorney Rigdon filed notices of appeal at both docket numbers and also presented to the trial court Kamara's post-sentence motion to withdraw his pleas. The trial court denied Kamara's post-sentence motion on September 10, 2012. On October 2, 2012, Attorney Rigdon filed a notice of intention to file an **Anders** brief in lieu of a concise statement of the issues complained of on appeal, pursuant to Pa.R.A.P. 1925(c)(4).

Before we address the merits of this appeal, we must determine whether Attorney Rigdon has followed the procedures for filing a brief and petition to withdraw pursuant to **Anders**. Counsel must file a petition to withdraw explaining that he or she has made a conscientious examination of the record and determined that an appeal would be frivolous. **Commonwealth v. Wright**, 846 A.2d 730, 736 (Pa. Super. 2004). Also, counsel must provide a copy of the **Anders** brief to the appellant and inform

him of his right to proceed *pro se*, retain different counsel, or assert issues not included in the **Anders** brief. In the present case, Attorney Rigdon has complied with these procedural requirements. Kamara has not filed a response or asserted any issues on appeal not set forth in the **Anders** brief.

Next, we must consider whether the **Anders** brief in this case comports with the following:

[T]he **Anders** brief that accompanies court-appointed counsel's petition to withdraw ... 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.

Santiago, 602 Pa. at 178-79, 978 A.2d at 361. Attorney Rigdon's **Anders** brief complies with these requirements, as it sets forth a summary of the factual and procedural history of this case and identifies one issue she believes could arguably support an appeal, while including her reasoning for why she believes it is frivolous.

Before considering the merits of this one issue, however, we must first determine whether these appeals were timely filed.² Rule 720 of the

² On October 4, 2012, this Court directed Kamara to show cause why these appeals should not be quashed as untimely. Attorney Rigdon filed a response focusing primarily on Kamara's *pro se* motion to withdraw his

Pennsylvania Rules of Criminal Procedure provides in relevant part as follows:

Rule 720. Post-Sentence Procedures; Appeal

(A) Timing.

(1) Except as provided in paragraphs (C) and (D), a written post-sentence motion shall be filed no later than 10 days after imposition of sentence.

(2) If the defendant files a timely post-sentence motion, the notice of appeal shall be filed:

(a) within 30 days of the entry of the order deciding the motion;

(b) within 30 days of the entry of the order denying the motion by operation of law in cases in which the judge fails to decide the motion; or

(c) within 30 days of the entry of the order memorializing the withdrawal in cases in which the defendant withdraws the motion.

(3) If the defendant does not file a timely post-sentence motion, the defendant's notice of appeal shall be filed within 30 days of imposition of sentence, except as provided in paragraph (A)(4).

Pa.R.Crim.P. 720.

In this case, the trial court sentenced Kamara on July 24, 2012 and Attorney Rigdon filed notices of appeal on September 7, 2012. Because this period of time exceeds thirty days, we must look to the tolling provisions in Rule 720(A)(2) to determine whether the notices of appeal were timely filed.

guilty pleas (discussed herein below). On October 11, 2012, the show-cause order was withdrawn and the timeliness issue deferred for this Panel's consideration and determination.

Rule 720(A)(2) provides that the timely filing of a post-sentence motion tolls the 30 day appeal period until such time as the motion is either decided, denied by operation of law, or withdrawn. Pa.R.Crim.P. 720(A)(2).

The post-sentence motion filed by Attorney Billman on August 6, 2012 did not result in a tolling of the appeal period. Even though the notices of appeal were filed within 30 days of the date on which this motion was decided (August 7 – September 7), by its express terms Rule 720(A)(2) provides for tolling only upon the filing of a **timely** post-sentence motion. Pa.R.Crim.P. 720(A)(2); **see, e.g., Commonwealth v. Felmlee**, 828 A.2d 1105, 1107 n.1 (Pa. Super. 2003) (*en banc*) (“Only a timely-filed post-sentencing motion will trigger an extension of the time for filing a notice of appeal.”). The post-sentence motion that Attorney Billman filed was untimely, as it was not filed within 10 days after the imposition of sentence (July 24 – August 6) as required by Rule 720(A)(1). Pa.R.Crim.P. 720(A)(1).

We turn, then, to the *pro se* post-sentence motion Kamara filed seeking to withdraw his pleas. The Commonwealth contends that this *pro se* motion was a nullity since he was represented by counsel at the time of its filing. Commonwealth’s Brief at 7. In support of its position, the Commonwealth cites **Commonwealth v. Ellis**, 534 Pa. 176, 626 A.2d 1137 (1993), in which our Supreme Court ruled that because no constitutional right to hybrid representation exists, appellate courts will not consider *pro se* briefs filed by appellants represented by counsel. **Id.** at 183-84, 626 A.2d

at 1141. The Supreme Court has more recently addressed the issue of *pro se* advocacy at the appellate level, reaffirming the rule in ***Ellis***. ***See, e.g., Commonwealth v. Jette***, 611 Pa. 166, 23 A.3d 1032 (2011); ***Commonwealth v. Ali***, 608 Pa. 71, 10 A.3d 282, 293 (2010).

In our view, however, ***Ellis***, ***Jette***, and ***Ali*** have no application in this case because those cases all deal with *pro se* filings by a represented party in an appellate court. As our Supreme Court reaffirmed in ***Commonwealth v. Cooper***, 611 A.2d 437, 27 A.3d 994, 1005 (2011), *pro se* filings by represented parties at the trial court level are governed by Rule 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(A)(4).

In the present case, the Clerk of Courts properly followed the requirements of this rule. The docket reflects that the Clerk of Courts received Kamara's *pro se* motion on or about August 7, 2012, filed it on August 9, 2012, and forwarded copies to counsel for the Commonwealth, the trial court, and Attorney Billman. After Attorney Rigdon replaced Attorney

Billman, the *pro se* motion was presented to the trial court on September 7, 2012, and denied three days later. Importantly for present purposes, pursuant to Rule 576(A)(4), the motion was **filed** on the docket and therefore implicates the tolling provisions in Rule 720(A)(2). In this circumstance, it was not a legal nullity as the Commonwealth contends. **Cooper**, 611 A.2d 437, 27 A.3d at 1005 (notice of appeal filed by *pro se* litigant “definitely was not a ‘nullity’”, although he was represented by counsel at the time of filing).

The next question is whether Kamara’s *pro se* motion was timely filed, so that the tolling provisions of Rule 720(A)(2) can apply. To be timely filed, Kamara’s *pro se* motion would have to have been filed on or before August 3, 2012, *i.e.*, within ten days after his sentencing on July 24, 2012. While not filed by the Clerk of Courts until August 9, 2012, the motion is dated August 2, 2012, and therefore might have been effectively filed prior to August 3, 2012 by application of the “prisoner mailbox rule.” This rule provides that a legal document is considered filed by an incarcerated litigant on the date it is delivered to the proper prison authority or deposited in the prison mailbox. **Thomas v. Elash**, 781 A.2d 170, 176 (Pa. Super. 2001).

To avail himself of the benefits of the prisoner mailbox rule, the incarcerated litigant must supply sufficient proof of the date of mailing. **Id.** In this case, Kamara has failed to do so. The only evidence of the date of mailing in the record on appeal is the postmark on the envelope used to mail

the *pro se* motion to the Clerk of Courts, which indicates that it was mailed on August 6, 2012. The date on this envelope is not dispositive, however, since it is possible that Kamara delivered the envelope and motion to prison authorities for mailing prior to that date. Normally, our proper course would be to remand the case to the trial court for a hearing on this issue. **See, e.g., *Commonwealth v. Jones***, 549 Pa. 58, 65 n.3, 700 A.2d 423, 426 n.3 (1997) (“Where ... the facts concerning timeliness are in dispute, a remand for an evidentiary hearing may be warranted.”); ***Commonwealth v. Little***, 716 A.2d 1287, 1289 (Pa. Super. 1998) (remanding case to the PCRA court to consider documentary evidence to establish timeliness of petition). In the present case, however, no remand is necessary as we find that even if Kamara’s *pro se* post-sentence motion was timely filed, he is not entitled to any relief on direct appeal.

In her ***Anders*** brief, Attorney Rigdon sets forth a single issue of possible merit – namely whether the trial court erred in denying Kamara’s post-sentence motion to withdraw the guilty plea because, *inter alia*, Attorney Billman failed to advise him properly and then coerced him into entering his (involuntary) pleas. ***Anders*** Brief at 11. Such a claim sounds in ineffective assistance of counsel, however, which this Court may not review on direct appeal absent an express, knowing, and voluntary waiver of review of all claims under the Post Conviction Relief Act, 42 Pa. C.S.A. §§ 9541-46. ***Commonwealth v. Barnett***, 25 A.3d 371, 377 (Pa. Super. 2011)

(*en banc*). Because the record on appeal contains no such waiver, Kamara's claims of ineffective assistance of counsel may not be considered by this Court on direct appeal.

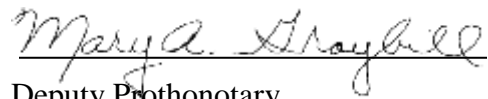
Having determined that the issue raised in the **Anders** brief is frivolous, it remains for this Court to conduct an independent examination of the record to determine whether counsel could have raised any non-frivolous arguments. **Santiago**, 602 Pa. at 168 n.5, 978 A.2d at 355 n.5. We have found none. We note that in his *pro se* motion to withdraw his pleas, Kamara contends that at the time of entry of his pleas, he was "unaware of recent legislation affecting his case, specifically the Justice Reinvestment Act, which would appear to alter Drug-Free School Zones." Motion to Withdraw Guilty Plea, 8/2/12, at ¶ 5. To the extent that this allegation could be considered as a challenge to the application of a mandatory minimum during his sentencing (rather than another claim of ineffectiveness), it is nevertheless frivolous. At least five states (North Carolina, Ohio, Missouri, Oklahoma, and Delaware) have passed legislation bearing the title "Justice Reinvestment Act," and Pennsylvania has by statute created a "Justice Reinvestment Fund." 71 P.S. § 1190.28a. Pennsylvania's Justice Reinvestment Fund, however, has no impact on school zone mandatory minimum sentences, and was instead created within the State Treasury "to support programs and activities to improve the delivery of criminal justice services within the Commonwealth." **Id.** We are aware of no legislative or

other impediments to the application of a mandatory minimum sentence pursuant to 18 Pa. C.S.A. § 6317(a), as applied by the trial court in Kamara's case.

For these reasons, we agree with Attorney Rigdon's assertion that there are no non-frivolous claims for Kamara to raise on direct appeal, and so we grant her petition to withdraw. We likewise affirm Kamara's judgment of sentence.

Petition to withdraw granted. Judgment of sentence affirmed.

Judgment Entered.


Deputy Prothonotary

Date: 5/7/2013