

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
	:	
HANNAH ROSE WILEY,	:	
	:	
Appellant	:	No. 1685 WDA 2012

Appeal from the Judgment of Sentence of October 15, 2012,  
in the Court of Common Pleas of Erie County,  
Criminal Division, at No: CP-25-CR-0001487-2011

BEFORE: SHOGAN, J., OTT, J., and STRASSBURGER, J.\*

MEMORANDUM BY STRASSBURGER, J.: FILED: August 8, 2013

Hannah Rose Wiley (Appellant) seeks permission to appeal the discretionary aspects of her judgment of sentence of 8 to 24 months' incarceration following the revocation of her probation. Also before us is a petition for leave to withdraw filed by Appellant's counsel. Upon review, we deny counsel's petition to withdraw and order counsel to file a supplemental brief.

On April 27, 2011, Appellant used another person's Macy's credit card without permission to purchase \$273.40 worth of merchandise. N.T., 5/7/2012, at 10. Appellant was placed in the accelerated rehabilitative disposition (ARD) program in December 2011. ARD was revoked on February 16, 2012, after Appellant admitted to the violations of (1) using marijuana, crack cocaine, and prescription painkillers during her supervision; and (2) refusing to enter a therapeutic program. On May 7, 2012, Appellant

\*Retired Senior Judge assigned to the Superior Court.

entered a plea of guilty to one count of access device fraud, a first-degree misdemeanor, in exchange for the Commonwealth's agreement to *nolle pros* a felony forgery charge.<sup>1</sup> **Id.** at 9, 11. On July 19, 2012, Appellant was sentenced to 36 months of probation. On October 15, 2012, Appellant's probation was revoked, again for illegal drug use and failure to complete a treatment program. On that same date, Appellant was sentenced to 8 to 24 months of state incarceration.<sup>2</sup> Appellant, who appeared *pro se* at the hearing, filed no post-sentence motion.

On October 24, 2012, Appellant filed an application for a public defender. Subsequently-appointed counsel for Appellant filed a timely notice of appeal on October 29, 2012. On November 1, 2012, the revocation court ordered Appellant to file a concise statement of matters complained of on appeal. Appellant's counsel instead filed a statement of intent to file an **Anders/McClendon**<sup>3</sup> brief pursuant to Pa.R.A.P. 1925(c)(4). On November 20, 2012, the revocation court filed a memorandum opinion indicating that there were no issues for it to address in light of counsel's statement.

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<sup>1</sup> 18 Pa.C.S. §§ 4106(a)(1)(ii) and 4101(a)(2), respectively.

<sup>2</sup> The revocation court noted that Appellant is RRRI eligible, reducing her minimum sentence to six months.

<sup>3</sup> **Anders v. California**, 386 U.S. 738 (1967) and **Commonwealth v. McClendon**, 434 A.2d 1185 (Pa. 1981).

Counsel then filed with this Court a petition for leave to withdraw as counsel and **Anders** brief.

In her brief, counsel states one question of arguable merit for our consideration: "WAS THE SENTENCE IN THIS CASE MANIFESTLY EXCESSIVE AND CLEARLY UNREASONABLE AND NOT INDIVIDUALIZED AS REQUIRED BY LAW, AND DID THE COURT FAIL TO CONSIDER MITIGATING CIRCUMSTANCES, SPECIFICALLY HER DRUG AND ALCOHOL PROBLEM?" Appellant's Brief at 1.

As a preliminary matter, we address counsel's application to withdraw before reaching the merits of the issues raised in the brief. **Commonwealth v. Rojas**, 874 A.2d 638, 639 (Pa. Super. 2005) (quoting **Commonwealth v. Smith**, 700 A.2d 1301, 1303 (Pa. Super. 1997)) ("When faced with a purported **Anders** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw.").

To withdraw pursuant to **Anders**, counsel must: 1) petition the Court for leave to withdraw, certifying that after a thorough review of the record, counsel has concluded the issues to be raised are wholly frivolous; 2) file a brief referring to anything in the record that might arguably support the

appeal;<sup>4</sup> and 3) furnish a copy of the brief to the appellant and advise her of his right to obtain new counsel or file a *pro se* brief to raise any additional points that the appellant deems worthy of review. **Commonwealth v. Garang**, 9 A.3d 237, 240 (Pa. Super. 2010). Thereafter, this Court independently reviews the record and issues. **Id.**

Counsel petitioned this Court to withdraw, certifying that she had made a thorough review of the case and determined that there are no non-frivolous issues to raise on appeal. Counsel has filed a brief that includes a summary of the history and facts of the case, a point of arguable merit, and counsel's analysis of why she has concluded that the appeal is frivolous. Counsel has certified that she served Appellant with a copy of the **Anders** brief and attached a copy of her letter to Appellant advising her that she

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<sup>4</sup> Our Supreme Court also addressed the requirements of an **Anders** brief in **Commonwealth v. Santiago**, 978 A.2d 349 (Pa. 2009). Counsel seeking 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.

**Id.** at 361.

may obtain new counsel or raise additional issues *pro se*.<sup>5</sup> We therefore proceed to an independent review of the record.

As noted above, Appellant was not represented by counsel at her probation revocation hearing. The record before us does not reveal whether Appellant desired to waive her right to counsel and proceed *pro se*. Because Rule 708 of the Pennsylvania Rules of Criminal Procedure provides that a judge shall not revoke probation unless there has been a hearing “at which the defendant is present and represented by counsel,” Pa.R.Crim.P. 708(B)(1), this issue arguably supports this appeal. Accordingly, we order counsel to file either an advocate’s brief or a supplemental **Anders** brief addressing the issue of Appellant’s lack of counsel at the probation revocation hearing.

Petition for leave to withdraw as counsel denied. Counsel shall file either an advocate’s brief or a supplemental **Anders** brief within 30 days of the date of this memorandum. Panel jurisdiction retained.

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<sup>5</sup> Appellant has not responded to counsel’s petition to withdraw.