J-S60006-12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
TIMOTHY M. KREAMER,	:	
	:	
Appellant	:	No. 1739 MDA 2011

Appeal from the Judgment of Sentence Entered May 27, 2010,
In the Court of Common Pleas of Lycoming County,
Criminal Division, at No. CP-41-CR-0001228-1996.

BEFORE: SHOGAN, MUNDY and OTT, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED: MAY 16, 2013**

Appellant, Timothy M. Kreamer, appeals *nunc pro tunc* from the judgment of sentence entered on May 27, 2010 following the revocation of his probation. Counsel has filed a petition to withdraw and brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), ***Commonwealth v. McClendon***, 495 Pa. 467, 434 A.2d 1185 (1981), and ***Commonwealth v. Santiago***, 602 Pa. 159, 978 A.2d 349 (2009).[1] Upon review, we grant counsel's petition to withdraw and affirm Appellant's judgment of sentence.

[1] This case was previously remanded for counsel to comply with the mandates of ***Anders*** and ***Santiago***. As counsel has complied with this Court's order, this appeal is ripe for our review.

In its Pa.R.A.P. 1925(a) opinion, the trial court set forth the factual and procedural history as follows:

> This opinion is written in support of this Court's judgment of sentence issued on May 27, 2010 following a probation violation hearing and the Court's Order of June 23, 2010, wherein it denied Appellant's motion to reconsider the probation violation sentence. In an Order entered September 2, 2011, the Court notes that it reinstated Appellant's right to take a direct appeal from the probation violation sentence.
>
> The relevant facts follow. On March 6, 1997, Appellant pled guilty to the following offenses: count 2, robbery, a felony of the second degree; count 7, robbery, a felony of the second degree; and amended count 6, criminal attempt to commit robbery by placing a person in fear of bodily injury, a felony of the second degree.
>
> On May 6, 1997, the Honorable William S. Kieser sentenced Appellant to two consecutive eight (8) to twenty-nine (29) month sentences on the two robbery convictions and a consecutive ten-year period of probation for criminal attempt to commit robbery.[1]
>
> [1] Appellant also was serving a sentence of three (3) to seven (7) years incarceration in a state correctional institution for homicide by vehicle while driving under the influence of alcohol. This sentence was imposed by the Honorable Kenneth D. Brown on or about June 7, 1994 in case number 93-11000.
>
> Appellant began serving the ten-year probation sentence on or about March 20, 2002. One of the conditions of Appellant's probation supervision was that he refrain from using controlled substances without a valid prescription. On or about November 13, 2009, Appellant appeared at the Williamsport District Office for his appointment with his probation officer, John Girardi. A drug test was conducted on Appellant's urine, which yielded a positive result for cocaine. Appellant was locked up on a forty-eight (48) hour detainer, but Mr. Girardi, with the approval of the District Director, gave Appellant a second chance on the street. Mr. Girardi explained to Appellant the risks he

was taking by giving him a second chance on the street and the need for Appellant to work with him and comply with the conditions of his supervision. He also sent Appellant to West Branch Drug and Alcohol for an evaluation and advised Appellant he would need to be involved in outpatient treatment.

Despite being given a second chance on the street, Appellant again tested positive for cocaine on March 17, 2010, April 18, 2010 and May 3, 2010. On May 3, 2010, Mr. Girardi arrested Appellant and placed him in the Lycoming County Prison. About a week before the May 3rd arrest, Mr. Girardi placed Appellant in intensive outpatient treatment. Although Appellant admittedly was in such treatment from at least April 28, 2010, N.T., May 27, 2010 at p. 8, his urine still tested positive for cocaine on May 3, 2010, indicating that Appellant was using cocaine while he was receiving treatment.

Mr. Girardi recommended a sentence of six (6) to twenty-four (24) months state incarceration for these violations of [Appellant's] probation. The paperwork provided to the Court, however, indicated a four (4) to twenty-four (24) month recommendation.

Appellant admitted he violated the conditions of his probation by using illegal controlled substances and agreed to proceed to a disposition, but he begged the Court not to send him "upstate" but to sentence him to a treatment or rehabilitation program, or home confinement instead.

The Court found he violated the conditions of his probation and sentenced him to four (4) to twenty-four (24) months incarceration in a state correctional institution.

Appellant filed a motion to reconsider sentence, which the Court held a hearing on June 23, 2010. Appellant again sought a reinstatement of probation with inpatient or outpatient treatment or, in the alternative, Drug Court or a county sentence. Appellant also made the following statement: "But I admit that I made a mistake. I thank you for the sentence you gave me. I believe it was fair. And I just, you know, I just want another shot to get out there...[.]" N.T., June 23, 2010, at p. 7.

> The Court denied the motion. The Court explained to Appellant that his choices to use drugs on multiple occasions backed the Court into a corner. If Appellant was not incarcerated, there was a high likelihood that he would use drugs and re-offend. N.T., June 23, 2010, at pp. 8-10.
>
> On November 1, 2010, Appellant filed a pro se Post Conviction Relief Act (PCRA) petition. The Court appointed counsel and gave counsel an opportunity to either amend Appellant's pro se petition or file a Turner/Finley letter. Counsel requested transcripts of the probation violation hearing and the reconsideration hearing. The transcripts were prepared, and counsel filed a motion to withdraw with a Turner/Finley letter attached.
>
> On May 24, 2011, the Court issued an Opinion and Order giving Appellant notice of its intent to deny his PCRA petition without holding an evidentiary hearing and granting counsel's motion to withdraw. In Appellant's response to the Court's notice of intent to dismiss, Appellant raised for the first time a claim that he had asked his attorney to file an appeal from his probation violation re-sentencing. The Commonwealth agreed to reinstate Appellant's direct appeal rights without holding an evidentiary hearing. Therefore, the Court reinstated Appellant's right to file a direct appeal from his probation violation sentence on or about September 3, 2011. Since Appellant's original PCRA counsel was no longer under contract with the County to handle conflict cases, the Court appointed new counsel to represent Appellant on appeal.

Trial Court Opinion, 3/21/12, at 1-4 (footnote in original).

As noted above, Counsel has filed a petition to withdraw and ***Anders*** brief. "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." ***Commonwealth v. Rojas***, 874 A.2d 638, 639 (Pa. Super. 2005). Furthermore, there are clear mandates that counsel seeking to withdraw pursuant to ***Anders/McClendon/Santiago*** must follow:

> In order for counsel to withdraw from an appeal pursuant to ***Anders*** … certain requirements must be met:
>
> > (1) counsel must petition the court for leave to withdraw stating that after making a conscientious examination of the record it has been determined that the appeal would be frivolous;
> >
> > (2) counsel must file a brief referring to anything that might arguably support the appeal, but which does not resemble a "no merit" letter or amicus curiae brief; and
> >
> > (3) counsel must furnish a copy of the brief to defendant and advise him of his right to retain new counsel, proceed *pro se* or raise any additional points that he deems worthy of the court's attention.

Commonwealth v. Millisock, 873 A.2d 748, 751 (Pa. Super. 2005).

In ***Santiago***, the Supreme Court set forth specific requirements for the brief accompanying counsel's petition to withdraw:

> [I]n 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.

Santiago, 978 A.2d at 361.

In the case before us presently, Appellant's counsel ("Counsel") has complied with the requirements of ***Santiago***, and our review of Counsel's petition to withdraw, supporting documentation, and ***Anders*** brief reveals

that Counsel has satisfied all of the foregoing requirements. Counsel has 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 has attached a copy of the letter sent to Appellant to the ***Anders*** petition as required under ***Millisock***.

Once Counsel has met her obligations, "it then becomes the responsibility of the reviewing court to make a full examination of the proceedings and make an independent judgment to decide whether the appeal is in fact wholly frivolous." ***Santiago***, 978 A.2d at 355 n.5. Thus, we will now examine the issues set forth by Counsel in the ***Anders*** brief that Appellant believes have merit.

In the ***Anders*** brief, Counsel raises four issues for this Court's consideration:

> I. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT RELIEF DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL DURING HIS PROBATION VIOLATION AND RESENTENCING HEARING BECAUSE HIS COUNSEL FAILED TO PROPERLY PRESENT THE MITIGATING FACTORS AT THE RESENTENCING PROCEEDINGS.
>
> II. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT RELIEF ON THE BASIS OF THE RESENTENCING CONSTITUTING DOUBLE JEOPARDY.
>
> III. WHETHER THE TRIAL COURT ERRED IN IMPOSING AN ILLEGAL SENTENCE UPON APPELLANT AT THE TIME OR RESENTENCING.

> IV. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IMPOSING A SENTENCE AND ORDERING IT BE SERVED IN A STATE CORRECTIONAL INSTITUTION.

Anders Brief at 8.

We have thoroughly reviewed Counsel's ***Anders*** brief, the trial court's opinion, the record in its entirety, and the case law and constitutional provisions relied upon by the trial court in reaching its determination. Following our review, we agree entirely with the trial court's well-reasoned analysis and legal conclusions that Appellant's possible issues are wholly without merit and frivolous. Accordingly, we adopt the March 21, 2012 trial court opinion as our own.[2] Furthermore, having reviewed the record as a whole, we conclude that there are no other issues of merit for appellate review. Accordingly, we affirm the judgment of sentence and permit counsel to withdraw.

Counsel's petition for leave to withdraw representation granted. Judgment of sentence affirmed.

Judgment Entered.

Mary A. Hrabell

Interim Deputy Prothonotary

Date: May 16, 2013

[2] The parties are directed to attach a copy of that opinion in the event of further proceedings in this matter.

J-S60006-12

Refiled

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-1228-1996
vs.	:	CRIMINAL DIVISION
TIMOTHY KREAMER, Defendant	:	1925(a) Opinion

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's judgment of sentence issued on May 27, 2010 following a probation violation hearing and the Court's Order of June 23, 2010, wherein it denied Appellant's motion to reconsider the probation violation sentence. In an Order entered September 2, 2011, the Court notes that it reinstated Appellant's right to take a direct appeal from the probation violation sentence.

The relevant facts follow. On March 6, 1997, Appellant pled guilty to the following offenses: count 2, robbery, a felony of the second degree; count 7, robbery, a felony of the second degree; and amended count 6, criminal attempt to commit robbery by placing a person in fear of bodily injury, a felony of the second degree.

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On or about November 13, 2009, Appellant appeared at the Williamsport District Office for his appointment with his probation officer, John Girardi. A drug test was conducted on Appellant's urine, which yielded a positive result for cocaine. Appellant was locked up on a forty-eight (48) hour detainer, but Mr. Girardi, with the approval of the District Director, gave Appellant a second chance on the street. Mr. Girardi explained to Appellant the risks he was taking by giving him a second chance on the street and the need for Appellant to work with him and comply with the conditions of his supervision. He also sent Appellant to West Branch Drug and Alcohol for an evaluation and advised Appellant he would need to be involved in outpatient treatment.

Despite being given a second chance on the street, Appellant again tested positive for cocaine on March 17, 2010, April 18, 2010 and May 3, 2010. On May 3, 2010, Mr. Girardi arrested Appellant and placed him in the Lycoming County Prison. About a week before the May 3rd arrest, Mr. Girardi placed Appellant in intensive outpatient treatment. Although Appellant admittedly was in such treatment from at least April 28, 2010, N.T., May 27, 2010 at p. 8, his urine still tested positive for cocaine on May 3, 2010, indicating that Appellant was using cocaine while he was receiving treatment.

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The Court denied the motion. The Court explained to Appellant that his choices to use drugs on multiple occasions backed the Court into a corner. If Appellant was not incarcerated, there was a high likelihood that he would use drugs and re-offend. N.T., June 23, 2010, at pp. 8-10.

On November 1, 2010, Appellant filed a pro se Post Conviction Relief Act (PCRA) petition. The Court appointed counsel and gave counsel an opportunity to either amend Appellant's pro se petition or file a Turner/Finley letter. Counsel requested transcripts of the probation violation hearing and the reconsideration hearing. The transcripts were prepared, and counsel filed a motion to withdraw with a Turner/Finley letter attached.

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notice of its intent to deny his PCRA petition without holding an evidentiary hearing and granting counsel's motion to withdraw. In Appellant's response to the Court's notice of intent to dismiss, Appellant raised for the first time a claim that he had asked his attorney to file an appeal from his probation violation re-sentencing. The Commonwealth agreed to reinstate Appellant's direct appeal rights without holding an evidentiary hearing. Therefore, the Court reinstated Appellant's right to file a direct appeal from his probation violation sentence on or about September 3, 2011. Since Appellant's original PCRA counsel was no longer under contract with the County to handle conflict cases, the Court appointed new counsel to represent Appellant on appeal.

Appellant filed his notice of appeal on October 3, 2011. In his appeal, Appellant raises four issues: (1) the trial court erred in failing to grant Appellant's PCRA petition requesting relief based upon his receiving ineffective assistance of counsel because counsel failed to adequately present mitigating factors to the court; (2) the trial court erred in failing to grant Appellant's PCRA petition requesting relief based upon the sentence imposed by the court subjected Appellant to double jeopardy; (3) the trial court erred in failing to grant Appellant's PCRA petition requesting relief based upon the sentence imposed by the court was illegal; and (4) the trial court erred in failing to grant Appellant's PCRA petition requesting relief based upon the sentence was ordered to be served in a state correctional institution.

Initially, the Court notes that since this is a direct appeal, any claim of ineffective assistance of counsel cannot be raised now, but must wait until the direct appeal is completed and be raised in a new PCRA petition. See Commonwealth v. Barnett, 25 A.3d

371 (Pa. Super. 2011). In the alternative, the Court notes that most, if not all, of Appellant's claims regarding mitigating evidence or reasons were presented and argued at the probation violation hearing and the reconsideration hearing. The Court considered all the evidence and arguments presented at those hearings and imposed a sentence that it believed would not only protect the public but would also keep Appellant from using drugs or committing new crimes.

Although the remaining issues are couched in language relating to the PCRA proceedings, the Court will address them as direct challenges to the sentence imposed.

Appellant contends the sentence imposed subjected him to double jeopardy. The Court cannot agree. In Commonwealth v. Mullins, 591 Pa. 341, 918 A.2d 82, 85 (Pa. 2007), the Pennsylvania Supreme Court stated, "Probation revocation is not a second punishment for the original conviction, but rather is an integral element of the original conditional sentence, and thus does not violate the Double Jeopardy Clause."

Appellant next asserts his sentence is illegal. This claim is frivolous. Appellant admitted that he used cocaine, thereby violating the conditions of his probation. Appellant's admissions justified revoking his original sentence of ten years probation.

Once probation has been revoked, a sentence of confinement may be imposed if any of the following conditions exits: (1) the defendant has been convicted of another crime; or (2) the conduct of the defendant indicated it is likely that the defendant will commit another crime if he is not imprisoned; or (3) such a sentence is essential to vindicate the authority of the court. 42 Pa.C.S.A. §9771 (c); Commonwealth v. Kalinchak, 943 A.2d 285, 289 (Pa. Super. 2008).

The Court imposed a sentence of confinement in this case, because it found that Appellant's conduct of using cocaine on multiple occasions indicated that it was likely he could commit another crime or continue to use illegal drugs if he was not incarcerated. N.T., June 23, 2010, at pp. 8-10. This conclusion is supported by the record. Appellant admitted on the record that he was in intensive outpatient treatment as of April 28, 2010. Appellant's urine tested positive for cocaine on four occasions: November 17, 2009; March 17, 2010; April 18, 2010; and May 3, 2010. Since the final occasion occurred after Appellant had entered intensive outpatient treatment, the Court had a basis to conclude that Appellant would not stop using cocaine unless he was incarcerated. Furthermore, to use cocaine, Appellant necessarily had to possess it, which is a crime. Additionally, Mr. Girardi noted on the record that if Appellant remained on probation, the state could not provide any type of inpatient treatment to Appellant, but if he went to state prison and was paroled the state could supply places for him to go for inpatient treatment if he used again. N.T., May 27, 2010, at p.16. In light of these facts, the Court found that, not only could a sentence of confinement be imposed, but such a sentence should be imposed in this case.

In fashioning such a sentence following a revocation of probation, the Court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence. Commonwealth v. Bowser, 783 A.2d 348, 349 (Pa. Super. 2001).

At the time of the probationary sentence, Appellant had pled guilty to attempted robbery, a felony of the second degree. The maximum sentence for a felony of the second degree is ten years. 18 Pa.C.S.A. §1103(2). The minimum sentence cannot exceed one-half the maximum sentence. 42 Pa.C.S.A. §9756(b)(1). The Court could have imposed

a sentence of five (5) to ten (10) year incarceration and it still would have been a lawful sentence. See Commonwealth v. Pierce, 497 Pa. 437, 441 A.2d 1218, 1219-20 (Pa. 1982). Therefore, the four (4) to twenty-four (24) month sentence imposed by the Court clearly was not illegal.

Finally, Appellant asserts that the Court erred in imposing a sentence of incarceration at a state correctional institution. The Court imposed a maximum sentence of two years. Therefore, the Court had the discretion to order that Appellant serve his sentence in either the county prison or in a state correctional institution. 42 Pa.C.S.A. §9762(a)(2); Commonwealth v. Hartle, 894 A.2d 800 (Pa. Super. 2006).

The Court imposed a state sentence for a variety of reasons. First, Appellant has previously served a state sentence on other counts in this case and in another case where he had a conviction for homicide by vehicle while DUI. Second, Appellant's ten-year period of probation was being supervised by the Pennsylvania Board of Probation and Parole. Third, the offense Appellant committed and for which he was on probation was a serious offense, an attempted robbery that put an individual in fear of bodily injury, which would justify a state sentence. Fourth, the original sentencing judge expressed an intention that Appellant should receive a state sentence if a violation occurred. Finally, Appellant likely would have more opportunities for programs, treatment, and counseling in a state correctional facility or on state parole than he would if he received a county sentence.

For the foregoing reasons, the Court believes Appellant's sentence neither violated double jeopardy nor was illegal, and it was not an abuse of discretion to require that the sentence be served in a state correctional institution.

DATE: 3-4-2010

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Lori Rexroth, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)