

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

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| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
| v. | : | |
| | : | |
| DOUGLAS RAY, | : | No. 18 WDA 2012 |
| | : | |
| Appellant | : | |

Appeal from the PCRA Order, December 1, 2011,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0004317-2006

BEFORE: FORD ELLIOTT, P.J.E., BOWES AND DONOHUE, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: February 27, 2013

Appellant, Douglas Ray, appeals the PCRA¹ court's order that granted him relief and re-sentenced him to an aggregate term of incarceration of two to four years with credit for time served. At the time of re-sentencing, appellant had served four years of incarceration. The new sentence resulted in appellant being released from prison and having no further sentence to serve. Appellant now argues the new sentence was illegal, an abuse of discretion and/or harsh. Court-appointed counsel, Thomas N. Farrell, Esq., has petitioned to withdraw and contends that the appeal is frivolous. After careful review, we affirm and grant Attorney Farrell's petition to withdraw.

¹ 42 Pa.C.S.A. §§ 9541–9546.

We adopt the trial court's recitation of the procedural history of this case.

Douglas Ray (Appellant) was charged by Criminal Information (200604317) with: two (2) counts of Possession with Intent to Deliver (Cocaine), two (2) counts of Possession, one (1) count of Possession of Drug Paraphernalia, two (2) counts of Retail Theft, one (1) count of Receiving Stolen Property, two (2) counts of Theft by Deception, and one (1) count of Bad Checks.

Ray's case was joined for trial with his co-defendants, Charles Jackson (Jackson) at CC200604322, and Jennifer Ballard (Ballard) at CC200604318. All three cases proceeded to a jury trial beginning September 10, 2007, in front of the Honorable Cheryl Allen. At the close of the Commonwealth's case, Judge Allen dismissed one count each of Theft, Retail Theft, Receiving Stolen Property and Bad Checks. Thereafter, on September 13, 2007, the jury convicted Ray of all remaining charges.

On December 6, 2007, Judge Allen sentenced Appellant to five (5) to ten (10) years as to Count One-Possession with Intent to Deliver and no further penalty at the remaining counts.

Appellant filed an appeal with the Superior Court at 577 WDA 2008. On February 25, 2010, the Superior Court affirmed the judgment of sentence. Appellant filed a Petition for Allowance of Appeal to the Supreme Court, which was denied on September 23, 2010.

On April 25, 2011, Appellant filed a *pro se* Motion pursuant to the Post-Conviction Relief Act (PCRA). Appellant was appointed counsel and an Amended PCRA Petition was filed on September 28, 2011.

During the same period of time, co-defendant Jennifer Ballard had also pursued an appeal. She raised a claim of Trial Court error for denying the Motion to Suppress. Initially, the Superior [C]ourt refused to address this claim citing the doctrine of coordinate jurisdiction; *i.e.*, a panel of the court had already denied the claim in co-defendant Jackson's appeal. However, the Supreme Court of Pennsylvania remanded and directed the Superior Court to address the merits of the issue. On April 21, 2011, the Superior Court found that the inventory search of the [sic] Ray's van was unreasonable. Accordingly, it vacated the judgments of sentence for Ballard's convictions of Possession of Controlled Substance with intent to Deliver, Possession of Controlled Substance, and Possession of Drug Paraphernalia. ***See Commonwealth v. Ballard***, Superior Court Opinion, April 21, 2011.

On November 2, 2011, the Commonwealth filed its Answer to the PCRA Petition conceding that Appellant should be afforded relief. On December 1, 2011, the Trial Court re-sentenced Appellant as follows: [footnote]

Count 9-Criminal Attempt- Theft by Deception to one (1) to two (2) years; and,

Count 10-Criminal Attempt- Retail Theft to one (1) to two (2) years consecutive to Count 9.

Defendant received time credit from September 13, 2007 to December 1, 2011.

[footnote] The Trial Court notes that the record is devoid of any evidence of the change/amending of the Theft by Deception and Retail Theft charges to Criminal Attempt of those crimes. The [sic] these crimes appear on the verdict slip as well as in the Sentencing Order. The Trial Court has concluded that this is a clerical error. However, it does not in

any way change the grading of the offense and would not affect the overall sentencing scheme.

Trial court opinion, 7/13/12 at 2-4.

Counsel has filed an **Anders**² brief in support of the petition to withdraw. Our review of the procedural history of this case indicates that the matter before us is a PCRA action.³ Therefore, a petition and “no merit” letter pursuant to **Commonwealth v. Turner**, 518 Pa. 491, 544 A.2d 927 (1988) and **Commonwealth v. Finley**, 550 A.2d 213 (Pa.Super. 1988) are the proper means for withdrawal in this appeal. However, the filing of an **Anders** brief does not render the current appeal unreviewable “because an **Anders** brief provides greater protection to a defendant, this Court may accept an **Anders** brief in lieu of a **Turner/Finley** letter.” **Commonwealth v. Widgins**, 29 A.3d 816, 817 n.2 (Pa.Super. 2011), **citing Commonwealth v. Fusselman**, 866 A.2d 1109, 1111 n.3 (Pa.Super. 2004), **appeal denied**, 584 Pa. 691, 882 A.2d 477 (2005).

Instantly, counsel’s filing, while incorrectly labeled an **Anders** brief, satisfies the requirements of **Turner/Finley**, as it includes a description of the nature and extent of counsel’s review, the issue appellant wishes to raise, and an explanation of why that issue lacks merit. **See**

² **Anders v. California**, 386 U.S. 738 (1967).

³ Appellant has appealed from a re-imposed sentence upon the grant of PCRA relief and a **Turner/Finley** “no merit” letter is the appropriate means of review of a petition to withdraw on appeal.

Commonwealth v. Daniels, 947 A.2d 795, 798 (Pa.Super. 2008) (counsel's **Anders** brief satisfied requirements for withdrawal under **Turner/Finley** in PCRA appeal); **Commonwealth v. Karanicolas**, 836 A.2d 940, 947 (Pa.Super. 2003) (substantial compliance with these requirements will satisfy **Turner/Finley** criteria). Additionally, counsel mailed a letter to appellant advising of his intention to seek permission to withdraw from representation, and advising appellant of his rights in lieu of representation.⁴ Appellant has not filed a response. We conclude counsel has complied with the requirements necessary to withdraw.

Our review of appellant's sentencing issue indicates the issue is waived. "To properly preserve the discretionary aspects of sentencing for appellate review, the issue must be raised during sentencing or in a timely post-sentence motion." **Commonwealth v. Sheller**, 961 A.2d 187, 189 (Pa.Super. 2008), **appeal denied**, 602 Pa. 666, 980 A.2d 607 (2009). **See Commonwealth v. Nischan**, 928 A.2d 349, 355 (Pa.Super. 2007), **appeal denied**, 594 Pa. 704, 936 A.2d 40 (2007) ("an appellant can seek to appeal discretionary sentencing issues only after preserving them during the

⁴ We note that in his petition to withdraw, counsel advises that as of February 13, 2012, all of his attempts to contact appellant have failed. (**See** petition to withdraw, n.7.) Counsel points out appellant was released from prison and did not give a forwarding address to him or prior counsel. Counsel states because appellant is not on probation or parole, he could not contact a parole officer for an address. Counsel sent the pleadings to appellant's last known address before he was incarcerated. We believe counsel's attempts to locate appellant are adequate to fulfill his responsibility.

sentencing hearing or in post-sentence motions”), citing *Commonwealth v. Malovich*, 903 A.2d 1247, 1250 (Pa.Super. 2006); *Commonwealth v. Hyland*, 875 A.2d 1175, 1183 (Pa.Super. 2005) (“Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or raised in a motion to modify the sentence imposed at that hearing.”), *appeal denied*, 586 Pa. 723, 890 A.2d 1057 (2005). Appellant did not preserve his allegation that the sentence was harsh by raising it at sentencing or in a post-sentence motion. Accordingly, the issue is waived. Moreover, we agree with the PCRA court that had the sentencing issue been preserved, it does not present a substantial question warranting discretionary review.

Appellant also asserts the sentence was illegal. An illegal sentence claim can never be waived. *Commonwealth v. Foster*, 609 Pa. 502, 505 n.1, 17 A.3d 332, 334 n.1 (2011) (plurality opinion); *Commonwealth v. Dinoia*, 801 A.2d 1254, 1257 (Pa.Super. 2002) (inquiry into the legality of a sentence is non-waivable.) Appellant was re-sentenced to one to two years of incarceration for criminal attempt (retail theft) and to one to two years of incarceration for criminal attempt (theft by deception). Each of the two counts of criminal attempt is graded as a misdemeanor of the first degree. The maximum penalty for a misdemeanor of the first-degree is five years of imprisonment. 18 Pa.C.S.A. § 106(b)(6). Appellant could have legally received a sentence of two and one-half to five years of incarceration on

J. S02012/13

each count, but was re-sentenced to far less. Appellant's sentence is not illegal.

Order affirmed. Petition to withdraw as counsel is granted.