NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. CHAD M. HUGENDUBLER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2003 MDA 2012

Appeal from the Order Entered October 25, 2012
In the Court of Common Pleas of Lebanon County
Criminal Division at No(s): CP-38-CR-0000063-2008

BEFORE: BOWES, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY OTT, J.: **FILED SEPTEMBER 11, 2013**

Chad M. Hugendubler appeals from the order entered on October 25, 2012, in the Court of Common Pleas of Lebanon County. Contemporaneous with this appeal, Hugendubler's counsel has filed a petition to withdraw from representation and ***Anders*** brief. ***See Anders v. California***, 386 U.S. 738 (1967); ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981). The sole issue identified in counsel's ***Anders*** brief is whether Hugendubler is entitled to "a reduction of his remaining balance of incarceration by sixty (60) days, which was spent on electronic monitoring." ***Anders*** Brief at 6.

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* Former Justice specially assigned to the Superior Court.

Based upon the following, we affirm the order of the trial court and grant counsel's motion to withdraw.

On May 22, 2008, Hugendubler pled guilty pursuant to a plea agreement to one count of terroristic threats and two counts of simple assault.[1] On August 13, 2008, the court sentenced him in accordance with the plea agreement to a period of incarceration of one month to two years less one day. As Hugendubler had already completed his minimum sentence, the Court directed his immediate release on August 13, 2008. Thereafter, on July 27, 2009, Hugendubler was found to have violated his parole, and was re-incarcerated for two months. On September 21, 2009, Hugendubler was released, and again violated his parole. On January 19, 2011, the court re-incarcerated Hugendubler for the maximum duration of his sentence without credit for street time, and rendered him eligible for re-parole in six months, with the additional condition that upon parole Hugendubler spend 60 days on house arrest with electronic monitoring.

Hugendubler was released on July 8, 2011, and violated parole a third time. On April 24, 2012, the court re-incarcerated Hugendubler for the maximum duration of his sentence — one year, one month and two days. ***See*** Order, 4/24/2012.

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[1] 18 Pa.C.S. §§ 2706 and 2701, respectively.

On August 27, 2012, Hugendubler filed a *pro se* Motion for Time Credit, in which he averred that he was entitled to have the 60 days he spent electronically monitored on house arrest — from July 8, 2011, to September 8, 2011 — credited against the balance of his April 24, 2012, sentence. Hugendubler asserted that 60 days credit for time served would change his "max out" date from May 14, 2013 to March 14, 2013. Hugendubler's Motion for Time Credit, ¶7. The court denied the motion on August 30, 2012.

On October 23, 2012, Hugendubler filed a *pro se* "Motion to Appeal Order of Court Denying Motion For Time Credit." On October 25, 2012, the court again denied Hugendubler's request for credit for time served. On November 8, 2012, Hugenbubler filed a *pro se* notice of appeal.[2] By order of December 12, 2012, this Court directed the trial court to order previous counsel or new counsel to represent Hugendubler, and the trial court thereafter appointed new counsel to represent Hugendubler in this appeal.[3]

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[2] By order of November 14, 2012, Hugendubler was directed to file a Pa.R.A.P. 1925(b) concise statement. Hugendubler's *pro se* concise statement was filed on November 28, 2012. The court issued an opinion pursuant to Pa.R.A.P. 1925(a) on November 29, 2012.

[3] As noted, counsel has filed a petition to withdraw from representation and brief in accordance with ***Anders***, and the ***Anders*** procedures outlined in ***Commonwealth v. Santiago***, 978 A.2d 349, 350-351 (Pa. 2009). Pursuant to ***Anders***, counsel must demonstrate an appeal is "wholly frivolous" before a court may grant the motion to withdraw as counsel. Our review confirms that counsel has substantially complied with ***Anders*** and ***Santiago***.

At the outset, we note that the sentence Hugendubler is challenging was imposed on April 24, 2011, following a third revocation of his parole. Hugendubler did not challenge the April 24, 2011 sentence by either a post-sentence motion or a direct appeal. Rather, on August 27, 2012, and October 23, 2012, he filed *pro se* motions in which he claimed that he was entitled to credit for time he had served on house arrest with electronic monitoring. The trial court denied these motions, which, in fact, were untimely post-sentence motions, filed after the expiration of time for filing a direct appeal. Our review confirms the court's determination that there is no legal authority that supports Hugendubler's claim.[4]

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[4] The trial court opined that Hugendubler should have, but did not, invoke the Post-Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541–9546. ***See*** Trial Court Opinion, 11/29/2012, at 3. In ***Commonwealth v. Taylor***, 65 A.3d 462, 465 (Pa. Super. 2013), a panel of this Court held that a writ of *habeas corpus,* filed after the judgment of sentence had become final, should have been treated as a PCRA petition. In two cases cited by the ***Taylor*** Court, this Court held that motions for credit for time served are to be treated as PCRA petitions. ***See id.*** at 466, *citing* ***Commonwealth v. Fowler***, 930 A.2d 586 (Pa. Super. 2007), and ***Commonwealth v. Beck***, 848 A.2d 987 (Pa. Super. 2004). Therefore, Hugenbubler's motions should have been treated as PCRA petitions and counsel should have been appointed to file an amended petition or ***Turner/Finley*** no merit letter. Under case law governing the PCRA, petitioners are entitled to one meaningfully counseled collateral review. ***See Commonwealth v. Turner***, 544 A.2d 927, 928 (Pa. 1988); ***Commonwealth v. Hampton***, 718 A.2d 1250 (Pa. Super. 1998). While in many instances a remand might be warranted for appointment of counsel, an attorney was appointed for purposes of this appeal, and the ***Anders*** requirements are more stringent than ***Turner/Finley*** requirements. Therefore, Hugendubler has received the counseled review to which he is entitled, and no purpose would be served by remanding for counsel to file a ***Turner/Finley*** no merit letter.

In ***Commonwealth v. Kyle***, 874 A.2d 12 (Pa. 2005), the Pennsylvania Supreme Court considered "whether an individual is in custody for purposes of awarding credit toward a prison sentence for time spent subject to home confinement with electronic monitoring while released on bail pending appeal." ***Id.*** at 13. The Court held that "time spent subject to electronic monitoring at home is not time spent in 'custody' for purposes of credit" toward a prison sentence. ***Id.*** at 22.

Thereafter, in ***Commonwealth v. Maxwell***, 932 A.2d 941 (Pa. Super. 2007), *appeal denied*, 940 A.2d 363 (Pa. 2007), a panel of this Court rejected the defendant's argument that that he was "entitled to credit for time served for successfully completing a *sentence* of electronic monitoring[.]" ***Id.*** at 942 (emphasis in original). The ***Maxwell*** Court reasoned: "In the cases relied upon by our Supreme Court in ***Kyle*** …, there is no difference in treatment between time spent on electronic monitoring while on bail and time spent on electronic monitoring in any other stage of the criminal justice. … As stated in ***Kyle***, 'this Court has emphasized that, because home release on electronic monitoring does not constitute custody, credit should not be awarded for it toward a prison sentence'." ***Id.*** at 945 (citation omitted).

Accordingly, under ***Kyle*** and ***Maxwell***, Hugendubler's claim is unsupportable.

Order affirmed. Petition to withdraw as counsel granted.

Judgment Entered.

Mary A. Hrabell

Deputy Prothonotary

Date: 9/11/2013