NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	
SHAMUS ARMSTEAD,	:	No. 1099 EDA 2013
	:	
Appellant	:	

Appeal from the Judgment of Sentence, March 15, 2013
in the Court of Common Pleas of Montgomery County
Criminal Division at No. CP-46-CR-0036196-1997

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND PLATT,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JUNE 10, 2014**

Shamus Armstead appeals from the judgment of sentence of March 15, 2013, following revocation of his probation. Appointed counsel, Timothy P. Wile, Esq., has filed a petition to withdraw and accompanying ***Anders*** brief.[1] After careful review, we grant the petition to withdraw and affirm the judgment of sentence.

On April 30, 2010, appellant entered a negotiated guilty plea to one count of criminal conspiracy to commit possession with intent to deliver ("PWID") cocaine, and received three years of probation. No direct appeal was filed. Subsequently, on March 26, 2011, appellant was arrested in

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* Retired Senior Judge assigned to the Superior Court.

[1] ***See Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981).

Philadelphia for attempted murder, aggravated assault, recklessly endangering, and other offenses. On November 7, 2012, appellant received a sentence of 6 to 14 years' imprisonment on the new charges.

On January 4, 2013, appellant appeared for a ***Gagnon II***[2] hearing, at which he stipulated that he was in violation of the terms of his probation. On March 15, 2013, following preparation of a pre-sentence investigation report ("PSI"), appellant was sentenced to 3 to 6 years' incarceration, to run concurrently with the 6 to 14-year sentence previously imposed. Post-sentence motions were denied, and this timely appeal followed. Appellant has complied with Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion.

Appellant has raised the following issues for this court's review:

> [1.] Is the three (3) to six (6) year sentence of total confinement imposed by the trial court following the revocation of probation illegal in that it exceeds the initial three (3) year period of probation imposed upon appellant?
>
> [2.] Is the trial court's sentence illegal in that the trial court failed to credit appellant with all of the commitment credit that appellant was due on said sentence?

Appellant's brief at 4.

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[2] ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973). "Where a finding of probable cause is made, a second, more comprehensive hearing, a ***Gagnon II*** hearing, is required before a final revocation decision can be made." ***Commonwealth v. Allshouse***, 969 A.2d 1236, 1240 (Pa.Super. 2009) (citations omitted).

Counsel having filed a petition to withdraw, we reiterate that "[w]hen presented with an ***Anders*** brief, this court may not review the merits of the underlying issues without first passing on the request to withdraw." ***Commonwealth v. Daniels***, 999 A.2d 590, 593 (Pa.Super. 2010), citing ***Commonwealth v. Goodwin***, 928 A.2d 287, 290 (Pa.Super. 2007) (***en banc***) (citation omitted).

> In order for counsel to withdraw from an appeal pursuant to ***Anders,*** certain requirements must be met, and 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.

Id., quoting ***Commonwealth v. Santiago,*** 978 A.2d 349, 361 (Pa. 2009).

Upon review, we find that Attorney Wile has complied with all of the above requirements. In addition, Attorney Wile served appellant a copy of the ***Anders*** brief, and advised him of his right to proceed ***pro se*** or hire a private attorney to raise any additional points he deemed worthy of this

court's review. Appellant has not responded to counsel's motion to withdraw. As we find the requirements of ***Anders*** and ***Santiago*** are met, we will proceed to the issues on appeal.

The sentence imposed following the revocation of probation "'is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal.'" ***Commonwealth v. Coolbaugh***, 770 A.2d 788, 792 (Pa.Super. 2001), quoting ***Commonwealth v. Sierra***, 752 A.2d 910, 913 (Pa.Super. 2000) (other citations omitted). As the ***Coolbaugh*** court observed:

> We recently summarized our standard of review and the law applicable to revocation proceedings as follows:
>
>> Our review is limited to determining the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing alternatives that it had at the time of the initial sentencing. 42 Pa.C.S.A. § 9771(b) . . . . Also, upon sentencing following a revocation of probation, the trial court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence. Finally, it is the law of this Commonwealth that once probation has been revoked, a sentence of total confinement may be imposed if any of the following conditions exist:
>>
>> (1) the defendant has been convicted of another crime; or

> (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or,
>
> (3) such a sentence is essential to vindicate the authority of court.
>
> 42 Pa.C.S.A. § 9771(c).

Id., quoting ***Commonwealth v. Fish***, 752 A.2d 921, 923 (Pa.Super. 2000) (other citations omitted). We also note that the sentencing guidelines do not apply to sentences imposed as the result of probation revocations. ***Id.*** (citations omitted).

Obviously, the trial court was authorized to revoke appellant's probation and impose a sentence of total confinement where appellant was convicted of new crimes. 42 Pa.C.S.A. § 9771(c)(1). Furthermore, the trial court was not constrained by the original 3-year probationary sentence, as appellant suggests. The trial court was limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence, which was 5 to 10 years' imprisonment for criminal conspiracy to commit PWID. ***See Commonwealth v. Wallace***, 870 A.2d 838, 843 (Pa. 2005) ("As it is well established that the sentencing alternatives available to a court at the time of initial sentencing are all of the alternatives statutorily available under the Sentencing Code, these authorities make clear that at any revocation of probation hearing, the court is similarly free to impose any sentence permitted under the Sentencing

Code and is not restricted by the bounds of a negotiated plea agreement between a defendant and prosecutor.") (footnotes and citations omitted). The trial court's sentence was not illegal.[3]

In his second issue on appeal, appellant claims he was statutorily entitled to 22 months of credit for time he spent incarcerated following his arrest in Philadelphia. From the time of his arrest on March 26, 2011, until his probation revocation, appellant remained in custody on both the new charges and a probation violation detainer.

The sentencing code provides:

> **§ 9760. Credit for time served**
>
> After reviewing the information submitted under section 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:
>
> (1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of conduct on which such a charge is based. Credit shall include credit for the time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

[3] Indeed, we note that appellant received the sentence he requested, 3 to 6 years concurrent with the sentence on the Philadelphia charges. (Notes of testimony, 3/15/13 at 15-16.) The trial court rejected the Commonwealth's request for a 5 to 10-year sentence. (***Id.*** at 17-19.)

> 42 Pa.C.S.A. § 9760(1)[]. "The principle underlying section 9760 is that a defendant should be given credit for time spent in custody prior to sentencing for a particular offense." ***Commonwealth v. Fowler***, 930 A.2d 586, 595 (Pa.Super.2007) (citation omitted)[], ***appeal denied***, 944 A.2d 756 (Pa.2008). "If a defendant . . . remains incarcerated prior to trial because he has failed to satisfy bail requirements on the new criminal charges, then the time spent in custody shall be credited to his new sentence." ***Gaito v. Pa. Bd. of Probation & Parole***, 488 Pa. 397, 412 A.2d 568, 571 (1980)[]. "Where an offender is incarcerated on both a Board [of Probation and Parole] detainer and new criminal charges, all time spent in confinement must be credited to either the new sentence or the original sentence." ***Martin v. Pa. Bd. of Probation & Parole***, 576 Pa. 588, 840 A.2d 299, 309 (2003). The Department of Corrections, an executive agency, has no power to change sentences, or to add or remove sentencing conditions, including credit for time served; this power is vested in the sentencing court. ***See McCray v. Pa. Dept. of Corrections***, 582 Pa. 440, 872 A.2d 1127, 1133 (2005).

Commonwealth v. Mann, 957 A.2d 746, 749 (Pa.Super. 2008) (emphasis deleted).

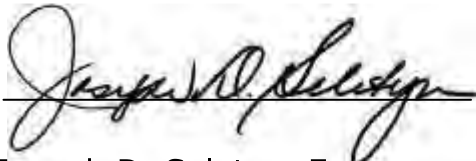
Instantly, appellant already received time credit for the 22 months spent in custody against his Philadelphia sentence imposed November 7, 2012. (Trial court opinion, 5/17/13 at 7.) Appellant is not entitled to double credit. 42 Pa.C.S.A. § 9760(4); ***Bright v. Pennsylvania Board of Probation and Parole***, 831 A.2d 775, 778 (Pa.Cmwlth. 2003) (Section 9760(4) mandates that credit for time served on a sentence can only be granted when it has not already been credited toward another sentence). The trial court did not err in refusing to award appellant credit

time where that time had already been applied to his sentence on the new charges.

For the reasons discussed above, we determine that appellant's issues on appeal are wholly frivolous and without merit. Furthermore, after our own independent review of the record, we are unable to discern any additional issues of arguable merit. Therefore, we will grant Attorney Wile's petition to withdraw and affirm the judgment of sentence.

Petition to withdraw granted. Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/10/2014