NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JOHN BERTIG Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1471 WDA 2013

Appeal from the Judgment of Sentence August 21, 2013
In the Court of Common Pleas of Jefferson County
Criminal Division at No(s): CP-33-CR-0000107-2010

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

MEMORANDUM BY JENKINS, J.: **FILED JUNE 17, 2014**

John Bertig ("Appellant") appeals from the judgment of sentence of 1 to 7 years of incarceration following the revocation of probation for his criminal trespass[1] conviction. The court sentenced Appellant after he pled guilty to new charges.[2] Appellant's counsel has filed an ***Anders***[3] brief, together with a petition to withdraw as counsel. We affirm the judgment of sentence and grant counsel's petition to withdraw.

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* Former Justice specially assigned to the Superior Court.

[1] 18 P.S. § 3503(a)(1)(i). Criminal trespass is a felony of the third degree.

[2] Appellant pled guilty to harassment, 18 Pa.C.S. § 2709, and public drunkenness, 18 Pa.C.S. § 5505 – both summary offenses.

[3] ***Anders v. California***, 386 U.S. 738 (1967).

Between January 14 and January 22, 2010, Appellant entered and occupied Tabitha Coyne's home in Brookville, Pennsylvania, knowing he had no license, privilege, or permission to do so. On January 23, 2010, after conducting separate interviews with Ms. Coyne, her neighbors, and Appellant, Officer Scott Ishman of the Brookville Police Department arrested Appellant.

On May 10, 2010, Appellant pled guilty to one count of criminal trespass. That same day, the trial court sentenced Appellant to a minimum of time served to a maximum of two years less one day of incarceration followed by three years of probation. On July 26, 2013, while on probation, Appellant was arrested and pled guilty to the summary offenses of harassment and public drunkenness.

On August 21, 2013, the probation revocation proceedings commenced. The court stated the following in sentencing Appellant:

> . . . You're 55 years of age and you have a criminal record that goes back to 1978.
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> * * *
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> Most importantly[,] an agg[ravated] assault [conviction], fleeing state sentence in 1981, probation from state capital police department, so I assume you must have altered some document there. False alarm to public agencies in 2002 and now harassment an[d] public intoxication. So throughout the years these crimes of violence . . . .
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> * * *

> From looking at your prior record and the fact []new charges have been filed and you were convicted[,] I'm going to revoke your split sentence, sentence you to no less than one [year and] no more than seven years in State Department of Corrections, giving you that long sentence because you have this continual history of new charges[,] to try to give you some help to manage. . . You will receive credit for any time you have served since the beginning of this case. . . .

N.T., 8/21/2013, p. 4-6. Appellant timely appealed.[4]

As previously noted, Appellant's counsel filed an application seeking to withdraw from representation pursuant to ***Anders v. California*** and its Pennsylvania counterpart, ***Commonwealth v. Santiago***.[5] Before addressing the merits of Appellant's underlying issues presented, we must first pass on counsel's petition to withdraw. ***Commonwealth v. Goodwin***, 928 A.2d 287, 290 (Pa.Super.2007) (en banc).

Prior to withdrawing as counsel on a direct appeal under ***Anders***, counsel must file a brief that meets the requirements established by our Supreme Court in ***Santiago***. The brief 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

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[4] Both Appellant and the court complied with Pa.R.A.P. 1925.

[5] 978 A.2d 349 (Pa.2009).

> statutes on point that have led to the conclusion that the appeal is frivolous.

Santiago, 978 A.2d at 361. Counsel must also provide a copy of the ***Anders*** brief to the appellant, and advise the appellant of his or her right to "(1) retain new counsel to pursue the appeal; (2) proceed *pro se* on appeal; or (3) raise any points that the appellant deems worthy of the court's attention in addition to the points raised by counsel in the *Anders* brief." ***Commonwealth v. Nischan***, 928 A.2d 349, 353 (Pa.Super.2007). Substantial compliance with these requirements is sufficient. ***Commonwealth v. Wrecks***, 934 A.2d 1287, 1290 (Pa.Super.2007). "After establishing that the antecedent requirements have been met, this Court must then make an independent evaluation of the record to determine whether the appeal is, in fact, wholly frivolous." ***Commonwealth v. Palm***, 903 A.2d 1244, 1246 (Pa.Super.2006).

Here, counsel filed a petition to withdraw as counsel. The petition indicates counsel conducted a review of the record and issues raised by Appellant in this matter, and found "there is no merit . . . to any of the issues raised or which could be raised by the [A]ppellant" on appeal. Motion to Withdraw Appearance at 1-2. Counsel notified Appellant of the withdrawal request, supplied him with a copy of the ***Anders*** brief, and sent him a letter explaining his right to proceed *pro se* or with new, privately-retained counsel to raise any additional points or arguments that Appellant believed had merit. ***See*** Letter to Appellant, January 9, 2014, attached to

Motion to Withdraw Appearance. In the ***Anders*** brief, counsel provides a summary of the facts and procedural history of the case with citations to the record, refers to evidence of record that might arguably support the issue raised on appeal, provides citations to relevant case law, and states his conclusion that the appeal is wholly frivolous and his reasons therefor. Accordingly, counsel has substantially complied with the requirements of ***Anders*** and ***Santiago***.

We review this appeal based on the ***Anders*** brief and Appellant's response thereto. The ***Anders*** brief raises the following issue of arguable merit:

> I. Whether the trial court abused its discretion when it revoked Appellant's county-level probation and re-sentenced him to serve a sentence of incarceration in the State Correctional Institution for a minimum of one (1) to a maximum of seven (7) years with credit for time served in the County Jail for [A]ppellant's violation of probation.

Anders Brief at 3.

Appellant's claim raises a challenge to the discretionary aspects of his sentence. "Challenges to the discretionary aspects of sentencing do not entitle a petitioner to review as of right." ***Commonwealth v. Allen***, 24 A.3d 1058, 1064 (Pa.Super.2011). Before this Court can address such a discretionary challenge, an appellant must comply with the following requirements:

> An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying

> a four-part test: (1) whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, see Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

Allen, 24 A.3d at 1064. "A substantial question will be found where the defendant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the [sentencing] code or is contrary to the fundamental norms which underlie the sentencing process." ***Commonwealth v. Christine***, 78 A.3d 1, 10 (Pa.Super.2013) (internal citations omitted); ***see also*** 42 Pa.C.S. § 9781(b). "We determine whether a particular case raises a substantial question on a case-by-case basis." ***Id.*** A Rule 2119(f) statement does not raise a substantial question of law if it "simply contains incantations of statutory provisions and pronouncements of conclusions of law. . . ." ***Commonwealth v. Bullock***, 868 A.2d 516, 529 (Pa.Super.2005), *affirmed*, 913 A.2d 207 (2006) (internal citations and quotations omitted).

> Rather, only where the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process, will such a statement be deemed adequate to raise a substantial question so as to permit a grant of allowance of appeal of the discretionary aspects of the sentence.

Bullock, 868 A.2d at 529. Additionally, a bald or generic assertion that a sentence is excessive does not, by itself, raise a substantial question justifying this Court's review of the merits of the underlying claim. ***Id.***; ***see also Commonwealth v. Harvard***, 64 A.3d 690, 701 (Pa.Super.2013).

Appellant in the present case filed a timely notice of appeal, and preserved his issues in a motion for reconsideration of sentence. Appellant also included in his brief a Rule 2119(f) Statement. The statement, however, fails to raise a substantial question for our review. Appellant does not explain what specific provision of the sentencing code or fundamental norm underlying the sentencing process has been violated but, instead, merely claims the court erred in failing to consider certain mitigating factors in imposing his sentence. "[T]his Court has held on numerous occasions that a claim of inadequate consideration of mitigating factors does not raise a substantial question for review." ***Bullock***, 868 A.2d at 529 (internal citations omitted). ***See also Commonwealth v. Johnson***, 961 A.2d 877, 880 (Pa.Super.2008).

Appellant's brief's four-sentence argument makes the bald assertion that his sentence was unreasonably excessive because the new convictions were for summary offenses. ***See Anders*** Brief at 7. This similarly does not present a substantial question for review. ***See Harvard***, 64 A.3d at 701.

Even if we determined Appellant had raised a substantial question for review, Appellant's discretionary aspects of sentence claim lacks merit. This Court reviews sentencing determinations as follows:

> . . . [S]entencing is vested in the discretion of the trial court, and will not be disturbed absent a manifest abuse of that discretion. An abuse of discretion involves a sentence which was manifestly unreasonable, or which resulted from partiality, prejudice, bias or ill will. It is more than just an error in judgment.

Commonwealth v. Malovich, 903 A.2d 1247, 1252-53 (Pa.Super.2006) (citations omitted).

Our review of the sentencing transcript reveals that the court acted within its discretion. The trial court imposed a sentence that was consistent with the protection of the public, took into account the gravity of the offense as it related to the impact on the life of the victim and on the community, and considered Appellant's rehabilitative needs, as required by 42 Pa.C.S.A. § 9721(b). ***See*** N.T. 8/21/2013, p. 7.

At sentencing, the trial court initially explained it reviewed the pre-sentence investigative report, and Appellant agreed that the information contained in the report was accurate. N.T. 8/21/2013, pp. 2-3.[6] Further,

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[6] We note that, where a sentencing court had the benefit of a presentence investigation report, we assume the sentencing court was aware of relevant information contained therein and weighed that information along with any mitigating factors. ***Commonwealth v. Moury***, 992 A.2d 162, 171 (Pa.Super.2010).

the court discussed the matter with Appellant and Appellant's counsel, and listened to their mitigation arguments based on his character and the alleged poor health condition of his wife. ***Id.*** at 2-4. The court then imposed a standard range sentence. ***See Commonwealth v. Moury***, 992 A.2d 162, 171 (Pa.Super.2010) ("[W]here a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code."). We find no abuse of discretion.

Appellant's response to the ***Anders*** brief asserts: (1) the court relied improperly on charges that were subsequently withdrawn; (2) the court inappropriately disregarded the probation officer's recommended sentence; and (3) the District Attorney's Office failed to present any evidence at his probation revocation and resentencing hearing. ***See*** *Pro Se* Response to ***Anders*** Brief at 1-2.

This Court finds the first issue waived because Appellant failed to object or preserve the issue at the sentencing hearing or subsequently in his motion for reconsideration.[7] Moreover, Appellant's first and third issues are waived because they are not supported; Appellant wholly fails to make citations to the record or cite law that would merit the relief sought. ***See***

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[7] We note the court also provided Appellant and counsel ample time to review the pre-sentence investigative report that contained the alleged inaccuracies on the day of the sentencing hearing. When prompted by the court, Appellant and his counsel stated in open court "there's no additions or corrections to be made." ***See*** N.T. 8/21/2013, pp. 2-3.

Commonwealth v. Berry, 877 A.2d 479, 485 (Pa.Super.2005) ("issues that are not supported by citations to the record and to pertinent legal authority are waived").

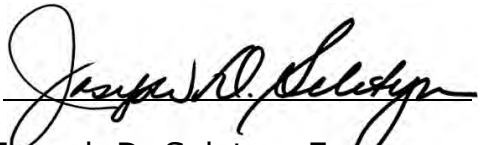
Even if Appellant's first and third arguments were not waived, they are meritless. Appellant claims the trial court relied upon withdrawn charges, although he fails to specify the particular charges. As discussed above, the trial court provided ample support for its imposition of the sentence and acted within its discretion. Additionally, while the Commonwealth did not present evidence at Appellant's resentencing hearing, the Commonwealth is not required to present evidence where a defendant has been convicted of another crime. ***See*** N.T. 8/21/2013, pp. 4-5. ***See also*** 42 Pa.C.S. § 9771(b), (c) (sentence of total confinement may be imposed upon a finding that, *inter alia*, "the defendant has been convicted of another crime"); 234 Pa. Code § 708(B), (D) (proper circumstances and procedures to resentence defendant when a violation of probation has occurred). Finally, Appellant's second issue concerns an alleged mitigating sentencing factor and, thus, the discretionary aspect of his sentence. As discussed above, this claim fails. ***See*** discussion at pages 7-9, ***supra***.

Given the foregoing, Appellant has not raised a substantial question regarding the appropriateness of his sentence. Further, even if he had raised a substantial question for review, his claim would fail on the merits. Finally, our independent review of the record has revealed no non-frivolous

claims that Appellant could have raised, and we agree with counsel that this appeal is wholly frivolous.

Judgment of sentence affirmed. Counsel's petition to withdraw is granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/17/2014