

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

BENJAMIN W. MERRING

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1819 MDA 2011

Appeal from the Judgment of Sentence August 15, 2011  
In the Court of Common Pleas of Lackawanna County  
Criminal Division at No(s): CP-35-CR-0002721-2007

BEFORE: BENDER, P.J.E., MUNDY, J., and JENKINS, J.

MEMORANDUM BY MUNDY, J.:

**FILED JUNE 02, 2014**

Appellant, Benjamin W. Merring, appeals from the August 15, 2011 judgment of sentence of time served, entered after this Court vacated the trial court's February 24, 2010 judgment of sentence as illegal and remanded for resentencing. Additionally, Appellant's counsel has filed a petition to withdraw her appearance pursuant to ***Anders v. California***, 386 U.S. 738 (1967). After careful review, we affirm the judgment of sentence and grant counsel's petition to withdraw.

This Court, in a memorandum disposing of Appellant's prior appeal, summarized the early history of this case.

On June 18, 2008, a jury found [Appellant] guilty of fleeing or attempting to elude police, 75 Pa.C.S.A. § 3733(a), driving an unregistered vehicle, 75 Pa.C.S.A. § 1301(a), driving while operator's privileges are suspended or revoked, 75 Pa.C.S.A. § 1543(a), failing to use safety belts, 75 Pa.C.S.A.

§ 4581(a)(2), and operating a vehicle without valid inspection, 75 Pa.C.S.A. § 4703(a). On September 17, 2008, the [trial] court sentenced [Appellant] on count 1, as a second-time section 3733(a) offender, to two years' intermediate punishment, consisting of three months' imprisonment to be followed by three months' house arrest and then 18 months' probation. The court ordered [Appellant] to pay fines pursuant to the remaining convictions. Additionally, the court ordered [Appellant] not to drive without a valid state driver's license.

[Appellant] filed a timely notice of appeal to this Court. The trial court ordered [Appellant] to file a Pennsylvania Rule of Appellate Procedure 1925(b) statement. The [trial] court then filed an opinion pursuant to Pa.R.A.P. 1925(a), which thoroughly disposed of the issues presented. By order dated March 30, 2009, [Appellant's] appeal was dismissed for failure to file a brief.

On October 10, 2009, [Appellant] was charged with violating the terms and conditions of his probation by: (1) failing to notify his probation officers of unfavorable contact with law enforcement within 72 hours (stemming from his citation for failing to stop his vehicle at a red light signal), (2) possessing or having access to a firearm, (3) failing to pay costs and fines relating to his criminal prosecution, and (4) operating a motor vehicle without a valid driver's license. At [Appellant's] **Gagnon II** [, **Gagnon v. Scarpelli**, 411 U.S. 778 (1973),] hearing on November 2, 2009, the [trial] court found that [Appellant] had violated his probation by driving his motor vehicle without a valid driver's license. On February 24, 2010, at [Appellant's] probation violation sentencing hearing, the court revoked his intermediate punishment and sentenced him to three months' house arrest to be followed by 21 months' imprisonment. On March 10, 2010, the court denied [Appellant's] motion for reconsideration.

**Commonwealth v. Merring**, 23 A.3d 1078, at 2-3 (unpublished memorandum) (citations and footnotes omitted).

Appellant timely appealed his February 24, 2010 revocation sentence.<sup>1</sup> His counsel filed a motion to withdraw together with an **Anders** brief. This Court determined that Appellant's first, second, and third issues were meritless, but held that Appellant's sentence was illegal based on Section 6503 of the Vehicle Code, which limited any sentence for a second or subsequent conviction for violating Section 3733 to no more than six months' imprisonment. **Merring, supra** at 18, citing 75 Pa.C.S.A. § 6503.<sup>2</sup> On January 10, 2011, a panel of this Court remanded the case to the trial court for resentencing and denied counsel's petition to withdraw. **Id.** at 19.

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<sup>1</sup> Appellant raised the following issues in that appeal.

1. Whether the lower court had jurisdiction over the Appellant[?]
2. Whether the lower court erred in finding that Appellant's private automobile is a motor vehicle, thus infringing on his fundamental right to travel[?]
3. Whether the lower court erred in imposing an illegal sentence and/or committed an abuse of discretion when it did not credit him for his incarceration time[?]
4. Whether the lower [court] abused its discretion in revoking his parole[?]

**Merring, supra** at 3-4.

<sup>2</sup> Effective September 4, 2012, the legislature amended Section 6503 to eliminate reference to convictions under 75 Pa.C.S.A. § 3733.

On August 15, 2011, Appellant appeared for resentencing represented by Dominic Mastri, Esquire. At that hearing, the trial court sentenced Appellant to time served and waived all fines and costs. On September 14, 2011, Appellant filed a *pro se* notice of appeal. As Appellant was represented by counsel, the Clerk of Judicial Records merely filed Appellant's *pro se* notice of appeal in accordance with Pennsylvania Rule of Criminal Procedure 576(A)(4).<sup>3</sup> On October 20, 2011, Assistant Public Defender, Donna DeVita, Esquire (Attorney DeVita), faxed a letter to the Lackawanna Clerk of Judicial Records, instructing her to forward Appellant's *pro se* notice of appeal to this Court.<sup>4</sup> Our Prothonotary received the notice of appeal on

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<sup>3</sup> Rule 576(A)(4) provides as follows.

(4) In any case in which a defendant is represented by an attorney, if the defendant submits for filing a written motion, notice, or document that has not been signed by the defendant's attorney, the clerk of courts shall accept it for filing, time stamp it with the date of receipt and make a docket entry reflecting the date of receipt, and place the document in the criminal case file. A copy of the time stamped document shall be forwarded to the defendant's attorney and the attorney for the Commonwealth within 10 days of receipt.

Pa.R.Crim.P. 576(A)(4). Further, Rule 576(A)(4) applies to a *pro se* notice of appeal. ***Commonwealth v. Cooper***, 27 A.3d 994, 1006 n.17 (Pa. 2011).

<sup>4</sup> The letter states as follows.

(Footnote Continued Next Page)

October 24, 2011, initially noting it as a *pro se* appeal. Attorney DeVita entered her appearance in this Court on behalf of Appellant on November 9, 2011.<sup>5</sup>

What then ensued is a protracted and convoluted procedural history occasioned by the attempt of Attorney DeVita to withdraw before the trial court and this Court without following the procedures and dictates of ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1988), or ***Anders, supra*** and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). Petition to

(Footnote Continued) \_\_\_\_\_

In a conversation with you on Wednesday, October 12, 2011, you informed me that Julie from Judge Barrasse's office had directed you to merely file [Appellant's] *pro se* Notice of Appeal. I do believe that this appeal should be forwarded on to the Superior Court for processing. Kindly do so at your earliest convenience.

Defense Counsel's Facsimile Letter to Judicial Records Office, 10/20/11, at 1.

<sup>5</sup> We have held that a criminal defendant's *pro se* actions have no legal effect while he or she remains represented by counsel. ***Commonwealth v. Hall***, 476 A.2d 7, 9-10 (Pa. Super. 1984); ***see also Commonwealth v. Nischan***, 928 A.2d 349, 355 (Pa. Super. 2007) (noting that a defendant's *pro se* filings while represented by counsel are legal nullities), *appeal denied*, 936 A.2d 40 (Pa. 2007). However, our Supreme Court has held that a *pro se* notice of appeal filed by an appellant while represented by counsel shall be considered merely premature if counsel and the trial court take appropriate actions to perfect the appeal. ***Cooper, supra*** at 1008 (Pa. 2011).

Instantly, counsel's direction to the Lackawanna County Clerk of Judicial Records to forward Appellant's *pro se* notice of appeal to this Court and her subsequent entry of appearance effectively perfected this appeal. Accordingly, we have jurisdiction to address the merits of the appeal.

Withdraw as Counsel, 11/22/11, (filed before the trial court)<sup>6</sup>, Application to Withdraw as Counsel, 1/11/12 (filed before this Court). As a result, this Court deferred further action on this appeal pending appearance of new counsel, or the trial court conducting an on-the-record **Grazier** hearing, establishing Appellant's informed decision to proceed *pro se*. *Per Curiam* Order, 2/7/12, at 1; *Per Curiam* Order, 1/4/13, at 1. In the absence of any report from the trial court of its compliance in conducting a **Grazier** hearing, this Court, on September 16, 2013, denied counsel's January 11, 2012 petition to withdraw and directed her to file a docketing statement.<sup>7</sup> *Per Curiam* Order, 9/16/13, at 1. After further delay by counsel, which was admonished by this Court, she filed a new application to withdraw together with an **Anders** brief on February 7, 2014. Appellant has not filed any response to counsel's motion to withdraw or **Anders** brief.<sup>8</sup>

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<sup>6</sup> The trial court granted counsel's petition to withdraw on January 6, 2012, without conducting a **Grazier** hearing. Appellant filed a *pro se* appeal from that order on January 20, 2012, which was docketed in this Court at 171 MDA 2012. This Court dismissed that appeal on March 12, 2012 for failure to comply with Pa.R.A.P. 3517.

<sup>7</sup> In its Rule 1925(a) opinion, the trial court recounts its efforts to comply with this Court's directive to conduct a **Grazier** hearing. From that account it is apparent that Appellant's failure to appear accounts in large part for the failure to achieve that goal and the inordinate delay in advancing this appeal.

<sup>8</sup> The trial court did not order Appellant to file a concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). The trial court filed a Rule 1925(a) opinion on October 3, 2013, apparently confusing the instant appeal with Appellant's dismissed (*Footnote Continued Next Page*)

In her **Anders** Brief, counsel raises the following five issues on Appellant's behalf.

- A. Whether the lower court had jurisdiction over the Appellant?
- B. Whether the lower court erred in finding that Appellant's private automobile is a motor vehicle, thus infringing on his fundamental right to travel?
- C. Whether the lower court violated his rights under Pa.R.Cr[im].P. 600 in the underlying criminal case?
- D. Whether "his driving record from the department of transportation was a fabrication" in an unrelated criminal matter?
- E. Whether the Appellant was denied the assistance of counsel in the underlying criminal charge?

**Anders** Brief at 4.

"When 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) (citation omitted). Additionally, we review counsel's **Anders** brief for compliance with the requirements set forth by our Supreme Court in **Santiago**.

[W]e hold that in the **Anders** brief that accompanies court-appointed counsel's petition to

(Footnote Continued) \_\_\_\_\_  
appeal at 171 MDA 2012 from the trial court's January 6, 2012 order granting counsel's motion to withdraw. Trial Court Opinion, 8/3/13.

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, supra***, at 361.

"Counsel also must provide a copy of the ***Anders*** brief to h[er] client. Attending the brief must be a letter that advises the client of his 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. Orellana***, 86 A.3d 877, 880 (Pa. Super. 2014) (internal quotation marks and citation omitted). "Once counsel has satisfied the above requirements, it is then this Court's duty to conduct its own review of the trial court's proceedings and render an independent judgment as to whether the appeal is, in fact, wholly frivolous." ***Commonwealth v. Goodwin***, 928 A.2d 287, 291 (Pa. Super. 2007) (*en banc*), quoting ***Commonwealth v. Wright***, 846 A.2d 730, 736 (Pa. Super. 2004).

Instantly we are satisfied that counsel has complied with the requirements of ***Anders*** and ***Santiago***. Counsel carefully summarized the pertinent procedural history and made appropriate references to the record.



She acknowledged her own review of the record, articulated that no issues could arguably support an appeal, and stated her conclusion that the appeal is frivolous. Further, she set forth the reasons upon which she based that conclusion. Counsel has also complied with the notification requirements described in ***Commonwealth v. Millisock***, 873 A.2d 748 (Pa. Super. 2005), and its progeny. Since receiving notice, Appellant has not filed any response. We therefore proceed with our independent review of the record and the issues presented on Appellant's behalf.

As pointed out by the Commonwealth, Appellant's *pro se* notice of appeal indicated he was appealing from the August 15, 2011 judgment of sentence, but also averred, "I further appeal all subsequent rulings, orders, determinations, etc. from the filing of the original papers in the [trial] court on January 18, 2007 continuing to the date of the sentencing order of August 15, 2011." Commonwealth's Brief at 2, *quoting* Appellant's Notice of Appeal, 9/14/11, at 1. Thus, all the issues raised by counsel in her ***Anders*** brief at Appellant's behest pertain to issues that were either disposed of by this Court in earlier appeals or could have been raised in those appeals but were not.

As recounted above however, Appellant's August 15, 2011 resentencing was at the direction of this Court's limited remand to correct an illegal sentence.

[W]here a case is remanded to resolve a limited issue, only matters related to the issue on remand

may be appealed. **Commonwealth v. Jackson**, 765 A.2d 389 (Pa. Super. 2000). In **Jackson**, this Court remanded “so that the trial court could hold a hearing to determine whether the Commonwealth acted with due diligence, as required by Pa.R.Crim.P. 1100(g).” **Id.** at 390. Upon remand, the trial court found the Commonwealth acted with due diligence. On appeal, the appellant raised three issues, the last of which challenged the trial court’s denial of the appellant’s “motion for severance of trials.” **Id.** at 391. This Court concluded that the last issue was waived, as it was unrelated to the matter on remand and had not been previously raised in the trial court. **Id.** at 395.

**Commonwealth v. Lawson**, 789 A.2d 252, 253 (Pa. Super. 2001).

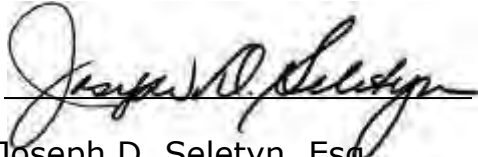
None of the **Anders** brief issues relate to the propriety of the trial court’s August 15, 2011 sentence, which is the only issue encompassed in this Court’s January 10, 2011 remand. We also note that, as Appellant had already served time on the underlying charges in excess of the maximum permitted by Section 6503 of the Vehicle Code, on remand the trial court sentenced Appellant to time served and discharged him. Accordingly, we again agree with counsel that there are no non-frivolous issues to be appealed relative to the limited issues on remand.

For the foregoing reasons, we agree with counsel that Appellant’s appeal is “wholly frivolous.” **Goodwin, supra**. Accordingly, we grant counsel’s petition to withdraw and affirm the trial court’s August 15, 2011 judgment of sentence.

Judgment of sentence affirmed. Petition to withdraw granted.

J-S30020-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 6/2/2014