

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ROBERT CLAYTON KROSTAG,	:	
	:	
Appellant	:	No. 1978 MDA 2013

Appeal from the Judgment of Sentence August 21, 2013,  
in the Court of Common Pleas of Luzerne County  
Criminal Division at No(s): CP-40-CR-0000198-2013,  
CP-40-CR-0000820-2013, CP-40-CR-0001589-2012,  
CP-40-CR-0002052-2012, CP-40-CR-0004167-2012

BEFORE: DONOHUE, WECHT, and STRASSBURGER,\* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED MAY 28, 2014**

Robert Clayton Krostag (Appellant) appeals from an August 21, 2013 judgment of sentence that followed his plea of guilty to one count each of criminal trespass, criminal mischief, and conspiracy to commit criminal trespass; and to three counts of theft by unlawful taking.<sup>1</sup> In addition, Appellant’s counsel has filed a petition to withdraw and a brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). We affirm the judgment of sentence and grant the petition to withdraw.

On May 3, 2013, Appellant entered an open plea of guilty to the above-mentioned crimes. The bulk of Appellant’s convictions stemmed from

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<sup>1</sup> 18 Pa.C.S. §§ 3503(a)(1)(ii), 3304(a)(5), 903(c), and 3921(a), respectively.

\* Retired Senior Judge assigned to the Superior Court.

his involvement in stealing hundreds of vases from gravestones. On August 21, 2013, the trial court sentenced Appellant to an aggregate term of imprisonment of six to twelve years in prison. Specifically, for his criminal trespass conviction, Appellant was sentenced to 16 to 32 months in prison. As to his criminal mischief conviction, the court sentenced Appellant to serve six to twelve months in prison. The court further sentenced Appellant to serve 14 to 28 months in prison for his conviction for conspiracy to commit criminal trespass. Regarding his convictions for theft by unlawful taking, the court sentenced Appellant to 14 to 28 months in prison at trial court docket number CP-40-CR-0002052-2012, to 16 to 32 months of imprisonment at trial court docket number CP-40-CR-0004167-2012, and to six to twelve months in prison at trial court docket number CP-40-CR-0000820-2013. The court ordered the sentences to run consecutively.

Appellant had until Tuesday, September 3, 2013 to file timely post-sentence motions. Pa.R.Crim.P. 720 (A)(1). Appellant did not file a post-sentence motion until September 6, 2013. The trial court denied that motion on September 17, 2013. Appellant filed a notice of appeal on October 16, 2013. The trial court directed Appellant to file a Pa.R.A.P. 1925(b) statement. Counsel subsequently filed a statement pursuant to Pa.R.A.P. 1925(c)(4), stating that she intended to withdraw her representation of Appellant.

We begin by determining whether we have jurisdiction to entertain this appeal. Because Appellant untimely filed his post-sentence motion, he had until September 20, 2013 to file timely a notice of appeal. Pa.R.Crim.P. 720(A)(3) (“If the defendant does not file a timely post-sentence motion, the defendant's notice of appeal shall be filed within 30 days of imposition of sentence[.]”). Because Appellant filed his notice of appeal on October 16, 2013, he untimely filed the notice, unless there was a breakdown in the processes of the court. ***Commonwealth v. Patterson***, 940 A.2d 493,498 (Pa. Super. 2007).

“The courts of this Commonwealth have held that a court breakdown occurred in instances where the trial court, at the time of sentencing, either failed to advise [a defendant] of his post-sentence and appellate rights or misadvised him.” ***Id.*** This Court also has held that a breakdown occurred when a court failed to indicate the defendant’s right to appeal and the time limits on that right in an order denying an untimely-filed post-sentence motion, and that order was filed within the period the defendant could have filed timely a notice of appeal. ***Id.*** at 499-500.

At sentencing, the trial court only asked Appellant’s counsel if he would explain Appellant’s post-sentence rights to him. N.T., 8/21/2013, at 18. Neither counsel nor the court informed Appellant, on the record, of those rights or his appellate rights. Moreover, the trial court issued an order denying Appellant’s untimely-filed post-sentence motion within the time

period in which Appellant could have filed timely a notice of appeal. That order failed to inform Appellant of his right to appeal and the time limits on that right.

Because these oversights constitute breakdowns in the court processes, we conclude that we have jurisdiction to entertain the appeal.

**Id.** at 500. In so doing, we are guided by the principles that follow.

Direct appeal counsel seeking to withdraw under **Anders** must file a petition averring that, after a conscientious examination of the record, counsel finds the appeal to be wholly frivolous. Counsel must also file an **Anders** brief setting forth issues that might arguably support the appeal along with any other issues necessary for the effective appellate presentation thereof....

**Anders** counsel must also provide a copy of the **Anders** petition and brief to the appellant, advising the appellant of the right to retain new counsel, proceed *pro se* or raise any additional points worthy of this Court's attention.

If counsel does not fulfill the aforesaid technical requirements of **Anders**, this Court will deny the petition to withdraw and remand the case with appropriate instructions (e.g., directing counsel either to comply with **Anders** or file an advocate's brief on Appellant's behalf). By contrast, if counsel's petition and brief satisfy **Anders**, we will then undertake our own review of the appeal to determine if it is wholly frivolous. If the appeal is frivolous, we will grant the withdrawal petition and affirm the judgment of sentence. However, if there are non-frivolous issues, we will deny the petition and remand for the filing of an advocate's brief.

**Commonwealth v. Wrecks**, 931 A.2d 717, 720-21 (Pa. Super. 2007)

(citations omitted).

Our Supreme Court has clarified portions of the **Anders** procedure:

Accordingly, we hold that in the **Anders** brief that accompanies court-appointed counsel's petition to 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**, 978 A.2d at 361.

We find that counsel has substantially complied with the requirements of **Anders** and **Santiago**. We, therefore, will undertake a review of the appeal to determine if it is wholly frivolous.

Counsel has included in the **Anders** brief one issue that might arguably support the appeal, namely, "Whether the consecutive sentences imposed by the trial court on August 21, 2013, are harsh and excessive?" **Anders** Brief at 2. This issue implicates the discretionary aspects of Appellant's sentence.

To reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether appellant's brief has a fatal defect; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

**Commonwealth v. Cook**, 941 A.2d 7, 11 (Pa. Super. 2007) (citations omitted).

We already have addressed the timeliness of Appellant's appeal. Regarding whether Appellant preserved this issue, he did not object to the

consecutive nature of his sentences at the sentencing hearing. He did include such a challenge in his untimely filed post-sentence motion. Specifically, Appellant sought modification of his sentence, claiming that the “sentence is excessive because all sentences were consecutive to each other and not concurrent[.]” Post-Sentence Motion, 9/6/2013.

However, “[a]n untimely post-sentence motion does not preserve issues for appeal.” **Wrecks**, 931 A.2d at 720. Because Appellant has waived his challenge to the discretionary aspects of his sentence, we agree with counsel that the appeal is wholly frivolous.<sup>2</sup>

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<sup>2</sup> Even if Appellant would have preserved his issue for appellate review, we still would not have reached the merits of it.

Generally, Pennsylvania law affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. Any challenge to the exercise of this discretion ordinarily does not raise a substantial question. In fact, this Court has recognized the imposition of consecutive, rather than concurrent, sentences may raise a substantial question in **only the most extreme circumstances**, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment. That is in our view, the key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case.

**Commonwealth v. Austin**, 66 A.3d 798, 808-09 (Pa. Super. 2013) (emphasis added) (citations and quotation marks omitted).

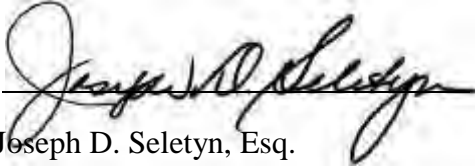
Appellant’s sentence does not represent the most extreme circumstances. His aggregate sentence of six to twelve years in prison does not appear, on its face, to be excessive given Appellant’s involvement in a

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For these reasons, we affirm the judgment of sentence and grant counsel's petition to withdraw.

Judgment of sentence affirmed. Petition to withdraw granted.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath it.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 5/28/2014

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scheme that resulted in the theft of over 500 vases from gravestones. We, therefore, would have concluded that Appellant failed to present a substantial question worthy of appellate review.