

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JAMEEL EARTHY EAST

Appellant

No. 2435 EDA 2013

Appeal from the Judgment of Sentence of June 26, 2013
In the Court of Common Pleas of Montgomery County
Criminal Division at No.: CP-46-CR-0005484-2011

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

FILED JULY 02, 2014

Jameel Earthy East (“East”) appeals his June 26, 2013 judgment of sentence. East’s counsel has filed a petition for leave to withdraw as counsel and an “**Anders/Santiago**” brief.¹ After review, we affirm the judgment of sentence and grant counsel’s petition.

The trial court has provided the following factual and procedural history:

On January 11, 2013, [East] . . . appeared before [the sentencing court] and entered an open plea of guilty to one count of third[-]degree murder¹ and one count of unsworn falsification to authorities.²

¹ 18 Pa.C.S.A. § 2502(c).

¹ **See *Anders v. California***, 386 U.S. 738, 744 (1967); ***Commonwealth v. Santiago***, 978 A.2d 349, 361 (Pa. 2009).

² 18 Pa.C.S.A. §4904(a)(1).

During the course of his guilty plea proceedings, [East] acknowledged that, on June 24, 2011, he was responsible for taking care of [E.], his three-month old son. [East] specifically admitted that, while he was supposed to be taking care of [E.], he struck [E.'s] head against a hard surface on the bathroom counter, causing injuries that resulted in [E.'s] death. [East] further admitted that he gave a statement to the police in which he first denied being responsible for [E.'s] injuries, but subsequently admitted to striking [E.'s] head against the counter. The affidavit of probable cause in support of the criminal complaint – which was incorporated into the record during [East's] guilty plea proceedings – further stated that an autopsy performed on [E.] resulted in a determination that [E.] had suffered blunt cerebral trauma with sufficient force that the child suffered two skull fractures, resulting in his death. The affidavit further stated that, in his statement to police, [East] first claimed to have accidentally struck [E.'s] head against the wall while taking the child downstairs after he had become ill, but that [East] subsequently admitted to striking [E.'s] head against the counter when he became “overwhelmed” with taking care of [E.] after the child vomited on him.

A pre-sentence investigation [(“PSI”)] was conducted, and [East] appeared before [the sentencing court] for sentencing on June 26, 2013. Following careful consideration of the PSI report, the arguments of counsel, and all of the evidence presented, [the sentencing court] imposed a standard range sentence of not less than fifteen (15) nor more than thirty (30) years['] imprisonment on [East's] sentence for third[-]degree murder. No additional sentence was imposed on [East's] conviction for unsworn falsification to authorities. [The sentencing court] stated the court's reasoning for the sentence imposed at some length on the record.

On July 5, 2013, [East] filed a timely post-sentence motion for reconsideration of sentence, in which [East] contended that, in imposing sentence, the court paid insufficient [attention] to potential mitigating factors, resulting in a sentence that was unduly harsh and excessive. Upon review of the record, [the sentencing court] denied [East's] motion by order dated July 22, 2013.

[East] filed a timely notice of appeal to [this Court] on August 20, 2013. On September 10, 2013, [the sentencing court] received a copy of [East's] statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b).

Sentencing Court Opinion ("S.C.O."), 11/20/2013, at 1-3 (citations to notes of testimony omitted).

Upon our initial review of East's appeal, we discovered that East's counsel filed an **Anders/Santiago** brief, but failed to file a petition to withdraw as counsel as counsel must to satisfy the **Anders/Santiago** requirements, which we discuss in more detail *infra*. Consequently, we remanded the case to allow East's attorney to file a petition to withdraw as counsel or to file an advocate's brief. We also allowed East forty-five days to file any response. Counsel has filed his petition and East has not filed a response, although the time period in which to do so has lapsed. Therefore, the case is now ripe for our review. We first must pass upon counsel's petition to withdraw before reviewing the merits of East's underlying issues. **Commonwealth v. Goodwin**, 928 A.2d 287, 290 (Pa. Super. 2007) (*en banc*).

Before withdrawing as counsel on a direct appeal, 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 statutes on point that have led to the conclusion that the appeal is frivolous.

Santiago, 978 A.2d at 361.

Counsel is required to provide a copy of the **Anders** brief to East. Counsel also must send East a letter that advises him 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. Nischan**, 928 A.2d 349, 353 (Pa. Super. 2007).

A review of counsel's brief demonstrates that he has complied substantially with all of **Santiago's** requirements. The brief includes a summary of the history of the case. **See Anders** Brief at 6-13. Counsel has identified the only issue that counsel believes that could be raised by East, and thoroughly has discussed why that issue is frivolous. **Id.** at 17-30. Counsel also has provided a copy of the **Anders** brief and a letter to East that advised East that he could obtain new counsel, proceed *pro se*, or raise additional issues with this Court. Letter, 4/18/2014. Counsel attached the letter to his petition to withdraw as counsel.

Based upon our review of the **Anders** brief and counsel's application to withdraw, we conclude that counsel has complied substantially with **Santiago**. Having so concluded, we now must conduct our own review of

the entire record to determine whether the case is wholly frivolous. **Santiago**, 978 A.2d at 354.

We begin with the only issue of arguable merit that East's counsel has identified: whether East's sentence was an abuse of discretion because the sentencing court failed to consider all the required factors in fashioning the sentence. **Anders** Brief at 7, 15.

East's issue implicates the discretionary aspects of sentencing.

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. Prior to reaching the merits of a discretionary sentencing issue:

[W]e conduct a four part analysis to determine: (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, 42 Pa.C.S. § 9781(b).

* * *

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. A substantial question exists only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.

Commonwealth v. Phillips, 946 A.2d 103, 112 (Pa. Super. 2008) (some citations omitted).

Instantly, East has filed a timely notice of appeal. He preserved his challenge by filing timely post-sentence motions. East's counsel included a

Rule 2119(f) statement in the **Anders** brief. Therefore, we must determine whether East has raised a substantial question.

East claims that the sentencing court focused exclusively upon the seriousness of his offense and that the court did not consider the other factors set for the in 42 Pa.C.S.A. § 9721(b). We previously have concluded that this type of claim raises a substantial question. **See Commonwealth v. Riggs**, 63 A.3d 780, 786 (Pa. Super. 2012); **Commonwealth v. Lewis**, 45 A.3d 405, 411 (Pa. Super. 2012) (holding an “allegation that the sentencing court focused exclusively on the seriousness of the crime raises at least a plausible argument that the sentencing court did not follow the requirements of section 9721”). Having determined that East has raised a substantial question, we proceed to the merits of the claim.

We review a challenge to the discretionary aspects of sentence according to the following standard:

The proper standard of review when considering whether to affirm the sentencing court’s determination is an abuse of discretion. . . . An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Moury, 992 A.2d 162, 169-70 (Pa. Super. 2010) (citation and brackets omitted; deletion in original).

“When imposing a sentence, a court is required to consider the particular circumstances of the offense and the character of the defendant.” **Commonwealth v. Griffin**, 804 A.2d 1, 10 (Pa. Super. 2002). “In particular, the court should refer to the

defendant's prior criminal record, his age, personal characteristics and his potential for rehabilitation." *Id.* Where the sentencing court had the benefit of a presentence investigation report ("PSI"), we can assume the sentencing court "was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." *Commonwealth v. Devers*, 546 A.2d 12, 18 (Pa. 1988); *see also Commonwealth v. Tirado*, 870 A.2d 362, 368 (Pa. Super. 2005) (stating if sentencing court has benefit of PSI, law expects court was aware of relevant information regarding defendant's character and weighed those considerations along with any mitigating factors).

Id. at 171 (citations modified).

In this case, the sentencing court had a PSI and explicitly considered it before crafting East's sentence. Notes of Testimony ("N.T."), 6/26/2013, at 56-57. The court also reviewed East's prior criminal, employment, social, and educational histories. The court heard and considered testimony from the psychologist who performed East's evaluation, East's character witness, and from the victim's grandmother. *Id.* at 57. The court also explicitly stated that it was considering the safety of the community and the rehabilitative needs of East. *Id.* at 58. The sentencing judge explained the reasons for imposing the particular sentence at some length. *Id.* at 58-63. It is clear that the sentencing judge considered all relevant factors and not just the seriousness of East's crime. Therefore, we agree with counsel that this claim is frivolous.

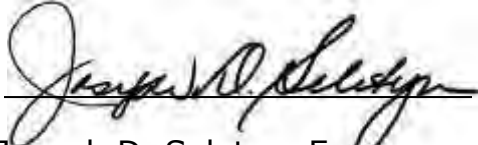
In addition to considering the issue raised by counsel, we have conducted an independent review of the case. We have found no additional non-frivolous issues that could have been raised in this direct appeal.

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Consequently, we grant counsel's petition to withdraw as counsel and we affirm the judgment of sentence.

Judgment of sentence affirmed. Petition to withdraw granted.

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: 7/2/2014