NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. PATRICK RICHARD STARK, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2750 EDA 2013

Appeal from the Order August 27, 2013
in the Court of Common Pleas of Delaware County
Criminal Division at No.: CP-23-CR-0000870-2011

BEFORE: SHOGAN, J., OTT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.: **FILED APRIL 25, 2014**

Appellant, Patrick Richard Stark, appeals from the order entered after his revocation of parole hearing in which the court revoked his parole and recommitted him to county jail to serve his full back-time. Appellant's counsel seeks to withdraw from representation pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). We affirm the court's order and grant counsel's application to withdraw.

On April 18, 2011, Appellant entered a negotiated guilty plea to one count of retail theft[1] related to his January 25, 2011 attempt to steal a

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* Retired Senior Judge assigned to the Superior Court.

power converter from an Auto Zone in Glenolden, Pennsylvania. The same day, the court sentenced Appellant to a term of incarceration of not less than six nor more than twenty-three months, and released him on parole. Appellant did not file a direct appeal. While on parole, Appellant was convicted of three separate driving under the influence (DUI) offenses.[2]

As a result, Appellant was accused of violating the terms of his parole and, on August 27, 2013, he appeared before the sentencing court for a ***Gagnon II***[3] hearing. At the hearing, Appellant stipulated to his DUI convictions and resulting parole violations. Pursuant to Appellant's parole officer's recommendation, the court revoked his parole and recommitted him to serve his full back-time of 357 days in the county jail. Appellant timely appealed.[4]

On December 4, 2013, counsel filed an application to withdraw and an ***Anders*** brief on the basis that the appeal is frivolous.

(Footnote Continued) ———————————

[1] 18 Pa.C.S.A. § 3929.

[2] 75 Pa.C.S.A. § 3802.

[3] ***See Gagnon v. Scarpelli***, 411 U.S. 778, 786 (1973).

[4] Pursuant to the sentencing court's order, Appellant's counsel informed the court that he would be filing an ***Anders*** brief. ***See*** Pa.R.A.P. 1925(c)(4). The court filed a Rule 1925(a) opinion on October 24, 2013, in which it "refrain[ed] from entering any opinion on the merits of [Appellant's] appeal." (Trial Court Opinion, 10/24/13, at 2); ***see also Commonwealth v. McBride***, 957 A.2d 752, 758 (Pa. Super. 2008) ("If counsel files a statement of intent to file an ***Anders***[] brief pursuant to Rule 1925(c)(4), a trial court opinion is not necessary[.]").

The standard of review for an ***Anders*** brief is well-settled.

> Court-appointed counsel who seek to withdraw from representing an appellant on direct appeal on the basis that the appeal is frivolous must:
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> > (1) petition the court for leave to withdraw stating that, after making a conscientious examination of the record, counsel has determined that the appeal would be frivolous; (2) file a brief referring to anything that arguably might support the appeal but which does not resemble a "no-merit" letter or *amicus curiae* brief; and (3) furnish a copy of the brief to the defendant and advise the defendant of his or her right to retain new counsel or raise any additional points that he or she deems worthy of the court's attention.
>
> [T]his Court may not review the merits of the underlying issues without first passing on the request to withdraw.

Commonwealth v. Lilley, 978 A.2d 995, 997 (Pa. Super. 2009) (citations and quotation marks omitted). Further, our Supreme Court ruled in ***Santiago***, ***supra***, that ***Anders*** briefs must contain "a discussion of counsel's reasons for believing that the client's appeal is frivolous[.]" ***Santiago***, ***supra*** at 360.

Instantly, counsel's ***Anders*** brief and application to withdraw substantially comply with the applicable technical requirements and reveal that he has made "a conscientious examination of the record [and] determined that the appeal would be frivolous[.]" ***Lilley***, ***supra*** at 997. Additionally, the record establishes that counsel served Appellant with a copy of the ***Anders*** brief and application to withdraw, and a letter of notice which advised Appellant of his right to retain new counsel or to proceed *pro*

se and raise additional issues to this Court. ***See id.***; (***see also*** Application to Withdraw as Counsel, 12/04/13, Attachment, at 1). Further, the application and brief cite "to anything that arguably might support the appeal[.]" ***Lilley***, ***supra*** at 997; (***see also Anders*** Brief, at 7-9). As noted by our Supreme Court in ***Santiago***, the fact that some of counsel's statements arguably support the frivolity of the appeal does not violate the requirements of ***Anders***. ***See Santiago***, ***supra*** at 360-61.

Having concluded that counsel's petition and brief substantially comply with the technical ***Anders*** requirements, we must "conduct [our] own review of the trial court's proceedings and render an independent judgment as to whether the appeal is, in fact, wholly frivolous." ***Lilley***, ***supra*** at 998 (citation omitted).

The ***Anders*** brief raises one question for our review: "Whether the recommitment of [Appellant] to serve his full back time of 357 days was unduly harsh and excessive under the circumstances of this case?" (***Anders*** Brief, at 3). Specifically, Appellant argues that "[t]he long-term benefits to [Appellant], and to society, would have been greater if he had been [o]rdered to undergo long-term inpatient treatment, rather than imprisonment." (***Id.*** at 8). Appellant's issue lacks merit.

> . . . [T]he purposes of a court's parole-revocation hearing—the revocation court's tasks—are to determine whether the parolee violated parole and, if so, whether parole remains a viable means of rehabilitating the defendant and deterring future antisocial conduct, or whether revocation, and thus recommitment, are in order. The Commonwealth must prove

> the violation by a preponderance of the evidence and, once it does so, the decision to revoke parole is a matter for the court's discretion. In the exercise of that discretion, a conviction for a new crime is a legally sufficient basis to revoke parole.
>
> Following parole revocation and recommitment, the proper issue on appeal is whether the revocation court erred, as a matter of law, in deciding to revoke parole and, therefore, to recommit the defendant to confinement. Accordingly, an appeal of a parole revocation is not an appeal of the discretionary aspects of sentence.
>
> As such, a defendant appealing recommitment cannot contend, for example, that the sentence is harsh and excessive. Such a claim might implicate discretionary sentencing but it is improper in a parole-revocation appeal. Similarly, it is inappropriate for a parole-revocation appellant to challenge the sentence by arguing that the court failed to consider mitigating factors . . . . Challenges of those types again implicate the discretionary aspects of the underlying sentence, not the legal propriety of revoking parole.

Commonwealth v. Kalichak, 943 A.2d 285, 290-91 (Pa. Super. 2008) (citations omitted).

Here, at the ***Gagnon II*** hearing, Appellant admitted that his three DUI convictions violated his parole. (***See*** N.T. Hearing, 8/27/13, at 3, 5, 18; ***see also Gagnon II*** Hearing Report, 8/21/13, at unnumbered page 1). His parole officer recommended that the sentencing court find that Appellant violated his parole and recommit him to serve his full back-time of 357 days in a county institution. (***See*** N.T. Hearing, 8/27/13, at 3-4; ***Gagnon II*** Hearing Report, 8/21/13, at unnumbered page 2).

The sentencing court revoked Appellant's parole due to the DUI convictions, and found that his continued drinking and driving created a "life

or death" situation "for people out on the street." (N.T. Hearing, 8/27/13, at 16; ***see also id.*** at 26). In an attempt to address Appellant's treatment needs, the sentencing court ordered that he undergo a drug and alcohol evaluation to establish a treatment plan. (***See id.*** at 21-25). The court noted that it would consider an early parole petition at a future time in an effort to accommodate Appellant's need for treatment. (***See id.*** at 26-27).

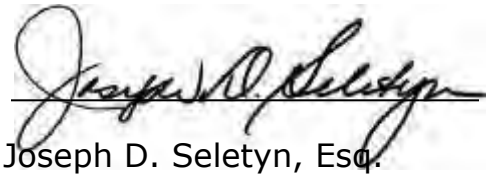
Based on the foregoing, we conclude that the sentencing court did not err in finding that Appellant's DUI convictions violated his parole, or abuse its discretion in finding that parole no longer a remains a "viable means of rehabilitating [Appellant] and deterring future antisocial conduct[.]" ***Kalichak***, ***supra*** at 290; ***see id.*** at 290-91.

Therefore, based on our own independent review of the record, we conclude that Appellant's claim is "wholly frivolous" and would not merit relief. ***Lilley***, ***supra*** at 998; ***see also Kalichak***, ***supra*** at 290-91. Additionally, we find no other non-frivolous issues.

Order affirmed. Counsel's application to withdraw granted.

Shogan, J., concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/25/2014