

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

GERRON ROZIER

Appellant

No. 291 EDA 2013

Appeal from the Judgment of Sentence January 24, 2011  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0009053-2007

BEFORE: GANTMAN, P.J., JENKINS, J., and FITZGERALD, J.\*

MEMORANDUM BY JENKINS, J.:

**FILED JULY 17, 2014**

Appellant Gerron Rozier appeals from a January 24, 2011 judgment of sentence entered in the Philadelphia County Court of Common Pleas following the revocation of his probation on an underlying conviction for possession of a controlled substance with intent to deliver.<sup>1</sup> Appellant's counsel has filed an **Anders**<sup>2</sup> 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.

<sup>1</sup> 35 P.S. § 780-113(a)(30).

<sup>2</sup> **Anders v. California**, 386 U.S. 738 (1967).

The trial court aptly set forth the facts and procedural history of this case as follows:

On December 20, 2007, [Appellant] entered a guilty plea to a charge of possession of a controlled substance (crack cocaine) with intent to deliver in violation of 35 P.S. § 780-113[(a)(30)] and was sentenced to 8 to 23 months in prison followed by two years probation.

On October 5, 2010, this [c]ourt found [Appellant] in technical violation of his probation for serious technical noncompliance with its terms and revoked his probation.

On January 7, 2011, the [c]ourt revoked his sentence for failure to give a proper address and re-sentenced him to 11½ to 23 months in prison with immediate parole and 3 years on probation.

On January 24, 201[1], Tiffany Chavous, Adult Probation and Parole, testified that once [Appellant] was released from county jail on immediate parole on January 7<sup>th</sup>, he failed to immediately report. Instead, he waited five days, and on January 12, 2011, [Appellant] appeared at Ms. Chavous['] office. At this time, [Appellant] was instructed to submit to a urine [test], but he refused stating that he wasn't doing it because he was smoking in jail, in custody. According to Ms. Chavous, [Appellant] had an attitude, used profanity at her, and stated that she was not his probation officer and that he lived in another area. [Appellant] further testified that he did not submit to the urine test because, "I didn't have the urine. I didn't have to go."

The [c]ourt found that this [Appellant] had not been compliant, had a poor attitude, and refused to submit to the required urine test. This [c]ourt further found that [Appellant] had a history of noncompliance and defiance of any sort of supervision or authority going back to his time on parole in 2007. The [c]ourt also noted that [Appellant] committed misconduct over at the County Prison back in 2007.

...

On [January 24, 2011], the [c]ourt re-sentenced [Appellant], imposing a new sentence of 1½ to 4 years in state prison followed by 1 year on reporting probation.

On February 7, 2011, [Appellant] untimely filed a post-sentence motion for reconsideration of sentence. See Pa.R.Crim.R. [708(E)] (allowing 10 days for filing of a post-sentence motion following imposition of sentence [following probation or parole revocation]).

[Appellant] then sought the reinstatement of his right to direct appeal, alleging ineffectiveness of counsel and government obstruction.

On January 17, 2013, an Order was issued granting the reinstatement of [Appellant's] appellate rights nunc pro tunc to the Superior Court.

This appeal followed.

Trial Court Pa.R.A.P. 1925(a) Opinion, December 13, 2013 ("Trial Court Opinion") at 1-3 (internal record citations and quotations omitted).

Appellant's counsel filed a statement pursuant to Pa.R.A.P. 1925(c) indicating counsel intended to file an **Anders** brief. The trial court filed its Pa.R.A.P. 1925(a) opinion on December 13, 2013.

As previously noted, Appellant's counsel has filed an application seeking to withdraw from representation pursuant to **Anders v. California** and its Pennsylvania counterpart, **Commonwealth v. Santiago**.<sup>3</sup> Before addressing the merits of Appellant's underlying issue presented, we must first pass on counsel's petition to withdraw. **Commonwealth v. Goodwin**, 928 A.2d 287, 290 (Pa.Super.2007) (*en banc*).

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<sup>3</sup> 978 A.2d 349 (Pa.2009).

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 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, together with a letter that advises 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).

Instantly, counsel filed a motion to withdraw as counsel. The motion states counsel engaged in an extensive review of the record and the law in this matter, and determined there were no non-frivolous issues to be raised

on appeal. The petition explains that counsel notified Appellant of the withdrawal request, supplied him with a copy of the **Anders** brief, and sent Appellant 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 15, 2014, attached as Appendix to the Motion to Withdraw as Counsel. 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**.

As Appellant filed neither a *pro se* brief nor a counseled brief with new, privately-retained counsel, we review this appeal based on the issues of arguable merit raised in the **Anders** brief:

1. The [c]ourt erred in finding that Appellant violated his probation in the circumstances surrounding Appellant's failure to comply with urinalysis and his domestic abuse arrest.
2. The [c]ourt's resentencing sentence on January 24, 2011, constituted an abuse of discretion.

**Anders** Brief at 9, 10.

Initially, Appellant alleges the trial court erred in concluding he had violated his probation based solely on his technical violations. **See** Appellant's Brief, p. 9. He is incorrect.

Our review of this issue is governed by the following standard:

The Commonwealth establishes a probation violation meriting revocation when it shows, by a preponderance of the evidence, that the probationer's conduct violated the terms and conditions of his probation, and that probation has proven an ineffective rehabilitation tool incapable of deterring the probationer from future antisocial conduct.

***Commonwealth v. A.R.***, 990 A.2d 1, 4 (Pa.Super.2010) (brackets removed).

Here, the record reveals that Appellant waited five days after his release from custody to report to Adult Probation and Parole, and that he refused to submit to a urinalysis once he did report. N.T. 1/24/2011, pp. 4-5. Further, Appellant conceded that these technical violations occurred. ***Id.*** at 8-10; Appellant's Brief at 9. Although these violations were not independently criminal, "technical violations are sufficient to trigger the revocation of probation." ***Commonwealth v. Sierra***, 752 A.2d 910, 912 (Pa.Super.2000). Accordingly, Appellant's first issue lacks merit.

Appellant's second claim raises a challenge to the discretionary aspects of the Appellant's sentence. ***See*** Appellant's Brief, pp. 10-11. "An appellant wishing to appeal the discretionary aspects of a probation-revocation sentence has no absolute right to do so but, rather, must petition this Court for permission to do so." ***Commonwealth v. Kalichak***, 943 A.2d 285, 289 (Pa.Super.2008). As this Court has explained:

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, 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, Pa.R.Crim.P. [708]; (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)].

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

Appellant in the present case filed a timely notice of appeal, and preserved the issue by requesting reconsideration in open court at sentencing. **See** N.T. 1/24/2011, pp. 22-23. While Appellant's brief does not include a concise statement of the reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f), the Commonwealth did not object.

***Commonwealth v. Kiesel***, 854 A.2d 530, 533 (Pa.Super.2004) ("[W]hen [an] appellant has not included a Rule 2119(f) statement and the appellee has not objected, this Court may ignore the omission and determine if there is a substantial question that the sentence imposed was not appropriate, or enforce the requirements of 2119(f) *sua sponte*, i.e., deny allowance of appeal."). Accordingly, we now determine whether Appellant has raised a substantial question for review and, if so, proceed to a discussion of the merits of the claim. Pa.R.A.P. 2119(f); ***Commonwealth v. Tuladziecki***, 522 A.2d 17 (Pa.1987).

"The determination of whether a particular case raises a substantial question is to be evaluated on a case-by-case basis. Generally, however, in order to establish that there is a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code

or contrary to the fundamental norms underlying the sentencing process.” ***Commonwealth v. Marts***, 889 A.2d 608, 612 (Pa.Super.2005) (internal citations omitted). On appeal from a probation revocation proceeding, this Court has previously determined a substantial question is presented when a sentence of total confinement, in excess of the original sentence, is imposed as a result of a technical violation of probation. ***See Commonwealth v. Sierra***, 752 A.2d 910, 913 (Pa.Super. 2000). Therefore, we examine Appellant’s claim.

“Revocation of a probation sentence is a matter committed to the sound discretion of the trial court and that court’s decision will not be disturbed on appeal in the absence of an error of law or an abuse of discretion.” ***Commonwealth v. Ahmad***, 961 A.2d 884, 888 (Pa.Super.2008). “The Commonwealth establishes a probation violation meriting revocation when it shows, by a preponderance of the evidence, that the probationer’s conduct violated the terms and conditions of his probation, and that probation has proven an ineffective rehabilitation tool incapable of deterring probationer from future antisocial conduct.” ***Id.*** “[I]t is only when it becomes apparent that the probationary order is not serving this desired end [of rehabilitation] the court’s discretion to impose a more appropriate sanction should not be fettered.” ***Id.*** at 888-89.

“Upon revocation the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing[.]” 42 Pa.C.S. § 9771(b). “Thus, if the original offense was punishable by total



confinement, such a penalty is available to a revocation court, subject to the limitation that the court shall not impose total confinement unless it finds that: (1) the defendant has been convicted of another crime; (2) the defendant's conduct indicates a likelihood of future offenses; or (3) such a sentence is necessary to vindicate the court's authority." **Kalichak**, 943 A.2d at 289. "Sentencing Guidelines do not apply to sentences imposed following a revocation of probation." **Commonwealth v. Ferguson**, 893 A.2d 735, 739 (Pa.Super.2006) (citation omitted). Instead, pursuant to 42 Pa.C.S. § 9721(b), the sentencing court must consider the protection of the public, the gravity of the offense in relation to the impact on the victim and the community, and the rehabilitative needs of the defendant. **Id.**

Here, the trial court conducted a probation revocation hearing and re-sentenced Appellant on January 24, 2011. The court explained the sentence imposed as follows:

In this case, at the Gagnon II hearing on January 24, 2011, this [c]ourt found that [Appellant] had not been compliant, had a poor attitude, and refused to submit to the required urine test. This [c]ourt further found that [Appellant] had a history of noncompliance and defiance of any sort of supervision or authority going back to his time on parole in 2007. The [c]ourt noted that [Appellant] committed misconduct over at the County Prison back in 2007. Moreover, on October 5, 2010, this [c]ourt found [Appellant] in technical violation of his probation for repeated noncompliance with its terms and on January 7, 2011, re-sentenced [Appellant] to 11½ to 23 months in [c]ounty jail with immediate parole followed by 3 years probation. It was not long after [Appellant] was sentenced and paroled, that he again violated the conditions of his parole.

Thus, the sentence in this second technical violation comes after a long history of [Appellant's] defiance of this [c]ourt. The

new sentence of 1½ to 4 years in state prison followed by 1 year on reporting probation was essential to vindicate the authority of court and was within the [c]ourt's discretion pursuant to 42 Pa.C.S.A. § 9771(c).

1925(a) Opinion, pp. 7-8 (record citations omitted).

Based on the foregoing, we discern no abuse of discretion or trial court error in revoking Appellant's probation and sentencing him to a term of total confinement. Appellant clearly violated the terms of his street supervision<sup>4</sup>

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<sup>4</sup> A review of the violation of probation hearing transcript reveals that the court actually released Appellant to parole with a consecutive probationary sentence on January 7, 2011:

**[APPELLANT]:** So I just got a whole new sentence?

**THE COURT:** You've got a whole new sentence of which the sentence is 11 and a half to 23 months, credit for time served, immediate parole, plus reentry eligibility, plus three years probation.

So, really, what you have for me now going forward, so we all understand each other, is about four years of supervision.

Okay. You may give your client his appellate rights.

**[DEFENSE COUNSEL]:** [Appellant], you've just been sentenced by the Honorable Rami Djerassi. Your probation was previously revoked. Now you have been sentenced on that revocation.

Your sentence is 11 and a half to 23 months with credit for all the time you've been in with immediate parole. You should be released today to be followed by three years probation.

That means essentially you have something less than a year of parole to walk off.

**[APPELLANT]:** Parole running concurrent with the probation after I get out?

*(Footnote Continued Next Page)*

by failing to cooperate with Adult Probation and Parole's requests and/or submit to chemical testing. The Commonwealth proved, and the trial court held, that the defendant was not amenable to street supervision as a rehabilitative tool.

Moreover, after independent review, we agree with counsel that Appellant's discretionary aspects of sentence claim is wholly frivolous.

If this Court grants appeal and reviews the sentence, the standard of review is well-settled: sentencing 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.

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

**THE COURT:** No. you're going to be on parole for the first – anything more – if you've served more than 11 and a half months, let's say you've served 13 months, then it would be another 7 and 3 – 10 months on parole and then the probation.

N.T. 1/7/2011, pp. 11-13. Normally, the only sentencing option available upon revocation of parole is recommitment to serve the balance of the initially-imposed term of incarceration. **See Commonwealth v. Kalichak**, 943 A.2d 285, 290 (Pa.Super.2008). However, a court may revoke both a defendant's parole and probation at the same time, even before the defendant has begun to serve the probationary period of the sentence. **See Commonwealth v. Ware**, 737 A.2d 251, 253-254 (Pa.Super.1999). When resentencing a defendant in such a situation, like a straight probation violation resentencing, the court has the same sentencing options that existed at the time of the original sentencing. **See id.** at 254.

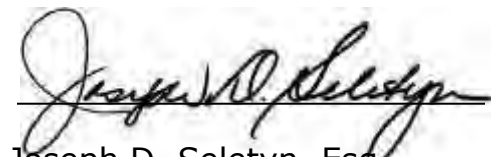
***Commonwealth v. Malovich***, 903 A.2d 1247, 1252-53 (Pa.Super.2006)  
(citations omitted).

Our review of the sentencing transcript reveals that the lower court did not abuse its discretion. Instead, 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 the Appellant's rehabilitative history and future needs, as required by 42 Pa.C.S. § 9721(b).

Given the foregoing, Appellant's claim that the trial court erred in determining he violated his probation fails on the record. Further, his claim regarding the discretionary aspects of the sentence 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. Accordingly, we affirm the judgment of sentence.

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

Judgment Entered.

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

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 7/17/2014