

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DANA SLEGEL,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3038 EDA 2013

Appeal from the Judgment of Sentence September 11, 2013
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0002398-2013

BEFORE: FORD ELLIOTT, P.J.E., BOWES, and SHOGAN, JJ.

MEMORANDUM BY BOWES, J.:

FILED JUNE 24, 2014

Dana Slegel appeals from the judgment of sentence of one to four years incarceration imposed by the trial court after Appellant pled guilty to theft and resisting arrest. Counsel has filed a petition to withdraw from representation and a brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). We grant counsel's petition to withdraw and affirm.

The trial court accurately conveyed the facts and procedural background as follows.

[A]ppellant, who had been released from a state prison in New Jersey approximately one week earlier, admitted to stealing a vehicle in Springfield, New Jersey and parking it in Bethlehem, Pennsylvania. He was arrested after police surveillance located the stolen vehicle, and observed the [A]ppellant entering it. As officers approached, the [A]ppellant attempted to abscond, which then led to a skirmish resulting in his arrest.

The terms of the plea agreement required the charges to run concurrently and that the minimum sentence would not exceed fifteen (15) months. The Commonwealth had no objection to the [A]ppellant's placement in TCAP (Treatment Continuum Alternative Project), a drug treatment program. The TCAP program was not a binding part of the plea agreement, and the [A]ppellant was so informed during the guilty plea colloquy.

On September 11, 2013, after receipt and review of the presentence report, the [A]ppellant was sentenced to not less than twelve (12) months and not more than forty-eight (48) months in a state correctional institution for the charge of [t]heft. A concurrent sentence of four and one-half (4 ½) months to twenty-four (24) months in a state correctional institution was imposed on the charge of [r]esisting [a]rrest. Both sentences were at the midpoint of the standard range of the Sentencing Guidelines. The [A]ppellant was ineligible for the TCAP program, but this Court recommended that the [A]ppellant be placed in a state correctional institution that could address both his substance abuse and mental health issues.

A '[m]otion [t]o [r]econsideration (sic) [o]f [s]entence' (hereinafter [m]otion) was filed on September 20, 2013. It was alleged that in light of [A]ppellant's need for 'long term inpatient treatment', he could best be treated under 'supervision by Lehigh County'. It was also alleged that this Court failed to consider that at the time of the crime the [A]ppellant was 'homeless and trying to return to Allentown upon release from prison in New Jersey'. The [m]otion was denied on September 30, 2013.

A [n]otice of [a]ppeal was filed on October 29, 2013, and this Court direct the filing of a [c]oncise [s]tatement pursuant to Pa.R.A.P. § [sic] 1925(b). The [A]ppellant did so on November 7, 2013[,] wherein it is alleged that this Court 'erred in imposing a manifestly excessive sentence by failing to consider the Defendant's need for drug treatment and failing to give appropriate reasons to deny the Defendant's request for treatment in the County Prison.'

Trial Court Opinion, 12/5/13, 1-3 (footnotes omitted).

Appellant's counsel now files a petition to withdraw and an accompanying **Anders** brief, contending that there are no non-frivolous issues to be reviewed. In the **Anders** brief, counsel sets forth the following two issues.

- A. Whether the sentencing court imposed a manifestly excessive sentence both as to the length of sentence and the imposition the sentence to be served in a state correctional institution rather than the Lehigh County prison?
- B. May appointed counsel be permitted to withdraw after a conscientious review of the issue presented and the facts in this case [provide] reason to believe that the issue presented [is] frivolous and without merit and that, pursuant to the **Anders** case, he should be permitted to withdraw?

Anders brief at 7.

As we do not address the merits of issues raised on appeal without first reviewing a request to withdraw, we review counsel's petition to withdraw at the outset. **Commonwealth v. Cartrette**, 83 A.3d 1030 (Pa.Super. 2013) (*en banc*). The procedural requirements for withdrawal require counsel to: 1) petition for leave to withdraw and state that, after making a conscientious examination of the record, counsel has concluded that the appeal is frivolous; 2) provide a copy of the **Anders** brief to the defendant; and 3) inform the defendant that he has the right to retain private counsel or raise, *pro se*, additional arguments that the defendant deems worthy of the court's attention. **Id.**

Counsel's petition to withdraw provides that he made a conscientious review of the record and concluded that there are no non-frivolous issues. Counsel notified Appellant that he was withdrawing and furnished Appellant with copies of both the petition to withdraw and **Anders** brief. Additionally, counsel informed Appellant of his right to retain new counsel or proceed *pro se* to raise any issues he believes this Court should consider. Thus, counsel has satisfied the procedural requirements of **Anders**.

Counsel having complied with the procedural dictates of **Anders**, we next consider whether counsel's **Anders** brief meets the substantive requirements of **Santiago**. Under **Santiago**, an **Anders** 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, supra at 361.

Counsel provided a history of the facts and procedural background of this case. He also discusses his reasons for determining that Appellant's appeal is frivolous, and provides case law indicating why he has concluded that the appeal is wholly frivolous. Hence, counsel has complied with the requirements of **Anders/Santiago**.

After our own independent review of the record and governing law, we find that there are no preserved non-frivolous issues that exist. Appellant's

merit-based issue presents a question pertaining to the discretionary aspects of his sentence. Discretionary sentencing claims generally must be preserved at sentencing or in a timely post-sentence motion. ***Commonwealth v. Kittrell***, 19 A.3d 532, 538 (Pa.Super. 2011). Appellant did present his discretionary sentencing challenge in his timely post-sentence motion.

In addition to adequately preserving the issue prior to an appeal, an appellant is required to raise the issue in a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal and in a Pa.R.A.P. 2119(f) statement in the appellant's brief. ***Commonwealth v. Naranjo***, 53 A.3d 66, 72 (Pa.Super. 2012). Appellant complied with both of these mandates. Thus, we next determine if Appellant has raised a substantial question for this Court's review. ***Commonwealth v. Crump***, 995 A.2d 1280, 1282 (Pa.Super. 2010); 42 Pa.C.S. § 9781(b). In doing so, "we look to whether the appellant has forwarded a plausible argument that the sentence, when it is within the guideline ranges, is clearly unreasonable. Concomitantly, the substantial question determination does not require the court to decide the merits of whether the sentence is clearly unreasonable." ***Commonwealth v. Dodge***, 77 A.3d 1263, 1270 (Pa.Super. 2013).

In ***Dodge, supra***, we noted the seeming discord among our precedent for determining whether a discretionary sentencing issue presents a substantial question. Therein, we collected cases finding that the failure to

adequately consider various sentencing factors, including mitigating circumstances did not raise a substantial question. **Dodge, supra** at 1272 n.8. However, the panel contrasted those cases with decisions that determined that an allegation that the court did not consider mitigating factors and that the sentence was excessive did raise a substantial question for this Court's review. **Id.**

As Appellant's position leveled below has been construed as raising a substantial question for purposes of this Court's review in some instances, **see Dodge, supra** (collecting cases), we consider the merits of his claim. Here, Appellant's claim that his sentence was excessive and that the court did not consider his need for rehabilitation and therapy is without any support in the record. First, Appellant's sentence fell well within the sentencing guidelines based on his prior record score, which was a five. Further, the sentencing court is presumed to have considered and weighed the appropriate factors where it reviews a presentence report. **Commonwealth v. Fowler**, 893 A.2d 758, 766 (Pa.Super. 2006). In addition, the sentencing court discussed at length Appellant's criminal history, his drug addictions, and need for rehabilitation. Accordingly, Appellant's sentence was not clearly unreasonable.

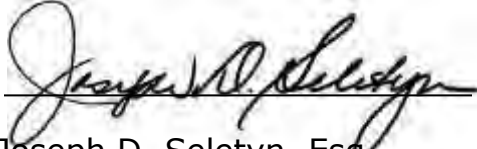
As our review of the record reveals that there are no other preserved issues that could present a non-frivolous claim, and Appellant's discretionary sentencing claim is frivolous, we affirm.

J-S38024-14

Judgment of sentence affirmed. Petition to Withdraw by Michael E. Brunnabend, Esq., is granted.

Judge Shogan Concurrs in the Result.

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: 6/24/2014