NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
DERWIN B. RIDLEY,	:	
	:	
Appellant	:	No. 3133 EDA 2013

Appeal from the Judgment of Sentence October 11, 2013
In the Court of Common Pleas of Montgomery County
Criminal Division No(s).: CP-46-CR-0007594-2011

BEFORE: BENDER, P.J.E., SHOGAN, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JULY 17, 2014**

Appellant, Derwin B. Ridley, appeals from the judgment of sentence entered in the Montgomery County Court of Common Pleas following the revocation of his probation. Appellant's counsel has filed a petition to withdraw pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009), with this Court. We grant counsel's petition and affirm the judgment of sentence.

The facts are unnecessary to our disposition. On May 1, 2012, Appellant entered a negotiated guilty plea in exchange for eleven-and-a-half to twenty-three months' imprisonment followed by four years' probation.

* Former Justice specially assigned to the Superior Court.

Appellant was released on parole, and on April 8, 2013, was arrested and charged with firearm violations. The court held a ***Gagnon II***[1] hearing on August 2, 2013, at which the court held Appellant violated his parole and probation.

On October 11, 2013, the court sentenced Appellant to serve the balance his backtime, revoked Appellant's probation, and imposed a two-and-a-half to five year sentence of imprisonment consecutive to his backtime. On October 18, 2013, Appellant filed a post-sentence motion pursuant to Pa.R.Crim.P. 708(D). Appellant's motion claimed the trial court abused its discretion by imposing an excessive sentence for three reasons: (1) it was Appellant's first violation; (2) he was not yet convicted of the firearms offense leading to the violation; and (3) he already served six months in prison. ***See*** Appellant's Post-Sentence Mot. to Modify Sentence Pursuant to R. Crim. Proc. 708(D), 10/18/13, at 1-2. The court denied Appellant's post-sentence motion on October 22, 2013. Appellant timely appealed and timely filed a court-ordered Pa.R.A.P. 1925(b) statement.

On February 24, 2014, Appellant's counsel filed a petition to withdraw with this Court. Appellant did not file a *pro se* brief with this Court.[2] "[T]his Court may not review the merits of the underlying issues without first

[1] ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973).

[2] The Commonwealth advised this Court that it would not file a brief.

passing on the request to withdraw." ***Commonwealth v. Garang***, 9 A.3d 237, 240 (Pa. Super. 2010) (citation omitted).

> [T]he three requirements that counsel must meet before he or she is permitted to withdraw from representation [are] as follows:
>
> > First, counsel must petition the court for leave to withdraw and state that after making a conscientious examination of the record, he has determined that the appeal is frivolous; second, he must file a brief referring to any issues in the record of arguable merit; and third, he must furnish a copy of the brief to the defendant and advise him of his right to retain new counsel or to himself raise any additional points he deems worthy of the Superior Court's attention.

Id. (citations omitted).

> [I]n 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.

> [I]n Pennsylvania, when counsel meets his or her obligations, "it then becomes the responsibility of the reviewing court to make a full examination of the proceedings and make an independent judgment to decide whether the appeal is in fact wholly frivolous."

Id. at 355 n.5 (citation omitted).

Instantly, in counsel's ***Anders*** brief, he stated that he made a conscientious examination of the record. He summarized the factual and

procedural history with citations to the record. He referred to every issue and everything in the record that he believes arguably supports the appeal. He articulated the facts from the record, case law, and statutes that led him to conclude that the appeal is frivolous. He furnished a copy of the brief to Appellant. He also advised him of his right to retain new counsel or to himself raise any additional points *pro se* that he deems worthy of the Court's consideration. We find that Appellant's counsel has complied with all the requirements set forth above. ***See id.*** at 361; ***Garang***, 9 A.3d at 240. Therefore, we now review the underlying issues on appeal. ***See Santiago***, 978 A.2d at 355 n.5.

The ***Anders*** brief raises the following issues:

> Did the violation of probation court violate Appellant's rights and exercise jurisdiction that it did not possess when it proceeded to revoke Appellant's parole and probation on the basis of conduct leading to new criminal charges on which Appellant has not yet been tried.
>
> Can a trial court revoke probation on the basis of conduct that occurred after an order of probation has been imposed but before the term of probation has commenced?
>
> Is the sentence imposed by the VOP court with respect to Appellant's parole and probation violations harsh and excessive under the circumstances?

Anders Brief at 5.[3]

[3] Appellant has not filed a *pro se* response.

"[T]he scope of review in an appeal following a sentence imposed after probation revocation is limited to the validity of the revocation proceedings and the legality of the sentence imposed following revocation." ***Commonwealth v. Infante***, 888 A.2d 783, 790 (Pa. 2005). "[I]t is now accepted that it is within our scope of review to consider challenges to the discretionary aspects of an appellant's sentence in an appeal following a revocation of probation." ***Commonwealth v. Ferguson***, 893 A.2d 735, 737 (Pa. Super. 2006).

> [T]he reason for revocation of probation need not necessarily be the commission of or conviction for subsequent criminal conduct. Rather, this Court has repeatedly acknowledged the very broad standard that sentencing courts must use in determining whether probation has been violated:
>
> > A probation violation is established whenever it is shown that the conduct of the probationer indicates the probation has proven to have been an ineffective vehicle to accomplish rehabilitation and not sufficient to deter against future antisocial conduct.
>
> Furthermore, when the basis for revocation arises from the advent of intervening criminal conduct, a VOP hearing may be held prior to any trial arising from such criminal conduct.

Infante, 888 A.2d at 791 (citations omitted). Further:

> If, at any time before the defendant has completed the maximum period of probation, **or before he has begun service of his probation**, he should commit offenses of such nature as to demonstrate to the court that he is unworthy of probation and that the granting of the same would not be in subservience to the ends of justice and the best interests of the public, or the defendant, the court could revoke or change the order of probation.

Commonwealth v. Allshouse, 33 A.3d 31, 39 (Pa. Super. 2011) (quoting ***Commonwealth v. Wendowski***, 420 A.2d 628, 630 (Pa. Super. 1980)).

Instantly, with respect to the first two issues in the ***Anders*** brief, our Supreme Court has opined that the trial court may hold a violation of probation hearing prior to any disposition of any criminal charges. ***See Infante***, 888 A.2d at 791. Further, probation may be revoked prior to the commencement of probation. ***See Allshouse***, 33 A.3d at 39. Thus, we agree with Appellant's counsel that Appellant's first two issues lack merit.

We briefly summarize the ***Anders*** argument in support of the last issue. Appellant suggests the court erred by imposing his two-and-a-half year sentence consecutive to his backtime. He opines that a sentence of total confinement is unsupported by the record. We hold Appellant is not entitled to relief.

This Court has stated that

> [c]hallenges to the discretionary aspects of sentencing do not entitle an appellant to appellate review as of right. Prior to reaching 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, ***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.A. § 9781(b).
>
> Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or raised in a motion to modify the sentence imposed at that hearing.

Commonwealth v. Evans, 901 A.2d 528, 533-34 (Pa. Super. 2006) (some citations and punctuation omitted); ***see also Ferguson***, 893 A.2d at 737.

> [T]he Rule 2119(f) statement must specify where the sentence falls in relation to the sentencing guidelines and what particular provision of the Code is violated (*e.g.*, the sentence is outside the guidelines and the court did not offer any reasons either on the record or in writing, or double-counted factors already considered). Similarly, the Rule 2119(f) statement must specify what fundamental norm the sentence violates and the manner in which it violates that norm (*e.g.*, the sentence is unreasonable or the result of prejudice because it is 500 percent greater than the extreme end of the aggravated range.).

Commonwealth v. Googins, 748 A.2d 721, 727 (Pa. Super. 2000) (*en banc*). "Our inquiry must focus on the **reasons** for which the appeal is sought, in contrast to the **facts** underlying the appeal, which are necessary only to decide the appeal on the merits." ***Id.***

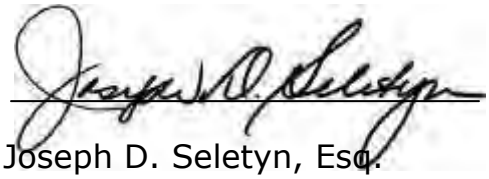
Instantly, Appellant timely appealed and included a Pa.R.A.P. 2119(f) statement in his brief. ***See Evans***, 901 A.2d at 533. Appellant, however, in his post-sentence motion did not raise the arguments he now seeks to raise for the first time on appeal. Appellant did not claim the court erred by not supporting a sentence of total confinement and by making that sentence consecutive to his backtime. ***See*** Appellant's Post-Sentence Mot. to Modify

Sentence Pursuant to R. Crim. Proc. 708(D) at 1-2. Because Appellant did not preserve the claims raised in the ***Anders*** brief, we need not resolve the substantive merits. ***See Evans***, 901 A.2d at 533-34. Our independent review of the record reveals no other issue of arguable merit. ***See Santiago***, 978 A.2d at 355 n.5. Accordingly, we conclude that the appeal is frivolous and grant counsel's petition for leave to withdraw.

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

Shogan, J. concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/17/2014