NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. LUIS ADALBERTO RIVERA Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3576 EDA 2013

Appeal from the Judgment of Sentence entered November 21, 2013
In the Court of Common Pleas of Lehigh County
Criminal Division at No: CP-39-CR-0003453-2012

BEFORE: FORD ELLIOTT, P.J.E., OLSON, and STABILE, JJ.

MEMORANDUM BY STABILE, J.: **FILED JULY 01, 2014**

Appellant, Luis Adalberto Rivera, appeals from the judgment of sentence entered for his violations of probation and parole (VOP). Appellant's counsel, Robert Long, Esq., has filed an ***Anders***/***Santiago***[1] brief and petitioned for leave to withdraw as counsel. We affirm and grant the petition to withdraw.

In 2012, Appellant pled guilty to possessing a prohibited offensive weapon, a loaded sawed-off shotgun.[2] Trial Court 1925(a) Opinion, 2/4/14, at 1-2. On September 13, 2012, the trial court sentenced Appellant to time served to 18 months followed by two years' probation. ***Id.*** Less than two

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[1] ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009).

[2] 18 Pa.C.S.A. § 908(a).

weeks after his release from prison, Appellant was arrested for discharging a firearm into a vehicle occupied by two adults and an infant. ***Id.*** Appellant pled guilty to aggravated assault graded as a second-degree felony. ***Id.*** On November 19, 2013, the trial court revoked Appellant's parole and probation in this case. For the parole violation, the trial court resentenced Appellant to serve the balance of his 18-month sentence (16 months). The trial court imposed a consecutive sentence of 5 to 42 months in prison for the probation violation. Appellant filed a motion to modify sentence on November 21, 2013, which the trial court denied. This appeal followed.

On appeal, counsel has directed our attention to two claims: (1) the aggregate VOP sentence of 21 to 42 months is excessive, and (2) the trial court should have made him eligible for boot camp. ***Anders***/***Santiago*** Brief at 4.

First, we must consider counsel's petition to withdraw. To withdraw under ***Anders*** and ***Santiago***, counsel must:

> (a) petition this Court for leave to withdraw after certifying that a thorough review of the record indicates the appeal is frivolous;
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> (b) file a brief referring to anything in the record that might arguably support the appeal; and
>
> (c) give the appellant a copy of the brief and advise the appellant of the right to obtain new counsel or file a *pro se* brief to raise any additional points for review.

See Commonwealth v. Millisock, 873 A.2d 748, 751 (Pa. Super. 2005). In addition to the above procedural requirements, the ***Anders***/***Santiago*** 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;
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> (3) set forth counsel's conclusion that the appeal is frivolous; and
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> (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.

We find that counsel has met the procedural and technical requirements of ***Anders*** and ***Santiago***. Counsel has petitioned for leave to withdraw, filed a brief that refers us to anything that might support the appeal, and informed Appellant of his right to hire a new lawyer or respond *pro se*.[3]

We now examine the appeal to determine whether it is frivolous. ***See Commonwealth v. Lilley***, 978 A.2d 995, 998 (Pa. Super. 2009). The two issues identified by counsel (sentence excessiveness and boot camp eligibility) challenge the discretionary aspects of Appellant's sentence.

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[3] Appellant has not filed a response.

Counsel, however, failed to preserve these issues. The ***Anders***/***Santiago*** Brief does not include a "concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence." Pa.R.A.P. 2119(f). A Rule 2119(f) statement is required to preserve a challenge to the discretionary aspects of a sentence. ***See, e.g., Commonwealth v. Clarke***, 70 A.3d 1281, 1286 (Pa. Super. 2013).

Nevertheless, because counsel has moved to withdraw under ***Anders*** and ***Santiago***, we must address the sentencing issues to determine whether the appeal is wholly frivolous. ***See Lilley***, 978 A.2d at 998 (addressing the discretionary aspects of a sentence notwithstanding deficient Rule 2119(f) statement in the ***Anders*** brief); ***Commonwealth v. Wilson***, 578 A.2d 523, 525 (Pa. Super. 1990) (considering the merits of a waived sentencing challenge to determine whether counsel should be permitted to withdraw under ***Anders***).

"Sentencing is a matter vested in the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." ***Commonwealth v. Schutzues***, 54 A.3d 86, 98 (Pa. Super. 2012) (internal quotation omitted) "An abuse of discretion requires the trial court to have acted with manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." ***Id.*** (internal quotation omitted).

Appellant argues that his sentence is excessive, because at the time he committed the underlying offense, his prior record score was 2. That

made his range under the guidelines RS – 12. His current aggregate sentence of 21-42 months exceeds that range. Appellant also wanted to be made boot-camp eligible.

We find that Appellant's argument about the length of his sentence is frivolous. The Sentencing Guidelines do not apply to VOP sentences. 204 Pa. Code § 303.1(b); ***Commonwealth v. Reaves***, 923 A.2d 1119, 1129 (Pa. 2007). Furthermore, while Appellant's prior record score was 2 when he pled guilty to prohibited offensive weapons, the trial court noted that less than two weeks after he was released from prison, Appellant committed a felony by firing a weapon into an occupied car. Trial Court 1925(a) Opinion, 2/4/14, at 5. It opined that incarceration was necessary because Appellant committed a new crime while under supervision and without incarceration, he would be likely to reoffend. ***Id.*** at 5-6. Appellant's VOP sentence is within statutory limits, and his challenge to it is frivolous.

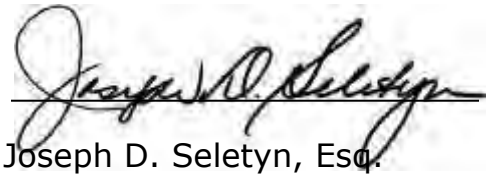
Appellant's request for boot-camp eligibility is similarly frivolous. It is within the sentencing judge's discretion to make an inmate boot camp eligible. 61 Pa.C.S.A. § 3904(b). Even if a sentencing judge makes an inmate eligible, the Department of Corrections has discretion to refuse to accept the inmate into the program. ***Id.*** § 3904(c). Here, the trial court determined that "Appellant's conduct belies his request for boot camp. . . . [H]e possessed a sawed-off shotgun and fled from the police. He then, by his own admission, discharged a firearm at two adults and an infant." Trial Court 1925(a) Opinion, 2/4/14, at 6. The trial court determined that

Appellant was not an appropriate candidate for boot camp, and we see no reason to disturb that decision.

Having conducted a review of the record, we conclude that this appeal is wholly frivolous. Therefore, we grant counsel's petition to withdraw and affirm the judgment of sentence.

Judgment of sentence affirmed. Petition to withdraw as counsel granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/1/2014