

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

GAMEL S. MCFARLAND

Appellant

No. 1026 MDA 2015

Appeal from the Judgment of Sentence May 4, 2015
In the Court of Common Pleas of Luzerne County
Criminal Division at No(s): CP-40-CR-0002244-2014

BEFORE: PANELLA, J., LAZARUS, J., and JENKINS, J.

MEMORANDUM BY LAZARUS, J.:

FILED FEBRUARY 01, 2016

Gamel S. McFarland appeals from the judgment of sentence, entered by the Court of Common Pleas of Luzerne County, following his guilty plea to aggravated assault,¹ two counts of simple assault,² recklessly endangering another person,³ two counts of disorderly conduct,⁴ harassment,⁵ and public drunkenness.⁶ McFarland's counsel also seeks to withdraw pursuant to the

¹ 18 Pa.C.S. § 2702(a)(1).

² 18 Pa.C.S. §§ 2701(a)(1), (3).

³ 18 Pa.C.S. § 2705.

⁴ 18 Pa.C.S. §§ 5503(a)(1), (4).

⁵ 18 Pa.C.S. § 2709(a)(1).

⁶ 18 Pa.C.S. § 5505.

dictates of ***Anders v. California***, 386 U.S. 738 (1967), ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009), and ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981). Upon review, we grant counsel's petition to withdraw and affirm McFarland's judgment of sentence.

McFarland was arrested and charged with the foregoing crimes following a domestic violence incident in which he attacked his then-girlfriend. The victim lost several teeth, suffered a broken jaw, and received multiple facial fractures. On May 4, 2015, McFarland was ordered to serve an aggregate sentence of 36 to 72 months' incarceration followed by two years of probation and to pay two \$300.00 fines. Trial counsel filed a motion to modify sentence on May 5, 2015, requesting that the sentence be modified to a 33 month minimum so that McFarland could be boot camp eligible. The trial court granted the motion to modify on May 6, 2015, resulting in a sentence of 33 to 72 months' incarceration. This timely appeal followed.⁷

On appeal, McFarland raises the following issues:

Whether the sentence of a minimum 33 months['] to a maximum 72 months['] incarceration imposed by the trial court was harsh and excessive.

⁷ McFarland was granted an extension of time to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). A concise statement was filed by the deadline, stating counsel's intent to file an ***Anders*** brief.

Brief for Appellant, at 2.

Counsel has a filed a petition to withdraw pursuant to **Anders**, **McClendon**, and **Santiago**. “When faced with a purported **Anders** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw.” **Commonwealth v. Rojas**, 847 A.2d 638, 639 (Pa. Super. 2005). Based upon **Anders** and **McClendon**, counsel seeking to withdraw must: 1) petition the court for leave to withdraw, certifying that after a thorough review of the record, counsel has concluded the issues to be raised are wholly frivolous; 2) file a brief referring to anything in the record that might arguably support an appeal; and 3) furnish a copy of the brief to the appellant and advise him of his right to obtain new counsel or file a *pro se* brief raising any additional points that the appellant deems worthy of review. **Commonwealth v. Hernandez**, 783 A.2d 784, 786 (Pa. Super. 2001). Additionally, in **Santiago**, our Supreme Court held that counsel must state the reasons for concluding the client’s appeal is frivolous. **Santiago**, 978 A.2d at 361.

Instantly, counsel’s petition to withdraw states that she has examined the record and has concluded that the appeal is wholly frivolous. Counsel has also filed a brief in which she repeats the assertion that there are no non-frivolous issues to be raised and indicates the reasons for concluding the appeal is frivolous. Counsel has notified McFarland of the request to withdraw and has provided McFarland with a copy of the brief and a letter explaining McFarland’s right to proceed *pro se* or with privately retained

counsel regarding any other issues he believes might have merit. Accordingly, we find that counsel has substantially complied with the procedural requirements for withdrawal.

Once counsel has satisfied the above requirements, this Court conducts its own review of the proceedings and renders an independent judgment as to whether the appeal is, in fact, wholly frivolous. ***Commonwealth v. Wright***, 846 A.2d 730, 736 (Pa. Super. 2004).

McFarland's sole contention is that his sentence is excessive, which presents a challenge to the discretionary aspects of sentencing. An appellant is not entitled to review of the discretionary aspects of sentencing unless he or she satisfies a four-part test:

(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.

Commonwealth v. Caldwell, 117 A.3d 763, 768 (Pa. Super. 2015) (en banc) (quoting ***Commonwealth v. Allen***, 24 A.3d 1058, 1064 (Pa. Super. 2011)).

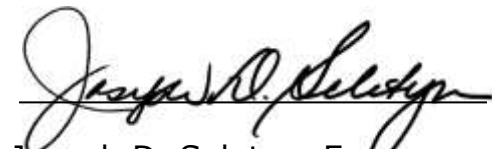
Here, McFarland's sentence was successfully modified via motion from a minimum of 36 months' to 33 months' incarceration. While a timely notice of appeal was filed, the issue of whether McFarland's modified sentence of 33 to 72 months' incarceration was excessive was not preserved in a post-sentence motion. Moreover, the sentence is within the statutory guidelines.

The mere claim that a sentence is excessive, when it is within the statutory limits, does not raise a substantial question. ***See Commonwealth v. Coss***, 695 A.2d 831, 833 (Pa. Super. 1997).

Based upon the foregoing, we find McFarland's claim to be meritless. Therefore, we affirm the judgment of sentence and grant counsel's petition to withdraw.

Judgment of sentence affirmed. Petition to withdraw granted.

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: 2/1/2016