

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

v.

HAFEES ALSTON

Appellant

No. 3629 EDA 2016

Appeal from the Judgment of Sentence dated March 4, 2014  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0001487-2013

BEFORE: PANELLA, J., SOLANO, J., and MUSMANNO, J.

MEMORANDUM BY SOLANO, J.:

**FILED DECEMBER 22, 2017**

Appellant Hafees Alston appeals from the judgment of sentence entered following a negotiated guilty plea to third-degree murder, conspiracy, carrying firearms without a license, and possession of an instrument of crime.<sup>1</sup> Appellant's counsel has filed a petition to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). We affirm and grant counsel's petition to withdraw.

The facts are undisputed. In the early morning of August 17, 2012, Appellant shot Idris Bilal seven times in front of several eyewitnesses. Appellant fled, was eventually apprehended, and made several statements during phone calls from prison. On March 4, 2014, he pleaded guilty and was sentenced to serve consecutive sentences of incarceration totaling twenty-

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<sup>1</sup> 18 Pa.C.S. §§ 2502, 903, 6106, and 907, respectively.

five to sixty years.<sup>2</sup> Appellant was represented by Adam Rogers, Esquire, during the plea process. Appellant filed no post-sentence motions and did not initially appeal his judgment of sentence, but he later filed a successful *pro se* petition under the Post Conviction Relief Act (PCRA),<sup>3</sup> which resulted in the reinstatement of his direct appeal rights *nunc pro tunc*.<sup>4</sup> On November 21, 2016, Appellant appealed.

Appellant's appointed appellate counsel, Earl Kaufmann, Esquire, has filed a petition to withdraw and an **Anders** brief with this Court.<sup>5</sup> Appellant did not file a *pro se* response. The **Anders** brief raises the following issues:

1. Whether the appellant had only 20 minutes to consider the Commonwealth's Offer of 25-50 years['] incarceration.
2. Whether trial counsel told [A]ppellant he would only receive a sentence of 15-40 years for his Guilty Plea.

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<sup>2</sup> Appellant's aggregate sentence is comprised of consecutive sentences of fifteen to forty years for third-degree murder, five to ten years for conspiracy, two and one-half to five years for carrying a firearm without a license, and two and one-half to five years for possession of an instrument of crime.

<sup>3</sup> **See** 42 Pa.C.S. §§ 9541-9546.

<sup>4</sup> Appellant filed an initial *pro se* PCRA petition in May 2014 and an amended *pro se* PCRA petition in September 2014. In Appellant's amended PCRA petition, Appellant complained that his trial counsel had advised him that his sentences would be run concurrently (resulting in an aggregate sentence of fifteen to forty years' incarceration), and that counsel never filed Appellant's requested appeal following the imposition of a sentence of twenty-five to sixty years. Appellant did not specifically request that the PCRA court reinstate his right to file a post-sentence motion to revoke his guilty plea.

<sup>5</sup> Appellant's counsel filed a statement of his intent to file an **Anders** brief in lieu of filing a Rule 1925(b) statement of errors complained of on appeal. **See** Pa.R.A.P. 1925(c)(4). The trial court did not file a Rule 1925(a) opinion.

3. Whether [A]ppellant was to have all sentences [] run concurrent[ly] because he only committed one crime.

4. Whether the [A]ppellant was rushed into the courtroom before he had the opportunity to study his own case materials.

5. Whether [A]ppellant's retained trial counsel was ineffective for telling him he would receive a sentence of 15-30 years for accepting the Offer; trial counsel did not discuss with him the advantages and disadvantages of taking a Negotiated Guilty Plea; trial counsel did not explain to the [A]ppellant the difference between concurrent and consecutive sentences; and trial counsel did not file a Notice of Appeal as [A]ppellant requested.

6. Whether the [A]ppellant could be convicted of criminal conspiracy when no co-defendant was charged in the case.

7. Whether the [A]ppellant's Negotiated Guilty Plea was knowingly, intelligently and voluntarily made.

**Anders** Brief at 4 (issues reordered to facilitate disposition).

"When faced with a purported **Anders** brief, this Court may not review the merits of any possible underlying issues without first examining counsel's request to withdraw." **Commonwealth v. Wimbush**, 951 A.2d 379, 382 (Pa. Super. 2008) (citation omitted). We set forth the **Anders** requirements in **Commonwealth v. Orellana**, 86 A.3d 877 (Pa. Super. 2014):

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 [**Commonwealth v. Santiago**], 978 A.2d 349 (Pa. 2009)]. 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 also must provide a copy of the **Anders** brief to his client. Attending the brief must be a letter that advises the client of his 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."

**Orellana**, 86 A.3d at 879–80 (some citations omitted). If counsel complies with these requirements, then "we will make a full examination of the proceedings in the lower court and render an independent judgment [as to] whether the appeal is in fact 'frivolous.'" **Id.** at 882 n.7 (citation omitted). Finally, "this Court must conduct an independent review of the record to discern if there are any additional, non-frivolous issues overlooked by counsel." **Commonwealth v. Flowers**, 113 A.3d 1246, 1250 (Pa. Super. 2015) (footnote and citation omitted).

Here, counsel's petition to withdraw and his brief comply with the technical requirements of **Anders** and **Santiago**. **See Orellana**, 86 A.3d at 879–80. The brief summarizes the procedural history and facts, includes arguments that could support the issues raised on appeal, and cites legal authority to support its conclusion that the appeal is frivolous. Counsel also advised Appellant of his right to retain new counsel or proceed *pro se* to

raise any points that he deems worthy of this Court's attention. We conclude that counsel has met the requirements of **Anders** and **Santiago**, and will therefore address the issues raised in the **Anders** brief.

"Initially, we note that when a defendant enters a guilty plea, he or she waives all defects and defenses except those concerning the validity of the plea, the jurisdiction of the trial court, and the legality of the sentence imposed." **Commonwealth v. Stradley**, 50 A.3d 769, 771 (Pa. Super. 2012). In Appellant's issues 1, 2, 4, and 7, he challenges the validity of his guilty plea. Appellant complains that he either lacked understanding or was misinformed about the sentence which would result from his guilty plea, and he generally complains that his plea was not knowingly, intelligently, and voluntarily entered. However, Appellant did not move to withdraw his guilty plea or file any post-sentence motions to preserve his claim prior to filing a direct appeal. Appellant has therefore waived these issues by failing to raise them before the trial court. **See** Pa.R.A.P. 302 (issues not presented to the trial court cannot be raised for the first time on appeal); **Commonwealth v. D'Collanfield**, 805 A.2d 1244, 1246 (Pa. Super. 2002) (issues related to deficiency of guilty plea waived by failing to object at the time of the sentencing hearing or through a post-sentence motion).<sup>6</sup>

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<sup>6</sup> This waiver is not affected by the fact that Appellant had his direct appeal rights reinstated *nunc pro tunc*, as Appellant did not also have his post-sentence rights reinstated by the PCRA court. **See Commonwealth v. Ciotto**, 555 A.2d 930, 931 (Pa. Super. 1989) (holding that an appellant's post-sentence rights should be reinstated *nunc pro tunc* when counsel's  
(Footnote Continued Next Page)

In Appellant's issues 3 and 6, Appellant purportedly challenges the legality of the sentences imposed. Although such claims cannot be waived on direct appeal, **see Commonwealth v. Eisenberg**, 98 A.3d 1268, 1275 (Pa. 2014), Appellant's issues are frivolous. First, in issue 3, Appellant complains that his sentences of imprisonment should have run concurrently, rather than consecutively, "because he only committed one crime." In fact, however, Appellant was sentenced for committing four crimes, and a trial court has the authority to run sentences for those crimes consecutively. **See** 42 Pa.C.S. § 9721(a); **Commonwealth v. Moury**, 992 A.2d 162, 171 (Pa. Super. 2010). Therefore, the consecutive sentencing scheme utilized by the trial court following Appellant's negotiated plea does not affect the legality of Appellant's sentences, and we deem this issue to be without arguable merit.<sup>7</sup>

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

failure to file post-sentence motions has waived the sole issue an appellant wishes to appeal).

<sup>7</sup> To the extent that Appellant intended in this issue to challenge whether the trial court sentenced Appellant in accordance with the terms of the plea bargain, that issue does not go to the legality of the sentence, and has therefore been waived. **See Stradley**, 50 A.3d at 771 (holding that a guilty plea waives all defects except jurisdiction, the validity of the plea, and legality of sentence). To the extent that Appellant intended in this issue to contend that his sentences should merge pursuant to 42 Pa.C.S. § 9765 because he alleges that his crimes arise "from a single criminal act" — a question which implicates the legality of his sentence, **see Commonwealth v. Baldwin**, 985 A.2d 830, 833 (Pa. 2009) — we find this claim frivolous as well. The crimes of third-degree murder, conspiracy, carrying firearms without a license, and possession of an instrument of a crime do not merge because each includes a statutory element not included in the others. **See id.** at 833-34.

Next, in issue 6, Appellant complains that he was sentenced for the crime of conspiracy to commit third-degree murder, but that no co-conspirator was charged in the case. However, while “[t]here is no doubt that the crime of conspiracy requires proof of more than a single participant[,] . . . it is established that where the other alleged co-conspirators are unapprehended, or even, in some instances, unknown, there is no basis to disturb a valid conviction for conspiracy.” **Commonwealth v. Byrd**, 417 A.2d 173, 176-77 (Pa. 1980) (citations omitted). We therefore conclude that this challenge to the legality of Appellant’s sentence is also without arguable merit.

In Appellant’s issue 5, he complains of the ineffectiveness of his plea counsel. However, “claims of ineffective assistance of counsel are to be deferred to PCRA review . . . and such claims should not be reviewed upon direct appeal.” **See Commonwealth v. Holmes**, 79 A.3d 562, 576 (Pa. 2013) (reaffirming **Commonwealth v. Grant**, 813 A.2d 726 (Pa. 2002)).<sup>8</sup>

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<sup>8</sup> There are two exceptions to this general rule which have been recognized by the Supreme Court:

First, . . . trial courts retain discretion, in extraordinary circumstances, to entertain a discrete claim of trial counsel ineffectiveness if the claim is both apparent from the record and meritorious, such that immediate consideration best serves the interest of justice. Second, . . . trial courts also have discretion to entertain prolix claims of ineffectiveness if there is a good cause shown and the unitary review thus permitted is accompanied by a knowing and express waiver by the defendant of the right to pursue a first PCRA petition.

We therefore dismiss Appellant's ineffectiveness claims without prejudice to Appellant's right to raise them in a subsequently filed PCRA petition. **See Arrington**, 86 A.3d at 857.<sup>9</sup>

In sum, we conclude that Appellant has presented no preserved and non-frivolous issues for which relief is due. In addition, we have reviewed the certified record consistent with **Flowers**, 113 A.3d at 1250, and have discovered no additional arguably meritorious issues. We therefore grant counsel's petition to withdraw and affirm Appellant's judgment of sentence.

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

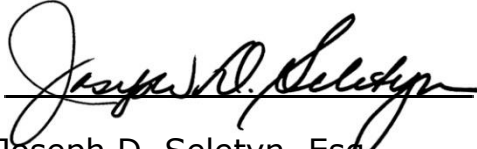
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**Commonwealth v. Arrington**, 86 A.3d 831, 856-57 (Pa.) (citing **Holmes**), **cert. denied**, 135 S. Ct. 479 (2014). Neither exception applies to this case. The trial court was not presented with a claim of counsel's ineffectiveness, and made no ruling on counsel's ineffectiveness.

<sup>9</sup> We take this opportunity to remind the parties and the PCRA court that although criminal defendants have a right to direct appeal, they are not obliged to pursue such a course, but may instead proceed immediately under the PCRA. If the defendant . . . believes that his only viable claims are collateral ones, he need not await the failure of a direct appeal to pursue his claims under the PCRA.

**Holmes**, 79 A.3d at 576 n.9.



Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/22/2017