

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
SARAH ANN BROWN	:	
	:	
Appellant	:	No. 1734 MDA 2017

Appeal from the Judgment of Sentence September 29, 2017
 In the Court of Common Pleas of Bradford County Criminal Division at
 No(s): CP-08-CR-0000059-2015

BEFORE: PANELLA, J., NICHOLS, J., and PLATT, J. *

MEMORANDUM BY NICHOLS, J.: **FILED JUNE 26, 2018**

Appellant Sarah Ann Brown appeals from the judgment of sentence imposed after the trial court revoked her county intermediate punishment (CIP). Appellant’s counsel has filed a brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and its Pennsylvania counterpart, ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). For the reasons that follow, we deny counsel’s petition to withdraw and remand with instructions.

On April 3, 2015, Appellant entered a non-negotiated guilty plea to driving under the influence (DUI) and endangering the welfare of children (EWOC).¹ On May 28, 2015, Appellant was sentenced to forty-five days of incarceration, followed by twenty-four months in the CIP program. On April

* Retired Senior Judge assigned to the Superior Court.

¹ 75 Pa.C.S. § 3802(a)(1), and 18 Pa.C.S. § 4304(a)(1), respectively.

3, 2017, Appellant's probation officer filed a petition to revoke Appellant's CIP sentence after she broke several conditions of her supervision, including testing positive for alcohol and missing numerous drug and alcohol tests. **See** Trial Ct. Op., 1/26/18, at 1. The trial court revoked Appellant's CIP sentence on August 24, 2017.

On September 29, 2017, Appellant was resentenced to one to twelve months' incarceration for EWOC and a consecutive six to twenty-three months and twenty-nine days' incarceration for DUI, followed by a thirty-six month probationary tail. **See id.**

It is unclear whether the trial court apprised Appellant of her post-sentence rights,² but the record contains the Bradford County Public Defender's Office's standard "post-sentence rights advisory" form, which was signed by Appellant and Appellant's counsel. That standard form stated, in relevant part, "I understand that any appeal must be taken within 30 days of the day sentence is imposed, unless post-sentence motions are filed, in which case any appeal must be taken within thirty (30) days of entry of the order denying the motion by operation of law." **See** Post-Sentence Rights Advisory, 9/29/17, at 1.

Appellant filed a motion for reconsideration of the sentence on October 5, 2017, which the trial court denied on October 19, 2017. Appellant filed a

² The record does not contain a copy of the sentencing hearing transcript.

notice of appeal on November 7, 2017.³ On November 15, 2017, the trial court issued an order for the filing of a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

On December 5, 2017, the trial court purported to amend its original sentence for DUI to six months to eleven months and twenty-nine days' imprisonment, followed by forty-eight months' probation. The trial court explained that it modified its original sentencing order "to be a county sentence pursuant to 75 Pa.C.S. § 3815, as intended[.]"⁴ Order, 12/5/17.

Counsel timely filed a Pa.R.A.P. 1925(b) statement on December 8, 2017, indicating that Appellant wished to challenge the original sentence as excessive, but that counsel "intend[ed] to file an **Anders** Brief in this matter." **See** Concise Statement of Matters Complained of on Appeal, 12/8/17 (reciting sentence imposed on September 29, 2017). The trial court filed an opinion suggesting that Appellant's "bald claim of excessiveness due to the consecutive nature of a sentence will not raise a substantial question." Trial Ct. Op., 1/25/17, at 2.

³ On November 28, 2017, this Court issued an order to show cause why the appeal should not be quashed as untimely under Pa.R.Crim.P. 708(E). Appellant filed a response on December 11, 2017, asserting that the appeal should be considered timely in the interests of justice. This Court discharged the show-cause order on December 20, 2017.

⁴ The Commonwealth did not object to the amendment of the original sentence.

Counsel has submitted an **Anders** brief, which identifies the following issue on appeal: “Whether the sentence of the court was excessive.” **Anders** Brief at 5.⁵ It appears that Counsel now addresses the discretionary aspects of the December 5, 2017 amended sentence. **See id.** at 9 (reciting sentence imposed on December 5, 2017).

As a prefatory matter, we must address the timeliness of this appeal. **See Commonwealth v. Green**, 862 A.2d 613, 615 (Pa. Super. 2004) (*en banc*). An appeal from a sentence following the revocation of CIP must be filed within thirty days of the imposition of the new sentence. **Commonwealth v. Flowers**, 149 A.3d 867, 871 (Pa. Super. 2016) (citing Pa.R.A.P. 903(a)). Moreover, the filing of a post-sentence motion does not extend the time to appeal a sentence imposed after the revocation of CIP. **Id.** (citing Pa.R.Crim.P. 708(E)).

Here, Appellant failed to file a notice of appeal within thirty days of the September 29, 2017 sentencing hearing. Instead, she filed her appeal on November 7, 2017, within thirty days of the order denying her motion for reconsideration. Thus, the instant appeal is facially untimely.

Nevertheless, the trial court denied Appellant’s post-sentence motion on October 19, 2017, before the proper time for appealing the judgment of sentence. The trial court’s order did not apprise Appellant as to the appropriate time to take an appeal. This constituted a breakdown in the

⁵ Appellant has not filed a *pro se* brief or a counseled brief with new, privately retained counsel.

operation of the court that excuses an otherwise untimely filing of an appeal. **See Commonwealth v. Patterson**, 940 A.2d 493, 498-99 (Pa. Super. 2009). Thus, we decline to quash the appeal.

Next, we must consider the trial court's decision to amend the original sentencing order. At the outset, we note that the trial court's amended sentence of six months to eleven months and twenty-nine days' imprisonment for DUI is illegal.⁶ **See** 42 Pa.C.S. § 9756 (requiring that "a minimum sentence of confinement . . . not exceed one-half of the maximum sentence imposed").

In any event, this Court has explained that

Rule 1701(a) of the Rules of Appellate Procedure states that, "after an appeal is taken . . . the trial court . . . may no longer proceed further in the matter." Pa.R.A.P. 1701(a); **see also** 42 Pa.C.S.A. § 5505 (stating that a court may modify any order within thirty days after its entry so long as no appeal from such order has been taken). However, according to Rule 1701(b)(3), "[a]fter an appeal is taken," the trial court may "[g]rant reconsideration of the order which is the subject of the appeal," if "an application for reconsideration of the order is filed in the trial court . . . within the time provided or prescribed by law" and "an order expressly granting reconsideration of such prior order is filed in the trial court . . . within the time prescribed by these rules for the filing of a notice of appeal." Pa.R.A.P. 1701(b)(3).

Commonwealth v. Haughwout, 816 A.2d 247, 249-50 (Pa. Super. 2003).

Thus, the general rule is that a court may not modify an order after thirty days have elapsed unless a party has filed a timely motion for reconsideration and the court expressly grants the motion before an appeal is taken. **See id.**

⁶ Although counsel, in his **Anders** brief, asserts that Appellant intends to challenge the December 5, 2017 sentence, he does not identify this legality of the sentence issue.

The Pennsylvania Supreme Court has recognized that the trial court possesses the inherent jurisdiction to correct “patent and obvious mistakes” beyond the general rule set forth in 42 Pa.C.S. § 5505 and Pa.R.A.P. 1701. **See Commonwealth v. Holmes**, 933 A.2d 57, 66-67 (Pa. 2007). However, the Court has cautioned that this exception is limited and does not extend to a court’s reconsideration of a prior discretionary decision. **See id.** at 67.

Instantly, the trial court purported to correct its sentence after it denied Appellant’s motion to modify the September 29, 2017 sentence and after Appellant filed her notice of appeal. The record suggests no patent or obvious mistake. Moreover, the original sentence was not illegal. Accordingly, it appears that the December 5, 2017 sentence is a nullity and the sentence imposed on September 29, 2017, is the only valid sentence for the purposes of this appeal. **See Holmes**, 933 A.2d at 66-67; **Haughwout**, 816 A.2d at 250. We emphasize, however, that we do not have the September 29, 2017 sentencing transcript to assess the trial court’s position that it intended to impose a “county sentence.”

We next consider counsel’s petition to withdraw and **Anders** brief. **Commonwealth v. Goodwin**, 928 A.2d 287, 290 (Pa. Super. 2007) (*en banc*). Instantly, counsel has complied with the technical requirements for petitioning to withdraw by (1) filing a petition for leave to withdraw stating that, after making a conscientious examination of the record, counsel has determined that the appeal would be frivolous; (2) providing a copy of the brief to Appellant; and (3) advising Appellant that she has the right to retain

private counsel, proceed *pro se*, or raise additional arguments that Appellant considers worthy of the court's attention. ***Commonwealth v. Lilley***, 978 A.2d 995, 997 (Pa. Super. 2009).

Counsel's brief, however, is defective in several respects. First, counsel merely assumes that the December 5, 2017 sentence was effective and legal without any further discussion. Second, although counsel includes several references to the standard range minimum sentences, ***Anders*** Brief at 9, the sentencing guidelines do not apply to sentences imposed following the revocation of CIP. ***See Commonwealth v. Cartrette***, 83 A.3d 1030, 1040 (Pa. Super. 2013) (*en banc*); ***see also*** 204 Pa. Code § 303.1(b) (stating that "[t]he sentencing guidelines do not apply to sentences imposed as a result of the following . . . revocation of probation, intermediate punishment or parole"). Third, counsel's brief takes the form of a traditional ***Anders*** brief, because counsel has not "state[d his] reasons for concluding that the appeal is frivolous" and did not "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." ***See Santiago***, 978 A.2d at 361.

Moreover, counsel has also failed to ensure that the sentencing transcript has been included in the certified record. ***See Commonwealth v. Vilsaint***, 893 A.2d 753, 758 (Pa. Super. 2006). This omission has inhibited our review.

Thus, we deny counsel's petition to withdraw and remand this matter with instructions. Upon remand, counsel for Appellant may file either an

advocate's brief or a petition to withdraw from representation along with an amended **Anders** brief that complies with **Santiago**. Counsel shall address whether the trial court had jurisdiction to amend its September 29, 2017 sentencing order and obtain all necessary transcripts to ensure the record is complete for review. Should counsel decide to file a petition to withdraw, he must comply with the procedural requirements for seeking leave to withdraw by attaching to his petition to withdraw a copy of a letter advising Appellant of counsel's intent to withdraw and Appellant's rights to proceed *pro se* or with private counsel. Counsel shall also ensure that Appellant has been furnished a copy of counsel's amended **Anders** brief.

Counsel must file his advocate's brief or petition to withdraw no later than thirty days of the date of this decision. In the event that counsel files a petition to withdraw, Appellant shall have thirty days to file a response in this Court after service of the petition to withdraw, letter, and brief.

Petition to withdraw denied. **Anders** brief stricken. Case remanded with instructions. Record remanded for a period not to exceed forty-five days. Panel jurisdiction retained.

Judge Panella joins in this memorandum.

Judge Platt concurs in the result.