

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

MONTGOMERY TIBURCIO JR.

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 2244 MDA 2011

Appeal from the Judgment of Sentence December 1, 2011  
In the Court of Common Pleas of Berks County  
Criminal Division at No(s): CP-06-CR-0003485-2007

BEFORE: STEVENS, P.J., OTT, J., and COLVILLE, J.\*

MEMORANDUM BY OTT, J.:

Filed: March 14, 2013

Montgomery Tiburcio, Jr., appeals from the judgment of sentence of 18 months to five years' imprisonment, imposed on December 1, 2011, in the Court of Common Pleas of Berks County, following revocation of his probation. Counsel has filed a petition for leave to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *Commonwealth v. McClendon*, 434 A.2d 1185 (Pa. 1981).<sup>1</sup> The sole issue identified in the *Anders* brief is a challenge to the discretionary aspects of the sentence.

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> Previously, we remanded this case for the filing of a proper *Anders* brief or advocate brief. *See Commonwealth v. Tiburcio*, \_\_\_ A.3d. \_\_\_ [2244 MDA 2011] (Pa. Super. 2012) (unpublished memorandum; filed October 24, 2012). Counsel has now filed a new petition to withdraw and a revised *Anders* brief.

Based upon the following, we affirm and grant counsel's petition to withdraw.

The Honorable Scott D. Keller has aptly stated the background of this case, as follows:

On September 23, 2008 [Tiburcio] entered a guilty plea to Disarming a Law Enforcement Officer Without Lawful Authorization [Count 6; 18 Pa.C.S. § 5104.1(a)(1)] and Aggravated Assault [Count 7; 18 Pa.C.S. § 2702(a)(3)]. The Honorable James Bucci sentenced [Tiburcio] to two (2) years probation for Disarming a Law Enforcement Officer with a concurrent sentence of two (2) years probation for Aggravated Assault. [Tiburcio] failed to comply with his probation and parole requirements as per the Court Order of September 23, 2008 and a bench warrant was issued for his arrest on October 7, 2008. A Gagnon II hearing was held. [Tiburcio] admitted the violations and the Court revoked [Tiburcio's] probation after which he was sentenced to a period of six (6) months to twenty-three (23) months with a credit of thirty-eight (38) days time served effective November 13, 2008. [In addition, Tiburcio was sentenced to a consecutive two year probationary period on Count 7.] A bench warrant was again issued for [Tiburcio's] arrest on December 2, 2010 for failure to comply with the conditions of probation and parole. On September 19, 2011 the case was reassigned to this court. Jay Nigrini, Esq. was appointed to represent [Tiburcio] on November 10, 2011. Another Gagnon II hearing was held. [Tiburcio] admitted the violation of his probation [due to a new arrest and conviction at CP-06-CR-4982-2010] and the Court revoked [Tiburcio's] probation [on Count 7]. [Tiburcio] was sentenced to eighteen (18) months to five (5) years, effective at the expiration of [the sentence imposed at CP-06-CR-4982-2010] with a credit of three (3) days time served on December 1, 2011. [Tiburcio] filed a timely Notice of Appeal on December 20, 2011. This court issued an Order for Concise Statement pursuant to Pa.R.A.P. 1925(b) on December 23, 2011. [Tiburcio] timely filed his Concise Statement on January 3, 2012.

Trial Court Opinion, 2/6/2012, at 1–2 (record citations omitted).<sup>2</sup>

Initially, we must review counsel's **Anders** brief and request to withdraw from representation. *See Commonwealth v. Daniels*, 999 A.2d 590, 593 (Pa. Super. 2010) ("When presented with an **Anders** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw.") (citation omitted). An **Anders** 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.

*Commonwealth v. Santiago*, 978 A.2d 349, 361 (Pa. 2009). Our review confirms that counsel has complied with these requirements.<sup>3</sup>

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<sup>2</sup> Tiburcio's Rule 1925(b) concise statement set forth the following issue:

Whether the sentence imposed was in violation of the sentencing code as the sentence imposed was unreasonable, based upon improper factors, based upon factors other than those presented at the probation violation hearing, and for which insufficient reasons appear on the record?

Tiburcio's Concise Statement of Errors Complained of on Appeal, 1/3/2012.

<sup>3</sup> Counsel also complied with the procedural requirements set forth in *Commonwealth v. Millisock*, 873 A.2d 748, 751 (Pa. Super. 2005). Counsel has (1) petitioned this Court for leave to withdraw as counsel, stating that after making a conscientious examination of the record he determined that an appeal would be frivolous; (2) filed a revised **Anders** brief; and (3) served Tiburcio by first-class mail with copies of the petition and brief, and a letter that informed Tiburcio of his right to retain new  
(Footnote Continued Next Page)

"[I]f counsel's petition and brief satisfy **Anders**, we will then undertake our own review of the appeal to determine if it is wholly frivolous. If the appeal is frivolous, we will grant the withdrawal petition and affirm the judgment of sentence." **Commonwealth v. Woods**, 939 A.2d 896, 898 (Pa. Super. 2007) (citations omitted). Therefore, we proceed to consider the issue identified in the **Anders** brief, as follows:

Did the sentencing court re-sentence [Tiburcio] to an illegal sentence, i.e., was the sentence imposed in violation of the sentencing code as it was unreasonable, based upon improper factors, based upon facts other than those presented at the probation violation hearing, and for which insufficient reasons appear of record?

**Anders** Brief at 9.

As this issue relates to the discretionary aspects of the sentence,<sup>4</sup> we keep in mind the following principles:

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

counsel, proceed *pro se* or to raise additional issues. **See** Petition for Leave to Withdraw as Counsel, 11/21/2012; **Anders** Brief, 11/21/2012, and Exhibit E (Letter to Tiburcio, 11/21/2012).

<sup>4</sup> The **Anders** Brief frames the issue raised on appeal as a challenge to the legality of sentence, and cites 42 Pa.C.S. § 9771(c) in the argument section. **See Anders** Brief at 10–11. Specifically, Section 9771(c) of the Sentencing Code provides that the court may impose a sentence of total confinement upon revocation if it finds that:

- (1) the defendant has been convicted of another crime; or
- (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or

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*Sentencing for Probation Violation.* Conviction of a new crime is a sufficient basis for a court to revoke a sentence of probation. **Commonwealth v. Mallon**, 267 Pa. Super. 163, 406 A.2d 569, 571 (Pa. Super. 1979). Upon revoking a defendant's probation and imposing a new sentence, a court has available to it essentially all the sentencing alternatives that existed at the time of the initial sentencing. 42 Pa.C.S.A. § 9771(b). Thus, if the original offense was punishable by total confinement, such a penalty is available to a revocation court, subject to the limitation that the court shall not impose total confinement unless it finds that: (1) the defendant has been convicted of another crime; (2) the defendant's conduct indicates a likelihood of future offenses; or (3) such a sentence is necessary to vindicate the court's authority. **Malovich**, 903 A.2d [1247,] 1253 [(Pa. Super. 2006)]; 42 Pa.C.S.A. § 9771(c).

An appellant wishing to appeal the discretionary aspects of a probation-revocation sentence has no absolute right to do so but, rather, must petition this Court for permission to do so. **Malovich**, 903 A.2d at 1250; 42 Pa.C.S.A. § 9781(b). Specifically, the appellant must present, as part of the appellate brief, a concise statement of the reasons relied upon for allowance of appeal. **Malovich**, 903 A.2d at 1250; Pa.R.A.P. 2119(f). In that statement, the appellant must persuade us there exists a substantial question that the sentence is inappropriate under the sentencing code. **Malovich**, 903 A.2d at 1250; Pa.R.A.P. 2119(f).

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

(3) such a sentence is essential to vindicate the authority of the court.

42 Pa.C.S. § 9771(c). Recently, in **Commonwealth v. Schutzues**, 54 A.3d 86 (Pa. Super. 2012), this Court held that challenges under 42 Pa.C.S. § 9771(c) were not among the narrow class of issues that implicated the legality of a sentence, and that if a defendant believes the record was devoid of evidence supporting total confinement under § 9771(c), he must preserve that argument as a challenge to the discretionary aspects of the sentence. **Id.** at 98.

If an appellant convinces us that a claim presents a substantial question, then we will permit the appeal and will proceed to evaluate the merits of the sentencing claim. *Id.* When we do so, our standard of review is clear: Sentencing is vested in the sound discretion of the court and will not be disturbed absent an abuse of that discretion. *Id.* at 1252, 1253. Moreover, an abuse of discretion is not merely an error in judgment. *Id.* Instead, it involves bias, partiality, prejudice, ill-will, or manifest unreasonableness. *Id.*

Likewise, we are mindful of the general rule that a sentencing court should impose a sentence consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. 42 Pa.C.S.A. § 9721(b). Where the court imposes a sentence for a felony or misdemeanor, the court shall make part of the record, and disclose in open court during sentencing, a statement of the reasons for the sentence imposed. *Id.* At the same time, the court is not required to parrot the words of the sentencing code, stating every factor relevant under 42 Pa.C.S.A. § 9721(b). *Commonwealth v. Cappellini*, 456 Pa. Super. 498, 690 A.2d 1220, 1226 (Pa. Super. 1997). Instead, the record as a whole must reflect due consideration by the court of the offense and the character of the offender. *Malovich*, 903 A.2d at 1253.

*Commonwealth v. Kalichak*, 943 A.2d 285, 289–290 (Pa. Super. 2008).

Preliminarily, we note that although Tiburcio did file a timely appeal, no objection to the sentence was raised, either at the sentencing hearing, or in a post sentence motion.<sup>5</sup> Accordingly, this sentencing claim is subject to

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<sup>5</sup> The certified record does contain Tiburcio's *pro se* post-sentence motion, time-stamped December 8, 2011. However, since counsel represented Tiburcio, the *pro se* motion was a legal nullity. *See Commonwealth v. Nischan*, 928 A.2d 349, 355 (Pa. Super. 2007), *appeal denied*, 936 A.2d 40 (Pa. 2007) ("Appellant had no right to file a *pro se* motion because he was represented by counsel. This means that his *pro se* post-sentence motion was a nullity, having no legal effect." (citations omitted)).

waiver. **See *Commonwealth v. Moury***, 992 A.2d 162, 170 (Pa. Super. 2010) (“Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or in a motion to modify the sentence imposed.” (citation omitted)). In any event, even if we were to address this challenge to the discretionary aspects of sentence and find that it raised a substantial question on appeal,<sup>6</sup> we would conclude that no relief is due.

“Pursuant to 42 Pa.C.S. § 9771(b), when a defendant is found in violation of his probation, upon revocation the sentencing alternatives available to the court shall be the same as were available at the time initial sentencing, due consideration being given to the time spent serving the order of probation.” ***Commonwealth v. Schutzues***, 54 A.3d 86, 98–99 (Pa. Super. 2012) (quotations and citation omitted). “A sentencing court need not undertake a lengthy discourse for its reasons for imposing a sentence or specifically reference the statute in question, but the record as a whole must reflect the sentencing court’s consideration of the facts of the crime and character of the offender.” ***Id.*** at 99 (citations omitted). The

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<sup>6</sup> With respect to the consecutive aspect of the sentence at issue, we note that under 42 Pa.C.S. § 9721, the court has discretion to impose sentences consecutively or concurrently and, ordinarily, a challenge to this exercise of discretion raises a substantial question “in only the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment.” ***Commonwealth v. Moury***, 992 A.2d 162, 171–172 (Pa. Super. 2010).

Sentencing Guidelines do not apply to sentences imposed following a revocation of probation. **See** 204 Pa. Code § 303.1(b); ***Commonwealth v. Ferguson***, 893 A.2d 735, 739 (Pa. Super. 2006), *appeal denied*, 906 A.2d 1196 (Pa. 2006).

Here, the trial court, in its opinion, set forth the following rationale in support of its sentencing decision:

[Tiburcio] has repeatedly been given a chance and has now violated the terms of his probation on multiple occasions. As we noted at the Gagnon II hearing on December 1, 2011, when [Tiburcio] first entered his guilty plea in front of The Honorable James Bucci in September 2008 he was given a mitigated sentence. [Tiburcio] violated that probationary sentence and was resentenced. After being resentenced [Tiburcio] again violated his probation. [Tiburcio] committed another aggravated assault, the same charge for which he was originally sentenced, and a felony of the second degree. We stated the following at the Gagnon II hearing:

All right. Well, certainly we believe that incarceration — subsequent incarceration is necessary. And due to the fact that he committed an offense while on this probation — it is a serious felony offense. He had previously been violated while on probation. We believe an 18 month to 5 year sentence consecutive is appropriate.

(Notes of Testimony (Hereinafter N.T.) 12/1/11, at 7).

The sentence imposed was not biased or partial, nor did it involve prejudice, ill will, or manifest unreasonableness. Simply, [Tiburcio] has twice been given a chance at probation. He has consistently violated his probation, the second time committing a serious felony, and again the same felony for which he originally entered a plea of guilty. A short term of incarceration and/or probation does not appear to serve the rehabilitative needs of [Tiburcio] and has failed to protect the public from [Tiburcio] in the past. This Court disclosed on the record the reasons for the sentence imposed and we believe those reasons were adequate



and thorough. Moreover, we further believe that the record clearly indicates the character of [Tiburcio] and the need for total confinement as sentenced by this Court.

Trial Court Opinion, *supra*, at 4–5.

It is evident from the sentencing transcript that the trial court properly considered all relevant factors in revoking Tiburcio's probationary sentence and imposing a sentence of total confinement, as the court explained that a consecutive sentence was necessary due to the fact that Tiburcio, having had originally received a mitigated sentence, had twice violated his probation, with the most recent violation being a serious felony offense.<sup>7</sup> **See** 42 Pa.C.S. § 9771(c). On this record, we conclude that even had the issue been preserved, there would be no meritorious discretionary aspect of sentencing claim. Furthermore, our independent review of the record reveals no meritorious appellate issues. Therefore, we grant counsel's petition for leave to withdraw from representation and affirm the judgment of sentence.

Judgment of sentence affirmed. Petition for leave to withdraw granted.

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<sup>7</sup> The violation leading to revocation of probation was Tiburcio's new conviction for conspiracy to commit aggravated assault, with grading as a felony of the second degree. **See** N.T., 12/1/2011, at 3. As the trial court noted in its opinion, Tiburcio had originally pleaded guilty to the same offense, aggravated assault. **See** Trial Court Opinion, 2/6/2012, at 4.