

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
HENRY CLAY BOYNES,	:	
	:	
Appellant	:	No. 2424 EDA 2011

Appeal from the Judgment of Sentence June 23, 2011,
Court of Common Pleas, Montgomery County,
Criminal Division at No. CP-46-CR-0006791-2010

BEFORE: DONOHUE, MUNDY and OLSON, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED MAY 28, 2013

Appellant, Henry Clay Boynes (“Boynes”), appeals from the judgment of sentence following his open guilty plea to one count of aggravated assault, 18 Pa. C.S.A. § 2702(a). Boynes’ counsel has filed a motion to withdraw from representation pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *Commonwealth v. Santiago*, 602 Pa. 159, 978 A.2d 349 (2009). For the reasons that follow, we grant counsel’s petition to withdraw and we affirm the judgment of sentence.

On July 31, 2010, police arrested Boynes after a victim reported that he had struck her in the head with a wooden baseball bat. On March 11, 2011, Boynes pled guilty to the above-referenced count of aggravated assault. In exchange for doing so, the Commonwealth agreed to dismiss all other charges against him and not to seek a mandatory 25 year minimum

sentence pursuant to Pennsylvania's "three-strike" enhancement, 42 Pa. C.S.A. § 9714.

After preparation and receipt of a pre-sentence investigation ("PSI"), on June 23, 2011, the trial court conducted a sentencing hearing. Boynes called several witnesses to testify on his behalf, including the victim of his attack. The trial court then reviewed Boynes' criminal history, discussed the contents of the PSI, and stated that he had considered the sentencing guidelines in deciding on the sentence to be imposed. The Commonwealth did not request a sentencing enhancement for the use of a deadly weapon.

The trial court sentenced Boynes to a term of incarceration of five to ten years on the aggravated assault conviction, a sentence at the bottom end of the standard sentencing range under Pennsylvania's sentencing guidelines. On June 30, 2011, the trial court subsequently denied Boynes' post-sentence motion seeking a reduction in his sentence. Boynes filed a notice of appeal, and later filed a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal.

Before we address the merits of this appeal, we must determine whether counsel has followed the procedures for filing a brief and petition to withdraw pursuant to **Anders**. Counsel must file a petition to withdraw explaining that he or she has made a conscientious examination of the record and determined that an appeal would be frivolous. **Commonwealth v. Wright**, 846 A.2d 730, 736 (Pa. Super. 2004). Also, counsel must

provide a copy of the **Anders** brief to the appellant and inform him of his right to proceed *pro se*, retain different counsel, or assert issues not included in the **Anders** brief. In the present case, counsel has complied with these procedural requirements. Boynes has not filed a response or asserted any issues on appeal not set forth in the **Anders** brief.

Next, we must consider whether the **Anders** brief in this case comports with the following:

[T]he **Anders** brief that accompanies court-appointed counsel's petition to withdraw ... 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, 602 Pa. at 178-79, 978 A.2d at 361. Counsel's **Anders** brief complies with these requirements, as it sets forth a summary of the factual and procedural history of this case and identifies one issue (certain discretionary aspects of sentence) he believes could arguably support an appeal, while including his reasoning for why he believes it is frivolous.

Challenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right. **Commonwealth v. Sierra**, 752 A.2d 910, 912 (Pa. Super. 2000). An appellant challenging the discretionary aspects of

his sentence must invoke this Court's jurisdiction by satisfying a four-part test:

[W]e conduct a four-part analysis to determine: (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, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa. Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted); **see also *Commonwealth v. Glass***, 50 A.3d 720, 726 (Pa. Super. 2012).

In this case, counsel's ***Anders*** brief contains a concise statement pursuant to Rule 2119(f) identifying all of the discretionary sentencing issues raised in Boynes Rule 1925(b) statement. These include:

- (1) The [PSI] showed that [Boynes] had made significant strides in overcoming his less than sterling criminal history in the past four (4) years;
- (2) The letters of support that the trial court had received from friends and family members of [Boynes] had shown that [Boynes] had turned his life around and that the incident giving rise to the instant conviction and resulting sentence was an aberration in an otherwise peaceful and law-abiding life;
- (3) The assault victim, Evelyn Douglass, appeared and testified on [Boynes'] behalf, conceding that it was she who initiated the incident giving rise to the [a]ggravated [a]ssault charge against [Boynes] and

further that she had struck the first blow against [Boynes] in the incident;

- (4) The incident giving rise to the criminal charges lodged against [Boynes] stemmed from a domestic dispute with his long-time girlfriend, Evelyn Douglass, in which passions were inflamed and good judgement [*sic*] was impaired on the part of both [Boynes] and the victim, Ms. Douglass;
- (5) [Boynes] took responsibility for his actions and tendered an open plea of guilty to the offense of Aggravated Assault, a violation of 18 Pa. C.S.A. § 2702(a), which offense was graded as a felony of the first degree;
- (6) [Boynes] acknowledges that the standard range recommended by the Sentencing Guidelines in his case is sixty (60) to seventy-two (72) months, that his prior record score (PRS) was five (5), that his offense gravity score (OGS) is ten (10), and that the sentence imposed by Your Honor is within the lower limit of the standard guideline range; and
- (7) [Boynes] contends that the interests of justice and the protection would have been best served by the imposition of a minimum sentence within the mitigated range of the Sentencing Guidelines.

Anders Brief at 22-23.

All of these contentions essentially amount to claims that the trial court failed to consider adequately various mitigating factors (*e.g.*, efforts at rehabilitation, favorable letters and testimony, and taking responsibility for his mistake). Paragraph (7) could arguably be read to constitute a claim that the trial court's sentence in the standard range was excessive, and that the appropriate sentence (when considering all of the mitigating factors) should instead be in the mitigated range of the sentencing guidelines.

None of these contentions raises a substantial question to permit review by this Court. A substantial question exists “only when the appellant advances a colorable argument that the sentencing judge's actions were either inconsistent with a specific provision of the Sentencing Code or contrary to the fundamental norms which underlie the sentencing process.” **Sierra**, 752 A.2d at 912-13. A claim that the trial court failed to consider mitigating factors does not present a substantial question. **Commonwealth v. Corley**, 31 A.3d 293, 298 (Pa. Super. 2011); **Commonwealth v. Kane**, 10 A.3d 327, 335-36 (Pa. Super. 2010). Moreover, as this Court indicated in **Commonwealth v. Moury**, 992 A.2d 162, 171 (Pa. Super. 2010), where the trial court imposed a sentence in the standard-range of the sentencing guideline and had the benefit of a PSI when doing so, no substantial question is raised and we will not consider the sentence excessive.

Having determined that the issues raised in the **Anders** brief are frivolous, it remains for this Court to conduct an independent examination of the record to determine whether counsel could have raised any non-frivolous arguments. **Santiago**, 602 Pa. at 168 n.5, 978 A.2d at 355 n.5. Having done so, we have found none. Accordingly, we agree with counsel that Boynes’ appeal is frivolous, and so we grant his petition to withdraw and affirm the judgment of sentence.

Judgment of sentence affirmed. Petition to withdraw granted.

J-S29004-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Gambetti", written over a horizontal line.

Prothonotary

Date: 5/28/2013