

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
WAYNE JOHNSON,		No. 2516 EDA 2011
Appellant		

Appeal from the Judgment of Sentence entered August 30, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1208802-2002

BEFORE: OLSON, WECHT AND COLVILLE,* JJ.

MEMORANDUM BY OLSON, J.:

Filed: March 18, 2013

Appellant, Wayne Johnson, appeals from the judgment of sentence entered on August 30, 2011. On this direct appeal, Appellant's court-appointed counsel has filed both a petition to withdraw as counsel and an accompanying brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009). We conclude that Appellant's counsel has complied with the procedural requirements necessary to affect withdrawal. Moreover, after independently reviewing the record, we conclude that the instant appeal is wholly frivolous. We therefore grant counsel's petition to withdraw and affirm Appellant's judgment of sentence.

The trial court has provided us with an excellent recitation of the underlying facts:

*Retired Senior Judge assigned to the Superior Court.

On May 25, 2003, [A]ppellant entered a negotiated guilty plea to robbery, graded as a felony of the first degree, criminal conspiracy [to commit first-degree felony robbery,] and possessing an instrument of crime (PIC).^[1] Th[e trial] court deferred [A]ppellant's sentencing hearing until July 9, 2003, at which time [A]ppellant also [pleaded] guilty to receiving stolen property [] in an unrelated matter The [trial] court then sentenced [A]ppellant to [11 ½] to [23 months'] incarceration[,] followed by ten [years'] probation on the robbery and conspiracy bills and two [years'] probation on the [receiving stolen property] bill. Each of [Appellant's] sentences was ordered to run concurrently. No further penalty was imposed on the PIC bill.

On December 29, 2003, shortly after being paroled from county jail, [A]ppellant reported to the Philadelphia Department of Adult Probation where he was given instructions about the rules and regulations of probation and parole. Almost immediately, [A]ppellant disregarded the most important rule by committing a new crime. On January 5, 2004 – a week after [Appellant's] release from jail – [A]ppellant was arrested and charged with possession [of a controlled substance] with [the] intent to deliver (PWID) and simple possession of a controlled substance. Th[e trial] court lodged a detainer. On May 20, 2004, [A]ppellant was convicted of simple possession . . . and sentenced to [12 months of] probation. . . .

On May 27, 2004, [the trial] court held a violation of probation (VOP) hearing. The [trial] court found [A]ppellant in direct violation of his probation and parole. The court [then] revoked [A]ppellant's parole, [ordered Appellant] to serve the balance of his back-time, and directed that [Appellant] not be paroled except upon the specific order of the court. The [trial] court did not revoke [A]ppellant's probation.

¹ 18 Pa.C.S.A. §§ 3701, 903, and 907, respectively.

In early August of 2004, [A]ppellant filed a Petition for Earned Time/Good Time and Early Parole. The Commonwealth did not object to [A]ppellant's request[] and, on August 16, 2004, the [trial] court granted [A]ppellant's request for parole.

[Following Appellant's release from prison,] Appellant again violated the terms of his probation and parole. He tested positive for drug use on three occasions. More importantly, [A]ppellant was arrested multiple times. On January 2, 2005, he was arrested and charged with two counts of simple assault and reckless endangerment [at two separate docket numbers]. . . . Appellant was convicted of all charges following a [m]unicipal [c]ourt trial before the Honorable James A. Lineberger. Judge Lineberger sentenced [A]ppellant to [11 ½] to [23 months'] incarceration on both cases. Appellant was also charged with robbery, carjacking, possessing a firearm[,] and related offenses which stemmed from an unrelated incident that occurred on or about November 29, 2004. . . . This case was eventually *nolle prossed* by the Commonwealth. . .

At a VOP hearing on July 26, 2005, [the trial] court again found [A]ppellant in direct and technical violation of his probation and parole. The [trial] court terminated [A]ppellant's parole, revoked his probation and imposed a new sentence of one-and-a-half [] to three [] years in state prison followed by four years [of] reporting probation.

On January 3, 2008, [A]ppellant was released from state prison and placed on special probation under the supervision of the Pennsylvania Board of Probation and Parole (BPP). Appellant immediately began using drugs. He tested positive for PCP use the day after his release. As a result of this positive drug test, BPP increased its supervision of [A]ppellant and placed him on electronic monitoring. Appellant failed to report to BPP on February 28, 2008 and, on April 5, 2008, [Appellant] was arrested for purchasing marijuana. . . . As a result of [A]ppellant's arrest, BPP lodged a detainer. BPP lifted the detainer and released [A]ppellant from custody after his marijuana case was dismissed for lack of prosecution on August 20, 2008.

On July 16, 2009, Philadelphia Police arrested [A]ppellant and charged him with murder and related offenses. On May 23, 2011, following a two week jury trial before the Honorable Rose Marie DeFino-Nastasi, [A]ppellant was convicted of [first-degree murder, PIC,] and violating [sections 6106] and 6108 of the Uniform Firearms Act. Judge DeFino-Nastasi thereafter sentenced [A]ppellant to life imprisonment on the murder bill, three-and-a-half [] to seven [years' imprisonment] on the PIC bill[,], and two-and-a-half [] to five [years' imprisonment] on both VUFA bills.

[The trial court then] conducted a VOP hearing on August 30, 2011 and found [A]ppellant in direct and technical violation of his probation/parole. The [trial] court terminated [A]ppellant's parole, revoked [Appellant's] probation[,], and [re-sentenced Appellant to a term of ten to 20 years in prison on the original robbery conviction and a concurrent term of ten to 20 years in prison on the original criminal conspiracy conviction]. The [trial] court further directed that its [entire] sentence run concurrently to the life sentence [that A]ppellant was already serving.

Trial Court Opinion, 10/13/11, at 1-3 (internal footnotes omitted).

Appellant filed a timely post-sentence motion and claimed that his sentence – following his probation revocation – was “excessive and unreasonable in light of the fact that [Appellant] is already serving a [l]ife sentence, with no possibility of parole, and in light of the mitigation that [the trial court] heard in the past, which is cumulatively part of this record.” Appellant's “Motion to Reconsider and Vacate Sentence,” 9/7/11, at 2. The trial court denied Appellant's post-sentence motion on September 12, 2011 and, on September 16, 2011, Appellant filed a timely notice of appeal. **See** Pa.R.Crim.P. 708(D) (“[a] motion to modify a sentence imposed after a revocation [of probation] shall be filed within 10 days of the date of

imposition. The filing of a motion to modify sentence will not toll the 30-day appeal period”).

On appeal, Appellant’s court-appointed counsel has filed a petition for leave to withdraw and has accompanied this petition with an **Anders** brief. The **Anders** brief raises the following claim:²

Did the [trial] court err and abuse its discretion at [A]ppellant’s [VOP] hearing by imposing a manifestly excessive sentence?

Anders Brief at 3.

Before reviewing the merits of this appeal, however, this Court must first determine whether counsel has fulfilled the necessary procedural requirements for withdrawing as counsel. **Commonwealth v. Miller**, 715 A.2d 1203, 1207 (Pa. Super. 1998).

To withdraw under **Anders**, court-appointed counsel must satisfy certain technical requirements. First, counsel must “petition the court for leave to withdraw stating that, after making a conscientious examination of the record, counsel has determined that the appeal would be frivolous.” **Miller**, 715 A.2d at 1207. Second, counsel must file an **Anders** brief, in which counsel:

² The trial court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Appellant complied and listed the claim he currently raises on appeal.

(1) provide[s] a summary of the procedural history and facts, with citations to the record; (2) refer[s] to anything in the record that counsel believes arguably supports the appeal; (3) set[s] forth counsel's conclusion that the appeal is frivolous; and (4) state[s] 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.

Finally, counsel must furnish a copy of the **Anders** brief to his client and advise the client "of [the client's] right to retain new counsel, proceed *pro se* or raise any additional points worthy of this Court's attention."

Commonwealth v. Woods, 939 A.2d 896, 898 (Pa. Super. 2007).

If counsel meets all of the above obligations, "it then becomes the responsibility of the reviewing court to make a full examination of the proceedings and make an independent judgment to decide whether the appeal is in fact wholly frivolous." **Santiago**, 978 A.2d at 355 n.5, *quoting Commonwealth v. McClendon*, 434 A.2d 1185, 1187 (Pa. 1981). It is only when both the procedural and substantive requirements are satisfied that counsel will be permitted to withdraw.

In the case at bar, counsel has met all of the above procedural obligations.³ We must, therefore, review the entire record and analyze

³ Appellant has not responded to counsel's petition to withdraw.

whether this appeal is, in fact, wholly frivolous. Our analysis begins with the issue raised in the **Anders** brief.

As the **Anders** brief claims, the trial court abused its discretion when it imposed a “manifestly excessive” sentence upon Appellant. **Anders** Brief at 10. Apparently, Appellant contends that his current sentence is excessive, as he is already serving a term of life imprisonment for first-degree murder. **See id.** at 12. Appellant does not challenge the revocation of his probation or the fact that the trial court imposed a sentence of total confinement. Rather, Appellant objects to the length of his sentencing term, which is a challenge to the discretionary aspects of his sentence. **Commonwealth v. Rhoades**, 8 A.3d 912, 916 (Pa. Super. 2010) (claim that sentence is excessive is a challenge to the discretionary aspects of a sentence).

We note that “sentencing is a matter vested in the sound discretion of the sentencing judge, whose judgment will not be disturbed absent an abuse of discretion.” **Commonwealth v. Ritchey**, 779 A.2d 1183, 1185 (Pa. Super. 2001). Moreover, pursuant to statute, Appellant does not have an automatic right to appeal the discretionary aspects of his sentence. **See** 42 Pa.C.S.A. § 9781(b). Instead, Appellant must petition this Court for permission to appeal the discretionary aspects of his sentence. **Id.**

As this Court has explained:

To reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at

sentencing or in a motion to reconsider and modify sentence, Pa.R.Crim.P. [708]; (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. Cook, 941 A.2d 7, 11 (Pa. Super. 2007). "The determination of whether a particular case raises a substantial question is to be evaluated on a case-by-case basis. Generally, however, in order to establish that there is a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process."

Commonwealth v. Marts, 889 A.2d 608, 612 (Pa. Super. 2005) (internal citations omitted).

Further, as our Supreme Court has held, the determination of whether a substantial question exists must be done prior to – and be divorced from – the determination of the potential merits of an issue. ***Commonwealth v. Tuladziecki***, 522 A.2d 17, 19 (Pa. 1987). If it were otherwise, a challenger would "in effect obtain[] an appeal as of right from the discretionary aspects of a sentence" – a result that would violate statutory law. ***Id.***

As stated above, Appellant filed a timely notice of appeal and preserved his discretionary sentence challenge in a post-sentence motion. Further, although Appellant has not included a Rule 2119(f) statement in his brief, the Commonwealth has not objected to this defect and we may, therefore, "ignore the omission and determine if there is a substantial

question that the sentence imposed was not appropriate." **Commonwealth v. Yeomans**, 24 A.3d 1044, 1049 (Pa. Super. 2011); **see also Commonwealth v. Lilley**, 978 A.2d 995, 998 (Pa. Super. 2009) (holding that, under **Anders**, this Court has the obligation to independently review the record; therefore, an insufficient Rule 2119(f) statement will not cause a discretionary aspects of sentencing claim to be waived on appeal). Appellant has not, however, raised a substantial question that his sentence is inappropriate under the Sentencing Code.

Since Appellant was sentenced following the revocation of probation, the sentencing guidelines do not apply to Appellant's sentence. 204 Pa.Code § 303.1(b); **Commonwealth v. Ferguson**, 893 A.2d 735, 739 (Pa. Super. 2006). Nevertheless, in sentencing Appellant, the trial court was required to "consider the general principles and standards of the Sentencing Code." **Commonwealth v. Russell**, 460 A.2d 316, 322 (Pa. Super. 1983). Section 9721 expresses these general principles in the following manner:

the sentence imposed should call for confinement that is 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).

In this case, Appellant was sentenced to two concurrent, ten-to-20-year terms of imprisonment for robbery and criminal conspiracy. As both of Appellant's convictions constitute first-degree felonies, the above sentences

were legal. **See** 18 Pa.C.S.A. § 1103(1) (statutory maximum term of imprisonment for a first-degree felony is 20 years in prison). Now on appeal, Appellant simply claims that his sentence was excessive because he is already serving a term of life in prison for first-degree murder. This contention does not explain how or why Appellant's sentence is "inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process." **Marts**, 889 A.2d at 612. The claim, thus, does not raise a substantial question that the sentence imposed was inappropriate under the Sentencing Code and we cannot reach the merits of Appellant's claim.

Further, after an independent review of the entire record, we see nothing that might arguably support this appeal. The appeal is, therefore, wholly frivolous. Accordingly, we affirm Appellant's judgment of sentence and grant counsel's petition for leave to withdraw appearance.

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