NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. CORNELIUS DAVIS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2592 EDA 2012

Appeal from the Judgment of Sentence August 3, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0006668-2011

BEFORE: GANTMAN, J., SHOGAN, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, J.: **FILED DECEMBER 27, 2013**

Appellant, Cornelius Davis, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his open guilty plea to receiving stolen property and fleeing or attempting to elude a police officer.[1] We affirm and grant counsel's petition to withdraw.

The relevant facts and procedural history of this case are as follows. On May 20, 2011, a Papa John's deliveryman exited his vehicle to make a delivery. When the driver returned to his vehicle, he found Appellant sitting in it. Appellant drove off in the vehicle. Police observed Appellant drive at a high rate of speed and almost crash into several parked cars. A police chase ensued. Ultimately, police apprehended Appellant. The Commonwealth

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[1] 18 Pa.C.S.A. § 3925; 75 Pa.C.S.A. § 3733.

charged Appellant with theft by unlawful taking, receiving stolen property, fleeing or attempting to elude a police officer, and unauthorized use of a motor vehicle.

On June 6, 2012, Appellant entered an open guilty plea to receiving stolen property and fleeing or attempting to elude a police officer. Prior to accepting the plea, the court conducted an on-the-record colloquy to confirm Appellant's plea was knowingly, voluntarily, and intelligently entered. Additionally, Appellant executed a written plea colloquy. On August 3, 2012, with the benefit of a pre-sentence investigation ("PSI") report, the court sentenced Appellant to three(3) to six (6) years' imprisonment on the receiving stolen property conviction, and a consecutive two and one-half (2½) to five (5) years' imprisonment on the fleeing or attempting to elude a police officer conviction. Appellant timely filed a post-sentence motion on August 13, 2012, claiming his sentence was excessive and warranted a reduction. On August 27, 2012, the court denied Appellant's motion.

Appellant timely filed a notice of appeal on August 31, 2012. On September 6, 2012, the court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant's counsel filed a statement of intent to file an ***Anders***/***McClendon*** brief (***see Anders v. California***, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); ***Commonwealth v. McClendon***, 495 Pa. 467, 434 A.2d 1185 (1981)), pursuant to Rule 1925(c)(4).

As a preliminary matter, appellate counsel seeks to withdraw his representation pursuant to ***Anders*** and ***Commonwealth v. Santiago***, 602 Pa. 159, 978 A.2d 349 (2009). ***Anders*** and ***Santiago*** require counsel to: 1) petition the Court for leave to withdraw, certifying that after a thorough review of the record, counsel has concluded the issues to be raised are wholly frivolous; 2) file a brief referring to anything in the record that might arguably support the appeal; and 3) furnish a copy of the brief to the appellant and advise him of his right to obtain new counsel or file a *pro se* brief to raise any additional points the appellant deems worthy of review. ***Id.*** at 173-79, 978 A.2d at 358-61. Substantial compliance with these requirements is sufficient. ***Commonwealth v. Wrecks***, 934 A.2d 1287 (Pa.Super. 2007).

In ***Santiago, supra***, our Supreme Court addressed the briefing requirements where court-appointed appellate counsel seeks to withdraw representation:

> Neither ***Anders*** nor ***McClendon*** requires that counsel's brief provide an argument of any sort, let alone the type of argument that counsel develops in a merits brief. To repeat, what the brief must provide under ***Anders*** are references to anything in the record that might arguably support the appeal.
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> Under ***Anders,*** the right to counsel is vindicated by counsel's examination and assessment of the record and counsel's references to anything in the record that arguably supports the appeal.

Santiago, supra at 176, 177, 978 A.2d at 359, 360. Thus, the Court held:

> [I]n the ***Anders*** brief that accompanies court-appointed counsel's petition to withdraw, counsel 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.

Id. at 178-79, 978 A.2d at 361.

Instantly, counsel filed a petition for leave to withdraw representation. The petition states that following counsel's careful review of the record, he determined the appeal is wholly frivolous. Counsel indicates he notified Appellant of the withdrawal request. Counsel also supplied Appellant with a copy of the brief and a letter explaining Appellant's right to proceed *pro se* or with new privately retained counsel to raise any additional points or arguments that Appellant believes have merit. (***See*** Letter to Appellant, dated 8/27/13, attached to Petition For Leave to Withdraw as Counsel, filed 8/27/13, at 1). In the ***Anders*** brief, counsel provides a summary of the facts and procedural history of the case with citations to the record. Counsel refers to evidence in the record that might arguably support the issues raised on appeal and provides citations to relevant law. Counsel also states the reasons for his conclusion that the appeal is wholly frivolous. Therefore, counsel has substantially complied with the requirements of ***Anders*** and ***Santiago***. ***See Wrecks, supra***.

As Appellant has filed neither a *pro se* brief nor a counseled brief with new privately retained counsel, we review this appeal based on the issues raised in the ***Anders*** brief:

> DID THE COURT HAVE JURISDICTION?
>
> WAS APPELLANT'S GUILTY PLEA INVOLUNTARY?
>
> WAS THE SENTENCE IMPOSED A LEGAL SENTENCE?
>
> WAS THE SENTENCE IMPOSED EXCESSIVE AND UNREASONABLE?

(***Anders*** Brief at 2).

For purposes of disposition, we combine Appellant's issues. Appellant challenges: (1) the trial court's jurisdiction in this matter; (2) the voluntariness of Appellant's plea; (3) the legality of Appellant's sentence; and (4) the court's imposition of consecutive sentences as excessive, where most of Appellant's prior convictions allegedly occurred over twenty years ago, and in light of Appellant's open guilty plea. Appellant's claims merit no relief.

Generally, "a person may be convicted under the law of this Commonwealth of an offense committed by his own conduct or the conduct of another for which he is legally accountable if…the conduct which is an element of the offense or the result which is such an element occurs within this Commonwealth." 18 Pa.C.S.A. § 102(a)(1).

Concerning challenges to the voluntariness of a plea:

> A defendant wishing to challenge the voluntariness of a guilty plea on direct appeal must either object during the plea colloquy or file a motion to withdraw the plea within ten days of sentencing. Pa.R.Crim.P. 720(A)(1), (B)(1)(a)(i). Failure to employ either measure results in waiver. ***Commonwealth v. Tareila***, 895 A.2d 1266, 1270 n.3 (Pa.Super. 2006). Historically, Pennsylvania courts adhere to this waiver principle because "[i]t is for the court which accepted the plea to consider and correct, in the first instance, any error which may have been committed." ***Commonwealth v. Roberts***, [352 A.2d 140, 141 (Pa.Super. 1975)] (holding that common and previously condoned mistake of attacking guilty plea on direct appeal without first filing petition to withdraw plea with trial court is procedural error resulting in waiver; stating, "(t)he swift and orderly administration of criminal justice requires that lower courts be given the opportunity to rectify their errors before they are considered on appeal"; "Strict adherence to this procedure could, indeed, preclude an otherwise costly, time consuming, and unnecessary appeal to this court").

Commonwealth v. Lincoln, 72 A.3d 606, 609-10 (Pa.Super. 2013) (holding defendant failed to preserve challenge to validity of guilty plea where he did not object during plea colloquy or file post-sentence motion to withdraw plea).

Moreover, withdrawal of a guilty plea after sentencing requires "a showing of prejudice on the order of manifest injustice…. A plea rises to the level of manifest injustice when it was entered into involuntarily, unknowingly, or unintelligently." ***Commonwealth v. Muhammad***, 794 A.2d 378, 383 (Pa.Super. 2002) (internal citations and quotation marks omitted). Pennsylvania law presumes a defendant who entered a guilty plea was aware of what he was doing and bears the burden of proving otherwise.

Commonwealth v. Pollard, 832 A.2d 517, 523 (Pa.Super. 2003). A defendant who decides to plead guilty is bound by the statements he makes while under oath, "and he may not later assert grounds for withdrawing the plea which contradict the statements he made at his plea colloquy." ***Id.*** "This Court evaluates the adequacy of the guilty plea colloquy and the voluntariness of the resulting plea by examining the totality of the circumstances surrounding the entry of that plea." ***Muhammad, supra*** at 383-84. A guilty plea will be deemed valid if an examination of the totality of the circumstances surrounding the plea shows that the defendant had a full understanding of the nature and consequences of his plea such that he knowingly and intelligently entered the plea of his own accord. ***Commonwealth v. Rush***, 909 A.2d 805, 808 (Pa.Super. 2006).

An illegal sentence is one that exceeds the statutory limits. ***Commonwealth v. Jacobs***, 900 A.2d 368 (Pa.Super. 2006) (*en banc*), *appeal denied*, 591 Pa. 681, 917 A.2d 313 (2007). The statutory maximum penalty for receiving stolen property and fleeing or attempting to elude a police officer is seven years' imprisonment for each crime. ***See*** 18 Pa.C.S.A. § 1103(3) (explaining statutory maximum in case of third-degree felony is seven years' imprisonment); § 3903(a.1) (stating theft constitutes felony of third degree if property stolen is automobile); 75 Pa.C.S.A. § 3733(a.2)(2)(iii) (stating crime of fleeing or eluding police officer constitutes felony of third degree if while driver was fleeing or attempting to elude police

officer, he endangers law enforcement officer or member of general public due to driver engaging in high-speed chase).

A challenge to the discretionary aspects of sentencing is not automatically reviewable as a matter of right. ***Commonwealth v. Hunter***, 768 A.2d 1136 (Pa.Super. 2001), *appeal denied*, 568 Pa. 695, 796 A.2d 979 (2001). Prior to reaching the merits of a discretionary sentencing issue:

> [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).

What constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Paul***, 925 A.2d 825, 828 (Pa.Super. 2007). A substantial question exists "only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Commonwealth v. Sierra***, 752 A.2d 910, 913 (Pa.Super. 2000) (quoting ***Commonwealth v. Brown***, 741 A.2d 726, 735 (Pa.Super. 1999) (*en banc*), *appeal denied*, 567 Pa. 755, 790 A.2d 1013 (2001)).

A claim of excessiveness can raise a substantial question as to the appropriateness of a sentence under the Sentencing Code, even if the sentence is within the statutory limits. ***Commonwealth v. Mouzon***, 571 Pa. 419, 430, 812 A.2d 617, 624 (2002). Bald allegations of excessiveness, however, do not raise a substantial question to warrant appellate review. ***Id.*** at 435, 812 A.2d at 627. Rather, a substantial question will be found "only where the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process…." ***Id.*** Nevertheless, "[a]n allegation that a sentencing court 'failed to consider' or 'did not adequately consider' certain factors does not raise a substantial question that the sentence was inappropriate." ***Commonwealth v. Cruz-Centeno***, 668 A.2d 536, 545 (Pa.Super. 1995), *appeal denied*, 544 Pa. 653, 676 A.2d 1195 (1996) (quoting ***Commonwealth v. Urrutia***, 653 A.2d 706, 710 (Pa.Super. 1995), *appeal denied*, 541 Pa. 625, 661 A.2d 873 (1995)). Moreover, where the sentencing court had the benefit of a PSI report, Pennsylvania law presumes the court was aware of the relevant information regarding an appellant's character and weighed those considerations along with mitigating factors. ***Commonwealth v. Devers***, 519 Pa. 88, 101-02, 546 A.2d 12, 18 (1988).

Instantly, the record makes clear Appellant's current crimes occurred

in Philadelphia, Pennsylvania. Thus, the Philadelphia County Court of Common Pleas had jurisdiction over Appellant's case. ***See*** 18 Pa.C.S.A. § 102. Appellant's first contention lacks merit.

With respect to Appellant's second issue, we initially observe that Appellant lodged no objection to the validity of his plea during the oral plea colloquy and did not file a post-sentence motion to withdraw his plea. Appellant's failure to challenge the voluntariness of his plea before the trial court would generally result in waiver on appeal. ***See Lincoln, supra***. In light of counsel's petition to withdraw and his filing of an ***Anders*** brief, however, we decline to find waiver on this basis and will address Appellant's claim as if properly preserved. ***See generally Commonwealth v. Lilley***, 978 A.2d 995, 998 (Pa.Super. 2009) (allowing review of issues otherwise waived on appeal when ***Anders*** brief is filed).

The record shows Appellant entered an open guilty plea to receiving stolen property and fleeing or attempting to elude a police officer. Appellant executed a written plea colloquy expressing the voluntariness of his plea. During the oral plea colloquy, Appellant agreed he understood the nature of the charges to which he was pleading guilty; the factual basis for his plea; that he had the right to proceed to a jury trial; that he was presumed innocent until found guilty; the permissible range of sentences and fines for the crimes charged; and that the court was not bound by the terms of any plea agreement. ***See*** Pa.R.Crim.P. 590(A)(2), *Comment* (setting forth

questions court should ask defendant to ascertain from defendant that plea is entered knowingly, intelligently and voluntarily). Following the colloquy, the court accepted Appellant's plea. Based on the totality of the circumstances, the record shows Appellant had a full understanding of the nature and consequences of his plea such that he knowingly and intelligently entered the plea of his own accord. ***See Rush, supra***; ***Muhammad, supra***. Therefore, Appellant's second issue merits no relief.

Regarding Appellant's challenge to the legality of his sentence, the court sentenced Appellant to three to six years' imprisonment for his receiving stolen property conviction, and a consecutive two and one-half to five years' imprisonment for his fleeing or attempting to elude a police officer conviction. The court's sentence did not exceed the statutory maximum of seven years for either offense. ***See*** 18 Pa.C.S.A. §§ 1103(3); 3903(a.1); 75 Pa.C.S.A. § 3733(a.2)(2)(iii). Therefore, the court imposed a legal sentence. ***See Jacobs, supra***. Appellant's third claim lacks merit.

As presented, Appellant's fourth issue challenges the discretionary aspects of sentencing. ***See Cruz-Centeno, supra*** (stating claim that sentence is excessive and unreasonable where court failed to consider several mitigating factors challenges discretionary aspects of sentencing). Nevertheless, Appellant's contention the court essentially failed to consider certain factors (that Appellant's prior convictions occurred more than twenty years ago and the open nature of his guilty plea) does not raise a substantial

question warranting review. ***See id.*** Moreover, the court had the benefit of a PSI report and imposed a standard range sentence for Appellant's offenses. Therefore, we can presume Appellant's sentence was reasonable and the court was aware of the relevant information regarding mitigating circumstances. ***Id.*** at 545-46 (explaining combination of PSI and standard range sentence, absent more, cannot be considered as excessive or unreasonable sentence). Furthermore, the record belies Appellant's claim that the majority of his prior convictions occurred more than twenty years ago. To the contrary, the record shows Appellant was convicted of various offenses in 1994, 2002, 2004, 2006, and 2010. (***See*** N.T. Guilty Plea Hearing, 6/6/12, at 29-33.)[2] Thus, Appellant is not entitled to relief. Accordingly, we affirm the judgment of sentence and grant counsel's petition to withdraw.

Judgment of sentence affirmed; counsel's petition to withdraw is granted.

*JUDGE SHOGAN CONCURS IN THE RESULT.

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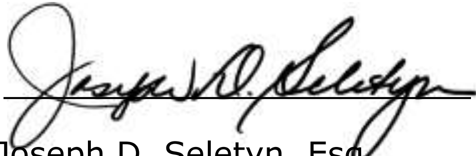
[2] Appellant's counsel explained at the guilty plea hearing that Appellant had no convictions for crimes of violence during the past twenty years but conceded he had various theft convictions, among others, during that timeframe. (***See id.*** at 30.)

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/27/2013