

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

CHARLES K. HORSH

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 278 WDA 2012

Appeal from the Judgment of Sentence January 13, 2012
In the Court of Common Pleas of Bedford County
Criminal Division at No(s): CP-05-CR-0000196-2011

BEFORE: SHOGAN, J., OTT, J., and COLVILLE, J.*

MEMORANDUM BY OTT, J.:

FILED JUNE 04, 2013

Charles K. Horsh appeals from the judgment of sentence imposed on January 13, 2012, in the Court of Common Pleas of Bedford County. On December 13, 2011, Horsh tendered a plea of *nolo contendere* to one count each of arson (danger of death or bodily injury), burglary, institutional vandalism, and intentional desecration of a public monument.¹ The court imposed an aggregate sentence of ten to 20 years' incarceration. Contemporaneous with this appeal, Horsh's counsel filed an application to withdraw from representation, in accordance with ***Commonwealth v.***

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S. §§ 3301(A)(1)(i), 3502(A), 3307(a)(1), and 5509(a)(1), respectively.

McClendon, 495 Pa. 467, 434 A.2d 1185 (1981), and its federal precursor, **Anders v. California**, 386 U.S. 738 (1967). **See also Commonwealth v. Santiago**, 978 A.2d 349 (Pa. 2009). Based upon the following, we affirm the judgment of sentence and grant counsel's application to withdraw.

The trial court concisely set forth the facts as follows:

The charges arose out of a fire at the Trinity Lutheran Church in Bedford Borough, Bedford County. Company 31 Fire Department responded to the fire, and 23 firefighters were actively engaged in fighting the fire. The State Police Fire Marshall determined the fire to be arson. It was later determined that [Horsh] and two juveniles were involved in burglarizing the church property, vandalizing the interior and deliberately starting a fire.

Trial Court Opinion, 4/17/2012, at 1-2.

In addition to the above-stated crimes, Horsh was also charged with 23 counts of arson (danger of death or bodily injury) as well as one count each of criminal trespass (breaks into structure), criminal use of communication facility, criminal mischief (damages tangible property of another intentionally, recklessly, or by negligence), receiving stolen property, theft by unlawful taking, possession of instrument of crime, and disorderly conduct. Horsh's case proceeded to trial. A jury had been selected and trial was scheduled for December 14, 2011. However, the day before trial, Horsh elected to plead no contest to arson, burglary, institutional vandalism, and intentional desecration of a public monument pursuant to a plea agreement, and in exchange, the remaining 23 counts of arson and seven other felony and/or misdemeanor counts were dismissed.

Horsh agreed to a firm bargain of ten to 20 years' imprisonment. A presentence investigation was prepared at the court's request. On January 13, 2012, the court imposed the ten to 20 year sentence in accordance with the plea agreement.² Horsh did not file post-sentence motions. This appeal followed.³

Before addressing the merits of Horsh's arguments, however, we must resolve whether appellate counsel properly filed a petition to withdraw from representation and brief in accordance with **Anders/McClendon** and the **Anders** procedures outlined in **Commonwealth v. Santiago**, 978 A.2d 349, 350-351 (Pa. 2009), specifically including proper notice of his rights to appeal and a copy of the **Anders** brief. Our review of the record reveals that counsel has substantially complied with **Anders** and **Santiago** and that no additional correspondence has been received from Horsh. We will proceed, then, to examine the record and make an independent determination of whether the appeal is wholly frivolous.

² Specifically, the court imposed a term of eight to 16 years' imprisonment with respect to the arson count and a consecutive term of two to four years' incarceration with regard to the burglary offense. The court also imposed terms of one to two years' incarceration for both the institutional vandalism and intentional desecration of a public monument charges, to be served concurrently to the other sentences. The remaining counts were *nolle prossed*.

³ On March 1, 2012, the trial court ordered Horsh to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Horsh filed a concise statement one day later. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on April 17, 2012.

We review this appeal on the basis of the issues identified in the

Anders brief:

- I. Whether the court erred when it imposed an excessive sentence in the aggravated range of the sentencing guidelines for the one count of arson-danger of death or bodily injury?
- II. Whether the court erred when it imposed an excessive sentence in the aggravated range of the sentencing guidelines without substantiating the reasons for the deviation?
- III. Whether the court erred when it accepted a plea of *nolo contendere* from [Horsh] that was not voluntarily, knowingly and intelligently entered as [Horsh] asserts that he was coerced at the time of the entry of the plea?

Anders Brief at 8. Based on the nature of Horsh's arguments, we will address his third issue first and then his other two claims together.

In his third argument, Horsh complains the court erred in accepting his plea of *nolo contendere* because he was coerced and therefore, he did not voluntarily, knowingly, and intelligently enter the plea. Specifically, he states "he was coerced at the time of the entrance of his plea as he was pressured to accept a plea as opposed to proceeding to a jury trial" because he was exposed to numerous offenses stemming from the one incident. Horsh's Brief at 23.⁴

⁴ We note that generally, where an appellant fails to challenge his guilty plea in the trial court, he may not do so on appeal. **Commonwealth v. Tareila**, 895 A.2d 1266, 1270 n.3 (Pa. Super. 2006). Horsh did not object to his *nolo contendere* plea during the oral plea colloquy or at sentencing. He also failed to move to withdraw his plea in a pre-sentence or post-sentence motion. In fact, a review of Horsh's plea agreement reveals that
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“Initially, we note that when a defendant enters a guilty plea, he or she waives all defects and defenses except those concerning the validity of the plea, the jurisdiction of the trial court, and the legality of the sentence imposed.” **Commonwealth v. Stradley**, 50 A.3d 769, 771 (Pa. Super. 2012) (citation omitted).⁵ “Our law presumes that a defendant who enters a guilty plea was aware of what he was doing. He bears the burden of proving otherwise.” **Commonwealth v. Yeomans**, 24 A.3d 1044, 1047 (Pa. Super. 2011) (citation omitted).

In order for a guilty plea to be constitutionally valid, the guilty plea colloquy must affirmatively show that the defendant understood what the plea connoted and its consequences. This determination is to be made by examining the totality of the circumstances surrounding the entry of the plea. [A] plea of guilty will not be deemed invalid if the circumstances surrounding the entry of the plea disclose that the defendant had a full understanding of the nature and consequences of his plea and that he knowingly and voluntarily decided to enter the plea.

Commonwealth v. Rush, 909 A.2d 805 (Pa. Super. 2006) (citation omitted).

In order to determine the voluntariness of the plea and whether the defendant acted knowingly and

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he waived the right to withdraw his plea pursuant to the agreement. **See** No Contest Plea Agreement, 12/21/2011. However, the testimony from the plea hearing indicates that the trial court did not question Horsh with respect to the effect of waiving the right to withdraw the plea. Therefore, in the interest of Horsh’s appellate rights, we will address the substantive issue.

⁵ A *nolo contendere* plea is treated the same as a guilty plea. **Commonwealth v. Kepner**, 34 A.3d 162, 166 n.6 (Pa. Super. 2011).

intelligently, the trial court must, at a minimum, inquire into the following six areas:

- (1) Does the defendant understand the nature of the charges to which he is pleading guilty?
- (2) Is there a factual basis for the plea?
- (3) Does the defendant understand that he has a right to trial by jury?
- (4) Does the defendant understand that he is presumed innocent until he is found guilty?
- (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged?
- (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Commonwealth v. McCauley, 797 A.2d 920, 922 (Pa. Super. 2001).

(citations omitted).

The law does not require that an appellant be pleased with the results of the decision to enter a guilty plea; rather “[a]ll that is required is that [appellant’s] decision to plead guilty be knowingly, voluntarily and intelligently made.” ***Commonwealth v. Moser***, 2007 PA Super 93, 921 A.2d 526, 528-29 (Pa. Super. 2007).

A defendant is bound by the statements made during the plea colloquy, and a defendant may not later offer reasons for withdrawing the plea that contradict statements made when he pled. ***Commonwealth v. McCauley***, 2001 PA Super 301, 797 A.2d 920, 922 (Pa. Super. 2001).

Commonwealth v. Brown, 48 A.3d 1275, 1277-1278 (Pa. Super. 2012).

Here, the trial court rejected Horsh's argument, as follows:

At the plea proceeding the Court was presented with the plea bargain and a signed colloquy. The Court, on the record, discussed with counsel and [Horsh] the meaning of a no contest plea and the maximum punishment for each offense to which he was to plead no contest. The Court also reviewed the elements of the offenses and [Horsh] indicated he understood them. Further, the Court reviewed the colloquy and asked [Horsh] if he understood his rights and if he had any questions about them. The Court also asked defense counsel if she believed he understood his rights and both [Horsh] and counsel indicated [Horsh] understood his rights. [Horsh] signed the verification stating he understood his rights. [Horsh] indicated he was pleading guilty because "there is too much evidence against me." It was also the Court's understanding the bargain was based on the fact [Horsh] would avoid exposure on 2[3] counts of Arson-endangering persons. The bargain reflected that a number of charges were to be dismissed. Each of the arson charges carried a standard range sentence of 12 to 24 months. A presentence investigation was prepared at the Court's order. Sentencing took place on January 13, 2012 and the sentence imposed was in accordance with the plea agreement. At no time during either the no contest plea or sentencing did [Horsh] state he did not understand the proceeding, to the contrary, he stated he understood the proceeding and this was agreed to by his counsel.

Generally speaking, a Defendant is bound by his sworn answers given at a plea proceeding. Com. v. Yeomans, 24 A.3d 1044, (Pa[.] Super[.] 2011). In the colloquy and on the record [Horsh] denied he was coerced and stated he understood the proceedings.

Trial Court Opinion, 4/17/2012, at 2 (record citation omitted).⁶

⁶ We note the record does not include Horsh's written colloquy; therefore, we are confined to the statements the court made at the plea hearing and in its Rule 1925(a) opinion with respect to the written colloquy. It was Horsh's (*Footnote Continued Next Page*)

We agree with the trial court that the record does not support Horsh's contention that he was coerced into accepting the plea. During the oral colloquy, the court thoroughly discussed the six areas of inquiry with Horsh to determine the voluntariness of his plea. **See McCauley, supra.** Horsh specifically denied that he was "feeling pressured in any way" with respect to the plea process. N.T., 12/13/2011, at 14. He is bound by the statements he made in court and may not now contradict them. **See Brown, supra.**⁷

Furthermore, as evident by the negotiated plea agreement, the multiple counts for arson, which Horsh claims he was exposed to and resulted in the coerced plea, were dismissed. As noted above, he pled *nolo contendere* to one count of arson and not 24 counts. The record belies Horsh's claim of inducement insofar as he received what he is now arguing about and did not face the possibility of multiple convictions for the crime. The lack of coercion evidence is further compounded by the fact that Horsh was aware of the set terms that the Commonwealth was offering in the firm bargain and he agreed to those terms when he pled *nolo contendere*.

We conclude the record reflects that Horsh knowingly, voluntarily, and intelligently agreed to a plea of *nolo contendere* in exchange for a firm

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responsibility to ensure that this Court had a complete certified record. **See Commonwealth v. Bongiorno**, 905 A.2d 998, 1000 (Pa. Super. 2006).

⁷ Likewise, he did not raise the coercion argument at the sentencing proceeding.

sentencing bargain of ten to 20 years' incarceration and he did so with the understanding that the court would likely impose that sentence in accordance with the agreement. Accordingly, Horsh's claim is without merit, and the trial court did not err in accepting his plea of *nolo contendere*.

Horsh's next two arguments concern the discretionary aspects of sentencing. In his first claim, he contends his sentence was excessive because he pled *nolo contendere* to only one count of arson and the court did not consider the gravity of the offense and his rehabilitative needs as provided in 42 Pa.C.S. § 9781. In his second claim, Horsh asserts the court imposed an excessive sentence without substantiating its reasons for deviating from the sentencing guidelines on the record.

This Court has previously held that "where the guilty plea agreement between the Commonwealth and a defendant contains a negotiated sentence, as is the case herein, and where that negotiated sentence is accepted and imposed by the court, a defendant is not allowed to challenge the discretionary aspects of the sentence." ***Commonwealth v. Byrne***, 833 A.2d 729 (Pa. Super. 2003) (citation omitted). Here, Horsh does not complain his sentence was not part of his negotiated *nolo contendere* plea or that the imposition of the sentence did not mirror the terms of the firm plea

agreement. Accordingly, he may not challenge that aspect of his sentence. Therefore, we need not address the arguments further.⁸

Lastly, as mandated by law, we have independently reviewed the record and agree with counsel that these issues are wholly frivolous. **See Commonwealth v. Woods**, 939 A.2d 896, 898 (Pa. Super. 2007). Accordingly, we affirm the judgment of sentence and grant counsel's motion to withdraw as counsel.

Judgment of sentence affirmed. Motion to withdraw as counsel granted.

⁸ Nevertheless, we note that a defendant does not have an absolute right to challenge the discretionary aspects of his sentence. To reach the merits of a discretionary issue, this Court must determine whether:

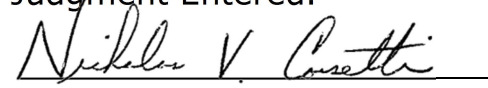
(1) the appellant preserved the issue either by raising it at the time of sentencing or in a post-sentence motion; (2) the appellant filed a timely notice of appeal; (3) the appellant set forth a concise statement of reasons relied upon for the allowance of his appeal pursuant to Pa.R.A.P. 2119(f); and (4) the appellant raises a substantial question for our review.

Commonwealth v. Stein, 39 A.3d 365, 370 (Pa. Super. 2012) (citations omitted).

Horsh has not preserved the excessive sentencing issue for our review. He did not raise this contention at the sentencing hearing. Likewise, he did not file a post-sentence motion. It bears mentioning that the court did apprise Horsh of his post-sentence and appellate rights at the sentencing hearing. **See** N.T., 1/13/2012, at 15. Accordingly, Horsh also waived his discretionary sentencing claim.

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Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Cussetti", is written over a horizontal line.

Deputy Prothonotary

Date: 6/4/2013