NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. TEREEK A. HANNER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 297 WDA 2013

Appeal from the Judgment of Sentence January 2, 2013
In the Court of Common Pleas of Erie County
Criminal Division at No(s): CP-25-CR-0001212-2012

BEFORE: BENDER, P.J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.: FILED: December 2, 2013

Appellant, Tereek A. Hanner, appeals from the judgment of sentence entered in the Erie County Court of Common Pleas, following his open guilty plea to aggravated assault.[1] We affirm, grant counsel's petition to withdraw, and deny Appellant's open petition for remission of the record.

The relevant facts and procedural history of this appeal are as follows. On April 15, 2012, Appellant chased three individuals while carrying a loaded handgun. When the three individuals entered a vehicle to flee, Appellant opened fire. Multiple bullets struck the vehicle, but the occupants were not injured. On May 24, 2012, the Commonwealth filed a criminal information charging Appellant with three counts each of aggravated assault, attempted

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[1] 18 Pa.C.S.A. § 2702.

homicide, recklessly endangering another person, and related offenses. On October 29, 2012, Appellant pled guilty to one count of aggravated assault. In exchange, the Commonwealth agreed to withdraw the remaining charges. The plea agreement did not include a negotiated sentence. Following an oral colloquy, the court accepted Appellant's plea.

With the benefit of a pre-sentence investigation ("PSI") report, the court conducted Appellant's sentencing hearing on January 2, 2013. At the conclusion of the hearing, the court sentenced Appellant to fifty-four (54) to one hundred twenty (120) months' incarceration. On January 7, 2013, plea counsel timely filed a post-sentence motion on Appellant's behalf and a motion to withdraw as counsel. In the post-sentence motion, Appellant asked the court to reduce his sentence in light of his desire to provide for his family. Appellant also emphasized that his plea agreement saved the Commonwealth and the victims the need for trial. Appellant claimed to have remorse for his actions, admitting that his actions were wrong. Further, Appellant reiterated his willingness to attend any treatment program the court deemed necessary. The court denied Appellant's post-sentence motion on January 8, 2013, and in a separate order the court granted plea counsel's motion to withdraw.

Appellant timely filed a notice of appeal on January 11, 2013. The court did not order Appellant to file a concise statement of errors complained

of on appeal, pursuant to Pa.R.A.P. 1925(b); and Appellant filed none. Appellant requested appointment of counsel for appeal, which was granted.

As a preliminary matter, appellate counsel seeks to withdraw her representation pursuant to ***Anders v. California***, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) 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. ***Santiago, supra*** at 173-79, 978 A.2d at 358-61. Substantial compliance with these requirements is sufficient. ***Commonwealth v. Wrecks***, 934 A.2d 1287, 1290 (Pa.Super. 2007). "After establishing that the antecedent requirements have been met, this Court must then make an independent evaluation of the record to determine whether the appeal is, in fact, wholly frivolous." ***Commonwealth v. Palm***, 903 A.2d 1244, 1246 (Pa.Super. 2006) (quoting ***Commonwealth v. Townsend***, 693 A.2d 980, 982 (Pa.Super. 1997)).

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

> Neither ***Anders*** nor ***McClendon***[2] 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, appellate counsel filed a petition for leave to withdraw representation. The petition states counsel conducted a conscientious review of the record and determined the appeal is wholly frivolous. Counsel

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[2] ***Commonwealth v. McClendon***, 495 Pa. 467, 434 A.2d 1185 (1981).

indicates she 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 arguments that Appellant believes have merit. In her ***Anders*** brief, counsel provides a summary of the facts and procedural history of the case. Counsel refers to evidence in the record that may arguably support the issue raised on appeal, and she provides citations to relevant law. The brief also provides counsel's reasons for her conclusion that the appeal is wholly frivolous. Therefore, counsel has substantially complied with the requirements of ***Anders*** and ***Santiago***.

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

> WAS THE SENTENCE IN THIS CASE MANIFESTLY EXCESSIVE AND CLEARLY UNREASONABLE, AND NOT INDIVIDUALIZED AS REQUIRED BY LAW?

(***Anders*** Brief at 1).[3]

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[3] Appellant has filed a *pro se* "petition for remission of the record." In it, Appellant states he has received "after-discovered/exculpatory evidence," and this Court must remand the matter to the trial court for additional proceedings. (***See*** Petition, filed 9/25/13, at 1.) Appellant, however, does not attempt to raise additional issues he deems worthy of this Court's review. ***See Santiago, supra***. Consequently, we deny Appellant's petition without prejudice to his right to raise the after-discovered evidence claim in a properly filed petition for collateral review. ***See*** 42 Pa.C.S.A. §

(Footnote Continued Next Page)

Appellant contends the sentencing court failed to impose an individualized sentence. Appellant asserts that a more lenient sentence would have been consistent with the protection of the public, the gravity of the offense, and his rehabilitative needs. Additionally, Appellant insists the court failed to consider the mitigating factors set forth by defense counsel at the sentencing hearing, including Appellant's strong family support and the fact that Appellant took responsibility for his actions by entering a guilty plea. Appellant concludes the court abused its discretion by imposing a manifestly excessive and clearly unreasonable sentence. Appellant challenges the discretionary aspects of sentence.[4] ***See Commonwealth v. Lutes***, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Commonwealth v. Sierra***, 752 A.2d

(Footnote Continued) ———————————

9543(a)(2)(vi) (explaining claims of after-discovered exculpatory evidence are cognizable under Post Conviction Relief Act).

[4] "[W]hile a guilty plea which includes **sentence negotiation** ordinarily precludes a defendant from contesting the validity of his…sentence other than to argue that the sentence is illegal or that the sentencing court did not have jurisdiction, **open** plea agreements are an exception in which a defendant will not be precluded from appealing the discretionary aspects of the sentence." ***Commonwealth v. Tirado***, 870 A.2d 362, 365 n.5 (Pa.Super. 2005) (emphasis in original). "An 'open' plea agreement is one in which there is no negotiated sentence." ***Id.*** at 363 n.1. Here, Appellant's plea included no negotiated sentence.

910 (Pa.Super. 2000). 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). Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or raised in a motion to modify the sentence imposed at that hearing. ***Commonwealth v. Mann***, 820 A.2d 788 (Pa.Super. 2003), *appeal denied*, 574 Pa. 759, 831 A.2d 599 (2003).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal 'furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing

decision to **exceptional** cases.'" ***Commonwealth v. Phillips***, 946 A.2d 103, 112 (Pa.Super. 2008), *cert. denied*, 556 U.S. 1264, 129 S.Ct. 2450, 174 L.Ed.2d 240 (2009) (quoting ***Commonwealth v. Williams***, 562 A.2d 1385, 1387 (Pa.Super. 1989) (*en banc*) (emphasis in original)).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830 A.2d 1013 (Pa.Super. 2003). 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." ***Sierra, supra*** at 912-13 (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 that a sentence is manifestly excessive might raise a substantial question if the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence imposed violates a specific provision of the Sentencing Code or the norms underlying the sentencing process. ***Mouzon, supra*** at 435, 812 A.2d at 627. 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)). ***See also Commonwealth v. Kane***, 10 A.3d 327 (Pa.Super. 2010), *appeal denied*, 612 Pa. 689, 29 A.3d 796 (2011) (stating claim that sentencing court failed to consider factors set forth in 42 Pa.C.S.A. 9721(b) does not raise substantial question).

Instantly, Appellant failed to raise his claim regarding an individualized sentence at the sentencing hearing. Appellant also failed to raise this claim in his post-sentence motion. Thus, the claim is waived. ***Mann, supra***. Moreover, Appellant's assertion that the court improperly weighed the mitigating factors does not raise a substantial question. ***See Cruz-Centeno, supra***. Additionally, the court had the benefit of a PSI report. Therefore, we can presume it considered the relevant sentencing factors. ***See Tirado, supra*** (stating where sentencing court had benefit of PSI, law assumes court was aware of and weighed relevant information regarding defendant's character and mitigating factors). The court also imposed a standard range sentence.[5] Thus, Appellant's sentence is presumptively valid. ***See Cruz-Centeno, supra*** (explaining that combination of PSI and standard range sentence, absent more, cannot be considered excessive or

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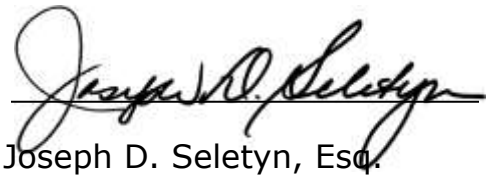
[5] With a prior record score of two (2) and an offense gravity score of ten (10), and application of the deadly weapon "used" sentencing enhancement, the standard range for Appellant's conviction was fifty-four (54) to sixty-six (66) months.

unreasonable). Accordingly, we affirm the judgment of sentence, grant counsel's petition to withdraw, and deny Appellant's petition for remission of the record.

Judgment of sentence affirmed; counsel's petition to withdraw is granted; Appellant's petition for remission of the record is denied.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/02/2013