

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

TORRE RANDOLPH,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3096 EDA 2011

Appeal from the Judgment of Sentence January 28, 2010
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-0002284-2009

BEFORE: STEVENS, P.J., BOWES, J., and FITZGERALD, J.*

DISSENTING MEMORANDUM BY STEVENS, P.J.

FILED MAY 29, 2013

As I disagree with the Majority's conclusion that Appellant's Motion for Modification/Reduction of Sentence should have been treated as a PCRA petition and that the trial court should have appointed counsel to represent him prior to its denial, I respectfully dissent.

On January 27, 2009, Appellant, represented by counsel, pled guilty to the first three counts of the criminal information pursuant to a plea bargain which counsel had negotiated with the Commonwealth. Appellant also completed a written Guilty Plea Colloquy dated January 27, 2009, wherein the charges to which he plead, along with their corresponding sentence, were set forth. Appellant indicated his full understanding of the charges as

* Former Justice specially assigned to the Superior Court.

well as of the rights he would be giving up by pleading guilty to them. He also was informed of the time by which he would need to file a timely appeal. The Commonwealth declined to invoke any of the potentially applicable mandatory minimum sentencing provisions under 18 Pa.C.S.A. § 7508, and the trial court did not apply such mandatory minimum sentences. The Commonwealth also withdrew charges set forth in six remaining counts of the criminal information.

At a hearing held on January 28, 2010, Appellant stated on the record he heard and understood the facts represented by the Commonwealth with regard to each count to which he was pleading guilty. N.T., 1/28/10 at 3-4. He further indicated he was satisfied with counsel's representation of him and that he was freely entering his plea. ***Id.*** at 4. The trial court accepted Appellant's plea and sentenced him to an aggregate term of six (6) years to twelve (12) years in a State Correctional Institution. Appellant received credit for time he had served in custody from April 29, 2009, to January 28, 2010. The trial court also informed Appellant that he may file a motion for reconsideration of his sentence within ten days and that he had thirty days in which to file an appeal with this Court challenging the voluntariness of his decision and the legality of the sentence. ***Id.*** at 12.

On October 14, 2011, Appellant filed a *pro se* Motion for the Modification/Reduction of Sentence wherein he argued the sentence should be modified "to a level which is more representative of the rehabilitative

goals of the criminal justice system.” **See** “Motion For The Modification/Reduction of Sentence” at ¶ 4. In an Order entered on October 20, 2011, the trial court denied Appellant’s Motion and included a footnote explaining its reasoning for doing so as follows:

[Appellant] seeks collateral review of his sentence imposed on January 20, 2010[,] which is impermissible. Further, [Appellant] was sentenced pursuant to a plea agreement which I found, at the time of sentencing, he voluntarily entered into. Accordingly, even if relief were possible, it would not be granted.

See Order entered 10/20/11 at n.1.

On November 14, 2011, Appellant filed his Notice of Appeal. Trial counsel filed a motion to withdraw as counsel, and in a *Per Curiam* Order filed on September 21, 2012, this Court granted the motion. Current counsel was appointed and filed his petition for leave to withdraw with this Court under **Anders and Santiago** on December 10, 2012.

When presented with an **Anders** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw. **Commonwealth v. Goodwin**, 928 A.2d 287, 290 (Pa. Super. 2007) (*en banc*). Before counsel is permitted to withdraw, he or she must meet the following requirements:

First, counsel must petition the court for leave to withdraw and state that after making a conscientious examination of the record, he has determined that the appeal is frivolous; second, he must file a brief referring to any issues in the record of arguable merit; and third, he must furnish a copy of the brief to the defendant and advise him of his right to retain new counsel or to himself raise any additional points he deems worthy of the Superior Court's attention.

Santiago, 602 Pa. at 178–79, 978 A.2d at 361.^{FN2}

FN2. The requirements set forth in **Santiago** apply to cases where the briefing notice was issued after August 25, 2009, the date the **Santiago** opinion was filed. As the briefing notice in this case was issued after **Santiago** was filed, its requirements are applicable here.

Commonwealth v. Martuscelli, 54 A.3d 940, 947 (Pa. Super. 2012).

Herein, following my review of the Petition of Counsel for Appellant for Leave to Withdraw, I would find that counsel's correspondence, wherein he summarized the issues he believed Appellant wished to raise on appeal and advised Appellant of his right to proceed *pro se* or with privately retained counsel, along with the **Anders** brief counsel prepared, satisfy all of the foregoing requirements. Moreover, I disagree with the Majority's determination that the language in counsel's letter suggests to Appellant that he cannot obtain new counsel or respond to present counsel's request to withdraw until after counsel's petition to withdraw is granted.

Appellate counsel has presented the issues of whether Appellant may properly challenge the discretionary aspects of his sentence imposed pursuant to the plea bargain and whether trial counsel had adequately and correctly advised Appellant in the negotiation of the pleas bargain.

Our standard of review in an appeal from the discretionary aspects of a sentence is well settled:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law,

exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Hardy, 939 A.2d 974, 980 (Pa. Super. 2007) (citation omitted).

[T]he right to appeal such an aspect of sentencing is not absolute and is waived if the appellant does not challenge it in post-sentence motions or by raising the claim during sentencing proceedings. To reach the merits of a discretionary sentencing issue, this Court will conduct a four-part analysis to determine:

(1) whether Appellant has filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether Appellant's brief has a fatal defect; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the sentencing code. **Commonwealth v. Bullock**, 948 A.2d 818, 825–26 (Pa. Super. 2008) (emphasis added) (citation omitted).

Commonwealth v. Lebarre, 961 A.2d 176, 178 (Pa. Super. 2008).

As the Majority acknowledges, in **Commonwealth v. Glunt**, 61 A.3d 228 (Pa. Super. 2012) this Court noted that a where an appellant did not seek relief pursuant to the PCRA in filing a post-sentence motion after his judgment of sentence had become final, but sought relief available under the PCRA, **see** 42 Pa.C.S.A. § 9543(a)(2)(vii), the trial **could have** elected to treat the petition as a PCRA petition, **see Commonwealth v. Wrecks**, 931 A.2d 717, 720 (Pa. Super. 2007) but it **chose** not to. **Commonwealth v. Glunt**, 61 A.3d 228, 229 (Pa. Super. 2012). The Majority herein has determined that this case must be interpreted as meaning that “when the relief requested in the post-trial motion cannot be framed so as to be

cognizable in a PCRA petition that the motion can be treated differently, which is not the case herein.” I disagree.

Appellant was sentenced on January 28, 2010, and did not file his Motion for Modification/Reduction of Sentence until October 14, 2011, almost twenty-one months later. Pa.R.CrimP. 720(A)(1) provides that “a written post-sentence motion shall be filed no later than 10 days after imposition of sentence.” Pa.R.Crim.P. 720(A)(1). In addition, Appellant failed to file a notice of appeal within thirty days of the entry of his judgment of sentence, though an appeal to this Court must be filed within thirty days of the entry of the appealed order, see Pa.R.A.P. 903(a), and this Court strictly has construed such time limitations. Also, as we noted earlier, Appellant was advised of these time constraints on the record. Thus, I would find Appellant’s discretionary aspects of sentencing claim is waived for his failure to file a timely post-sentence motion and notice of appeal.

Lebarre, supra.

Even if Appellant had properly preserved this issue for our review, it is noteworthy that:

[w]e have recognized the importance of the plea bargaining process as a significant part of the criminal justice system. ***Commonwealth v. Anderson***, 434 Pa. Super. 309, 643 A.2d 109 (1994). Under this aspect of the system, a defendant is permitted to waive valuable rights in exchange for important concessions by the Commonwealth when the defendant is facing a slim possibility of acquittal. ***Id.***

For example, we have upheld the validity of a defendant's express waiver of his constitutional right to appeal in exchange

for the Commonwealth's agreement not to seek the death penalty. ***Commonwealth v. Barnes***, 455 Pa. Super. 267, 687 A.2d 1163 (1996). **Similarly, we have 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. Reichle*, 404 Pa. Super. 1, 589 A.2d 1140 (1991).** We stated, "If either party to a negotiated plea agreement believed the other side could, at any time following entry of sentence, approach the judge and have the sentence unilaterally altered, neither the Commonwealth nor any defendant would be willing to enter into such an agreement." ***Id.*** at 1141 (quoting ***Commonwealth v. Coles***, 365 Pa. Super. 562, 530 A.2d 453, 458 (1987)). . . Appellant entered a negotiated guilty plea and now seeks to avoid a specific term negotiated as part of that arrangement. If we allowed him now to avoid the term, it "would undermine the designs and goals of plea bargaining," and " 'would make a sham of the negotiated plea process.' " ***Reichle, supra*** at 1141 (quoting in part ***Coles, supra*** at 456).

Commonwealth v. Byrne, 833 A.2d 729, 735-736 (Pa. Super. 2003) (emphasis added).

Consequently, after an independent review of this appeal, I would find Appellant's discretionary aspects of sentencing issue to be frivolous, and I would grant counsel's petition to withdraw.