NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DAVID ALAN BONGIORNO Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 405 WDA 2013

Appeal from the Order Entered October 4, 2012
In the Court of Common Pleas of Blair County
Criminal Division at No(s): CP-07-CR-0000701-2011
CP-07-CR-0000845-2011
CP-07-CR-0000848-2011
CP-07-CR-0000850-2011
CP-07-CR-0000855-2011

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

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

Appellant, David Alan Bongiorno, appeals from the order entered in the Blair County Court of Common Pleas, which denied and dismissed Appellant's *pro se* motion to modify and reduce sentence *nunc pro tunc*. We affirm and grant counsel's petition to withdraw.

The relevant facts and procedural history of this case are as follows. On November 18, 2011, Appellant entered a negotiated guilty plea to four counts of possession of a controlled substance with the intent to deliver ("PWID"). That day, the court sentenced Appellant to an aggregate term of five (5) to ten (10) years' imprisonment, plus five (5) years' probation. The court's sentencing order made clear Appellant was eligible for Recidivism

Risk Reduction Incentive ("RRRI") sentencing and Appellant's RRRI minimum sentence was fifty (50) months' imprisonment. Appellant did not file a direct appeal. On September 4, 2012, Appellant filed a *pro se* motion to modify and reduce sentence *nunc pro tunc*. In his motion, Appellant argued the Department of Corrections ("DOC") did not follow the court's sentencing directive that Appellant was RRRI eligible; the DOC did not offer Appellant an opportunity to take part in the State Intermediate Punishment program, for which Appellant was eligible; the DOC rescinded its "pre-release" program, for which Appellant was also eligible; and based on these circumstances, the court should re-sentence Appellant to concurrent sentences on each conviction. On October 4, 2012, the court denied the motion for lack of jurisdiction.[1] Appellant timely filed a notice of appeal on Monday, November 5, 2012. 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. Upon Appellant's request, the court appointed counsel to represent Appellant on appeal.

---

[1] We note that the court properly declined to treat Appellant's motion as a petition pursuant to the Post Conviction Relief Act ("PCRA") at 42 Pa.C.S.A. §§ 9541-9546, because Appellant's claims, as presented, are not cognizable under the PCRA. ***See*** 42 Pa.C.S.A. § 9543(a)(2) (explaining petitioner is eligible for relief under PCRA if he pleads and proves by preponderance of evidence that his conviction or sentence resulted from constitutional violation, ineffective assistance of counsel, unlawfully induced guilty plea, improper obstruction of right to appeal, existence of after-discovered exculpatory evidence, imposition of sentence greater than lawful maximum, or proceeding in tribunal without jurisdiction).

As a preliminary matter, appellate counsel seeks to withdraw his representation pursuant to ***Anders v. California***, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)[2] 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.

---

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

* * *

> 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 7/16/13, attached to Petition For Leave to Withdraw as Counsel, filed 7/17/13, at 1). In the ***Anders*** brief, counsel provides a summary of the facts and procedural history of the case. Counsel explains that based on the trial court's lack of jurisdiction to review Appellant's motion, there is no

evidence in the record to arguably support the appeal. Counsel also cites to relevant law to support his reasons for the conclusion that Appellant's 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 issue raised in the ***Anders*** brief:

> WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO MODIFY/REDUCE HIS SENTENCE?

(***Anders*** Brief at 6).

Initially, we observe that 42 Pa.C.S.A. § 5505 governs the modification of trial court orders as follows: "Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed." 42 Pa.C.S.A. § 5505. Thus, absent an appeal, the trial court retains power to modify or rescind any order within thirty (30) days after its entry. ***Commonwealth v. Sheppard***, 539 A.2d 1333 (Pa.Super. 1988). Generally, after the thirty-day period expires, the court lacks jurisdiction to modify an order. ***Commonwealth v. Glunt***, 61 A.3d 228 (Pa.Super. 2012). Where a patent or obvious error exists, however, the court may exercise its inherent power to correct the error despite the absence of traditional

jurisdiction. ***Commonwealth v. Holmes***, 593 Pa. 601, 615, 933 A.2d 57, 65 (2007). Significantly, "[t]his exception to the general rule of Section 5505 cannot expand to swallow the rule." ***Id.*** at 617-18, 933 A.2d at 66-67 (emphasizing that power to correct patent or obvious errors is limited judicial power and does not extend to reconsideration of court's exercise of sentencing discretion). ***See also Commonwealth v. Robinson***, 33 A.3d 89, 92 (Pa.Super. 2011), *appeal denied*, 615 Pa. 776, 42 A.3d 292 (2012) (defining "patent" as "a fact apparent from a review of the record without resort to third-party information").

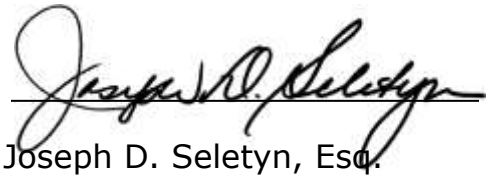
Instantly, Appellant entered a negotiated guilty plea to four counts of PWID on November 18, 2011. That day, the court sentenced Appellant to an aggregate term of five (5) to ten (10) years' imprisonment, plus five (5) years' probation. The court's sentencing order made clear Appellant was eligible for RRRI sentencing and Appellant's RRRI minimum sentence was fifty (50) months' imprisonment. Appellant did not file a direct appeal. Nearly ten months later, on September 4, 2012, Appellant filed a *pro se* motion to modify and reduce sentence *nunc pro tunc*, arguing the DOC did not follow the court's sentencing directive that Appellant was RRRI eligible; the DOC did not offer Appellant an opportunity to take part in the State Intermediate Punishment program, for which Appellant was eligible; the DOC rescinded its "pre-release" program, for which Appellant was also eligible; and based on these circumstances, the court should re-sentence Appellant to

concurrent sentences on each conviction. As a post-sentence motion, Appellant's filing was grossly untimely. ***See*** Pa.R.Crim.P. 720(A)(1) (explaining defendant shall file written post-sentence motion no later than 10 days after imposition of sentence). Additionally, with respect to Appellant's contention regarding the DOC's alleged failure to grant Appellant RRRI eligibility, counsel explained in his petition to withdraw that Appellant admitted to counsel that the DOC **did** grant him RRRI status, but Appellant wanted additional time removed from his sentence. (***See*** Petition For Leave to Withdraw as Counsel, filed 7/17/13, at 3.)

Furthermore, as Appellant filed his motion well beyond the thirty-day period in which the court could have modified the sentencing order per Section 5505, the court properly denied and dismissed the motion for lack of jurisdiction. ***See*** 42 Pa.C.S.A. § 5505; ***Glunt, supra***; ***Sheppard, supra***. Nothing in the record evidences a patent or obvious error to trigger the court's limited judicial power under the narrow exception to Section 5505. ***See Holmes, supra***; ***Robinson, supra***. Accordingly, we affirm.

Order affirmed; counsel's petition to withdraw is granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/02/2013