

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

FRANK MICICHE

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 470 EDA 2013

Appeal from the Judgment of Sentence January 9, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0003515-2012

BEFORE: PANELLA, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.:

FILED DECEMBER 03, 2013

Appellant, Frank Miciche, appeals from the January 9, 2013 judgment of sentence of one and one-half to three years' imprisonment, imposed following the revocation of his probation. Contemporaneously with this appeal, counsel has requested leave to withdraw in accordance with ***Anders v. California***, 386 U.S. 738 (1967), and its progeny. After careful review, we grant counsel's petition to withdraw and affirm the judgment of sentence.

The trial court summarized the relevant facts and procedural history as follows.

* Former Justice specially assigned to the Superior Court.

On January 7, 2012 [Appellant] was arrested for Robbery and related charges after he stole a purse from the complaining witness. On June 13, 2012 [Appellant] pled guilty to the charge of Robbery as a felony of the third degree. The trial court imposed a negotiated sentence of eleven and a half to twenty-three months of incarceration followed by three years of consecutive probation.

The trial court also ordered that [Appellant] undergo an evaluation for drug and alcohol abuse, known as a FIR evaluation. The evaluation recommended inpatient drug and alcohol abuse treatment. Two months after the [trial] court sentenced [Appellant], the trial court granted [Appellant]'s Petition for Immediate Parole to Conewago, an inpatient drug and alcohol program, which [Appellant] completed. [Appellant], however, when released to an outpatient program, refused to attend after the intake appointment.

On January 9, 2013, Judge Dubow found [Appellant] in violation of his probation and ordered [Appellant] to serve a period of incarceration at SCI Chester. On January 18, 2013, [Appellant] filed a Motion for Reconsideration of the Violation of Probation Sentence, which the [trial] court denied. On February 8, 2013, [Appellant] appealed.^[1]

On May 1, 2013, counsel for [Appellant] filed a Statement of Intent to File an **Anders/McClendon** Brief.

¹ We note on February 14, 2013, Appellant was ordered to file a concise statement of errors complained of on appeal in accordance with Pa.R.A.P. 1925(b). Appellant was granted two extensions of time to file said statement pending receipt of the probation revocation hearing transcripts. Upon receipt of the January 9, 2013 transcript, counsel filed a statement of intent to file an **Anders/McClendon** brief pursuant to Pa.R.A.P. 1925(c)(4).

Trial Court Opinion, 6/11/13, at 1-2 (footnote omitted). Subsequently, on July 10, 2013, Appellant's counsel filed a petition to withdraw and advised Appellant of his right to retain new counsel or proceed *pro se*. Appellant did not file a response.

In his **Anders** brief, counsel raises the following issues on Appellant's behalf.

- A. Was [the] evidence that [Appellant] absconded from probation and from drug treatment sufficient for revocation?
- B. Was the probation revocation sentence excessive in light of the underlying technical violation?

Anders Brief at 2.

"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. Titus**, 816 A.2d 251, 254 (Pa. Super. 2003) (citation omitted). For cases where the briefing notice was issued after August 25, 2009, as is the case here, an **Anders** brief shall comply with the requirements set forth by our Supreme Court in **Commonwealth v. Santiago**, 978 A.2d 349 (Pa. 2009).

[W]e hold that in 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 361. Additionally, counsel must furnish the appellant with a copy of the brief, advise him in writing of his right to retain new counsel or proceed *pro se*, and attach to the **Anders** petition a copy of the letter sent to appellant as required under **Commonwealth v. Millisock**, 873 A.2d 748, 751 (Pa. Super. 2005). **See Commonwealth v. Daniels**, 999 A.2d 590, 594 (Pa. Super. 2010) (holding that, “[w]hile the Supreme Court in **Santiago** set forth the new requirements for an **Anders** brief, ... the holding did not abrogate the notice requirements set forth in **Millisock** that remain binding legal precedent”) (footnote omitted). “After counsel has satisfied these requirements, we must conduct our own review of the trial court proceedings and independently determine whether the appeal is wholly frivolous.” **Titus, supra** at 254 (citation omitted).

In the instant matter, we conclude that counsel’s **Anders** brief complies with the requirements of **Santiago, supra**. First, counsel has provided a procedural and factual summary of the case with references to the record. Second, counsel advances relevant portions of the record that arguably support Appellant’s sufficiency and sentencing claims on appeal. Third, counsel concluded “there are no non-frivolous issues to appeal.” **Anders** Brief at 10. Lastly, counsel has complied with the requirements set

forth in *Millisock, supra*. As a result, we proceed to conduct an independent review to ascertain if the appeal is indeed wholly frivolous.

Our standard of review in assessing whether a trial court has erred in fashioning a sentence following the revocation of probation is well settled. The “[r]evocation of a probation sentence is a matter committed to the sound discretion of the trial court and that court’s decision will not be disturbed on appeal in the absence of an error of law or an abuse of discretion.” *Commonwealth v. Williams*, 997 A.2d 1205, 1208 (Pa. Super. 2010) (citation omitted). “An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused.” *Commonwealth v. Burns*, 988 A.2d 684, 689 (Pa. Super. 2009) (*en banc*) (citation omitted), *appeal denied*, 8 A.3d 341 (Pa. 2010).

In his first issue, Appellant argues the evidence was insufficient to revoke his probation. *Anders* Brief at 9. Specifically, Appellant avers the evidence was insufficient to show that he absconded from probation and drug treatment. *Id.*

When assessing whether to revoke probation, the trial court must balance “the interests of society in preventing future criminal conduct by the defendant against the possibility of rehabilitating the defendant outside of prison.” *Commonwealth v. Ballard*, 814 A.2d 1242, 1245 (Pa. Super. 2003). In

order to uphold a revocation of probation, the Commonwealth must show by a preponderance of the evidence that a defendant violated his probation. ***Commonwealth v. Shimonvich***, 858 A.2d 132, 134 (Pa. Super. 2004).

Commonwealth v. Allshouse, 33 A.3d 31, 37 (Pa. Super. 2011) (footnote omitted), *appeal denied*, 49 A.3d 441 (Pa. 2012).

Appellant's claim that the evidence was insufficient to establish he violated his probation is belied by the record. At the January 9, 2013 probation revocation hearing, Appellant asserted that several factors in his history should not be considered in resentencing Appellant upon revocation. However, Appellant did not dispute that a technical violation of probation occurred by his failure to report to outpatient drug and alcohol treatment in accordance with the terms of his probation. Specifically, in response to the Commonwealth's testimony regarding Appellant's past history of drug and alcohol treatment, Appellant's counsel argued the past history should not be considered, but noted "we do not dispute the technical violation[.]" N.T., 1/9/13, at 5. Further, Appellant's counsel went on to argue that Appellant's past history of abuse toward his parents was irrelevant, but again reiterated, "as I said, we do not dispute the technical violation." ***Id.*** at 7. Finally, in sentencing Appellant, the trial court stated, "[w]e are not disputing the technical violation, he is in violation[.]" ***Id.*** at 14. Accordingly, Appellant's claim that there was insufficient evidence that he violated the terms of his probation must fail. ***See Allshouse, supra*** at 37.

In his next issue, Appellant avers that the probation revocation sentence of one and one-half to three years' imprisonment was excessive in light of the underlying technical violation. **Anders** Brief at 9. Appellant concedes that the sentence is "legal in that 3 years total confinement plus 4 years['] probation does not exceed the statutory maximum of 7 years." **Id.** at 10. Nevertheless, Appellant argues that the trial court "did not make the explicit finding before imposing a state sentence that [Appellant]'s conduct indicates that he is likely to commit another crime if not incarcerated or that imprisonment is essential to vindicate the authority of the court." **Id.**

"Our review is limited to determining the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing alternatives that it had at the time of the initial sentencing." **Commonwealth v. MacGregor**, 912 A.2d 315, 317 (Pa. Super. 2006) (citations omitted). We also observe that, "whether an offender is serving a sentence of probation or intermediate punishment, if he violates the assigned conditions, the order of probation or intermediate punishment (as the case may be) may be revoked and a new sentence imposed." **Commonwealth v. Wegley**, 829 A.2d 1148, 1153 (Pa. 2003) (citations omitted).

[T]he scope of review in an appeal following a sentence imposed after probation revocation is limited to the validity of the revocation proceedings and the legality of the judgment of sentence[.]. Once probation has been revoked, a sentence of total confinement may be imposed if any of the following

conditions exist: (1) the defendant has been convicted of another crime; or (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or, (3) such a sentence is essential to vindicate the authority of the court. 42 Pa.C.S.A. § 9771(c)[.]

Commonwealth v. Edwards 71 A.3d 323, 327 (Pa. Super. 2013) (some citations omitted).

As noted, Appellant does not assert his sentence is illegal, but rather avers the trial court did not explicitly state one of the reasons for imposing a sentence of total confinement pursuant to Section 9771(c). The trial court has set forth the following reasoning in support of its determination to revoke Appellant's probation and resentence him to a term of incarceration.

[Appellant] has been addressing his substance abuse issues for a long period of time, having received thirteen years of drug and alcohol treatment, including inpatient, outpatient, and detoxification programs. Unfortunately, [Appellant] has not successfully dealt with his substance abuse issues and has a history of committing crimes in order to feed his substance abuse issues, including in the instant case. In fact, he has nine arrests and five convictions.

The trial court, recognizing [Appellant]'s need [for] drug and alcohol treatment, granted [Appellant]'s Petition for Early Parole so that he could take the first step to deal with his drug addiction by entering an inpatient drug and alcohol abuse program. [Appellant], however, refused to participate in the next phase of his treatment by attending outpatient treatment. Without outpatient treatment, [Appellant] has not sufficiently dealt with his substance abuse issues and is at risk for committing more crimes to feed his addiction.

[Appellant] needs the structure of incarceration to complete drug treatment successfully.

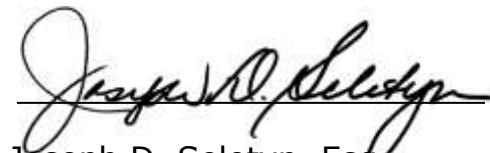
Trial Court Opinion, 6/11/13, at 3 (citations to notes of testimony omitted).

A review of the probation revocation hearing transcript reveals the trial court's reasoning is supported by the record. **See** N.T., 1/9/13, at 21-24. In sentencing Appellant, the trial court stated "I am concerned that if you remained out on the street on probation, I am concerned that you will continue to commit other crimes[.]" **Id.** at 22; **see** 42 Pa.C.S.A. § 9771(c)(2). Further, the trial court explicitly stated "he needs a long-term program... I don't want to see him here committing more felonies." **Id.** at 24. Accordingly, Appellant's claim that he was not sentenced in accordance with one of the reasons prescribed in Section 9771(c) must fail.

Based on the foregoing, we grant counsel's petition to withdraw and affirm the trial court's January 9, 2013 judgment of sentence.

Judgment of sentence affirmed. Petition to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/3/2013