

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ERIC REED VINEY,	:	
	:	
Appellant	:	No. 551 EDA 2013

Appeal from the PCRA Order February 8, 2013
In the Court of Common Pleas of Montgomery County
Criminal Division No(s): CP-46-CR-0003131-2006

BEFORE: ALLEN, MUNDY and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED NOVEMBER 25, 2013**

Appellant, Eric Reed Viney, appeals from the order denying his first Post Conviction Relief Act¹ petition. Counsel for Appellant has filed in this Court a petition to withdraw from representation and an "**Anders** brief"² indicating that Appellant wishes to argue that prior counsel was ineffective for failing to file a motion for reconsideration of sentence and a direct appeal. We affirm and grant counsel's petition to withdraw.

October 17, 2006, Appellant pleaded guilty to one count of persons not to possess a firearm, and, on that same day, the trial court sentenced him to

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541-9546.

² **Anders v. California**, 386 U.S. 738 (1967).

J. S61034/13

one and one-half to three years' imprisonment and a consecutive two years' probation. The probationary sentence on that underlying conviction commenced on August 5, 2010. Approximately one year later, on July 25, 2011, the Pennsylvania Board of Probation and Parole filed a bench warrant against Appellant for two technical violations of the curfew requirement of his probation.³

Appellant stipulated to the technical violations and, on November 7, 2011, the trial court revoked his probation and sentenced him to serve one to four years' imprisonment. Appellant did not take an appeal from the judgment of sentence.

Appellant timely filed a *pro se* PCRA petition on November 1, 2012, which gives rise to this appeal. The PCRA court appointed present counsel, who filed an amended petition. On February 8, 2013, the court convened a hearing at which Appellant, prior counsel, and the head of the Appellate Unit of Office of the Public Defender testified. The court entered the instant order

³ Additionally, the Board noted that Appellant had tested positive for cocaine and drove a vehicle without staff permission, although these incidents were not directly cited as bases for revocation. Technical Violation Arrest Report, 7/13/11, at 2. The Board also asserted that Appellant was associating with his brother, who was also on probation or parole, and that the two were suspected of two armed robberies in the area. ***Id.*** Appellant was not charged for any additional criminal offenses. N.T. Sentencing, 11/7/11, at 6-7. However, his brother was charged for one of the robberies. ***Id.***

denying Appellant's petition immediately following the hearing. This timely appeal followed.⁴

The brief filed on Appellant's behalf identifies the following argument: "Whether [prior] counsel rendered ineffective assistance by failing to file a motion for reconsideration of the probation violation sentence, and a direct appeal, when requested to do so by Appellant?" **Anders** Brief at 4. As noted, present counsel also seeks leave from this Court to withdraw from representation.

Preliminarily, we must consider whether present counsel has met the procedural requirements for seeking leave to withdraw:

Counsel petitioning to withdraw from PCRA representation must proceed . . . under [**Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*), and] . . . must review the case zealously. **Turner/Finley** counsel must then submit a "no-merit" letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

Counsel must also send to the petitioner: (1) a copy of the "no merit" letter/brief; (2) a copy of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.

* * *

⁴ Present counsel timely submitted a court-ordered Pa.R.A.P. 1925 statement stating that there were no non-frivolous issues for appeal and that she intended to withdraw from representation. **See** Pa.R.A.P. 1925(c)(4).

[W]here counsel submits a petition and no-merit letter that . . . satisfy the technical demands of **Turner/Finley**, the court—trial court or this Court—must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief.

Commonwealth v. Doty, 48 A.3d 451, 454 (Pa. Super. 2012) (citation omitted).

Instantly, present counsel conflates the requirements for withdrawal under **Anders**, which applies in a direct appeal, and **Turner/Finley**, which applies during a PCRA proceeding. **See generally, Commonwealth v. Wrecks**, 931 A.2d 717, 720-22 (Pa. Super. 2007) (distinguishing between **Anders** and **Turner/Finley** requirements). However, the filing of an **Anders** brief does not evince a failure to comply with **Turner/Finley** as a brief filed under **Anders** may substantially comply with the dictates of **Turner/Finley**. **Commonwealth v. Fusselman**, 866 A.2d 1109, 1111 n.3 (Pa. Super. 2004). Moreover, counsel, in this appeal, has included in her petition to withdraw a “no-merit” letter she sent to Appellant. Pet. to Withdraw as Counsel, 6/13/13, Ex. B, Letter from Erin C. Lentz-McMahon to Appellant, 6/13/13 (“no-merit letter”).

In light of the contents of the no-merit letter attached to the petition to withdraw, we conclude that present counsel has substantially complied with the requirements of **Turner/Finley**. In her letter, counsel details her review of the record, lists the issues that Appellant wished to raise in the

underlying PCRA proceeding, and explained why, in her view, this appeal would be futile. **Id.** at 1-2, 6-7. Counsel informed Appellant that she filed a petition to withdraw and an **Anders** brief in this Court and enclosed copies of those documents with her letter to him. **Id.** at 1. She also apprised Appellant of his right to proceed *pro se* or obtain private counsel in the event that her petition was granted. **Id.** at 1. Appellant has not responded to counsel's petition to withdraw, her no-merit letter, or the **Anders** brief. Therefore, we will proceed to an independent review of the issues identified by counsel.

"On appeal from the denial of PCRA relief, our standard of review requires us to determine whether the ruling of the PCRA court is supported by the record and free of legal error." **Commonwealth v. Widgins**, 29 A.3d 816, 819 (Pa. Super. 2011) (citation omitted). "The PCRA court's credibility determinations are binding on this Court, where the record supports those determinations." **Id.** at 820 (citation omitted).

The first issue identified by counsel is whether the PCRA court erred in denying relief on Appellant's claim that prior counsel was ineffective for failing to file a direct appeal. As counsel notes, Appellant testified at the PCRA hearing, "[A]fter the sentence was handed down[,] I asked [prior counsel] to file a reconsideration, and I guess it's called a direct appeal, to the I guess it's the Superior Court." **Anders** Brief at 5 (quoting N.T. PCRA

Hr'g, 2/8/13, at 4).⁵ According to Appellant, prior counsel responded, "[O]kay," but he "never discussed . . . what any issues would be." **Id.**

It is well settled:

[W]here there is an unjustified failure to file a requested direct appeal, the conduct of counsel falls beneath the range of competence demanded of attorneys in criminal case, denies the accused the assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, as well as the right to direct appeal under Article V, Section 9, and constitutes prejudice for purposes of Section 9543(a)(2)(ii). Therefore, in such circumstances, and where the remaining requirements of the PCRA are satisfied, the petitioner is not required to establish his innocence or demonstrate the merits of the issue or issues which would have been raised on appeal.

* * *

The remedy for the deprivation of this fundamental right of appeal is its restoration.

Commonwealth v. Haun, 32 A.3d 697, 700 (Pa. 2011) (citations omitted).

Thus, the failure to file a requested appeal constitutes ineffectiveness *per se*,

⁵ A copy of the PCRA hearing transcript was not included in the certified record transmitted to this Court. However, the certification of the clerk of the PCRA court states that the transcript was included as document number forty-seven. The forty-seventh document is a transcript of the Appellant's probation violation hearing, not the PCRA hearing transcript. A complete copy of the PCRA hearing transcript was included in Appellant's reproduced record, and the Commonwealth has not objected to the accuracy of that copy.

In light of this record, and in the interests of judicial economy, we will consider the copy of the PCRA hearing transcript in the reproduced record. **See Commonwealth v. Brown**, 52 A.3d 1139, 1145 n.4 (Pa. 2012).

and prejudice is presumed. **Commonwealth v. Reaves**, 923 A.2d 1119, 1128 (Pa. 2007).

Instantly, the PCRA court considered Appellant's testimony that he requested a direct appeal immediately after sentencing. However, the court found "[b]ased on credible testimony[,] . . . that [Appellant] did not ask [prior counsel] for an appeal" and that prior counsel would have initiated the appeal process if Appellant made a request. N.T. PCRA Hr'g at 21. These findings were supported by prior counsel's testimony at the PCRA hearing that although he was "not a hundred percent sure what the discussions were after[the sentencing hearing]", he was "a hundred percent sure if he asked me for an appeal I would have filed it for him." **See id.** at 11. The PCRA court's credibility and fact determination are supported in the record, and we are bound to the finding that Appellant did not request an appeal. **See Widgins**, 29 A.3d at 819. Thus, given this record and our standard of review, we agree with present counsel's assessment that there is no meritorious appellate issue arising from Appellant's claim that prior counsel failed to honor his request for a direct appeal.

Present counsel has identified a second issue Appellant intended to pursue, namely, that prior counsel was ineffective for failing to file a motion to modify the sentence. **Anders** Brief at 4. Although this issue is related to Appellant's claim that prior counsel failed to file a requested direct appeal, it is subject to a separate legal analysis. **See Reaves**, 923 A.2d at 1129

(holding counsel's failure to object to, and file motion to modify, sentence following revocation did not warrant presumption of prejudice); **See generally Commonwealth v. Green**, 957 A.2d 1238, 1243 (Pa. Super. 2008) (holding petitioner's claim that counsel was ineffective for failing to file post-sentence motions had arguable merit and remanding for further proceedings), *aff'd in part, vacated in part*, 981 A.2d 1283 (Pa. 2009).⁶ Present counsel preserved this issue in the amended petition she filed, but did not litigate the issue at the PCRA hearing. Am. Pet. for Post Conviction Relief, 1/4/13, ¶ 12(a); **see** N.T. PCRA H'rg at 4-7. Thus, neither present counsel, nor the PCRA court, conducted an independent review of the effectiveness of prior counsel's failure to file a motion to modify. However, our independent review confirms that, even if this issue was properly presented on appeal, no relief is due.

To establish a claim of counsel's ineffectiveness, a petitioner

must plead and prove both that his counsel's performance was deficient and that the deficient performance prejudiced the defense. To prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Reaves, 923 A.2d at 1127 (citations and quotation marks omitted).

⁶ In **Green**, the Pennsylvania Supreme Court, by a *per curiam* order, agreed with the decision of this Court to remand the case to the PCRA court, but concluded that this Court inappropriately presumed the lack of reasonable cause and prejudice attendant counsel's failure to file a post-sentence motion. **Green**, 981 A.2d at 1283-84.

“The Commonwealth establishes a probation violation meriting revocation when it shows, by a preponderance of the evidence, that the probationer’s conduct violated the terms and conditions of his probation, and that probation has proven an ineffective rehabilitation tool incapable of deterring probationer from future antisocial conduct.” **Commonwealth v. Perreault**, 930 A.2d 553, 558 (Pa. Super. 2007) (citation omitted). The imposition of sentence following revocation is vested in the discretion of the trial court. **Id.** Nevertheless,

[w]hen imposing a sentence of total confinement after a probation revocation, the sentencing court is to consider the factors set forth in 42 Pa.C.S. § 9771. Under 42 Pa.C.S. § 9771(c), a court may sentence a defendant to total confinement subsequent to revocation of probation 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 this court.

A sentencing court need not undertake a lengthy discourse for its reasons for imposing a sentence or specifically reference the statute in question, but the record as a whole must reflect the sentencing court’s consideration of the facts of the crime and character of the offender.

Commonwealth v. Crump, 995 A.2d 1280, 1282-83 (Pa. Super. 2010) (citations omitted).

Moreover, Pennsylvania Rule of Criminal Procedure 708 states, *inter alia*:

(D) Sentencing Procedures

* * *

(2) The judge shall state on the record the reasons for the sentence imposed.

(3) The judge shall advise the defendant on the record:

(a) of the right to file a motion to modify sentence and to appeal, of the time within which the defendant must exercise those rights, and of the right to assistance of counsel in the preparation of the motion and appeal; and

(b) of the rights, if the defendant is indigent, to proceed in forma pauperis and to proceed with assigned counsel as provided in Rule 122.

* * *

(E) Motion to Modify Sentence

A motion to modify a sentence imposed after a revocation shall be filed within 10 days of the date of imposition. The filing of a motion to modify sentence will not toll the 30-day appeal period.

Pa.R.Crim.P. 708(D)(2), (3)(a)-(b), (E). An objection to the discretionary aspects of a sentence imposed must be presented either at the sentencing hearing or in a post-sentence motion. ***Commonwealth v. McAfee***, 849 A.2d 270, 275 (Pa. Super. 2004).

We find the record in this case troubling because there is no indication that Appellant was apprised of his post-sentence and appellate rights

following the revocation of probation and sentencing hearing. **See** Pa.R.Crim.P. 708(D)(3)(a); N.T. Sentencing, 11/7/11, at 15; Prob./Parole/Intermediate Punishment Violation Form, 11/7/11, at 2. Furthermore, aside from Appellant's testimony that he asked prior counsel to seek modification of the sentence, which the PCRA court rejected as not credible, there is no indication that prior counsel consulted with Appellant or apprised him of his right to file a motion to modify.

Nevertheless, Appellant was required to demonstrate prejudice. **See Reaves**, 923 A.2d at 1129. Following our independent review, we discern no basis to conclude that Appellant demonstrated prejudice or that counsel's alleged ineffectiveness deprived him of the ability to raise a meritorious claim.

Instantly, at the sentencing hearing, prior counsel requested that the trial court impose a "time-served sentence" because Appellant was "in custody for over four months on two technical violations." N.T. Sentencing at 12. Prior counsel further argued there was no proof of additional circumstances, other than the technical violations, that warranted a greater sentence. **Id.**

The trial court, upon consideration of Appellant's probation officer's testimony, the record, the parties' arguments, and Appellant's statement to the court, entered the following statement of reasons for its sentence:

The Court has considered the Sentencing Code, the presentence investigation and report, as well as the

information supplied today and the statement of [Appellant].

* * *

[Appellant] was released from state prison in August of 2010. The violations were being observed outside of his residence and also being observed inside the Brew House Tavern close to 2:00 a.m.

There is a significant prior record here. He had some problems as a juvenile, being adjudicated delinquent on simple assault, receiving stolen property, violation of the Drug Act, access device fraud, a felony there.

He had multiple placements as a juvenile including Vision Quest, George Junior and Glenn Mills.

As an adult he had the Philadelphia robbery, a three-to-six year state prison sentence; a Norristown drug violation, a one year probation; a second Drug Act one year probation; and then the firearm offense [that gave rise to the probationary sentence Appellant violated in the instant appeal].

He lives in Norristown when not in prison. He has a number of relatives, brothers and sisters. Brother Mark is currently incarcerated on a parole violation and awaiting trial on kidnapping and robbery offenses. This is the person he was associating with, a known criminal, during the period of his supervision.

[Appellant] is presently single. We just heard that the girlfriend has had a baby recently. [Appellant] was mainly raised by his father, then he went to live with his mother. His father abused drugs. [Appellant] was out of control when with his mother. As indicated, he was involved in the juvenile system.

He has no significant history of mental health problems. He has used alcohol, cocaine and marijuana. He received a GED at Glenn Mills. He was not in the military. He has never had any verifiable employment history of any significance.

The Wisconsin Risk Score does indicate supervision maximum with a risk score of 31 and needs score of 24. There are a number of areas of concern listed: [a] lengthy criminal history; multiple incarcerations; associating with a known criminal; behavioral problems starting at a young age; history of marijuana and cocaine abuse; no employment history of any significance; unstructured free time; limited assets.

It is quite clear that according to the Sentencing Code, Title 42.9771, the conduct of [Appellant] indicates that while being on parole, with his character and attitude, he is likely to commit a new offense. He does not respond to the supervision as structured by the parole agent.

Based on his character and attitude and history and what he has done to violate, a state prison sentence is necessary to vindicate not only the authority of the Court, but also the authority of the Probation and Parole Department, and to protect the community.

N.T. Sentencing at 12-15.

The record developed regarding the two technical violations, Appellant's criminal background, and his risks for reoffense supports the trial court's findings and conclusions. Moreover, mindful of the standards governing the exercise of discretion by the trial court, we detect no basis to conclude that the court's decisions to revoke Appellant's probation and sentence him to one to four years' imprisonment were manifestly unreasonable or constituted reversible error. Accordingly, Appellant's underlying challenge to the excessiveness of the sentence warranted no relief, and his present claim that prior counsel was ineffective for failing to file or consult regarding a motion to modify did not result in prejudice for the

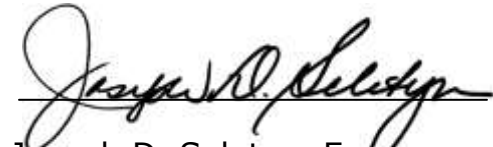
J. S61034/13

purposes of the PCRA. **See Reaves**, 923 A.2d at 1129; **McAfee**, 849 A.2d at 277.

Having conducted an independent review and discerning no meritorious issues, we affirm the order denying Appellant's PCRA petition and grant present counsel's petition to withdraw from representation.

Order affirmed. Counsel's petition to withdraw granted.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013