J. S57039/12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
WHITAKER LEE GREEN,	:	
Appellant	:	No. 605 MDA 2012

Appeal from the Judgment of Sentence entered March 7, 2012, in the Court of Common Pleas of Berks County, Criminal Division, at No. CP-06-CR-0002723-2011.

BEFORE: MUSMANNO, OLSON, and STRASSBURGER*, JJ.

MEMORANDUM BY STRASSBURGER, J.: Filed: January 10, 2013

Appellant, Whitaker Lee Green, appeals from the judgment of sentence entered following his convictions by a jury of possession of a controlled substance (cocaine), possession with the intent to deliver a controlled substance (PWID) (cocaine), and prohibited offensive weapons.[1] Additionally, Appellant's counsel has filed a petition to withdraw as counsel and an accompanying brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). Upon review, we grant counsel's petition to withdraw and affirm Appellant's judgment of sentence.

[1] 35 P.S. §§ 780-113(a)(16), (30) and 18 Pa.C.S. § 908(a), respectively.

* Retired Senior Judge assigned to the Superior Court.

The relevant facts and procedural history are as follows. On May 21, 2011, Appellant was arrested on an outstanding warrant for a probation violation on unrelated charges. After being taken into custody, Appellant was searched and on his person was discovered a spring-loaded pocket knife, $145.00 in U.S. currency, 84 empty plastic baggies stamped with a billiard-type 8-ball logo imprint, and a clear cellophane bag that contained 9 smaller baggies of cocaine, which weighed a total of .55 grams. As a result of this search, Appellant was charged with possession of a controlled substance, PWID, and prohibited offensive weapons.

Following a jury trial held on February 15 and 16, 2012, Appellant was convicted on all charges. On March 7, 2012, Appellant was sentenced to an aggregate term of four to thirteen years of incarceration.[2] On March 15, 2012, Appellant filed a *pro se* "Motion for Reconsideration & Sentence Remodification," which, *inter alia*, alleged ineffective assistance of trial counsel. A copy of the motion was forwarded to trial counsel by the Clerk of Courts. Based on these allegations, counsel requested he be permitted to withdraw and that new counsel be appointed to represent Appellant. The court granted the motion and present counsel was appointed. The motion for reconsideration was ultimately denied. This timely appeal followed. Both

[2] Specifically, Appellant was sentenced to a mandatory term of three to ten years' incarceration on the PWID conviction for a school zone violation. On the prohibited offensive weapons count, the court imposed a consecutive sentence of not less than twelve months nor more than three years'

Appellant and the trial court have complied with Pa.R.A.P. 1925. On appeal, counsel for Appellant has filed a petition for leave to withdraw as counsel and an ***Anders*** brief.

"When faced with a purported ***Anders*** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw." ***Commonwealth v. Rojas***, 874 A.2d 638, 639 (Pa. Super. 2005) (citation omitted). Furthermore, there are clear mandates counsel seeking to withdraw pursuant to ***Anders/McClendon/Santiago*** must follow.

> In order for counsel to withdraw from an appeal pursuant to ***Anders***…certain requirements must be met:
>
> > (1) counsel must petition the court for leave to withdraw stating that after making a conscientious examination of the record it has been determined that the appeal would be frivolous;
> >
> > (2) counsel must file a brief referring to anything that might arguably support the appeal, but which does not resemble a "no merit" letter or amicus curiae brief; and
> >
> > (3) counsel must furnish a copy of the brief to defendant and advise him of his right to retain new counsel, proceed pro se or raise any additional points that he deems worthy of the court's attention.

Commonwealth v. Millisock, 873 A.2d 748, 751 (Pa. Super. 2005).

In ***Santiago***, the Supreme Court set forth specific requirements for the brief accompanying counsel's petition to withdraw:

> [I]n the ***Anders*** brief that accompanies court-appointed counsel's petition to withdraw, counsel must: (1) provide a

---

incarceration. The crime of possession of a controlled substance merged for sentencing purposes.

> 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.

Santiago, 978 A.2d at 361.

Our review of counsel's petition to withdraw, supporting documentation, and ***Anders*** brief reveals that counsel has adequately satisfied the foregoing requirements.[3] Counsel has furnished a copy of the brief to Appellant; advised him of his right to retain new counsel, to proceed *pro se,* or raise any additional points that he deems worthy of this Court's attention; and has attached a copy of the letter sent to the client with the ***Anders*** petition as required under ***Millisock, supra***.[4] Counsel also avers specifically that the appeal is frivolous because "Appellant's two sentences, while consecutive, are for two distinct offenses, drugs and an illegal weapon, and each fall[s] with[in] the applicable guidelines." ***Anders*** Brief, at 8.

Once counsel has met his or her obligations, "it then becomes the responsibility of the reviewing court to make a full examination of the proceedings and make an independent judgment to decide whether the appeal is in fact wholly frivolous." ***Santiago***, 978 A.2d at 355 n.5. Thus, we

---

[3] While Appellant's counsel does not cite to ***Santiago*** in the brief, counsel nonetheless complies with the requirements set forth in ***Santiago***.

[4] Appellant has not responded to counsel's petition to withdraw.

will now examine the issue set forth by counsel in the ***Anders*** brief that Appellant believes has arguable merit. ***See Commonwealth v. Vilsaint***, 893 A.2d 753, 755 (Pa. Super. 2006) ("The essence of ***Anders*** is that counsel, without actually arguing against his or her own client, sets forth all arguments put forward by the client.").

In the ***Anders*** brief, counsel raises the sole issue of "[w]hether the consecutive sentences were unreasonable, excessive and abuses of discretion?" ***Anders***' Brief at 6.

Our standard of review in such cases is one of abuse of discretion. 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. ***Commonwealth v. Shugars***, 895 A.2d 1270, 1275 (Pa. Super. 2006). Moreover, where an appellant challenges the discretionary aspects of a sentence there is no automatic right to appeal, and an appellant's appeal should be considered a petition for allowance of appeal. ***Commonwealth v. W.H.M.***, 932 A.2d 155, 162 (Pa. Super. 2007). As we observed in ***Commonwealth v. Moury***, 992 A.2d 162 (Pa. Super. 2010):

> [a]n appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:
>
> > [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).

Id. at 170 (citing ***Commonwealth v. Evans***, 901 A.2d 528 (Pa. Super. 2006)).

Instantly, Appellant has met prongs one and two of this test by filing a timely notice of appeal and by preserving the issue in a timely motion to reconsider sentence. However, Appellant has failed to include in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of his sentence pursuant to Pa.R.A.P. 2119(f).[5] Typically, where an appellant fails to include a Rule 2119(f) statement and the Commonwealth lodges an objection to the omission of the statement, this Court is precluded from reaching the merits of the claim. ***See Commonwealth v. Robinson***, 931 A.2d 15, 19 (Pa. Super. 2007) (*en banc*) (providing that "[i]f a defendant fails to include an issue in his Rule 2119(f) statement, and the Commonwealth objects, then the issue is waived and this Court may not review the claim"). However, where, as here,

[5] It is well established that Pa.R.A.P. 2119(f) requires an appellant to "provide a separate statement specifying where the sentence falls in the sentencing guidelines, what provision of the sentencing code has been violated, what fundamental norm the sentence violates, and the manner in which it violates the norm." ***Commonwealth v. Sarapa***, 13 A.3d 961, 962 (Pa. Super. 2011) (citing ***Commonwealth v. Crump***, 995 A.2d 1280, 1282 (Pa. Super. 2010)).

counsel files an ***Anders*** brief and neglects to include a Rule 2119(f) statement, it becomes "necessary for us to examine the merits of the appeal to determine if it is 'wholly frivolous' so as to permit counsel's withdrawal." ***Commonwealth v. Wilson***, 578 A.2d 523, 525 (Pa. Super. 1990). Thus, we will address the merits of Appellant's issue on appeal.

Appellant's argument challenges the excessiveness of his sentence on the basis that the court imposed consecutive sentences instead of concurrent sentences. "Generally, Pennsylvania law affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. Any challenge to the exercise of this discretion ordinarily does not raise a substantial question." ***Commonwealth v. Prisk***, 13 A.3d 526, 533 (Pa. Super. 2011) (internal quotation omitted) (quoting ***Commonwealth v. Pass***, 914 A.2d 442, 446–47 (Pa. Super. 2006)). "[T]he key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case." ***Commonwealth v. Mastromarino***, 2 A.3d 581, 587 (Pa. Super. 2010).

Instantly, Appellant was convicted of possession of a controlled substance, PWID, and prohibited offensive weapons. At the time of Appellant's arrest on the outstanding warrant for his probation violation,

which resulted in the current charges, Appellant was located within 1000 feet of an elementary school. At the time of sentencing, the parties agreed that the "youth/school zone enhancement" applied to the PWID conviction.[6] Thereafter, the trial court summarized Appellant's criminal conduct, his history with the court, his rehabilitation needs, his employment endeavors and its reasoning for imposition of sentence, stating:

> All right. I had the opportunity to review the presentence investigation report. [Appellant] is 24 years of age, 25 shortly later in this month. He has a high prior record score. His prior record for such a young man is actually very impressive. We have a number of theft charges as a juvenile. We have a number of crimes of violence, a resisting arrest as a juvenile. We have robbery counts and criminal trespass and a simple assault. So [Appellant] has an extensive record. He has a record of crimes with a history of violence and does not have any well-established work record.
>
> Obviously I believe that there needs to be sufficient punishment for these offenses. They occurred at the time that

---

[6] The Commonwealth provided on the record the undisputed sentencing guidelines for Appellant's crimes, as follows:

> Possession with intent to deliver, Count 1, the prior record score is a three. Offense gravity score is a six. The standard range is 12 to 18, plus or minus six. But with the youth/school enhancement, the guidelines will be 24 to 54 months, plus or minus six months.
>
> Count 3, offensive weapons, again, the prior record score is a three. Offense gravity score is a four. The standard is three to 14 months, plus or minus three months.

N.T., 3/7/2012, at 4. The Commonwealth then made a recommendation for "Count 1 would be 48 months to 96 months, which is a four-to-eight–year sentence followed by 12 months to 24 months, which would be one to two years [for Count 3], for a total of five to ten years of incarceration." ***Id.*** at 4-5.

> he was already on parole. He was given on the robbery case and the collateral - - or the accompanying charges, he was given a county sentence because of his young age at the time and did not take advantage of that and, in fact, committed these serious crimes while under county supervision, which certainly indicates to this Court that he is not amenable any longer to county supervision. So I believe that there needs to be significant punishment for his continuing to commit crimes when he was actively on parole and probation, and I believe that he needs to be under supervision for a very long period of time to ensure that he does not re-offend.

N.T. Sentencing, 3/7/2012, at 7-8. ***See also*** Trial Court Opinion, 5/15/2012, at 2-3 (referencing Sentencing N.T.).

Review of the certified record on appeal supports the trial court's rationale asserted, and its decision conforms to the applicable law.[7] Given Appellant's conduct, we cannot find Appellant's sentence manifestly excessive. ***See generally Commonwealth v. Mouzon***, 828 A.2d 1126, 1130-31 (Pa. Super. 2003) (providing, maximum consecutive sentences on five of eight robbery convictions, two of seven conspiracy convictions, and

[7] Section 9781(d) provides:

> (d) **Review of record. –** In reviewing the record the appellate court shall have regard for:
>
> > (1) the nature and circumstances of the offense and the history and characteristics of the defendant.
> >
> > (2) the opportunity of the sentencing court to observe the defendant, including any presentence investigation.
> >
> > (3) the findings upon which the sentence was based.
> >
> > (4) the guidelines promulgated by the commission.

one of eight possessing an instrument of crime convictions were not manifestly excessive; significant sentence was commensurate with significant amount of crime that defendant committed, and sentencing court witnessed defendant throughout proceedings, studied his history, and considered his prospective rehabilitation, and thus, was in the best position to determine appropriate sentence, which was supported with specificity). Accordingly, Appellant's claim challenging his consecutive sentences does not raise a substantial question. Therefore, he is not entitled to relief.

In conclusion, we have not only reviewed the ***Anders*** Brief filed on behalf of Appellant, but also have conducted an independent evaluation of the record in this case and concur with counsel's assessment that the appeal is wholly frivolous. Consequently, we grant counsel's petition to withdraw and affirm Appellant's judgment of sentence.

Judgment of sentence affirmed. Petition to withdraw as counsel granted.

---

42 Pa.C.S. § 9781(d).