

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ADAM WILLIAM MALLIN,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 672 WDA 2012

Appeal from the Judgment of Sentence of January 18, 2012,
in the Court of Common Pleas of Erie County,
Criminal Division at No. CP-25-CR-0001035-2011

BEFORE: SHOGAN, OTT and COLVILLE*, JJ.

CONCURRING MEMORANDUM BY COLVILLE, J.: Filed: March 12, 2013

I agree with the Majority's conclusions that counsel complied with ***Anders*** and that Appellant's appeal does not entitle him to relief. However, because I reach the latter conclusion in a different manner than does the Majority, I write separately.

According to counsel, Appellant wishes to challenge the discretionary aspects of his sentence. In order to preserve such an issue for appeal, Appellant was required to object to his sentence during the revocation sentencing hearing or by filing a post-sentence motion. ***See Commonwealth v. Kalichak***, 943 A.2d 285, 289 (Pa. Super. 2008)

*Retired Senior Judge assigned to the Superior Court.

("Normally, issues not preserved in the lower court may not be raised on appeal. For example, when a court revokes probation and imposes a new sentence, a criminal defendant needs to preserve challenges to the discretionary aspects of that new sentence either by objecting during the revocation sentencing or by filing a post-sentence motion.") (citations omitted). Because Appellant failed to challenge the discretionary aspects of his sentence in the trial court, he failed to preserve any such challenge for appellate review. In other words, Appellant waived his challenge.

The Majority refuses to find that Appellant waived this challenge, citing to the following portion of the information given by the Assistant District Attorney to Appellant and two other persons being sentenced at the same time:

You don't have to file a post-sentence motion here in the Court of Common Pleas in order to preserve or to keep your right to appeal to the Superior Court. That means if you want you can skip that post-sentence motion and just file a notice of appeal in the Superior Court if you want to do that. If you choose to do that, you have to file your notice of appeal with the Superior Court within thirty days of today.

N.T., 01/18/12, at 6-7.

There is nothing unsound about this statement of the law. I see no reason why this statement would obviate the requirement that Appellant challenge the discretionary aspects of his sentence either by objecting to it at his sentencing hearing or by filing a post-sentence motion raising such an issue.

Accordingly, I concur.

