

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ADAM WILLIAM MALLIN

Appellant

No. 672 WDA 2012

Appeal from the Judgment of Sentence January 18, 2012
In the Court of Common Pleas of Erie County
Criminal Division at No(s): CP-25-CR-0001035-2011

BEFORE: SHOGAN, J., OTT, J., and COLVILLE, J.*

MEMORANDUM BY OTT, J.:

Filed: March 12, 2013

Adam William Mallin appeals from the judgment of sentence entered in the Court of Common Pleas of Erie County following the revocation of his sentence of parole on charges of aggravated assault, terroristic threats, and false alarm.¹ His original aggregate sentence was three to twelve months' incarceration followed by 48 months of probation.² The trial court directed Mallin be paroled as soon as mental health treatment became available. Following his violation of probation, Mallin was sentenced to an aggregate term of two to four years' incarceration, followed by 36 months of probation.

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S. §§ 2702(a)(6), 2706(a) and 4905(a), respectively.

² Mallin was originally sentenced on August 22, 2011.

In this appeal, Mallin claims his sentence was manifestly excessive. Counsel has filed an *Anders*³ brief along with a petition to withdraw as counsel. After a thorough review of the *Anders* brief⁴, the official record, and relevant law, we affirm and grant counsel's motion to withdraw.

Mallin pled guilty to the charges listed above based upon his calling 911 and reporting one of his neighbors was coming over to his house to kill him. When the police arrived at Mallin's house, he met them on the porch brandishing a realistic looking CO₂ pellet gun and telling the responding police officers he was going to kill them. Despite the gravity of the charges, the trial court originally sentenced Mallin with consideration of his mental health issues and recognizing that Mallin's actions were closer to an attempted suicide by police than an actual attack upon the police.

However, Mallin violated his probation almost immediately by changing his residence without permission, acting in a threatening manner when being arrested, failing to report to his probation officer as instructed, and by consuming alcohol.

³ *Anders v. California*, 386 U.S. 738 (1967), *Commonwealth v. McClendon*, 434 A.2d 349 (Pa. 1981), and modified by *Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009).

⁴ The Commonwealth filed a letter stating it did not believe a response was necessary, and therefore declined to file an Appellee's brief.

In sentencing Mallin, the parole/probation revocation judge stated,

Well, unfortunately, Mr. Mallin, this is like a vicious cycle with regard to your failure and refusal to maintain your medications, even to the point of ignoring the person that was assigned to give – to come and give you your medications on a daily basis, and a rehab tech because you got angry with him, and using or misusing your grandfather's car and multitude evaluations. It's clear you will not abide by any orders of this Court at the local level; therefore, I am revoking you at 1035 of 2011, count one, and I'm sentencing you to a period of incarceration in a state institution of two to four years. You will get credit for time served on your original arrest against that. You're not RRRI eligible. It's an aggravated assault.

At count number three I'm reimposing the 36 months['] probation, which will be served consecutive to your incarceration at the state institution.

And at count number eight I'm imposing 36 months['] probation concurrent^[5] with the probation I imposed at count number three. That is all to be state supervised.

And also recommending that you undergo a mental health evaluation at the state institution and be placed in a mental health unit that will more properly be able to deal with the issues that you have, but at this point your actions indicate to me quite

⁵ There appears to be a scrivener's error in the record. The sentencing paperwork found in the official record indicates Mallin's two probationary sentences are consecutive, making a total of 72 months' probation. The notes of testimony, signed by Judge Dunleavy on 5/21/12, clearly indicate the probation sentences at counts three and eight are to be served concurrently. When the official record is returned to the Court of Common Pleas of Erie County, Judge Dunleavy is directed to make certain the errors are corrected. The written orders in error are the 1/18/12 Sentencing Order and the 2/7/12 Request for Special Probation/Parole Supervision. We do not believe this scrivener's error mandates rejection of the **Anders** brief.

clearly you are a danger to this community and will not follow the rules that anyone imposes upon you.

N.T. Parole/Probation Revocation, 1/18/12 at 12-13.

“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. Daniels**, 999 A.2d 590, 593 (Pa. Super. 2010) citing **Commonwealth v. Goodwin**, 928 A.2d 287, 290 (Pa. Super. 2007) (*en banc*) (citation omitted).

Recently, our Supreme Court discussed the three requirements that counsel must meet before he or she is permitted to withdraw from representation as follows:

First, counsel must petition the court for leave to withdraw and state that after making a conscientious examination of the record, he has determined that the appeal is frivolous; second, he must file a brief referring to any issues in the record of arguable merit; and third, he must furnish a copy of the brief to the defendant and advise him of his right to retain new counsel or to himself raise any additional points he deems worthy of the Superior Court's attention. Super. Ct. Op. at 2 (citing **Commonwealth v. Ferguson**, 761 A.2d 613, 616 (Pa. Super. 2000)).

Commonwealth v. Santiago, 602 Pa. 159, 978 A.2d 349, 351 (2009). FN6

FN6. We note that the holding in **Santiago** altered the prior requirements for withdrawal under **Anders** as **Santiago** now requires counsel to provide the reasons for concluding the appeal is frivolous; however, our Supreme Court explained that the requirements enumerated in **Santiago** would apply only to cases wherein the briefing notice was issued after August 25, 2009, the date upon which **Santiago** was filed. Since the briefing notice for the within matter was issued after August 25, 2009, the **Anders** requirement set forth in **Santiago** that counsel must state her/his reasons for concluding the appeal is frivolous is required. We also note that

Appellant has not responded to counsel's petition to withdraw.

Commonwealth v. Garang, 9 A.3d 237, 240 (Pa. Super. 2010).

In this matter, counsel has fulfilled the requirements of ***Anders/McClendon/Santiago***. A letter has been sent to Mallin explaining his rights and Mallin has not filed an independent response. Therefore, we will address the substance of the ***Anders*** brief.

When reviewing a sentencing claim, we are cognizant that

[s]entencing 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. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Cunningham, 805 A.2d 566, 575 (Pa. Super. 2002) (citations omitted). More specifically, 42 Pa.C.S.A. § 9721(b) offers the following guidance to the trial court's sentencing determination:

[T]he sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.

42 Pa.C.S.A. § 9721(b).

Commonwealth v. Bowen, 55 A.3d 1254, 1263 (Pa. Super. 2012).

Finally, Mallin is challenging the discretionary aspect of his sentence. An appellant is not entitled to a review of the discretionary aspect of a sentence as of right, but must set forth a statement of reasons for allowing discretionary review pursuant to Pa.R.A.P. 2119(f) and ***Commonwealth v.***

Tuladziecki, 522 A.2d 17 (Pa. 1987). Mallin has included the required 2119(f) statement and alleges his sentence is manifestly excessive in that it was not individualized to his particular needs and circumstances. This allegation represents a substantial question⁶ and therefore we may address the claim.⁷

The notes of testimony, quoted above, belie Mallin's allegations. The revocation court demonstrated concern over Mallin's particular needs. The court recognized that the county had been unable to properly provide for Mallin. Additionally, Mallin was to be placed in a mental health unit, thereby ensuring Mallin's underlying problems were addressed. The revocation court concluded its explanation for sentencing by noting the sentence imposed would not only be the best option to address Mallin's needs, but also recognized the danger Mallin presented to the community as he repeatedly ignored his medications and those people who were assigned to help him.

⁶ ***See Commonwealth v. Schueg***, 582 A.2d 1339 (Pa. Super. 1990).

⁷ We note that Mallin did not file a post-sentence motion challenging his sentence. Normally, this would result in waiver of this claim. However, in this instance Mallin was instructed by the assistant district attorney, prior to sentencing, "You don't have to file a post-sentence motion here to preserve or to keep your right to appeal to the Superior Court. That means if you want you can skip the 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. Revocation Hearing, 1/18/12 at 6-7. Mallin followed this instruction and asked to appeal his sentence within thirty days. Therefore, we will not find waiver for failure to file a post-sentence motion.

Our review of the official record leads us to conclude there has been no abuse of discretion in Mallin's sentencing and that his sentence was tailored to his needs and circumstances. Therefore, we agree with counsel that the appeal is frivolous and Mallin is not entitled to relief.

Judgment of sentence affirmed. Motion to withdraw as counsel is granted. Scrivener's error is to be corrected when the official record is returned to the Court of Common Pleas of Erie County, in accordance with this decision.

Colville, J., files a concurring memorandum.