

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KWAME LAMAR BARNES,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 691 MDA 2013

Appeal from the Judgment of Sentence Entered May 18, 2012  
In the Court of Common Pleas of Dauphin County  
Criminal Division at No(s): CP-22-CR-0000426-2011

BEFORE: BENDER, P.J., WECHT, J., and FITZGERALD, J.\*

MEMORANDUM BY BENDER, P.J.

**FILED DECEMBER 03, 2013**

Appellant, Kwame Lamar Barnes, appeals from the judgment of sentence imposed following his convictions for Attempted Homicide, Aggravated Assault, Kidnapping, and Recklessly Endangering Another Person.

On May 18, 2012, Appellant was sentenced to a term of 20 – 40 years' incarceration for his conviction for Attempted Homicide, a consecutive term of 2 ½ - 5 years' incarceration for his conviction of Aggravated Assault, and a consecutive term of 2 ½ - 5 years' incarceration for his conviction for Kidnapping. Appellant presents the following question for our review:

[1.] Pennsylvania holds that every element of aggravated assault subsumes the elements of attempted murder. Therefore, the

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\* Former Justice specially assigned to the Superior Court.

two offenses merge for sentencing purposes. Here, the court sentenced [Appellant] to consecutive confinement for 20 to 40 years for attempted murder and two and a half to five years for aggravated assault. Did the court render an illegal sentence when it did not merge [Appellant]'s convictions for sentencing?

Appellant's Brief at 4.

Initially, we note that this issue is raised for the first time in Appellant's Brief, as Appellant's counsel filed a Statement of Intent to File an **Anders/McClendon**<sup>1</sup> Brief in lieu of a Pa.R.A.P. 1925(b) Concise Statement of Errors Complained of on Appeal. However, issues regarding the legality of a sentence are non-waiveable. **Commonwealth v. Dinoia**, 801 A.2d 1254, 1257 (Pa. Super. 2002). This Court has recognized that "[a] claim that crimes should have merged for sentencing purposes raises a challenge to the legality of the sentence." **Commonwealth v. Quintua**, 56 A.3d 399, 400 (Pa. Super. 2012). Accordingly, this Court may review Appellant's claim even though it has not been properly preserved.

Appellant argues that his convictions for Aggravated Assault and Attempted Homicide arise from a single set of facts and, therefore, these offenses merge for sentencing purposes. **Commonwealth v. Rovinski**,

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<sup>1</sup> **See Anders v. California**, 386 U.S. 738, 744 (1967) ("If counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal"), and **Commonwealth v. McClendon**, 434 A.2d 1185 (Pa. 1981) (establishing Pennsylvania's procedure for withdrawal in **Anders** cases).

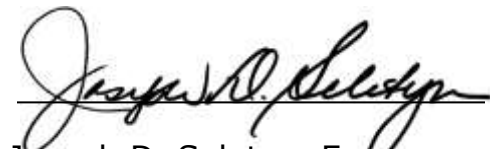
704 A.2d 1068, 1075 (Pa. Super. 2007). We note that the Commonwealth does not dispute Appellant's contention.

Upon review of the record, we are constrained to agree. The convictions in question arise from a single set of facts; namely, that Appellant choked the victim to unconsciousness. As such, the sentences for these offenses merge for sentencing purposes, and we are compelled to vacate Appellant's sentence.

We note that our disposition reduces the aggregate term of Appellant's sentence. Therefore, we conclude that it upsets the trial court's overall sentencing scheme. ***Commonwealth v. Thur***, 906 A.2d 552, 569 (Pa. Super. 2006). Accordingly, we remand this case for resentencing.

Judgment of sentence ***vacated***. Case ***remanded*** for resentencing. Jurisdiction ***relinquished***.

Judgment Entered.



Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/3/2013