

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

VICTOR EDWARD BAIR, JR.

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 725 MDA 2012

Appeal from the Judgment of Sentence March 16, 2012

In the Court of Common Pleas of Dauphin County

Criminal Division at No(s): CP-22-CR-0005791-2010

BEFORE: PANELLA, J., OTT, J., and STRASSBURGER, J.\*

MEMORANDUM BY OTT, J.:

Filed: February 11, 2013

Victor Edward Bair, Jr., appeals from the judgment of sentence of two and one-half to five years' imprisonment, imposed on March 16, 2012, in the Court of Common Pleas of Dauphin County, following revocation of his sentence of intermediate punishment. Concurrent with this appeal, counsel for Bair has filed a petition to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1987), and *Commonwealth v. McClendon*, 434 A.2d 1185 (Pa. 1981). The sole issue identified in the *Anders* brief is a challenge to the discretionary aspects of sentencing. Based upon the following, we affirm and grant counsel's petition to withdraw.

The trial court has aptly stated the background of this case, as follows:

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\* Retired Senior Judge assigned to the Superior Court.

### Procedural History

On November 19, 2010, [Bair] was charged with burglary [18 Pa.C.S § 3502] and criminal mischief [18 Pa.C.S § 3304(a)(5)]. On November 24, 2010, Patricia Bair, [Bair's] wife (hereinafter "wife"), obtained a protection from abuse order (PFA) against [Bair]. [Bair] took a guilty plea to the lesser charge of criminal trespass [18 Pa.C.S § 3503(a)(1)] instead of burglary. On April 11, 2011, [Bair] was sentenced by the Honorable Todd A. Hoover as follows:

Count 1 — Criminal Trespass — Five (5) years of intermediate punishment, first four (4) months and ten (10) days restrictive at Dauphin County Prison, time credited for four (4) months and ten (10) days, immediate parole; and

Count 2 — Criminal Mischief — One (1) year probation concurrent to Count 1, restitution to Brittany Beckem [Bair's step-daughter] for four hundred seventy five dollars (\$475.00) and to State Farm Insurance for six thousand eight hundred fifty three dollars (\$6,853.00).

Further, he was ordered to not have any contact with the victim for five (5) years, to continue with counseling at [Case Management Unit], and to undergo anger management.

On May 16, 2011, [Bair] filed a Motion to Waive Supervision Fees and Clarify Conditions of Supervision. He requested to have contact with his wife. On May 26, 2011, [Bair's] Motion was denied by Judge Hoover.

On November 10, 2011, a detainer was issued on [Bair] for violation of his intermediate punishment. Moreover, he was charged with resisting arrest. On March 16, 2012, a revocation hearing was held by the Honorable Deborah E. Curcillo. The hearing was scheduled to address [Bair's] guilty plea and sentencing for the new charge, as well as [Bair's] revocation. [Bair's] April 11, 2011, sentence was revoked and he was resentenced as follows:

Count 1 - Criminal Trespass — Two and one half (2½) to five (5) years in a state correctional institution; and

Count 2 — Criminal Mischief — closed from any further supervision.

He was granted time credit from November 19, 2010 to April 11, 2011, and from December 1, 2011 to March 16, 2012. At his new charge of resisting arrest, [Bair] was sentenced as follows:

Count 1 — Resisting Arrest — One (1) to two (2) years in a state correctional institution to run consecutive to the revocation docket outlined above.

On March 26, 2012, [Bair] filed a Post Sentence Motion to Modify Sentence pursuant to Pa. R. Crim. P. § 720. On March 28, 2012, [Bair's] Motion was granted in part and denied in part. Specifically, under docket number 5791 CR 2010, [Bair's] modification request was denied. Relating to docket number 5008 CR 2011 (resisting arrest), the sentence was modified to twenty-four (24) months of state supervision to run concurrent with 5791 CR 2010.

[Bair] filed a direct appeal on April 12, 2012. On April 17, 2012, this Court ordered [Bair] to file a Concise Statement of Errors Complained of on Appeal. [Bair] timely complied on May 7, 2012.

#### Factual Background

Probation Officer Anglemeyer testified that [Bair] violated his intermediate punishment numerous times. First, [Bair] failed to refrain from the violation of the PFA Order, state, local, federal penal laws. [Bair] was arrested by the Harrisburg City Police on November 10, 2011 for the new charge of resisting arrest and an indirect criminal contempt (ICC). The police had to use force to take [Bair] into custody. [Bair] plead guilty to the ICC on December 2, 2011, before the Honorable Andrew Dowling and was sentenced to twenty-one (21) days to six (6) months with immediate parole. Second, [Bair] failed to make biweekly or monthly payment. [Bair] owes \$10,666 and has not paid anything as of the date of the revocation hearing. Third, [Bair] failed to refrain from drug use. [Bair] tested positive for use of cocaine on July 1, 2011. He checked himself into Roxbury on October 19, 2011 for a 14-day program. After his release, he was arrested on the new charges.

Officer Anglemeyer testified about [Bair's] extensive history of being argumentative, his unwillingness to be supervised, and his unwillingness to be a productive member of society since April 28, 2011. At [Bair's] first office visit on April 29, 2011, he was placed on curfew and told his conditions. [Bair] became immediately confrontational. Later, [Bair] was advised not to have contact with his wife. Again, [Bair] became confrontational and argumentative. Officer Anglemeyer informed that during a personal home contact on May 23, 2011, at 9:30 p.m., [Bair] again was argumentative about the Officer's presence and was hesitant to allow Officer Anglemeyer into his room. Officer Anglemeyer eventually entered [Bair's] room to find a woman present. Officer Anglemeyer recommended sending [Bair] to state prison.

[Bair] argued that he suffers from mental health issues. Specifically, he suffers from major depression, antisocial personality disorder, and substance abuse. Previously, he was submitted to the Dauphin County Mental Health Program, but was denied. He is currently taking Zoloft and Sinequan at night. Concerning his health issues, he has diabetic neuropathy and gastroparesis.

Regarding the newer charges against [Bair], he argued that after successful completion of the Roxbury program, he contacted his wife for his wallet and Access cards. His wife called the police. Due to an active PFA in place, contact with his wife was a violation thereof. Therefore, the police attempted to arrest [Bair]. [Bair] refused arrest and the police officers had to use force to bring him into custody.

Ms. White, from [Case Management Unit], testified Susquehanna Harbor Safe Haven was willing to accept [Bair] into their shelter program. She explained that Susquehanna Harbor Safe Haven is designed for homeless, mentally ill men. However, it is not a secure facility and the men can come and go as they please. [Bair] requested to be sent to Susquehanna Harbor Safe Haven in order to get back on his feet and pay towards his restitution.

Trial Court Opinion, 5/15/2012, at 1–5 (footnotes omitted) (record citations omitted).

As a prefatory matter, we must review counsel's ***Anders*** brief and request to withdraw from representation. ***Commonwealth v. Daniels***, 999 A.2d 590, 593 (Pa. Super. 2010) ("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.") (citation omitted). A sufficient ***Anders*** brief must:

- (1) provide a summary of the procedural history and facts;
- (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.

***Commonwealth v. Santiago***, 978 A.2d 349, 361 (Pa. 2009). Our review confirms that counsel has substantially complied with these requirements.<sup>1</sup>

Where "counsel's petition and brief satisfy ***Anders***, we will then undertake our own review of the appeal to determine if it is wholly frivolous. If the appeal is frivolous, we will grant the withdrawal petition and affirm the judgment of sentence." ***Commonwealth v. Woods***, 939 A.2d 896, 898 (Pa. Super. 2007) (citations omitted). The ***Anders*** brief identifies the following issue: "Whether the trial court erred in sentencing [Bair] to two

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<sup>1</sup> Counsel also complied with the procedural requirements set forth in ***Commonwealth v. Millisock***, 873 A.2d 748 (Pa. Super. 2005). On June 25, 2012, counsel petitioned the trial court for leave to withdraw; filed the ***Anders*** brief; and served Bair, by mail, copies of the petition and brief, and a letter informing him of his right to retain new counsel, proceed *pro se*, and to raise additional points. See Petition to Withdraw, 6/25/2012; Letter, 6/25/2012, attached to ***Anders*** Brief as Exhibit "C." Bair has not filed a response to the ***Anders*** brief.

and one half (2½) to five (5) years of state incarceration where [Bair's] sentence was excessive and unreasonable in light of [Bair's] mental health issues and rehabilitative needs?" ***Anders*** Brief at 5.

The principles that guide our review are well settled. Upon revocation of a sentence of county intermediate punishment, "the sentencing alternatives available to the court shall be the same as the alternatives available at the time of initial sentencing." 42 Pa.C.S. § 9773(b). "This rule of re-sentencing is analogous to that set forth for resentencing following revocation of probation." ***Commonwealth v. Philipp***, 709 A.2d 920, 921 (Pa. Super. 1998). "[R]evocation of probation occurs, as does revocation of an intermediate punishment sentence, where it has been found the defendant has violated the terms of his sentence." ***Id.*** Moreover,

[s]entencing is a matter vested within the discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. An abuse of discretion requires the trial court to have acted with manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous. It is also now accepted that in an appeal following the revocation of probation, it is within our scope of review to consider challenges to both the legality of the final sentence and the discretionary aspects of an appellant's sentence.

***Commonwealth v. Crump***, 995 A.2d 1280, 1282 (Pa. Super.) (citations omitted), *appeal denied*, 13 A.3d 475 (Pa. 2010).

Since the discretionary aspects of the sentence are at issue, we are governed by the following procedure:

Before we reach the merits of this case, we must engage in a four part analysis to determine: (1) whether the appeal is

timely; (2) whether Appellant preserved his issues; (3) whether Appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is inappropriate under the sentencing code. ... Finally, if the appeal satisfies each of these four requirements, we will then proceed to decide the substantive merits of the case.

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To convince us a substantial question exists, an appellant needs to advance a colorable argument that the sentencing court's actions were inconsistent with a specific provision of the Sentencing Code or violated a fundamental norm of the sentencing process. More specifically, the statement must explain where the sentence falls in relation to the sentencing guidelines, identify what specific provision of the Code and/or what fundamental norm was violated, and explain how and why the sentencing court violated that particular provision and/or norm.

**Commonwealth v. Kane**, 10 A.3d 327, 335 (Pa. Super. 2010) (citations omitted), *appeal denied*, 29 A.3d 796 (Pa. 2011). As Bair filed a timely appeal, properly preserved the issue in a post-sentencing motion, and submitted a statement pursuant to Pa.R.A.P. 2119(f), the first three requirements are met.

With regard to the fourth requirement, Bair claims that "the sentence imposed by the sentencing court is manifestly excessive such that it constitutes too severe a punishment where [Bair] has significant mental health problems, and where the court had other options in sentencing [Bair] that would have addressed his rehabilitative needs." Bair's Brief at 10. Specifically, Bair asserts that he "presented the testimony that [he] had been accepted into a shelter program for homeless, mentally ill men, at

Susquehanna Harbor Safe Haven.” *Id.* As such, Bair’s statement does not raise a substantial question. *See Commonwealth v. Cannon*, 954 A.2d 1222, 1229 (Pa. Super. 2008), *appeal denied*, 964 A.2d 893 (Pa. 2009) (claim of inadequate consideration of mitigating factors does not raise a substantial question for our review); *Commonwealth v. Ladamus*, 896 A.2d 592, 595 (Pa. Super. 2006) (claim that court failed to consider defendant’s individualized needs “regarding his medical condition and his status as the primary caregiver for his mother” failed to raise a substantial question). Therefore, the issue identified in the *Anders* brief does not warrant this Court’s review.

Nonetheless, even if we were to review this challenge to the discretionary aspects of the sentence, no relief would be due. Once probation has been revoked, a sentence of total confinement may be imposed if any of the following conditions exist in accordance with Section 9771(c) of the Sentencing Code:

- (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 the court.

42 Pa.C.S. 9771(c).<sup>2</sup> Here, the Honorable Deborah E. Curcillo cogently justified the sentence imposed, as follows:

... [Bair] violated the terms of his intermediate punishment numerous times until he was detained on November 10, 2011. At [Bair's] revocation hearing, [Probation] Officer Anglemeyer testified to the following violations: Failure to refrain from the violation of the PFA order, state, local [and] federal penal laws; failure to make biweekly or monthly payment; and failure to refrain from drug use. Furthermore, Officer Anglemeyer testified that [Bair] has an extensive history of being argumentative, an unwillingness to be supervised, and an unwillingness to be a productive member of society since April 28, 2011. [Bair] admitted to resisting arrest and grabbing at a police officer. Moreover, [Bair] displayed a disinclination to abide by the terms of the PFA in the future through his testimony about his relationship with his wife.

... Since [Bair] is reluctant to abide by his intermediate punishment conditions, then it only seems logical he would not be cooperative under probation either. Therefore, incarceration is the only option.

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This Court articulated on the record that, 'based on the defendant's prior record and the numerous times he's been involved in the criminal justice system, this Court believes the sentence at 5791 CR 2010 ... is justified.' ...

[Bair] argues that this sentence was excessive and unreasonable in light of [Bair's] mental health issues and rehabilitative needs. [Bair] requested that he be sent to Susquehanna Harbor Safe Haven. However, this Court notes that Susquehanna Harbor Safe Haven is a non-secure facility that allows its residents to come and go as they please. This

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<sup>2</sup> Additionally, we note that the sentencing guidelines "do not apply to sentences imposed as a result ... revocation of probation, intermediate punishment or parole." 204 Pa. Code § 303.1(b).

type of environment would foster [Bair's] continued non-compliance with intermediate punishment conditions. Moreover, this Court took into consideration [Bair's] health and avers that such needs can be adequately addressed through this sentence as [Bair] will be in the confined setting of the state correctional institution and will be able to benefit from any mental health treatment which would be available to him. Thus, this Court believes that the new sentence is crafted to [Bair's] individual and rehabilitative needs.

Trial Court Opinion, *supra*, at 7–10.

The above analysis reflects that the trial court carefully considered all relevant circumstances, including Bair's mental health needs, in revoking his intermediate punishment sentence and imposing a new sentence. Accordingly, we agree with counsel there is no meritorious discretionary aspect of sentencing claim.

Furthermore, our independent review of the record reveals no meritorious appellate issues. Therefore, we grant counsel's petition to withdraw from representation and affirm the judgment of sentence.

Judgment of sentence affirmed. Petition to withdraw granted.