J-S67006-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
WILLIAM T. SHAW, JR.,	:	
	:	
Appellant	:	No. 732 MDA 2013

Appeal from the Judgment of Sentence Entered November 21, 2012,
In the Court of Common Pleas of Franklin County,
Criminal Division, at No. CP-28-CR-0002150-2010.

BEFORE: SHOGAN, ALLEN and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED DECEMBER 31, 2013**

Appellant, William T. Shaw, Jr., appeals from the judgment of sentence entered following his convictions of indecent assault of a child, unlawful contact with a minor, and indecent exposure. In addition, counsel has filed a petition to withdraw and a 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.

The trial court summarized the history of this case as follows:

> On September 19, 2011, [Appellant] was found guilty by a jury of his peers to one count of unlawful contact with a minor, 18 Pa.C.S.A. § 6318(A)(1), one count of indecent assault of a child, 18 Pa.C.S.A. § 3126(A)(2), and one count of indecent

> exposure, 18 Pa.C.S.A. § 3127(A). The Honorable Shawn D. Meyers sentenced [Appellant] on November 21, 2012. Post-sentence motions were filed by [Appellant] on December 3, 2012 and the Commonwealth filed its Answer on December 28, 2012. The [trial c]ourt issued its opinion on March 26, 2013 granting modification of the sentence, in part, to allow [Appellant] to have supervised contact with his two daughters, and denying in part. The [trial c]ourt denied the portion of [Appellant's] motion claiming that the sentence imposed by [the trial court] was excessive. [Appellant] filed a notice of appeal on April 23, 2013 and the [trial c]ourt ordered him to file a concise statement of matters complained of on appeal, which the [trial c]ourt received on May 10, 2013.

Trial Court Opinion, 6/18/13, at 1-2.

At the outset, we note that "[w]hen 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). Furthermore, there are clear mandates that counsel seeking to withdraw pursuant to ***Anders***, ***McClendon***, and ***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 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.

In the case before us, Appellant's counsel has complied with the requirements of ***Santiago***, and our review of counsel's petition to withdraw, supporting documentation, and ***Anders*** brief reveals that counsel has satisfied all of the additional requirements. Counsel has furnished a copy of the brief to Appellant; he has advised Appellant of his right to retain new counsel, proceed *pro se,* or raise any additional points that he deems worthy of this Court's attention; and he has attached a copy of the letter sent to Appellant as required under ***Millisock***. Counsel also avers that the appeal is frivolous. ***Anders*** Brief at 10.

Once counsel has met his 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 will now examine the issue presented by counsel in the ***Anders*** brief.

Counsel sets forth the following issue for our review:

> Whether the Sentencing Court abused its discretion by not modifying its order of sentence by reducing the period of incarceration from 54 to 204 months in a State Correctional Institution to 54 to 108 months in a State Correctional Institution and/or by not running Counts 2 and 3 concurrently with Count 1 rather than consecutively?

Anders Brief at 11.

We note that this issue implicates the discretionary aspects of Appellant's sentence. It is well settled that there is no absolute right to appeal the discretionary aspects of a sentence. ***Commonwealth v. Hartle***, 894 A.2d 800, 805 (Pa. Super. 2006). Rather, an appellant's appeal should be considered to be 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):

> An 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)).

Whether a particular issue constitutes a substantial question about the appropriateness of sentence is a question to be evaluated on a case-by-case basis. ***Commonwealth v. Kenner***, 784 A.2d 808, 811 (Pa. Super. 2001). As to what constitutes a substantial question, this Court does not accept bald assertions of sentencing errors. ***Commonwealth v. Malovich***, 903 A.2d 1247, 1252 (Pa. Super. 2006). An appellant must articulate the reasons the sentencing court's actions violated the sentencing code. ***Id***.

Herein, the first three requirements of the four-part test are met, those being that Appellant brought an appropriate appeal, raised the challenge in his post-sentence motion, and included in his appellate brief the necessary separate concise statement of the reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f). Therefore, we will next determine whether Appellant raises a substantial question requiring us to review the discretionary aspects of the sentence imposed by the trial court.

Appellant claims that the sentencing court relied upon improper factors in sentencing Appellant within the aggravated range of the sentencing guidelines for each of the three offenses. ***Anders*** Brief at 14. We have

stated that "[b]ased on Appellant's assertion that the sentencing court considered improper factors in placing the sentence in the aggravated range, we conclude that Appellant presents a substantial question on appeal." ***Commonwealth v. Stewart***, 867 A.2d 589, 592 (Pa. Super. 2005). Accordingly, because Appellant has stated a substantial question, we will consider this issue on appeal.[1]

Because Appellant has stated a substantial question, we will review his issue with regard to the trial court failing to consider proper factors in imposing aggregate sentences on appeal. Nevertheless, we conclude that Appellant is entitled to no relief on this claim, as the record reveals that the sentencing court did not consider improper factors.

It is undisputed that 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. Fullin***, 892 A.2d 843, 847 (Pa. Super. 2006). In this context, an abuse of discretion is not shown merely by an error in judgment. ***Id***. Rather, the

[1] In addition, Appellant baldly claims that the sentencing court unreasonably imposed the sentences in a consecutive fashion. ***Anders*** Brief at 14. This Court has concluded that a challenge to the consecutive nature of a sentence presents a substantial question permitting our review only where "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). We conclude that Appellant's bald allegation of improper sentencing in a consecutive manner does not raise a substantial question.

appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. ***Id***. It is undisputed that, "a court is required to consider the particular circumstances of the offense and the character of the defendant." ***Commonwealth v. Griffin***, 804 A.2d 1, 10 (Pa. Super. 2002). "In particular, the court should refer to the defendant's prior criminal record, his age, personal characteristics and his potential for rehabilitation." ***Id***.

Our review of the record reflects that at the time of sentencing, the trial court listened to detailed testimony regarding Appellant from an expert with the sexual offenders' assessment board. N.T., 11/21 12, at 3-12. Notably, the expert discussed the fact that Appellant had been through sex offender treatment on two, unrelated, prior occasions. ***Id***. at 7. Ultimately, the expert opined that Appellant is a sexually violent predator and that Appellant's likelihood of "re-offense is very high." ***Id***. at 9-11. The trial court also heard from the Commonwealth regarding its request for sentencing. ***Id***. at 13-14. In addition, the trial court received testimony from the minor victim's legal guardian pertaining to the severe impact the incident has had upon the victim. ***Id***. at 14-16.

The record further reflects that the trial court offered the following explanation for the imposition of the instant sentences of incarceration upon Appellant:

> For the record, the Court will reiterate that it sat through the trial. It has had the benefit of the report of [the sexual offenders assessment board expert]. It has had the benefit of [a] pre-sentence report. The pre-sentence report sets forth the nature of the offenses.
>
> The Court notes the response by [Appellant]. The Court also had the benefit of hearing from [the victim's legal guardian.] Has taken into account the recommendations offered by probation, has taken into account the sentencing memo set forth by the Commonwealth and has also considered the sentencing guideline sheets. Taking all that into consideration, I'm going to state on the record, [Appellant], that I'm not going to sentence in accordance with the recommendation of probation or the Commonwealth. I'm going to sentence you in the aggravated range, on each offense and they are going to be consecutive. I can't think of any other way that I have to safeguard the community, based upon what I've heard. Furthermore, to also bring about punishment that's appropriate, considering the impact that this has had upon the victim in this case. Specifically, that the aggravated sentence is warranted because of the impact upon the victim. It has caused her substantial trauma, causing regression, social limitations and an impact upon her educational accomplishments. Those are my reasons. I'm stating them for the record. They are in writing as well on the sentencing orders.

N.T., 11/21/12, at 22-23. Furthermore, at the conclusion of imposing each sentence in open court, the trial court stated on the record its reasons for giving Appellant a sentence in the aggravated range. ***Id***. at 25, 26-27, 28.

In addition, in its written opinion pursuant to Pa.R.A.P. 1925(a), the trial court offered the following discussion pertaining to its decision to

impose sentences within the aggregate range of the sentencing guidelines upon Appellant:

> [Appellant] was found guilty of one count of unlawful contact with a minor, 18 Pa.C.S.A. § 6318(A)(1), one count of indecent assault of a child, 18 Pa.C.S.A. § 3126(A)(2), and one count of indecent exposure, 18 Pa.C.S.A. § 3127(A). At the time of sentencing, [Appellant's] prior record score was "2" as he had two previous convictions — one for indecent exposure in 1998 and one for statutory sexual assault in 2007. Under the sentencing guidelines, the standard ranges are as follows:
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> 1. Unlawful contact with a minor (F3) (OGS 6): nine to sixteen months;
>
> 2. Indecent assault (MI) (OGS 5): three to fourteen months,
>
> 3. Indecent exposure (M1) (OGS 4): RS - <12 months.
>
> The standard ranges are set forth in the sentencing guidelines but it is well-settled that there may be aggravating circumstances that justify an increased sentence. Pursuant to §303.13(c) of the Sentence Guidelines and 42 Pa.C.S.A. § 9721(b), the Court must state its reasons for an aggravated sentence on the record. At sentencing on November 21, 2012, the Court first heard from Herbert Hays, a member of the Pennsylvania Sexual Offenders Assessment Board, who testified that he conducted an assessment of [Appellant] and, in his professional opinion, within a reasonable degree of professional certainty that [Appellant] meets the criteria to be classified as a sexually violent predator. The Court also heard testimony from the minor victim's guardian who testified as to the victim's emotional state at the current time. The Court also took into consideration the Sentencing memorandum and recommendations from the Franklin County Probation Department. The Court stated on the record that its reasons for imposing the aggregated sentence were: 1) safeguard the community, 2) bring about punishment that is appropriate to the impact on victim consisting of substantial trauma, depression,

> and social difficulties, and 3) impact on the victim's educational accomplishments. Subsequently, the Court imposed the following sentences:
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> 1 Unlawful contact with a minor (F3) (OGS 6): twenty-two to eighty-four months;
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> 2. Indecent assault (M1) (OGS 5): seventeen to sixty months,
>
> 3. Indecent exposure (M1) (OGS 4): fifteen to sixty months.
>
> Section 303.13(a) of the Sentencing Guidelines states that "for Offense Gravity Scores of 6 and 7, the court may impose a sentence that is up to six months longer than the upper limit of the standard range" and "for Offense Gravity Scores of 1 through 5, the court may impose a sentence that it up to three months longer than the upper limit of the standard range." §303.13(a)(3)-(4). In this instance, the Court imposed an aggregated sentence as allowed by § 303.13(a) of the Sentencing Guidelines and believes that it is within the Court's discretion to do so because the circumstances justified aggregation.
>
> Some semblance of this argument was made in [Appellant's] post-sentence motion from December 3, 2012. The Court listed at sentencing, and again in its opinion from March 26, 2013, the reasons that it imposed [Appellant's] sentence. Although the sentence was within the aggravated range, it was still within the sentencing guidelines and the Court stated its reasons for doing so.

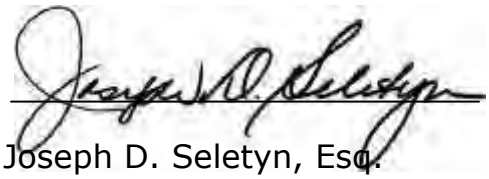
Trial Court Opinion, 6/18/13, at 2-4.

Upon review, we discern no abuse of discretion as the trial court carefully considered the appropriate factors when imposing Appellant's sentence, which was within the aggravated range of the sentencing guidelines. Accordingly, Appellant is entitled to no relief.

In summary, it is our determination that Appellant's counsel has complied with the requirements of ***Anders*** and that an appeal in this case would be wholly frivolous. Furthermore, we have conducted our own, independent review of the record. We do not discern any non-frivolous issues that Appellant could have raised. In light of the foregoing, we grant counsel's petition to withdraw and affirm the judgment of sentence.

Petition to withdraw granted. Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/31/2013