NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. TROY TRAVIS LARGE Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 932 EDA 2013

Appeal from the Judgment of Sentence October 26, 2011
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0006216-2010

BEFORE: PANELLA, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.: **FILED DECEMBER 03, 2013**

Appellant, Troy Travis Large, appeals from the October 26, 2011 aggregate judgment of sentence of 10 to 29 years' imprisonment imposed after pleading guilty to three counts of robbery and one count of criminal conspiracy.[1] Contemporaneously with this appeal, counsel has requested leave to withdraw in accordance with ***Anders v. California***, 386 U.S. 738

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 3701(a) and 903(a), respectively.

(1967), and its progeny. After careful review, we grant counsel's petition to withdraw and affirm the judgment of sentence.[2]

The trial court summarized the relevant facts and procedural history as follows.

> [Appellant] entered an open guilty plea on April 18, 2011 to three counts of Robbery – felony of the first degree, and one count of Criminal Conspiracy. Due to the seriousness and violent nature of the robberies, the [trial] court sentenced [Appellant] on October 26, 2011, to 51 months to 15 years for Count 1 [robbery]; 42 months to 7 years for Count 2 [robbery]; and 27 months to 7 years on Count 3 [robbery]. The [trial] court ordered these sentences to run consecutively and thus [Appellant] is to serve an aggregate sentence of 10 to 29 years in a state correctional institution. The [trial] court imposed a finding of guilt without further penalty for the Criminal Conspiracy charge.
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> No post-sentence motions were filed. On April 18, 2012, [Appellant] filed a *pro se* Petition for Reconsideration, which [the trial] court ultimately denied on June 6, 2012. Thereafter, he filed a *pro se* Post Conviction Relief Act Petition on October 9, 2012, which prompted [the trial] court to appoint counsel to file an amended petition. Appointed counsel filed an Amended PCRA Petition on January 28, 2013, requesting among other things that [Appellant] be permitted to file a Post-Sentence Motion *Nunc Pro Tunc*, challenging the discretionary aspect of his sentence. The [trial] court granted his request as to restoration of his post-sentence motion and direct appeal rights on February 19, 2013. [Appellant]'s Post-Sentence Motion was filed on

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[2] On September 6, 2013, the Commonwealth filed a letter noting its agreement with Appellant's counsel's determination that all issues Appellant raises are frivolous and indicated it will not be filing a brief in this matter.

> March 13, 2013 and denied by [the trial] court on March 21, 2013.

Trial Court Opinion, 5/23/13, at 1-2 (footnotes omitted).

On March 25, 2013, Appellant filed a timely notice of appeal. Thereafter, on April 2, 2013 the trial court directed Appellant, within 21 days, to file a concise statement of errors complained of on appeal in accordance with Pennsylvania Rule of Appellate Procedure 1925(b). Appellant failed to timely comply. On May 8, 2013, Appellant filed a motion for leave to file a concise statement *nunc pro tunc*. That same day counsel filed said statement. Nevertheless, the trial court addressed Appellant's claims and noted the following in its Rule 1925(a) opinion.

> "In the event a Rule 1925(b) statement is filed late by a represented criminal defendant, such constitutes per se ineffectiveness so that the proper remedy is to remand for filing of such a statement nunc pro tunc." ***Commonwealth v. Grohowski***, 980 A.2d 113, 114 (Pa. Super. 2009) (citing ***Commonwealth v. Burton***, 973 A.2d 428 (Pa. Super. 2009)(en banc)). However, where the trial court has filed an opinion addressing the issues presented in the 1925(b) concise statement, the appellate court may review the merits of the issues presented. ***Id.*** Because we had an opportunity to review [Appellant]'s Concise Statement before issuing our Opinion, we will address the issue [Appellant] raises below pursuant to the rule established in ***Burton*** supra. See also ***Grohowski***, 980 A.2d at 115.

Id. at 2. Accordingly, because we agree with the trial court's determination, and because the trial court has adequately addressed Appellant's claim in its Rule 1925(a) opinion, we proceed to address the merits of Appellant's claim.

Additionally, we note that on September 3, 2013, Appellant's counsel filed a petition for leave to withdraw advising Appellant of his right to retain private counsel or proceed *pro se*. Appellant did not file a response.

In his ***Anders*** brief, counsel raises the following issue on Appellant's behalf.

> [I.] Did the trial court abuse its discretion when it sentenced Appellant to an aggregate term of ten (10) to twenty-nine (29) years of total confinement with respect to Appellant's convictions for robbery and conspiracy?

Anders Brief at 5.

"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. Titus***, 816 A.2d 251, 254 (Pa. Super. 2003) (citation omitted). For cases where the briefing notice was issued after August 25, 2009, as is the case here, an ***Anders*** brief shall comply with the requirements set forth by our Supreme Court in ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009).

> [W]e hold that in 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.

Id. at 361. Additionally, counsel must furnish the appellant with a copy of the brief, advise him in writing of his right to retain new counsel or proceed *pro se*, and attach to the ***Anders*** petition a copy of the letter sent to appellant as required under ***Commonwealth v. Millisock***, 873 A.2d 748, 751 (Pa. Super. 2005). ***See Commonwealth v. Daniels***, 999 A.2d 590, 594 (Pa. Super. 2010) (holding that, "[w]hile the Supreme Court in ***Santiago*** set forth the new requirements for an ***Anders*** brief, … the holding did not abrogate the notice requirements set forth in ***Millisock*** that remain binding legal precedent") (footnote omitted). "After counsel has satisfied these requirements, we must conduct our own review of the trial court proceedings and independently determine whether the appeal is wholly frivolous." ***Titus***, ***supra*** at 254 (citation omitted).

In the instant matter, we conclude that counsel's ***Anders*** brief complies with the requirements of ***Santiago***, ***supra***. First, counsel has provided a procedural and factual summary of the case with references to the record. Second, counsel advances relevant portions of the record that arguably support Appellant's claim that the trial court abused its discretion in sentencing Appellant to 10 to 29 years' imprisonment. Third, counsel states that he "reluctantly concluded that [Appellant]'s challenge to the discretionary aspects of Judge O'Neill's [October 26,] 2011 judgment of sentence lacks any basis in either law or fact and is, therefore, wholly

frivolous." ***Anders*** Brief at 38. Lastly, counsel has complied with the requirements set forth in ***Millisock***, ***supra***. As a result, we proceed to conduct an independent review to ascertain if the appeal is indeed wholly frivolous.

Appellant asserts two distinct challenges to the trial court's discretion in imposing his sentence. Specifically, Appellant first asserts that the trial court "failed to give due consideration and adequate weight to his mitigating factors, including his long-standing fight against drug addiction, the fact that he was arrest-free for more than a decade prior to the present offences [sic], and that he has been a model prisoner and taken advantage of drug rehabilitation programes [sic] following his arrest on [July 20,] 2010." ***Anders*** Brief at 23. Secondly, Appellant asserts that the trial court erred when running Appellant's sentences consecutively as opposed to concurrently. ***Id.*** at 29.

Our standard of review in assessing whether a trial court has erred in fashioning a sentence is well settled. "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. Holiday***, 954 A.2d 6, 9 (Pa. Super. 2008), *appeal denied*, 972 A.2d 520 (Pa. 2009).

> In fashioning a sentence, a judge is obligated to follow the general principle that the 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. A court is required to consider the particular circumstances of the offense and the character of the defendant. In particular, the court should refer to the defendant's prior criminal record, his age, personal characteristics and his potential for rehabilitation.

Commonwealth v. Hyland, 875 A.2d 1175, 1184 (Pa. Super. 2005) (citations and quotation marks omitted), *appeal denied*, 890 A.2d 1057 (Pa. 2005).

Where an appellant challenges the discretionary aspects of his sentence, as is the case here, there is no automatic right to appeal, and an appellant's appeal should be considered a petition for allowance of appeal. ***Commonwealth v. W.H.M., Jr.***, 932 A.2d 155, 163 (Pa. Super. 2007). We will grant an appeal challenging the discretion of the sentencing court only where the appellant has advanced a colorable argument that the sentence is inconsistent with the Sentencing Code or contrary to the fundamental norms that underlie the sentencing process. ***Hyland***, ***supra*** at 1183. In other words, an appellant must seek permission from this Court to appeal and must establish that a substantial question exists that the sentence was not appropriate under the Sentencing Code. ***Commonwealth v. Mouzon***, 812 A.2d 617, 627-628 (Pa. 2002); 42 Pa.C.S.A. § 9781(b).

Prior to reaching the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine the following.

> (1) [W]hether 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).

Commonwealth v. Prisk, 13 A.3d 526, 532 (Pa. Super. 2011).

Applying the four-factor test to the present matter, we conclude Appellant has complied with the first three requirements. Accordingly, we proceed to consider whether Appellant has presented a substantial question for our review. "A substantial question will be found where the defendant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the [sentencing] code or is contrary to the fundamental norms which underlie the sentencing process." ***Commonwealth v. Booze***, 953 A.2d 1263, 1278 (Pa. Super. 2008) (citation omitted), *appeal denied*, 13 A.3d 474 (Pa. 2010); ***see also*** 42 Pa.C.S.A. § 9781(b).

As noted, Appellant contends the trial court abused its discretion by not considering all the mitigating factors, and by sentencing him to consecutive as opposed to concurrent sentences. ***Anders*** Brief at 22, 29. This Court has consistently held that "[a]n argument that the sentencing court failed to adequately consider mitigating factors in favor of a lesser sentence does not present a substantial question appropriate for our

review." ***Commonwealth v. Ratushny***, 17 A.3d 1269, 1273 (Pa. Super. 2011). We have held that the weight to be afforded the various sentencing factors is a discretionary matter for the sentencing court and the action of the sentencing court will not be disturbed simply because the defendant would have preferred that different weight be given to any particular factor. ***Commonwealth v. Marts***, 889 A.2d 608, 615 (Pa. Super. 2005).

Further, this Court has held that a trial court's discretion to sentence Appellant to a consecutive sentence does not raise a substantial question.

> We have stated that the imposition of consecutive rather than concurrent sentences lies within the sound discretion of the sentencing court. ***Commonwealth v. Lloyd***, 878 A.2d 867, 873 (Pa. Super. 2005), *appeal denied,* 585 Pa. 687, 887 A.2d 1240 (2005) (citing ***Commonwealth v. Hoag***, 445 Pa. Super. 455, 665 A.2d 1212, 1214 (1995)). Long standing precedent of this Court recognizes that 42 Pa.C.S.A. § 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. ***Commonwealth v. Marts***, 889 A.2d 608, 612 (Pa.Super.2005) (citing ***Commonwealth v. Graham***, 541 Pa. 173, 184, 661 A.2d 1367, 1373 (1995)). A challenge to the imposition of consecutive rather than concurrent sentences does not present a substantial question regarding the discretionary aspects of sentence. ***Lloyd***, 878 A.2d at 873. "We see no reason why [a defendant] should be afforded a 'volume discount' for his crimes by having all sentences run concurrently." ***Hoag***, 665 A.2d at 1214. Also, an allegation that a sentencing court failed to consider or did not adequately consider certain factors does not raise a substantial question that the sentence was inappropriate. ***Commonwealth v. Petaccio***, 764 A.2d 582, 587 (Pa. Super. 2000). Accordingly,

> Appellant's assertion of abuse of discretion for imposing consecutive sentences without properly considering mitigating factors fails to present a substantial question to justify this Court's review of his claim.

Commonwealth v. Johnson, 961 A.2d 877, 880 (Pa. Super. 2008). Accordingly, we conclude Appellant's claim that the trial court erred in sentencing Appellant to consecutive rather than concurrent sentences fails to raise a substantial question for our review.[3]

Nevertheless, even if we were to reach the merits of Appellant's sentencing claims, they would nonetheless fail. Our review of the record reveals that the trial court properly considered all relevant sentencing factors in sentencing Appellant to an aggregate term of 10 to 29 years' imprisonment. Specifically, the trial court stated the following reasoning on the record at the October 26, 2011 sentencing hearing.

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[3] Recently, in ***Commonwealth v. Dodge***, -- A.3d ----, 2013 WL 4829286 (Pa. Super. 2013), this Court held that under certain circumstances a challenge to the trial court's imposition of consecutive, as opposed to concurrent sentences, does raise a substantial question. In reaching this conclusion we qualified that, "[t]o make it clear, a defendant **may** raise a substantial question where he receives consecutive sentences within the guideline ranges if the case involves circumstances where the application of the guidelines would be clearly unreasonable, resulting in an excessive sentence; however, a bald claim of excessiveness due to the consecutive nature of a sentence will not raise a substantial question." ***Id.*** at *3. Herein, Appellant's bald assertion that 10 to 29 years' imprisonment was excessive, in light of the violent nature of his crimes, does not meet the "clearly unreasonable, resulting in an excessive sentence" threshold required by our holding in ***Dodge***. ***Id.***

> All right. The Court has considered all of the evidence, testimony, and referenced items for sentencing, and again has incorporated all of the PSI, the sentencing guidelines, and the testimony that is here at sentencing.
>
> The first is to the matter of whether the Court will apply the deadly weapon enhancement. I find that under the applicable law, the actual statute regarding defining any device … that a deadly weapon enhancement will apply.
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> …
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> Clearly, I hear the argument as to desperation, but reject it in this case in that these are choices that are thought out of the crimes that will be committed, despite the fact that [Appellant] is clearly an addict, is clearly in need of treatment, clearly comes from a disturbing upbringing, a disturbing childhood, a disturbing adolescence, and now one that has pretty much predesigned for him to become an addict, and because of his concurring mental issues, a violent addict, at that.
>
> So, the Court has to balance the two of these. Too often, we do hear a great deal about the defendant, because the defendant is the one who presents at sentencing and the Court is required, under law, to take into a great deal of consideration the defendant's background and this concept of rehabilitation of a defendant in the criminal justice system….
>
> The Court has to take in the risks. This [Appellant] does present a very high-risk individual, both by certain of his mental health issues, clearly his addiction issues, but his choices of the types of crimes that he committed, violent crimes, pure and simple; crimes that meant to threaten innocent store owners, clerks, people making ends meet by working low-end jobs, the pizza parlor, the Shell gas station, people who own a jewelry store in hopes that they could establish themselves in a community….

> And the pictures alone in this particular case speak volumes of the Douglas Jewelers robbery. This was a violent robbery. …
>
> So the Court does have to weigh that these are serious crimes, the most serious crimes that can be charged under our Crimes Code, as graded as felony of the first degree. So, a great deal of weight that this Court has to put in is the protection of society, pure and simple. And the total confinement of [Appellant] for a long period of time is warranted, simply by the crimes that he, [and his co-defendants] committed, pure and simple. They committed violent crimes.
>
> And the concepts of [] rehabilitation of [Appellant], of course, are important, but they are weighted against the protection of society. And I am saddened deeply that a desperate drug addict, again, who had very little choice almost in his life whether he would become a drug addict, it was informed by his family life, it was informed by his parents, and it only got supported through is life and the attempts at trying to go another direction just didn't work out. I don't fault him for it, it just is a fact.
>
> … I have a violent drug addict, pure and simple; a violent drug addict who committed violent crimes that terrorized law-abiding, contributing members of the community. So, nothing less than total confinement is warranted in this case, and the protection of society and the seriousness of this crime inform this Court's sentence.

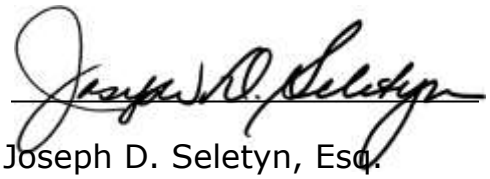
N.T., 10/26/11, at 59-60, 62-65. Additionally, the trial court considered and relied upon a PSI report. ***Id.*** at 10-11. When a trial court has the benefit of a PSI report, we presume that it "was aware of the relevant information regarding the defendant's character and weighed those considerations along

with mitigating statutory factors." ***Commonwealth v. Walls***, 926 A.2d 957, 967 n.7 (Pa. 2007).

For all the foregoing reasons, we agree with counsel that Appellant's appeal is "wholly frivolous." ***Titus***, ***supra*** at 254. Accordingly, we grant counsel's petition to withdraw and affirm the trial court's October 26, 2011 judgment of sentence.

Judgment of sentence affirmed. Petition to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/3/2013