

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

CARL L. HILL

Appellant

No. 1541 EDA 2015

Appeal from the Judgment of Sentence March 24, 2015
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0005385-2013

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and JENKINS, J.

MEMORANDUM BY JENKINS, J.:

FILED FEBRUARY 01, 2016

Appellant Carl L. Hill appeals from the judgment of sentence entered in the Lehigh County Court of Common Pleas following his negotiated guilty plea to robbery, threatens another with immediate serious bodily injury.¹ After review, we affirm and grant counsel's petition to withdraw.

Appellant admitted to the following information at his guilty plea hearing. On August 3, 2013, Appellant entered the residence of Shaneice Wimberly ("Victim"), without Victim's permission, while she was asleep with her infant son. N.T., 3/24/2015, at 9-10. Victim recognized Appellant as her cousin Nicole's paramour. *Id.* at 10. Nicole was aware that Victim had just collected \$1,400.00 of social security money. *Id.* at 10-11. Appellant

¹ 18 Pa.C.S. § 3701(a)(1)(ii).

brandished a rifle and demanded money from Victim. **Id.** at 11. Victim refused to give Appellant her money and tried to grab his gun. **Id.** Appellant fired two shots into the room and departed with Victim's \$1,400.00. **Id.**

On March 24, 2015, Appellant entered into a negotiated guilty plea. Appellant pled guilty to robbery and agreed to immediate sentencing following his hearing. The Commonwealth withdrew the other charges against Appellant² and agreed to a minimum sentence of four years. Appellant completed a written guilty plea colloquy and indicated that he read the form, voluntarily signed it, and understood his rights as well as the rights he was giving up by pleading guilty. N.T., 3/24/2015, at 4-7. Appellant indicated that he understood his maximum sentence could be up to twenty (20) years. **Id.** at 4. The trial court accepted Appellant's guilty plea and proceeded to sentencing.

After considering Appellant's prior record score of five (5), his previous convictions, the fact that Appellant accepted responsibility for his crime by pleading guilty and that Appellant had nothing to say on his behalf except that there "ain't no reason" why he had committed his crime, the court sentenced Appellant to four (4) to twenty (20) years' incarceration. N.T., 3/24/2015, at 16-20.

² Appellant also was charged with rape, burglary and recklessly endangering another person ("REAP").

On March 31, 2015, Appellant filed a timely post-sentence motion for reconsideration of sentence. After a hearing, the court denied the post-sentence motion on May 13, 2015. On May 21, 2015, Appellant timely filed a notice of appeal. On May 29, 2015, the trial court ordered Appellant to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and he timely complied on June 17, 2015. On August 31, 2015, Appellant's counsel filed a petition for leave to withdraw along with an **Anders** brief.

As a preliminary matter, appellate counsel seeks to withdraw his representation pursuant to **Anders v. California**, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and **Commonwealth v. Santiago**, 978 A.2d 349 (Pa.2009). Prior to withdrawing as counsel on a direct appeal under **Anders**, counsel must file a brief that meets the requirements established by our Supreme Court in **Santiago**. The brief 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. Counsel must also provide a copy of the **Anders** brief to the appellant, together with a letter that advises the appellant of his or her right to "(1) retain new counsel to pursue the appeal; (2) proceed *pro se* on appeal; or (3) raise any points that the appellant

deems worthy of the court's attention in addition to the points raised by counsel in the **Anders** brief." **Commonwealth v. Nischan**, 928 A.2d 349, 353 (Pa.Super.2007), *appeal denied*, 936 A.2d 40 (Pa.2007). Substantial compliance with these requirements is sufficient. **Commonwealth v. Wrecks**, 934 A.2d 1287, 1290 (Pa.Super.2007). "After establishing that the antecedent requirements have been met, this Court must then make an independent evaluation of the record to determine whether the appeal is, in fact, wholly frivolous." **Commonwealth v. Palm**, 903 A.2d 1244, 1246 (Pa.Super.2006).

Here, counsel filed a petition for leave to withdraw as counsel along with an **Anders** brief and a letter advising Appellant of his right to obtain new counsel or proceed *pro se* to raise any points he deems worthy of the court's attention in addition to the one raised in the **Anders** brief. The petition states counsel determined there were no non-frivolous issues to be raised on appeal, notified Appellant of the withdrawal request, supplied him with a copy of the **Anders** brief, and sent him a letter explaining his right to proceed *pro se* or with new, privately-retained counsel to raise any additional points or arguments that Appellant believed had merit. In the **Anders** brief, counsel provides a summary of the facts and procedural history of the case with citations to the record, refers to evidence of record that might arguably support the issue raised on appeal, provides citations to relevant case law, and states his conclusion that the appeal is wholly frivolous and his reasons therefor. **See Anders** Brief, at 8-18. Accordingly,

counsel has substantially complied with the technical requirements of **Anders** and **Santiago**.

As Appellant filed neither a *pro se* brief nor a counseled brief with new, privately-retained counsel, we review this appeal based on the issue raised in the **Anders** brief:

Appellant raises the following issue for our review:³

WHETHER THE [TRIAL] COURT ABUSED ITS SENTENCING DISCRETION WHEN THE COURT SENTENCED [APPELLANT] TO A PERIOD OF INCARCERATION THAT COMPLIED WITH THE PLEA AGREEMENT AND HAD A MINIMUM SENTENCE WHICH WAS IN THE MITIGATED RANGE OF THE SENTENCING GUIDELINES, BUT, IMPOSED A MAXIMUM SENTENCE OF THE STATUTORY LIMIT FOR THE CHARGE?

Anders Brief at 7.

Appellant challenges the discretionary aspects of his sentence. He claims his sentence was manifestly excessive and that the court failed to adequately consider mitigating factors before imposing such a lengthy maximum sentence. Appellant's issue merits no relief.

³ Appellant also listed the following as a second issue in the **Anders** Brief:

MAY APPOINTED COUNSEL BE PERMITTED TO WITHDRAW AFTER A CONSCIENTIOUS REVIEW OF THE ISSUES AND THE FACTS PURSUANT TO THE **ANDERS** CASE AND AFTER DETERMINING THAT THE APPEAL IS FRIVOLOUS?

Anders Brief at 7. This issue is merely counsel's request to withdraw, which we grant herein after a discussion of his first issue, *infra*.

First, we must determine whether Appellant has the right to seek permission to challenge the discretion of the sentencing court. Where a “plea agreement contains a negotiated sentence which is accepted and imposed by the sentencing court, there is no authority to permit a challenge to the discretionary aspects of that sentence.” ***Commonwealth v. Reichle***, 589 A.2d 1140, 1141 (Pa.Super.1991). However, “[w]here a defendant pleads guilty without any agreement as to sentence, the defendant retains the right to petition this Court for allowance of appeal with respect to the discretionary aspects of sentencing.” ***Commonwealth v. Brown***, 982 A.2d 1017, 1019 (Pa.Super.2009). Where a plea agreement contains a negotiated minimum sentence, but leaves the maximum sentence to the discretion of the sentencing judge, a petitioner may seek a discretionary appeal regarding the maximum aspect of his sentence. ***See id.***

Here, Appellant entered into a negotiated guilty plea that specified his minimum but not his maximum sentence. Thus, Appellant has retained his right to petition this Court for allowance of appeal with respect to the discretionary aspect of his maximum sentence. Challenges to the discretionary aspects of sentencing, however, do not entitle a petitioner to review as of right. ***Commonwealth v. Allen***, 24 A.3d 1058, 1064 (Pa.Super.2011). Before this Court can address such a discretionary challenge, an appellant must invoke this Court’s jurisdiction by satisfying the following four-part test:

(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.

Id.

Here, Appellant properly preserved his issue in a post-sentence motion and filed a timely notice of appeal. Further, Appellant's brief does not have a fatal defect.⁴ We must now determine whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

"The determination of what constitutes a substantial question must be evaluated on a case-by-case basis." ***Commonwealth v. Prisk***, 13 A.3d 526, 533 (Pa.Super.2011). Further:

A substantial question exists only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.

Id. (internal citations omitted).

⁴ The ***Anders*** brief includes a section labeled "Substantial Question as to the Discretionary Aspect of Sentencing." ***Anders*** Brief at 10. The ***Anders*** brief addresses the importance of the Pa.R.A.P. 2119(f) statement, but does not include a separate section labeled such, possibly because counsel did not believe Appellant raised a substantial question. We decline to deny Appellant's petition for allowance of appeal due to a technical defect in the ***Anders*** brief.

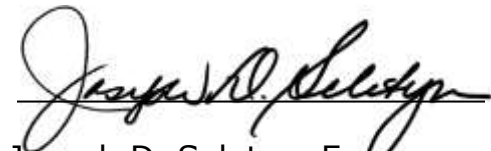
Here, Appellant's challenge to the trial court's imposition of the statutory maximum sentence does not present a substantial question. **See Commonwealth v. Kimbrough**, 872 A.2d 1244, 1263 (Pa.Super.2005) ("When the sentence is within the range prescribed by statute, a challenge to the maximum sentence imposed does not set forth a substantial question as to the appropriateness of the sentence under the guidelines."); **Commonwealth v. Yeomans**, 24 A.3d 1044, 1049-50 (Pa.Super.2011) (Challenge to imposition of statutory maximum did not present substantial question because sentencing guidelines provide for minimum and not maximum sentences).

Because Appellant does not raise a substantial question, we need not address whether the court abused its discretion in the terms of its sentence.

Further, after an independent review of the record, we agree with Counsel that this appeal is wholly frivolous.

Judgment of sentence affirmed. Counsel's petition to withdraw granted.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016