NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MIGUEL ANGEL RODRIGUEZ Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 947 MDA 2013

Appeal from the Judgment of Sentence of January 18, 2012
In the Court of Common Pleas of Dauphin County
Criminal Division at No.: CP-22-CR-0000266-2011

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

MEMORANDUM BY WECHT, J.: **FILED APRIL 22, 2014**

Miguel Rodriguez ("Rodriguez") appeals from his January 18, 2012 judgment of sentence. Rodriguez' counsel has filed with this court an ***Anders*/*Santiago***[1] brief, as well as a petition to withdraw as counsel. After review, we affirm the judgment of sentence, and grant counsel's petition to withdraw.

Rodriguez was charged with four counts of delivery or possession with intent to deliver ("PWID"), 35 P.S. § 780-113(a)(30); one count of resisting arrest, 18 Pa.C.S.A. § 5104; one count of tampering with physical evidence, 18 Pa.C.S.A. § 4910; and one count of flight to avoid apprehension, 18

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* Former Justice specially assigned to the Superior Court.

[1] ***See Anders v. California***, 386 U.S. 738, 744 (1967); ***Commonwealth v. Santiago***, 978 A.2d 349, 361 (Pa. 2009).

Pa.C.S.A. § 5126(a). The last two counts were withdrawn and Rodriguez pled guilty to the other counts.

At the guilty plea colloquy, the Commonwealth placed a factual basis for the plea on the record, which we summarize here. On October 27, 2010, a confidential informant ("CI") working with an undercover officer set up a drug buy with "P" at Paxton Pub. The officer and CI met with P and the officer exchanged $40 for cocaine. On October 29, 2010, the officer contacted P to arrange another buy. Again, the officer gave P $40 and P provided the officer with cocaine. On November 29, 2010, another identical exchange occurred between the officer and P. On December 2, 2010, after P was identified as Rodriguez, the officer arranged to buy $100 worth of cocaine, after which the police intended to take Rodriguez into custody. After Rodriguez met the officer, they walked to the officer's vehicle and the officer gave Rodriguez the $100. When Rodriguez observed marked police vehicles in the area, he fled. When he was later apprehended, Rodriguez had nine bags of cocaine, $573 in cash, the $100 in buy money, and a cell phone. The total weight of the cocaine was approximately 4.5 grams.

On January 18, 2012, Rodriguez appeared for a bench trial on additional drug-related charges at docket number 1288 C.R. 2010. The docket at issue in this appeal, 266 C.R. 2011, also was scheduled to be heard that day. At the conclusion of the bench trial on 1288 C.R. 2010, Rodriguez was found guilty of those charges. Before moving to sentencing

on 1288 C.R. 2010, Rodriguez consulted with his attorney and agreed to enter an open guilty plea on 266 C.R. 2011.

The Commonwealth's attorney proceeded to colloquy Rodriguez to determine whether he understood the rights that he was forgoing by entering a guilty plea. The Commonwealth read the factual basis for the plea and the potential sentences into the record. The court accepted the plea and proceeded directly to sentencing. The court heard argument on sentencing and testimony from Rodriguez' character witnesses. Rodriguez was sentenced to thirty-six to seventy-two months' incarceration on the fourth count of PWID, eighteen to thirty-six months' incarceration on each of the remaining three counts of PWID, and six to twelve month's incarceration on the resisting arrest count. Rodriguez was also fined $1,700 and ordered to pay costs. All of the sentences at 266 C.R. 2011 were to run concurrently to each other. However, the sentences were ordered to run consecutively to the sixty to 120 months' incarceration sentence that was imposed at 1288 C.R. 2010.

Rodriguez did not take a direct appeal. On January 22, 2013, Rodriguez filed a timely *pro se* petition seeking relief pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541 *et seq*. Counsel was appointed and filed a motion to reinstate Rodriguez' direct appeal rights, claiming that Rodriguez had requested that his trial counsel file an appeal and that the counsel did not do so. On May 13, 2013, the PCRA court

granted the relief and granted Rodriguez thirty days to file an appeal. On May 24, 2013, Rodriguez filed his notice of appeal.

On June 24, 2013, the court ordered Rodriguez to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Rodriguez' counsel timely complied, but indicated his intention to file an ***Anders*** brief. The trial court did not file an opinion.

This Court first must review counsel's petition to withdraw for compliance with ***Anders*/*Santiago***. ***Commonwealth v. Goodwin***, 928 A.2d 287, 290 (Pa. Super. 2007) (*en banc*). In relevant part, counsel's brief pursuant to ***Anders*/*Santiago*** 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.

Commonwealth v. Santiago, 978 A.2d 349, 361 (Pa. 2009). Counsel also must provide a copy of the ***Anders*** brief to the appellant. Attending the brief must be 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).

The ***Anders*** brief is not a mere formality. It is our method to ensure that a criminal appellant has not been denied his or her constitutional right to counsel for a direct appeal. In ***Santiago***, our Supreme Court stated that the brief "will assist the intermediate appellate courts in determining whether counsel has conducted a thorough and diligent review of the case to discover appealable issues and whether the appeal is indeed frivolous." ***Santiago***, 978 A.2d at 360.

Instantly, counsel's ***Anders*** brief does not contain all of the required information. It sets forth a procedural history. ***Anders*** Brief at 8-9. It provides controlling case law and Rodriguez' argument. ***Id.*** at 11-12. However, counsel's ***Anders*** brief does not contain his conclusion that the appeal is wholly frivolous, the claims that Rodriguez wished to raise with discussion of those claims, additional decisional authority, or the facts that support counsel's conclusion that the appeal is frivolous, including citations to the record. However, counsel does address these missing issues in his petition to withdraw. Petition to Withdraw, 10/7/2013, ¶¶16-24. Counsel has attached to his petition a letter to Rodriguez that provided him with copies of the petition to withdraw and ***Anders*** brief. Letter, 10/7/2013. The letter also informed Rodriguez that he could retain private counsel, or proceed *pro se*, and to provide this Court with supplemental briefing. ***Id.***

While counsel's ***Anders*** brief, by itself, does not comply with ***Santiago***, counsel's brief in addition to his petition to withdraw does. Because we are able to ensure from the scope of the petition and brief,

when considered together, that counsel performed the thorough and diligent review of the record that is required by ***Anders***/***Santiago***, we conclude that counsel has complied with the requirements of ***Santiago*** and ***Nischan***. Further, we see no benefit to Rodriguez in a delay attendant to remanding the case for counsel to file a new brief that likely would only reiterate the points already present in counsel's petition to withdraw. However, we remind counsel of the obligation to file a proper ***Anders*** brief in future cases.

We now must conduct our own review of the record to determine whether the case is wholly frivolous. ***Santiago***, 978 A.2d at 354.

Rodriguez sought to raise the following issue:

> [Rodriguez] argues the guilty plea was not voluntary as he was not sentenced concurrently to his 1288 CR 2010 docket and the plea colloquy was defective.

Anders Brief at 7.

When a defendant pleads guilty, all avenues of appeal are waived with the exceptions of the voluntariness of the plea, the jurisdiction of the court, legality of the sentence, and ineffective assistance of counsel ("IAC"), if the ineffectiveness caused an involuntary or unknowing plea. ***Commonwealth v. Boyd***, 835 A.2d 812, 815 (Pa. Super. 2003). To the extent that Rodriguez wishes to challenge the consecutive, rather than concurrent, nature of his sentence, such a challenge is to the discretionary aspects of sentence. ***See Commonwealth v. Hoag***, 665 A.2d 1212, 1214 (Pa. Super.

1995) ("The general rule in Pennsylvania is that in imposing a sentence the court has discretion to determine whether to make it concurrent with or consecutive to other sentences then being imposed or other sentences previously imposed." (citation omitted)). However, to preserve a challenge to the discretionary aspects of sentence, it must be raised at sentencing or in a post-sentence motion. ***Commonwealth v. Mann***, 820 A.2d 788, 794 (Pa. Super. 2003). Our review of the record indicates that Rodriguez did neither. This issue is waived so we may not grant relief. ***Commonwealth v. Banks***, 350 A.2d 819, 820 (Pa. 1976). Because relief cannot be granted, the issue must be deemed frivolous.

> Rodriguez also wished to challenge the voluntariness of this plea.
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> Once a defendant has entered a plea of guilty, it is presumed that he was aware of what he was doing, and the burden of proving involuntariness is upon him. Therefore, where the record clearly demonstrates that a guilty plea colloquy was conducted, during which it became evident that the defendant understood the nature of the charges against him, the voluntariness of the plea is established. . . . Determining whether a defendant understood the connotations of his plea and its consequences requires an examination of the totality of the circumstances surrounding the plea.
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> [I]n order to determine the voluntariness of the plea and whether the defendant acted knowingly and intelligently, the trial court must, at a minimum, inquire into the following six areas:
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> (1) Does the defendant understand the nature of the charges to which he is pleading guilty?
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> (2) Is there a factual basis for the plea?
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> (3) Does the defendant understand that he has a right to trial by jury?

> (4) Does the defendant understand that he is presumed innocent until he is found guilty?
>
> (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged?
>
> (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Commonwealth v. Moser, 921 A.2d 526, 529 (Pa. Super. 2007) (citation omitted, ellipsis and bracketed material in original).

The record reveals that Rodriguez did not complete a written colloquy. While the oral colloquy addressed many of the requirements identified in ***Moser***, Notes of Testimony ("N.T."), 1/18/2012, at 86-92, it did not contain a warning that the trial judge could impose concurrent or consecutive sentences, or that the sentences could be consecutive to the other docket in which Rodriguez was found guilty. The colloquy provided a statement of a minimum and maximum sentence, but these limits were only in relation to the PWID charges and it was unclear whether the time stated was for one of the PWID charges or the four charges aggregated. N.T. at 87. The colloquy did not address the possible sentence for the resisting arrest charge. Finally, the attorney performing the colloquy was unsure of the possible fine, stating: "I think, I believe the fines are $10,000, but they may . . . have been doubled. Maybe $15,000, may have doubled as a result of his prior conviction?" ***Id.*** at 87-88.

Our Supreme Court has been clear that a colloquy must provide the possible sentence and that any sentences may be run consecutively or concurrently:

> The goal sought to be attained by the guilty plea colloquy is assurance that a defendant's guilty plea is tendered knowingly, intelligently, voluntarily and understandingly. A defendant obviously cannot be expected to plead intelligently without understanding the consequences of his plea. In order to understand the consequences of his plea it is clear that a defendant must be informed of the *maximum* punishment that might be imposed for his conduct. To hold that the term "maximum" does not include the total possible aggregate sentence is clearly incorrect. And to hold that a plea was intelligently and understandingly entered where a defendant was not informed that consecutive sentences could be imposed upon his multiple convictions is equally incorrect.
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> * * *
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> We believe that the reasoning behind this standard is sound, for this approach will help to assure that the defendant appreciates the significance and consequences of his plea and that once entered the plea will withstand post-sentencing attack. Requiring the trial court to tell the defendant that the sentences may be imposed consecutively and what the total aggregate sentence could be will not significantly lengthen the colloquy or place any undue burden on the court. Accordingly, we find that the absence of this inquiry from the transcript renders the colloquy defective.

Commonwealth v. Persinger, 615 A.2d 1305, 1308 (Pa. 1992).

However, Rodriguez never sought to withdraw his plea on the basis that it was involuntary.[2] A defendant can seek to withdraw a guilty plea by

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[2] In his *pro se* PCRA petition, Rodriguez identified a claim that counsel was ineffective for failing to withdraw his plea. A claim of ineffective
(Footnote Continued Next Page)

written or oral motion prior to, or at, sentencing. ***See*** Pa.R.Crim.P. 591. After sentencing, a defendant may still seek to withdraw his plea in a motion upon a showing of manifest injustice. ***See Commonwealth v. Broaden***, 980 A.2d 124, 129 (Pa. Super. 2009). Because no motion was filed, the issue has not been preserved. ***Commonwealth v. Spencer***, 496 A.2d 1156, 1160 (Pa. Super. 1985) ("If appellant wished to challenge the validity of his guilty plea, he was obliged to file a motion to withdraw the plea within ten days of the sentence. Pa.R.Crim.P. 321. Appellant filed no such motion. Accordingly, he has failed to preserve the argument he now makes to us, *i.e.,* that he should have been permitted to withdraw the plea because the assistant district attorney violated the plea agreement."); ***see also Commonwealth v. Tareila***, 895 A.2d 1266, 1270 (Pa. Super. 2006) ("Where an appellant fails to challenge his guilty plea in the trial court, he may not do so on appeal. In order to preserve an issue related to the guilty plea, an appellant must either object[ ] at the sentence colloquy or

(Footnote Continued) ———————————

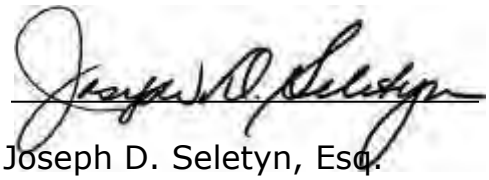
assistance of counsel ("IAC"), if the ineffectiveness caused an involuntary or unknowing plea, is an available PCRA claim if an appellant has pled guilty. ***Boyd***, 835 A.2d at 815. However, our Supreme Court has recently stated that "absent [unusual circumstances], claims of ineffective assistance of counsel are to be deferred to PCRA review; trial courts should not entertain claims of ineffectiveness upon post-verdict motions; and such claims should not be reviewed upon direct appeal." ***Commonwealth v. Holmes***, 79 A.3d 562, 576 (Pa. 2013). As none of those unusual circumstances are present here, we may not review Rodriguez' IAC claims in this direct appeal. They must wait for any PCRA review.

otherwise rais[e] the issue at the sentencing hearing or through a post-sentence motion." (citation omitted)). When an issue is not preserved for appeal, we may not grant relief. ***Banks***, 350 A.2d at 820. Because relief cannot be granted, the issue must be deemed frivolous.

We conclude that the issue Rodriguez sought to raise is frivolous in this direct appeal. Our independent review of the record finds no other non-frivolous issues that could have been raised. Therefore, we affirm the judgment of sentence and grant counsel's petition to withdraw.

Judgment of sentence affirmed. Petition to withdraw as counsel granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014