

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

RICK LEE BYERS

Appellant

No. 1233 MDA 2013

Appeal from the Judgment of Sentence May 28, 2013
In the Court of Common Pleas of Adams County
Criminal Division at No(s): CP-01-CR-0000958-2010

BEFORE: GANTMAN, P.J., OTT, J. and MUSMANNO, J.

MEMORANDUM BY GANTMAN, P.J.:

FILED APRIL 22, 2014

Appellant, Rick Lee Byers, appeals from the judgment of sentence entered in the Adams County Court of Common Pleas, following revocation of his intermediate punishment. We quash this appeal as untimely and grant counsel's petition to withdraw.

The trial court set forth the relevant facts and procedural history of this case as follows:

On August 29, 2010, Appellant was charged with the crime of persons not to possess firearms as a felony of the first degree in violation of Section 6105(a)(1) of the Pennsylvania Crimes Code. The affidavit of probable cause alleged that Appellant possessed two rifles despite a criminal history which included a conviction for burglary as a felony of the first degree. On January 24, 2011, Appellant entered a plea of *nolo contendere* to the charge against him. As the plea was entered without agreement as to sentencing, a pre-sentence investigation was ordered. Included among information in the pre-sentence

investigation was the Pennsylvania standard sentencing guideline range calculation. That calculation revealed an offense gravity score of nine (9) for the crime for which Appellant was convicted. It further revealed Appellant had a prior record score of five (5) thereby carrying a standard minimum sentence guideline range of 48 months to 60 months with a mitigated range of minus 12 months. Prior to sentencing, the [c]ourt weighed the relevant factors noting Appellant's burglary conviction was more than 30 years old. Based upon consideration of those factors and in order to give Appellant the opportunity to prove his recent conduct was an aberration, the [c]ourt imposed a sentence well below the standard sentencing guideline range. Appellant was sentenced to 36 months of county intermediate punishment with 13 days to be served in partial confinement and the remaining time spent on probationary phases. Appellant was credited for 13 days of partial confinement.

On June 16, 2011, Appellant was given notice for a violation of his sentence of intermediate punishment. Specifically, he admitted that on June 15, 2011 and June 16, 2011, he was present in a vehicle which contained marijuana. The violation resulted in a warning without revocation. Shortly thereafter, Appellant once again violated his sentence and admitted to using marijuana on October 4, 2011 and October 19, 2011. Rather than initiate revocation proceedings, a case review was conducted by the Probation Department and a plan was subsequently entered with Appellant.

On April 2, 2013, the Commonwealth moved to revoke Appellant's sentence of intermediate punishment. A revocation hearing was conducted on May 28, 2013. Commonwealth evidence at hearing established the violations referenced above as well as Appellant's failure to comply with the requirement of the case review plan that he obtain a mental health evaluation and comply with treatment recommendations. Additionally, revocation testimony established Appellant failed to report to the Probation Department as directed on December 19, 2011. Most alarmingly, the evidence established a disturbing interaction between Appellant and Probation staff which occurred on April 5, 2013. On that date, while meeting

with his probation officer, Appellant stood up, reached across the desk, and verbally threatened to stab the probation officer. He held a comb in his hand at the time and made a jabbing motion towards the officer. Shortly thereafter, Appellant told the probation officer that he had several firearms at his residence and bragged that Probation could not search for the firearms as they were stored in the portion of the residence where his mother resided. Finally, in violation of a condition of his sentence, Appellant refused to provide a urine sample. A subsequent search of Appellant's residence yielded a machete-type weapon with a 24-inch blade hidden behind a mirror next to his bed.

Finding Appellant to have violated the conditions of his sentence of intermediate punishment, the [c]ourt re-sentenced Appellant to a sentence of no less than four years nor more than eight years in a state correctional institution. The minimum sentence was at the bottom of the standard guideline range for the charge which Appellant was originally convicted.

(Trial Court Opinion, filed September 3, 2013, at 1-3) (footnote omitted). At the conclusion of Appellant's resentencing on May 28, 2013, the court read Appellant his post-sentence rights. Thereafter, Appellant filed a post-sentence motion on June 5, 2013, which the court denied on June 10, 2013. Appellant filed a notice of appeal on July 8, 2013. On July 15, 2013, the court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant complied on July 29, 2013.

As a preliminary matter, appellate counsel seeks to withdraw her representation pursuant to ***Anders v. California***, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and ***Commonwealth v. Santiago***, 602 Pa.

159, 978 A.2d 349 (2009). **Anders** and **Santiago** require counsel to: 1) petition the Court for leave to withdraw, certifying that after a thorough review of the record, counsel has concluded the issues to be raised are wholly frivolous; 2) file a brief referring to anything in the record that might arguably support the appeal; and 3) furnish a copy of the brief to the appellant and advise him of his right to obtain new counsel or file a *pro se* brief to raise any additional points the appellant deems worthy of review. **Santiago, supra** at 173-79, 978 A.2d at 358-61. 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) (quoting **Commonwealth v. Townsend**, 693 A.2d 980, 982 (Pa.Super. 1997)).

In **Santiago, supra**, our Supreme Court addressed the briefing requirements where court-appointed appellate counsel seeks to withdraw representation:

Neither **Anders** nor **McClendon**^[1] requires that counsel's brief provide an argument of any sort, let alone the type of argument that counsel develops in a merits brief. To repeat, what the brief must provide under **Anders** are

¹ **Commonwealth v. McClendon**, 495 Pa. 467, 434 A.2d 1185 (1981).

references to anything in the record that might arguably support the appeal.

* * *

Under **Anders**, the right to counsel is vindicated by counsel's examination and assessment of the record and counsel's references to anything in the record that arguably supports the appeal.

Santiago, supra at 176, 177, 978 A.2d at 359, 360. Thus, the Court held:

[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.

Id. at 178-79, 978 A.2d at 361.

Instantly, counsel filed a petition to withdraw. The petition states counsel conducted a thorough review and analysis of Appellant's issues and the record and determined the appeal is frivolous. Counsel notified Appellant of counsel's request to withdraw. Counsel also supplied Appellant with a copy of the brief and a letter explaining Appellant's right to retain new counsel or to proceed *pro se* to raise any additional points that Appellant deems worthy of this Court's attention. (**See** Letter to Appellant, dated October 21, 2013, attached to Petition to Withdraw as Counsel.) In the **Anders** brief, counsel provides a summary of the facts and procedural history of the case. Counsel's argument refers to relevant law that might

arguably support the issue raised on appeal. Counsel further states the reasons for her conclusion that the appeal is frivolous. Therefore, counsel has substantially complied with the requirements of **Anders** and **Santiago**.

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

WHETHER IT WAS AN ABUSE OF DISCRETION TO SENTENCE APPELLANT TO SERVE NO LESS THAN FOUR (4) TO EIGHT (8) YEARS IN A STATE CORRECTIONAL INSTITUTION FOLLOWED BY TWO YEARS PROBATION ON A FIRST REVOCATION, WITH NO NEW CRIMINAL CHARGES, WHEN APPELLANT'S ORIGINAL SENTENCE WAS 36 MONTHS INTERMEDIATE PUNISHMENT WITH ONLY 13 DAYS IN RESTRICTIVE PHASES?

(**Anders** Brief at 6).

Initially, we must address the timeliness of Appellant's appeal. Rule 708 of the Pennsylvania Rules of Criminal Procedure, which applies to intermediate punishment revocation hearings, makes clear that the right to appeal accrues after the court revokes intermediate punishment, imposes sentence, and advises the defendant of his appellate rights. **Commonwealth v. Heilman**, 876 A.2d 1021, 1026 (Pa.Super. 2005). "An appellant whose revocation of [intermediate punishment] sentence has been imposed after a revocation proceeding has 30 days to appeal [his] sentence from the day [his] sentence is entered, regardless of whether or not [he] files a post-sentence motion." **Commonwealth v. Parlante**, 823 A.2d 927, 929 (Pa.Super. 2003) (citing Pa.R.Crim.P. 708(D)). "Therefore, if an

appellant chooses to file a motion to modify [his] revocation sentence, [he] does not receive an additional 30 days to file an appeal from the date [his] motion is denied.” **Id.** (citing **Commonwealth v. Coleman**, 721 A.2d 798 (Pa.Super. 1998); Pa.R.Crim.P. 708(D)).

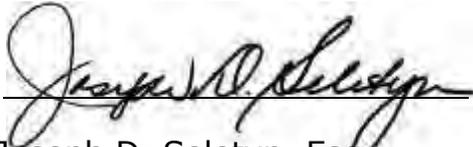
Time limitations for taking appeals are strictly construed and cannot be extended as a matter of grace. **Commonwealth v. Valentine**, 928 A.2d 346 (Pa.Super. 2007). This Court can raise the matter *sua sponte*, as the issue is one of jurisdiction to entertain the appeal. **Id.** This Court has no jurisdiction to entertain an untimely appeal. **Commonwealth v. Patterson**, 940 A.2d 493 (Pa.Super. 2007), *appeal denied*, 599 Pa. 691, 960 A.2d 838 (2008).

Here, the court resentenced Appellant on May 28, 2013. Thus, Appellant’s notice of appeal was due on or before June 27, 2013. **See Parlante, supra.** Appellant did not file the notice of appeal until July 8, 2013. Moreover, the record contains no evidence of extraordinary circumstances such as a court holiday or closing, or breakdown in the operations of the court that might excuse Appellant’s untimely filing. **See Commonwealth v. Braykovich**, 664 A.2d 133 (Pa.Super. 1995), *appeal denied*, 544 Pa. 622, 675 A.2d 1242 (1996) (extension of filing period is permitted only in extraordinary circumstances, such as fraud or some breakdown in court’s operation). Therefore, Appellant’s failure to file the notice of appeal within thirty (30) days of the resentencing following

revocation of his intermediate punishment divests this Court of appellate jurisdiction. ***See Parlante, supra; Patterson, supra.*** Accordingly, we quash this appeal.

Appeal quashed; counsel's petition to withdraw is 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: 4/22/2014