

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ROBERT JOSEPH DEMCHER,	:	
	:	
Appellant	:	No. 1322 MDA 2013

Appeal from the Judgment of Sentence entered on May 14, 2013
in the Court of Common Pleas of Lackawanna County,
Criminal Division, No(s): CP-35-CR-0002904-2012;
CP-35-CR-0002914-2012

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

MEMORANDUM BY MUSMANNO, J.:

FILED APRIL 23, 2014

Robert Joseph Demcher (“Demcher”) appeals from the judgment of sentence imposed following his guilty plea to two counts of robbery.¹ Additionally, Demcher’s court-appointed counsel, Donna M. DeVita, Esquire (“Attorney DeVita”), has filed a Petition to withdraw as counsel and an accompanying brief pursuant to *Anders v. California*, 386 U.S. 738, 744 (1967). We grant counsel’s Petition and affirm the judgment of sentence.

The trial court set forth the facts and relevant procedural history underlying this appeal in its Opinion, and we adopt the court’s discussion herein by reference. **See** Trial Court Opinion, 9/19/13, at 2-5.

In July 2013, the trial court ordered Demcher to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

¹ **See** 18 Pa.C.S.A. § 3701(a)(1)(ii), and (v).

In response, Attorney DeVita filed a timely Rule 1925(b) Concise Statement, raising three claims challenging the discretionary aspects of Demcher's sentence.

Subsequently, however, Attorney DeVita filed an **Anders** Brief and Petition to Withdraw as Demcher's counsel, asserting that Demcher's issues were wholly frivolous and that there are no other meritorious issues to raise on appeal. Demcher filed a *pro se* response to Attorney DeVita's Petition to Withdraw and **Anders** Brief with this Court.²

Before addressing Demcher's issues on appeal, we must determine whether Attorney DeVita has complied with the dictates of **Anders** and its progeny in petitioning to withdraw from representation. Pursuant to **Anders**, when counsel believes that an appeal is frivolous and wishes to withdraw from representation, she must do the following:

(1) petition the court for leave to withdraw stating that after making a conscientious examination of the record and interviewing the defendant, counsel has determined the appeal would be frivolous, (2) file a brief referring to any issues in the record of arguable merit, and (3) furnish a copy of the brief to defendant and advise him of his right to retain new counsel or to raise any additional points that he deems worthy of the court's attention. The determination of whether the appeal is frivolous remains with the [appellate] court.

Commonwealth v. Burwell, 42 A.3d 1077, 1083 (Pa. Super. 2012)

(citations omitted).

² Demcher did not retain alternate counsel for this appeal.

Additionally, the Pennsylvania Supreme Court has explained that a proper **Anders** 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.

Commonwealth v. Santiago, 978 A.2d 349, 361 (Pa. 2009).

Our review of Attorney DeVita's **Anders** Brief and Petition to Withdraw reveals that she has substantially complied with the requirements of **Anders/Santiago**.³ **See Commonwealth v. O'Malley**, 957 A.2d 1265, 1267 (Pa. Super. 2008) (stating that substantial compliance with the requirements to withdraw as counsel will satisfy the **Anders** criteria). The record further reflects that Attorney DeVita has (1) provided Demcher with a copy of both the **Anders** Brief and Petition to Withdraw; (2) sent a letter to Demcher advising him 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 (3) attached a copy of this letter to the Petition to Withdraw, as required under **Commonwealth v. Millisock**, 873 A.2d 748, 751-52 (Pa. Super.

³ We observe that Attorney DeVita's Petition to Withdraw as counsel incorrectly states that Demcher pled guilty of driving under the influence of alcohol, when, in fact, he pled guilty to two counts of robbery. However, this minor error does not affect our analysis.

2005). Accordingly, we next examine the record and make an independent determination of whether Demcher's appeal is, in fact, wholly frivolous.

Attorney DeVita states that Demcher wished to raise the following issues on appeal:

- A. Whether the lower court erred when it imposed consecutive sentences rather than [con]current sentences since the charges occurred within one day of each other and, as such, constituted a crime spree?
- B. Whether the sentences imposed were unduly harsh and excessive?

Anders Brief at 4 (capitalization omitted).

Demcher's issues challenge the discretionary aspects of his sentence, to which there is no absolute right to appeal. ***Commonwealth v. Hill***, 66 A.3d 359, 363 (Pa. Super. 2013). Rather, where, as here, the appellant has preserved the discretionary sentencing claim for appellate review by raising it in a timely post-sentence motion,

[t]wo requirements must be met before a challenge to the discretionary aspects of a sentence will be heard on the merits. First, the appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of [the] sentence. Pa.R.A.P. 2119(f). Second, [the appellant] must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. 42 Pa.C.S.A. § 9781(b). The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. In order to establish a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.

Commonwealth v. Sheller, 961 A.2d 187, 189 (Pa. Super. 2008) (citation to case law omitted).

Here, Attorney DeVita's ***Anders*** Brief contains a Concise Statement of the reasons relied upon for allowance of appeal, in compliance with Rule 2119(f). Accordingly, we must determine whether the Rule 2119(f) Concise Statement presents a substantial question for our review.

Demcher argues that the sentencing court abused its discretion by ordering the sentences imposed on his robbery convictions to run consecutively, since the two robberies occurred merely one day apart, and, therefore, "they were committed during a crime spree." ***Anders*** Brief at 8.

It is well settled that the imposition of consecutive as opposed to concurrent sentences is solely within the sound discretion of the trial court, and generally does not present a substantial question. ***See Commonwealth v. Austin***, 66 A.3d 798, 808 (Pa. Super. 2013); ***Commonwealth v. Johnson***, 961 A.2d 877, 880 (Pa. Super. 2008) (collecting cases). In fact, this Court has stated that "the imposition of consecutive, rather than concurrent, sentences may raise a substantial question in only the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment." ***Commonwealth v. Lamonda***, 52 A.3d 365, 372 (Pa. Super. 2012) (*en banc*) (citation omitted).

In the instant case, Demcher baldly asserts that the trial court should have ordered his separate sentences to run concurrently because the offenses occurred only one day apart and thus constituted a single criminal transaction.⁴ This claim does not present a substantial question for our review, and we will therefore not address it.⁵ **See *Austin***, 66 A.3d 798, 808-09; ***Johnson***, 961 A.2d at 880.

Demcher next argues that the sentencing court abused its discretion by imposing an aggregate prison sentence that is unduly harsh and manifestly excessive. ***Anders*** Brief at 8-9. This claim presents a substantial question for our review. ***See Commonwealth v. Mouzon***, 812 A.2d 617, 627-28 (Pa. 2002) (plurality) (holding that a claim that a sentence, which is within the statutory limits, is excessive can raise a substantial question).

Our standard of review 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. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by

⁴ We observe that a sentencing court has the authority to impose consecutive sentences for offenses arising out of the same criminal transaction. ***See Commonwealth v. Lawson***, 650 A.2d 876, 881 (Pa. Super. 1994).

⁵ Even if we determined that Demcher's challenge to the trial court's imposition of consecutive sentences presented a substantial question, we would conclude that the sentencing court did not abuse its discretion based upon the sound rationale advanced in the trial court's Opinion. **See** Trial Court Opinion, 9/19/13, at 8-9.

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.

Commonwealth v. Garcia-Rivera, 983 A.2d 777, 780 (Pa. Super. 2009)

(citation omitted).

Demcher asserts that

the [sentencing court's] imposition of sentences on the individual crimes in the high end of the standard range [of the sentencing guidelines was] unwarranted. Moreover, ... the aggregate sentence [of] 62 to 130 months [in prison] plus fourteen [] years[] of probation was excessive given the individual crimes and considering [that] they all arose out [of] one continuous criminal episode.

Anders Brief at 11. Demcher further contends that the sentencing court failed to adequately consider that he has mental issues, is addicted to narcotics, and allegedly was under the influence of narcotics at the time he committed the offenses. **Id.**

The trial court addressed Demcher's allegation of excessiveness of sentence and rejected this claim. **See** Trial Court Opinion, 9/19/13, at 13-14. We agree with the trial court that Demcher's sentence was not excessive and affirm based on the court's rationale regarding this issue. **See id.** We discern no abuse of discretion by the trial court in sentencing Demcher within the standard range of the applicable sentencing guidelines.

Finally, we observe that the only claim that we can discern from Demcher's *pro se* response to Attorney DeVita's Petition to Withdraw and **Anders** Brief is a claim asserting ineffectiveness of counsel. However, this

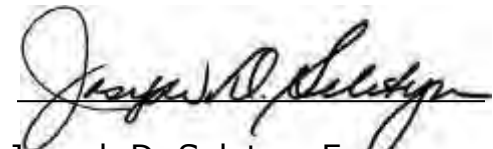
claim is not cognizable because ineffectiveness claims may not be raised in the first instance on direct appeal. ***Commonwealth v. Holmes***, 79 A.3d 562, 563 (Pa. 2013) (reaffirming the general rule of deferral to collateral review of ineffectiveness claims set forth in ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002)).

Based upon the foregoing, we are convinced that Demcher's appeal is wholly frivolous and that there are no non-frivolous issues to be considered. Accordingly, we grant Attorney DeVita's Petition to Withdraw as counsel under the precepts of ***Anders*** and its progeny.

Judgment of sentence affirmed; Petition to Withdraw as counsel granted.

Gantman, P.J., concurs in the result.

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: 4/23/2014