COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
DANIEL ERIC BENTZ,	:	No. 1531 MDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, June 21, 2012,
in the Court of Common Pleas of Susquehanna County
Criminal Division at No. CP-58-CR-0000482-2011

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
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DANIEL ERIC BENTZ,	:	No. 1532 MDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, June 21, 2012,
in the Court of Common Pleas of Susquehanna County
Criminal Division at No. CP-58-CR-0000401-2011

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., AND OLSON, J.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MAY 22, 2013**

Appellant, Daniel Eric Bentz, appeals from the judgment of sentence entered on June 21, 2012 in the Court of Common Pleas of Susquehanna County. Appointed counsel, Patrick M. Daly, Esq., has filed a petition to

withdraw accompanied by an ***Anders*** brief.[1] We grant counsel's withdrawal petition and affirm.

This matter involves two criminal episodes. On September 6, 2011, a criminal complaint was filed against appellant for stealing a pick-up truck from a VFW parking lot on August 27, 2011. Appellant was charged with a felony count of theft by unlawful taking. This case is filed at No. CP-58-CR-0000401-2011, and docketed in the Superior Court at No. 1532 MDA 2012.

While out on bail, appellant and a cohort, Tracey Ramsey, committed a robbery on October 13, 2011. On that date, in front of the victim's house, appellant and Ramsey opened the driver's side door, pulled the victim out of his car, shoved him to the ground, kicked him, and smashed his hand repeatedly on the paved road in order to take his keys. (Notes of testimony, 6/21/12 at 6-7.) The victim, a 72-year-old man, was left in the middle of the street and had to crawl back to his house. (***Id.*** at 7.) This case is filed at CP-58-CR-0000482-2011, and docketed in the Superior Court at No. 1531 MDA 2012.[2] After taking the vehicle, appellant and Ramsey drove to Lackawanna County and committed a burglary. The Lackawanna County matter is not before us.

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[1] ***See Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. McClendon***, 495 Pa. 467, 434 A.2d 1185 (1981).

[2] These two cases were consolidated ***sua sponte*** by order dated October 15, 2012.

On May 31, 2012, appellant signed a written guilty plea colloquy. At the June 1, 2012 guilty plea hearing, the court conducted an oral plea colloquy. The plea agreement for the robbery case specifically indicated that there was no agreement that appellant's Susquehanna County sentence would run concurrent to his Lackawanna County sentence. Appellant signed the agreement and accepted a plea of guilty to robbery -- inflicts or threatens bodily injury, a felony of the second degree.

On June 21, 2012, appellant was sentenced to a period of incarceration of not less than 2 years and not more than 10 years for robbery - inflicts or threatens bodily injury. Appellant had a prior record score of 4 which made his standard range sentence 18 to 24 months. This sentence was to be served consecutive to his Lackawanna County sentence. Appellant received a 14 month minimum sentence for the Lackawanna County burglary conviction thereby resulting in an aggregate minimum sentence of 38 months' incarceration between the Susquehanna and Lackawanna County sentences. Additionally, appellant received a 6 to 24-month sentence of incarceration for stealing the pick-up truck from the VFW parking lot. However, under the terms of his plea agreement, this sentence was to run concurrent to his sentence for robbery.

Post-sentence motions were filed and denied in both cases. These appeals followed. Counsel has subsequently filed a petition for leave to withdraw and an ***Anders*** brief with this court. Appellant has not responded

to the petition to withdraw. "When presented with an ***Anders*** brief, this [c]ourt may not review the merits of the underlying issues without first passing on the request to withdraw." ***Commonwealth v. Daniels***, 999 A.2d 590, 593 (Pa.Super. 2010), citing ***Commonwealth v. Goodwin***, 928 A.2d 287, 290 (Pa.Super. 2007) (***en banc***) (citation omitted).

> In order for counsel to withdraw from an appeal pursuant to ***Anders***, certain requirements must be met, and 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., quoting ***Commonwealth v. Santiago***, 602 Pa. 159, 178-179, 978 A.2d 349, 361 (2009).

> We note that the holding in ***Santiago*** altered prior requirements for withdrawal under ***Anders***. ***Santiago*** now requires counsel to provide the reasons for concluding the appeal is frivolous. The Supreme Court explained that the requirements set forth in ***Santiago*** would apply only to cases where the briefing notice was issued after the date that the opinion in ***Santiago*** was filed, which was August 25, 2009.

Id. As the briefing notice in this case followed the filing of ***Santiago***, its requirements are applicable here.

Our review of Attorney Daly's application to withdraw, supporting documentation, and ***Anders*** brief reveals that he has complied with all of the foregoing requirements. We note that counsel also furnished a copy of the brief to appellant, advised 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 attached 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 Daniels***, 999 A.2d at 594 ("While the Supreme Court in ***Santiago*** set forth the new requirements for an ***Anders*** brief, which are quoted above, the holding did not abrogate the notice requirements set forth in ***Millisock*** that remain binding legal precedent."). As we find the requirements of ***Anders*** and ***McClendon*** are met, we will proceed with our review.

Appellant challenges the discretionary aspects of his sentence. Appellant complains that Ramsey's sentences were run concurrently while his Susquehanna and Lackawanna County sentences were imposed consecutively. We begin by noting that "[i]ssues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings." ***Commonwealth v. Shugars***, 895 A.2d 1270, 1273-1274

(Pa.Super. 2006). "Absent such efforts, an objection to a discretionary aspect of a sentence is waived." ***Id.*** at 1274. Instantly, appellant filed a timely post-sentence motion preserving this issue.

Further, there is no absolute right to appeal the discretionary aspects of sentence:

> Where an appellant challenges the discretionary aspects of a sentence, as in the instant case, there is no automatic right to appeal and an appellant's appeal should be considered a petition for allowance of appeal. ***Commonwealth v. Ritchey***, 779 A.2d 1183, 1185 (Pa.Super. 2001). Before a challenge to a judgment of sentence will be heard on the merits, an appellant first must set forth in his or her brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of his or her sentence. ***Id.***; Pa.R.A.P. 2119(f). . . .
>
> An appellant also must show that there is a substantial question as to whether the imposed sentence was inappropriate under the Sentencing Code. ***See Ritchey***, 779 A.2d at 1185; 42 Pa.C.S.A. § 9781(b). Whether an issue raises a substantial question is a determination that must be made on a case-by-case basis; however, in order to establish a substantial question, the appellant generally must establish that the sentencing court's actions either were inconsistent with a specific provision of the Sentencing Code or contrary to the fundamental norms which underlie the sentencing process. ***Ritchey***, 779 A.2d at 1185.

Commonwealth v. Curran, 932 A.2d 103, 105 (Pa.Super. 2007).

In the instant case, appellant has not included such a statement in the ***Anders*** brief submitted by counsel, and the Commonwealth has failed to object to this deficiency. Thus, we will review his argument to determine

whether appellant has raised a substantial question as to the discretionary aspects of his sentence. ***See Commonwealth v. Brougher***, 978 A.2d 373, 375 (Pa.Super. 2009).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Paul***, 925 A.2d 825 (Pa.Super. 2007). 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." ***Commonwealth v. Sierra***, 752 A.2d 910, 912-913 (Pa.Super. 2000).

Generally, Pennsylvania law "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. Any challenge to the exercise of this discretion ordinarily does not raise a substantial question." ***Commonwealth v. Pass***, 914 A.2d 442, 446–447 (Pa.Super. 2006). ***See also Commonwealth v. Hoag***, 665 A.2d 1212, 1214 (Pa.Super 1995) (stating appellant is not entitled to "volume discount" for his crimes by having all sentences run concurrently).[3]

[3] ***But see Commonwealth v. Dodge***, 957 A.2d 1198 (Pa.Super. 2008), ***appeal denied***, 602 Pa. 662, 980 A.2d 605 (2009) (holding consecutive, standard range sentences on thirty-seven counts of theft-related offenses for aggregate sentence of 58 1/2 to 124 years' imprisonment constituted virtual

Appellant does not allege that his sentence was excessive, rather, he merely claims that the trial court's decision to have his sentences run consecutively rather than concurrently was an abuse of discretion. Appellant complains Ramsey was the aggressor during the assault yet she received concurrent sentences. (Appellant's brief at 6.) Such a claim does not raise a substantial question. ***Commonwealth v. Lloyd***, 878 A.2d 867, 873 (Pa.Super. 2005) ("the imposition of consecutive rather than concurrent sentences lies within the sound discretion of the sentencing court"), ***appeal denied***, 585 Pa. 687, 887 A.2d. 1240 (2005); ***Commonwealth v. Marts***, 889 A.2d 608 (Pa.Super. 2005).

In any event, the trial court explained appellant's consecutive sentence as follows:

> Defendant's complaint concerning his and Ramsey's sentence has no merit. Ramsey had a prior record score of one while the prior record score of Defendant Bentz was a four.
>
> There was no agreement on the record in either written or oral form that Bentz's sentence would run concurrent with that of Lackawanna County. To the contrary, the plea agreement of June 1, 2012, provided in relevant part, "No agreement on whether sentence will run concurrent with Lackawanna County Sentence."
>
> Because of the higher prior record score of Defendant Bentz and the lack of any agreement to run this court's sentence with that of the

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life sentence and, thus, was so manifestly excessive as to raise substantial question).

> Lackawanna County Court of Common Pleas, we are within our discretion to have ordered our sentence to run consecutive to that of the Lackawanna County Court of Common Pleas. More especially, we are within our sound discretion as Bentz and Ramsey, co-defendants, perpetrated an assault upon an elderly man, resulting in life changing injuries to him.

Trial court opinion, 7/11/12 at 2.

We find appellant has failed to raise a substantial question for our review with respect to the discretionary aspects of his sentence, and after conducting our own independent review of the record, we agree with counsel that the instant appeal is wholly frivolous. Accordingly, we will affirm the judgment of sentence and grant counsel's petition to withdraw.

Petition to withdraw granted. Judgment of sentence affirmed.

Judgment Entered.

Mary A. Hoyle

Deputy Prothonotary

Date: 5/22/2013