NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. PAUL NEWELL, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 56 EDA 2012

Appeal from the Judgment of Sentence entered November 30, 2011, in the Court of Common Pleas of Philadelphia County, Criminal Division, at No(s): CP-51-CR-1210381-2000

BEFORE: SHOGAN, ALLEN, and OTT, JJ.

MEMORANDUM BY ALLEN, J.: **FILED APRIL 21, 2014**

Paul Newell ("Appellant") appeals from the judgment of sentence imposed after he violated the conditions of his probation. Appellant's appointed counsel seeks to withdraw, citing ***Anders v. California***, 386 U.S. 738 (1967) and ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981). We affirm the judgment of sentence and grant counsel's petition to withdraw.

The trial court summarized the procedural posture as follows:

> [Appellant] entered a guilty plea on October 10, 2001 in front of the Honorable Eugene Edward Maier. Appellant received a sentence of five (5) to ten (10) years confinement followed by twenty (20) years of probation. Appellant pled guilty to charges of Rape, (18 Pa.C.S.A. § 3121) and Burglary (18 Pa.C.S.A. § 3502).
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> While on Judge Maier's probation, [A]ppellant was arrested for violating his probation. Appellant tested positive for marijuana for the second time since his release from prison. He

> tested positive for codeine as well. Appellant also tested positive for marijuana on May 25, 2011, less than 24 hours after being released from prison.
>
> Appellant also failed to attend a mandatory sex offender treatment class and was dismissed from the sex offender treatment program on August 4, 2011. This was the second time that [A]ppellant has been dismissed from the program. Appellant claims that he had a doctor's appointment at the same time as the treatment program which held class once a week on Thursday's from 10:00 A.M. until 11:30 A.M. Appellant did tell his probation officer about the time conflict but was advised to reschedule the doctor appointment. He failed to reschedule and was ultimately dismissed from this needed program. As a result of his second dismissal, the program will not accept him back. Without the program, [A]ppellant cannot conform to his probation requirements.
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> ***
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> [A]s a result of [A]ppellant's violation of probation, [the trial court] sentenced him to two (2) to four (4) years of confinement followed by five (5) years of probation. [The trial court] also terminated Judge Maier's previous longer probation. [No post-sentence motions were filed].
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> On July 5, 2012, [Appellant] filed a notice of appeal through his attorney. A timely 1925(b) statement of matters complained of on appeal was submitted ...

Trial Court Opinion, 7/13/13, at 1-2 (citations to notes of testimony omitted).

Appellant raises the following issues:

1. Was [A]ppellant's sentence for technical violations of probation excessive?

2. Did the trial court err in failing to order a pre-sentence report before sentencing [A]ppellant?

Anders Brief at 3.

Preliminarily, we recognize that Appellant's counsel has filed a brief pursuant to ***Anders*** and its Pennsylvania counterpart, ***McClendon***. ***See Anders***, 386 U.S. 738; ***McClendon***, 434 A.2d at 1187. Where an ***Anders/McClendon*** brief has been presented, our standard of review requires counsel seeking permission to withdraw pursuant to ***Anders*** to: (1) petition the court for leave to withdraw stating that after making a conscientious examination of the record it has been determined that the appeal would be frivolous; (2) file a brief referring to anything that might arguably support the appeal, but which does not resemble a "no merit" letter or amicus curiae brief; and (3) furnish a copy of the brief to the defendant and advise him of his right to retain new counsel or raise any additional points that he deems worthy of the court's attention. ***Commonwealth v. McBride***, 957 A.2d 752, 756 (Pa. Super. 2008). Counsel is required to submit to this Court "a copy of any letter used by counsel to advise the appellant of the rights associated with the ***Anders*** process." ***Commonwealth v. Woods***, 939 A.2d 896, 900 (Pa. Super. 2007). Pursuant to ***Commonwealth v. Santiago***, 978 A.2d 349, 361 (Pa. 2009), Appellant's counsel must state the reasons for concluding that the appeal is frivolous in the ***Anders*** brief. If these requirements are met, this Court may then review the record to determine whether the appeal is indeed frivolous.

In the instant case, by letter dated December 4, 2013, counsel for Appellant, the Defender Association of Philadelphia, notified Appellant of

their intent to file an ***Anders*** brief and petition to withdraw with this Court, and informed Appellant of his rights to retain new counsel and raise additional issues. That same day, Appellant's counsel filed an appropriate petition seeking leave to withdraw. Finally, Appellant's counsel has submitted an ***Anders*** brief to this Court, with a copy provided to Appellant. We are satisfied that counsel has adhered to the technical requirements set forth in ***Anders*** and ***McClendon***, and proceed to address the substantive issues raised in the ***Anders*** brief.

Appellant argues that his sentence for technical violations of his probation was excessive, and that the trial court therefore abused its discretion. Appellant's Brief at 11-15. Additionally, Appellant argues that the trial court abused its discretion by failing to order a pre-sentence report prior to sentencing. *Id*. at 15-18. These issues challenge the discretionary aspects of Appellant's sentence. ***See Commonwealth v. Carrillo-Diaz***, 64 A.3d 722, 724-725 (Pa. Super. 2013) (appellant's contention that the lower court erred when it imposed a sentence without ordering a pre-sentence investigation report, or in the alternative, failing to give a reason on the record for not ordering such a report, presents a challenge to the discretionary aspects of appellant's sentence).

"[I]t is within our scope of review to consider challenges to the discretionary aspects of an appellant's sentence in an appeal following a revocation of probation." ***Commonwealth v. Ferguson***, 893 A.2d 735,

737 (Pa. Super. 2006) (citation omitted). However, a challenge to the discretionary aspects of a sentence is not appealable as of right. Rather, Appellant must petition for allowance of appeal pursuant to 42 Pa.C.S.A. § 9781. ***Commonwealth v. Hanson***, 856 A.2d 1254, 1257 (Pa. Super. 2004).

> Before we reach the merits of this [issue], we must engage in a four part analysis to determine: (1) whether the appeal is timely; (2) whether Appellant preserved his issue; (3) whether Appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the sentencing code. The third and fourth of these requirements arise because Appellant's attack on his sentence is not an appeal as of right. Rather, he must petition this Court, in his concise statement of reasons, to grant consideration of his appeal on the grounds that there is a substantial question. Finally, if the appeal satisfies each of these four requirements, we will then proceed to decide the substantive merits of the case.

Commonwealth v. Austin, 66 A.3d 798, 808 (Pa. Super. 2013) (citations omitted).

Here, Appellant filed a timely notice of appeal. However, he failed to file any post-sentence motions or present his claim to the sentencing court, and thus did not preserve his discretionary claims for purposes of appeal. "[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. Absent such efforts, an objection to a discretionary aspect of a sentence is waived." ***Commonwealth v. Kittrell***,

19 A.3d 532, 538 (Pa. Super. 2011). Because Appellant did not preserve his sentencing claims in a post-sentence motion, or present his claim to the trial court during sentencing, his assertions on appeal that the trial court abused its sentencing discretion are waived.

We note, however, that our review of the record indicates that at the sentencing hearing, when Appellant's counsel explained Appellant's post-sentence rights to him and asked Appellant if he understood those rights, Appellant responded "No." N.T., 11/30/11, at 17. The notes of testimony reveal no further discussion on the matter. Because Appellant's counsel failed to ensure that Appellant's post-sentence rights were properly preserved, we could remand for Appellant to file a *nunc pro tunc* post-sentence motion. However, in light of the fact that Appellant raised his discretionary claims in his Pa.R.A.P. 1925(b) statement of errors complained of on appeal, and the trial court addressed Appellant's claims in its 1925(a) opinion, in the interest of judicial economy, we will proceed to address the merits of Appellant's claim.

In his first issue, Appellant asserts that his two to four year sentence was excessive. Appellant's claim that his sentence was excessive does not, alone, present a substantial question for our review. ***See Commonwealth v. Christine***, 78 A.3d 1, 10 (Pa. Super. 2013) ("a generic claim that a sentence is excessive does not raise a substantial question for our review") *citing* ***Commonwealth v. Harvard***, 64 A.3d 690, 701 (Pa. Super. 2013) ("a

bald assertion that a sentence is excessive does not by itself raise a substantial question justifying this Court's review of the merits of the underlying claim"). Furthermore, our review of the record comports with ***Anders*** counsel's conclusion that "the trial court did take into account all of the relevant factors, including Appellant's background, the circumstances of the offense, and Appellant's explanations for his conduct." ***Anders*** Brief at 14; *see infra*.

In his second issue, Appellant asserts that the trial court erred by failing to order a pre-sentence investigation ("PSI") report, and did not conduct an adequate colloquy to substitute for the PSI. Appellant's argument that the trial court abused its discretion by neglecting to order a pre-sentence investigation report presents a substantial question. ***See Commonwealth v. Kelly***, 33 A.3d 638, 640 (Pa. Super. 2011) ("[A]n appellant's allegation that the trial court imposed sentence without considering the requisite statutory factors or stating adequate reasons for dispensing with a pre-sentence report [raises] a substantial question.") *quoting* ***Commonwealth v. Flowers***, 950 A.2d 330, 332 (Pa. Super. 2008).

Pennsylvania Rule of Criminal Procedure 702 "vests a sentencing judge with the discretion to order a pre-sentence investigation as an aid in imposing an individualized sentence." ***Commonwealth v. Carrillo-Diaz***, 64 A.3d 722, 725-726 (Pa. Super. 2013). This Court has held that

Pa.R.Crim.P. 702 is applicable to sentences imposed following the revocation of probation. ***Id***. We have explained:

> The first responsibility of the sentencing judge [is] to be sure that he ha[s] before him sufficient information to enable him to make a determination of the circumstances of the offense and the character of the defendant. Thus, a sentencing judge must either order a PSI report or conduct sufficient presentence inquiry such that, at a minimum, the court is apprised of the particular circumstances of the offense, not limited to those of record, as well as the defendant's personal history and background....The court must exercise 'the utmost care in sentence determination' if the defendant is subject to a term of incarceration of one year or more[.]
>
> To assure that the trial court imposes sentence in consideration of both 'the particular circumstances of the offense and the character of the defendant,' our Supreme Court has specified the minimum content of a PSI report. The 'essential and adequate' elements of a PSI report include all of the following:
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> (A) a complete description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt;
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> (B) a full description of any prior criminal record of the offender;
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> (C) a description of the educational background of the offender;
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> (D) a description of the employment background of the offender, including any military record and including his present employment status and capabilities;
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> (E) the social history of the offender, including family relationships, marital status, interests and activities, residence history, and religious affiliations;
>
> (F) the offender's medical history and, if desirable, a psychological or psychiatric report;

> (G) information about environments to which the offender might return or to which he could be sent should probation be granted;
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> (H) supplementary reports from clinics, institutions and other social agencies with which the offender has been involved;
>
> (I) information about special resources which might be available to assist the offender, such as treatment centers, residential facilities, vocational training services, special educational facilities, rehabilitative programs of various institutions to which the offender might be committed, special programs in the probation department, and other similar programs which are particularly relevant to the offender's situation;
>
> (J) a summary of the most significant aspects of the report, including specific recommendations as to the sentence if the sentencing court has so requested.
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> [While case law does not] require that the trial court order a pre-sentence investigation report under all circumstances, the cases do appear to restrict the court's discretion to dispense with a PSI report to circumstances where the necessary information is provided by another source. Our cases establish, as well, that the court must be apprised of comprehensive information to make the punishment fit not only the crime but also the person who committed it.

Commonwealth v. Goggins, 748 A.2d 721, 728 (Pa. Super. 2000) (*en banc*) (citations, quotation, and quotation marks omitted).

"Although Rule 702(A)(2) provides that the requirement to document the reasons for not ordering a pre-sentence report is mandatory," this Court has made clear that "sentencing courts have some latitude in how this requirement is fulfilled." ***Carrillo-Diaz***, 64 A.3d 722, 726 *quoting*

Commonwealth v. Flowers, 950 A.2d 330, 333 (Pa. Super. 2008). Thus, technical noncompliance with the requirements of Rule 702(A)(2) may be rendered harmless where a court elicits sufficient information during the colloquy to substitute for a PSI report, to allow for a fully informed sentencing decision. ***Id***.

Here, the trial court did not order a PSI report. However, in its Pa.R.A.P. 1925(a) opinion, the trial court explained that it conducted an "extensive dialogue" with Appellant "to allow the [trial court] to gain further insight into [A]ppellant's explanations for his conduct (or conduct omissions)" and therefore a PSI report was not required. Trial Court Opinion, 7/13/13, at 3. Our review of the record supports the trial court's determination that sufficient information was elicited at the sentencing hearing.

At the November 30, 2011, sentencing hearing, the trial court heard testimony from Brian Stahmer, a parole agent with the Pennsylvania Board of Probation and Parole, who testified that Appellant used marijuana and consumed Tylenol with codeine, in violation of the conditions of his probation. N.T., 11/30/11, at 4. Moreover, Agent Stahmer testified that Appellant had appeared before the same trial court judge on May 25, 2011, after having been found to have used marijuana and after having been unsuccessfully discharged from sex offender treatment, and at the conclusion of that hearing, the trial court instructed Appellant to comply with

his sex offender treatment and follow the instructions of his probation agent. *Id*. at 9. Thus, the trial court was particularly familiar with Appellant's history, background, and personal circumstances, having presided over the earlier May 25, 2011 hearing. Additionally, at the time of sentencing, the trial court conducted a colloquy, in which Appellant detailed the circumstances surrounding his drug usage, as well as his various medical conditions, and his efforts at compliance with the conditions of his probation. *Id*. at 9-13. Appellant then expressed his remorse, and recounted his previous compliance with the conditions of his probation. *Id*. The trial court was also apprised of Appellant's age and criminal history. *Id*. 13-16. Moreover, the trial court was aware of Appellant's rehabilitative needs, in particular, that Appellant was in need of sex-offender treatment. *Id*. at 9-16.

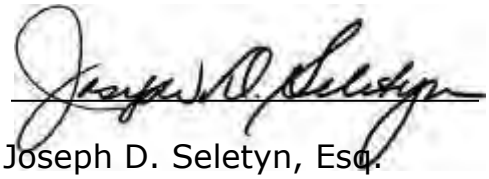
Based on the foregoing, we conclude that the trial court conducted a sufficient presentence inquiry and possessed sufficient information to substitute for a PSI, thereby allowing a fully informed and individualized sentencing decision. The trial court considered appropriate sentencing factors including the nature and circumstances of the offense, Appellant's background and character, his medical history, his involvement in sex-offender treatment and efforts at rehabilitation, his expressions of remorse, and his criminal history, in making its sentencing determination. We therefore find no merit to Appellant's claim that the trial court abused its

sentencing discretion. ***See Carillo-Diaz,*** 64 A.3d 722 (holding that the record reflected the trial court's reasons for the defendant's sentence and consideration of the circumstances of the offense, and defendant's background and character where the trial court conducted a proper pre-sentence inquiry in the absence of a PSI), ***and compare Kelly***, 33 A.3d at 638 (remanding for resentencing where trial court did not order a PSI or conduct a pre-sentence inquiry as to the defendant's criminal record, educational and employment background, social and familial history, or medical and psychiatric history and sentenced the defendant without obtaining even the most basic personal information necessary to craft a sentence tailored to the defendant's individual and rehabilitative needs).

Upon independent review of the record, we discern no other issues of arguable merit. We affirm the judgment of sentence, and grant counsel's petition to withdraw.

Judgment of sentence affirmed. Petition to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/21/2014