

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

WAYNE MICHAEL GLASS

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1750 MDA 2014

Appeal from the Judgment of Sentence of September 15, 2014
In the Court of Common Pleas of Adams County
Criminal Division at No.: CP-01-MD-0001151-2014

BEFORE: BENDER, P.J.E., ALLEN, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

FILED JULY 31, 2015

Wayne Michael Glass appeals the judgment of sentence imposed by the trial court following a bench trial at which Glass was found guilty of eleven counts of indirect criminal contempt for serial violations of a protection from abuse ("PFA") order.¹ Glass' counsel has filed a petition for leave to withdraw as counsel, together with an "**Anders/Santiago** brief."² We find that counsel has satisfied the **Anders/Santiago** requirements and that Glass has no meritorious issues to pursue on appeal. Consequently, we grant counsel's petition for leave to withdraw as counsel, and we affirm Glass' judgment of sentence.

¹ **See** 23 Pa.C.S. § 6114.

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

The trial court provided the following account of the factual history underlying Glass' convictions:

On May 23, 2012[,] a Final PFA Order was entered prohibiting [Glass] from having any contact with his estranged wife, Pamela Glass. After prior findings of indirect criminal contempt of that May 23, 2012 Order, by subsequent Order dated April 15, 2013, [the trial] court extended the Final PFA Order until April 20, 2017. The April 15, 2013 Order also clarified that [Glass] was prohibited from having any contact of any type with the victim He was personally informed by the [c]ourt, on the record, that the prohibition against contact included attempts to communicate with the victim through third parties. A few months later, beginning in November of 2013, [Glass] resumed writing letters directly referencing the victim

At trial, the victim identified 13 letters written by [Glass] from his place of incarceration [that] were received by her or brought to her attention. The letters were directly and variously addressed to [Glass'] adult children, [Glass'] minor grandson, friends of the victim, as well as the victim's mother. In addition, in January of 2014, the victim received a number of phone calls at her home from the automated system at the Adams County Adult Correctional Complex asking if she would accept the call from "Wayne." The victim was able to identify [Glass'] voice in those telephonic requests.

Some of the letters addressed to the party's adult children suggested that the recipient should show the letter to the victim. Some of the letters were addressed to the victim as "wife" and stated "I miss you Pamela . . . your husband always." In another letter delivered to the victim, [Glass] stated "only God loves you more than me [*sic*]" and "give her hugs and kisses." At least one letter contained threatening language stating "she has not even experienced the emotional distress I could put her through." Another letter says "please talk her into staying with me."

As a direct acknowledgment of [Glass'] knowledge that he was violating the PFA Order, [Glass] implores a third party to "give her hugs and kisses from me. Don't tell anyone . . . I don't want any more trouble from the law." Another letter says "I will do anything to keep her as my wife . . . anything." Yet another

says "I keep violating my PFA letters . . . I miss her and love her." A separate letter says "I called home . . . I got to hear Pam's voice." In another letter addressed directly to the victim, he says "I need you to be by my side because I promise you I won't hurt you again."

Trial Court Opinion ("T.C.O."), 12/2/2014, at 2-3 (footnote omitted).

After a bench trial at which the Commonwealth presented thirteen separate writings of the sort detailed above, the trial court found Glass guilty of eleven counts of indirect criminal contempt. The court requested and received a pre-sentence investigation report, which detailed numerous prior convictions: "[Glass'] convictions include 2 [c]ounts of terroristic threats in 2002, terroristic threats in 2006, terroristic threats in 2012, and convictions for indirect criminal contempt of a PFA order from May 7, 2012, December 17, 2012, December 26, 2012, April 15, 2013, May 28, 2013[,] and August 27, 2013." *Id.* at 5. All convictions for indirect criminal contempt arose from Glass' violation of one or more prior temporary or final PFA orders entered on behalf of Glass' wife, Pamela. *Id.* at 5 n.1.

For the above-stated reasons and others, the trial court sentenced Glass to three to six months' imprisonment on each of three of the eleven convictions, each sentence to run consecutively to each other and to any prior sentences that Glass then was serving. On each of the remaining eight counts, the trial court sentenced Glass to six months' probation, to run consecutively to Glass' incarceration and to each other. Thus, Glass'

aggregate sentence was nine to eighteen months' incarceration to be followed by forty eight months' of probation.³ This appeal followed.

Because counsel for Glass proceeds pursuant to **Anders** and **Santiago**, this Court first must pass upon counsel's petition to withdraw before reviewing the lone issue presented by Glass, in which he contends that his judgment of sentence was excessive relative to his convictions. **Commonwealth v. Goodwin**, 928 A.2d 287, 290 (Pa. Super. 2007) (*en banc*). Prior to withdrawing as counsel under **Anders**, counsel must file a brief that meets the requirements established by our Supreme Court in **Santiago**. Pursuant thereto, the brief must provide the following information:

- (1) a summary of the procedural history and facts, with citations to the record;
- (2) reference to anything in the record that counsel believes arguably supports the appeal;
- (3) counsel's conclusion that the appeal is frivolous; and
- (4) 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.

Santiago, 978 A.2d at 361.

Counsel also must provide a copy of the **Anders** brief to his client. Attending the brief must be a letter that advises the client of his rights to

³ The trial court also imposed fines and costs.

“(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); **see Commonwealth v. Daniels**, 999 A.2d 590, 594 (Pa. Super. 2010). Finally, to facilitate our review of counsel’s satisfaction of his obligations, he must attach to his petition to withdraw the letter that he transmitted to his client. **See Commonwealth v. Millisock**, 873 A.2d 748, 752 (Pa. Super. 2005).

Our review of counsel’s petition to withdraw and the accompanying brief demonstrates that counsel has satisfied **Santiago’s** requirements. Counsel has provided a case history detailing the events relevant to this appeal. Brief for Glass at 5. Counsel also has articulated Glass’ claim that his sentence was excessive, and has analyzed the information presented to the sentencing court in favor of his appeal. Ultimately, counsel has concluded that Glass has no non-frivolous basis for challenging his sentence, because the trial court sentenced him within the statutory limits for the underlying conviction and there was no evidence of an abuse of discretion. **Id.** at 7-10.

Counsel also has sent Glass a letter informing him that counsel has identified no meritorious issues to pursue on appeal; that counsel has filed an application to withdraw from Glass’ representation; and that Glass may find new counsel or proceed *pro se*. Counsel has attached the letter to his

petition to withdraw. **See** Petition for Leave to Withdraw as Counsel, 1/20/2015. Accordingly, counsel has complied with **Anders'** technical requirements. **See Millisock**, 873 A.2d at 751.

We now must conduct an independent review of the record to determine whether this appeal is, as counsel claims, wholly frivolous, or if any meritorious issues may remain. **Santiago**, 978 A.2d at 355 (quoting **Anders**, 386 U.S. at 744) (“[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel’s request to withdraw”).

We begin with the lone issue identified by **Anders** counsel, that Glass’ sentence was excessive. Such a claim presents a challenge to the discretionary aspects of sentence. **Commonwealth v. Ahmad**, 961 A.2d 884, 886 (Pa. Super. 2008). “A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute.” **Commonwealth v. McAfee**, 849 A.2d 270, 274 (Pa. Super. 2004).

In addressing a challenge to the discretionary aspects of a defendant’s sentence issue we follow a four-factor protocol:

[W]e . . . determine: (1) whether appellant has filed a timely notice of appeal, **see** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa.R.Crim.P. [720]; (3) whether appellant’s brief has a fatal defect, Pa.R.A.P 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S. § 9781(b).

Commonwealth v. Martin, 611 A.2d 731, 735 (Pa. Super. 1992) (most internal citations omitted). Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or raised in a motion to modify the sentence imposed at that hearing. **Commonwealth v. Mann**, 820 A.2d 788, 794 (Pa. Super. 2003).

Commonwealth v. Hyland, 875 A.2d 1175, 1183 (Pa. Super. 2005)

(citations modified).

Regarding waiver, we have held as follows:

[Pennsylvania Rule of Appellate Procedure] 302 provides that “issues not raised in the lower court are waived and cannot be raised for the first time on appeal.” **Commonwealth v. Jarvis**, 663 A.2d 790, 791 (Pa. Super. 1995). As such, issues challenging the discretionary aspects of sentencing must be raised in a post-sentence motion or by raising the claim during the sentencing proceedings. **Commonwealth v. Petaccio**, 764 A.2d 582 (Pa. Super. 2000). Absent such efforts, an objection to a discretionary aspect of sentence is waived. **Id.**

Mann, 820 A.2d at 794 (citations modified).

Neither of the parties, nor the trial court, address whether Glass first sought relief from his judgment of sentence by raising it at his sentencing hearing or by filing a post-sentence motion to modify his sentence. Our review of the sentencing transcript reveals that Glass made no such objection during his sentencing hearing. Furthermore, the certified record is

devoid of any evidence that such a post-sentence motion was filed within ten days after the imposition of sentence.⁴

Although the trial court makes a persuasive case that it did not abuse its discretion in imposing the sentence upon Glass that it did, **see** T.C.O. at 4-6, we need not reach that question. Because Glass did not raise the discretionary aspects of his sentence during or in the immediate wake of his sentencing proceeding, any such challenge would be waived, regardless of its substantive merit. This Court may not overlook this omission. **See Mann, supra**. Furthermore, this Court may affirm the trial court's judgment of sentence on any proper basis. **Commonwealth v. Beckman**, 450 A.2d 660, 662 (Pa. Super. 1982).

Because we are constrained to find that Glass' sentencing challenge is waived, we also must agree, albeit for a different reason, with counsel that Glass' challenge to the discretionary aspects of his sentence is frivolous, insofar as it is waived. Furthermore, our independent review has disclosed no other issue upon which Glass might seek relief from his judgment of sentence. Consequently, we must affirm Glass' judgment of sentence.

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

⁴ Glass was informed during his sentencing hearing that he had ten days to file a post-sentence motion. **See** Notes of Testimony, 9/15/2014, at 5.

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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: 7/31/2015