NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. GEORGE MATSON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2142 MDA 2013

Appeal from the Judgment of Sentence of November 6, 2013
In the Court of Common Pleas of Lackawanna County
Criminal Division at No.: CP-35-CR-0002994-2008

BEFORE: DONOHUE, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.: **FILED JULY 25, 2014**

George Matson ("Matson") appeals from a judgment of sentence entered on November 6, 2013. Matson alleges that the trial court abused its discretion when it revoked Matson's probation for a violation that occurred before Matson's probation began. Matson's counsel has filed a petition to withdraw as counsel, together with an "***Anders/Santiago*** brief."[1] We grant counsel's petition to withdraw, and we affirm Matson's judgment of sentence.

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* Retired Senior Judge assigned to the Superior Court.

[1] ***See Anders v. California***, 386 U.S. 738 (1967); ***Commonwealth v. Santiago***, 978 A.2d 349, 361 (Pa. 2009). In ***Santiago***, our Supreme Court developed certain rules to ensure compliance with the principles underlying the ***Anders*** decision. Thus, it is common practice in this Court to refer to briefs filed thereunder as "***Anders/Santiago*** briefs."

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

> [Matson] was found guilty on 08 CR 2994 Count 1, **Aggravated Assault (18 Pa.C.S. § 2702(a)(3))**, 08 CR 2994 Count 2, **Simple Assault (18 Pa.C.S. § 2701(b))**, and 08 CR 2994 and Count 3, **Terroristic Threats (18 Pa.C.S. § 2706)** on December 7, 2009. Pursuant to the verdict, on August [3]1, 2010 this court sentenced [Matson] to an aggregate sentence of **44 months to 102 months, plus 4 years special probation**.[1] Notes of Testimony ("N.T."), 8/31/2010, at 8.
>
> [1] Note, this aggregate sentence also included a charge of DUI, docketed at 09 CR 129.
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> [Matson] was awarded time served towards this original sentence, that time credited being from October 28, 2008 to August 31, 2010, a period of 672 days (1 year, 10 months, and 3 days). Due to this significant amount of time credited, shortly after the implementation of [Matson's] sentence, he was accepted to State Supervision, to begin the portion of his sentence pertaining to special probation, on February 19, 2013. Furthermore, prior to his parole [Matson] was notified of his special probation requirements and signed off upon such. One of those said requirements was that [Matson's] approved residence was Youthbuild in York, Pennsylvania, and that he must report there immediately upon his release. On September [6], 2013, a warrant to commit and detain [Matson] was issued by the Pennsylvania Board of Probation and Parole, for a parole violation. The Pennsylvania Board of Probation and Parole cited [Matson's] parole violation as being "Assaultive Behavior" and "Removal from Treatment/Failure." The violation stemm[ed] firstly from an incident that occurred on May 7, 2013 when [Matson] failed to abide by program rules and regulations. [Matson] failed to abide by said rules and regulations when he was reprimanded by the center director for making "inappropriate remarks and displaying inappropriate behavior toward a female staff member." The motivation for the remarks and behavior appeared to be sexually driven. In addition, on May 15, 201[3] [Matson] was unsuccessfully discharged from

> the YouthBuild program after verbally threatening a staff member. [Matson] was therefore placed halfway back at Keystone Correctional Services,[2] in Harrisburg, Pennsylvania. On August 6, 2013 [Matson] returned late to the center and was unsuccessfully discharged yet again, now from Keystone Correctional Services, after making the following statement to a staff member upon his late arrival[:]
>
> > **"I am sick of this place and I am about to do some serious damage in here. If any staff wants to get in my way, they can step right up and I will fuck them up. I don't care. I don't give a fuck about any staff in here."**
>
> Due to the nature of [Matson's] statements, in conjunction with his previous technical violations and assaultive history, [Matson] was deemed inappropriate for placement and therefore was taken into custody and was transported to York County Prison. The decision of the Pennsylvania Board of Probation and Parole, was that [Matson] be incarcerated in York County Prison for 6 months due to "multiple technical violations."
>
> Due to [Matson's] multiple technical violations, this court held a [***Gagnon II***[3]] hearing concerning [Matson] on November 6, 2013. At such time, [Matson's] attorney, Donna Devita, Esq., set forth that [Matson] previously stipulated to only the technical violation concerning his language to staff members at Keystone Correctional Services, but however, was not admitting to the other technical violations pitted against him. N.T., 11/6/2013, at 2-3. However, the one violation being sufficient enough [*sic*] to move forward, this court did such. [Matson] waived his right to a hearing on the matter, and the court moved forward with sentencing. ***Id.*** at 3. [Matson's] counsel[] and [Matson] were awarded time to speak on [Matson's] behalf. [Matson] stated the following on the record concerning his stipulated violation:

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[2] Keystone Correctional Services, Inc., is a "Work Release" Community Corrections Program that focuses on employment and self-esteem building for offenders pending release to their communities. Terry L. Davis, *Keystone Correctional Services, Home*, http://www.kcshbg.com/kcs.html (last visited July 2, 2014).

[3] ***See Gagnon v. Scarpelli***, 411 U.S. 778 (1973).

> [Matson]: "I'm guilty [of this violation] at the Keystone Correctional Services . . . because I was scheduled to start college on August 14 from HVAC because I took the course while I was in prison, I was 11 miles from the midtown to the campus without public transportation. I wrote a formal letter to the director of the facility and to my parole agent and both denied me **it was the only way for me to get transferred out of there. I didn't want to do what I did, I had to do it in order to get a transfer**."
>
> The Court: "**You had to do what, George?"**
>
> [Matson]: **"It was the only way to be transferred out of there, Judge Barrasse."**
>
> The Court: **"To what?"**
>
> [Matson]: **"I wrote a formal letter to the director."**
>
> The Court: "What was the only way to get out?"
>
> [Matson]: "To make a threat."

Id. at 4-5.

After this admission by [Matson] the court went on to state that [Matson] had "14 prior arrests of which maybe a half dozen are assault[s]." ***Id.*** at 5.

* * * *

> The Court: "George, because of your past violence and the number of arrests you have for assaults is mind boggling . . ."
>
> [Matson]: "I know."
>
> The Court: "And then you go ahead and –"
>
> [Matson]: "I know."
>
> The Court: "– you repeat the same conduct in prison."

Id. at 6-7.

Therefore, only after a review of [Matson's] Pre-Sentence Investigation . . ., coupled with a sentencing hearing on

> [Matson's ***Gagnon II***,] where [Matson] admitted to purposely threatening staff to get his way and get out of his placement and back to this court, along with [Matson's] long and worrisome arrest history, showing a very violent nature and an inability to change, did this court impose sentence. This court, on 08 CR 2994 [Count 1, aggravated assault] "revoke[d] the probation and sentence[d Matson] to two to four years, one year additional probation" and on 08 CR 2994, [Count 3, terroristic threats], "two years[']' probation, consecutive" for an aggregate sentence of "two to four years plus three years[']' probation," with the sentence of this court being "consecutive to the present sentence" [Matson] was serving. ***Id.*** at 7.

Trial Court Opinion ("T.C.O."), 3/25/2014, at 1-6 (emphasis in original; citations modified). On November 26, 2013, Matson filed a notice of appeal. On December 4, 2013, the trial court directed Matson to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On December 18, 2013, Matson's current counsel timely filed a Rule 1925(b) statement on Matson's behalf raising four issues.[4] Thereafter, on March 25, 2014, the trial court issued a Rule 1925(a) opinion that exhaustively examined and rejected each of Matson's four assertions of error.

As noted above, appointed counsel has filed an ***Anders/Santiago*** brief asserting that Matson has no non-frivolous issues to pursue on appeal and a corresponding petition to withdraw as counsel. This Court must first pass upon counsel's petition to withdraw before reviewing the merits of the

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[4] In her ***Anders/Santiago*** brief, by contrast, counsel has addressed only a single issue. Consistently with our obligation to review the record independently, we address hereinafter the other three issues counsel raised initially.

underlying issue presented by Matson. ***Commonwealth v. Goodwin***, 928 A.2d 287, 290 (Pa. Super. 2007) (*en banc*).

Prior to withdrawing as counsel on a direct appeal under ***Anders***, counsel must file a brief that meets the requirements established by our Supreme Court in ***Santiago***:

> [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.

Santiago, 978 A.2d at 361. Counsel also must provide a copy of the ***Anders/Santiago*** brief to her client. Attending the brief must be a letter that advises the client of his or her right to "(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) (citing ***Commonwealth v. Millisock***, 873 A.2d 748, 752 (Pa. Super. 2005)). To enable this Court to confirm that counsel has done so, she must attach to her petition to withdraw a copy of the letter to her client. ***Millisock***, 873 A.2d at 752.

Our review of counsel's petition to withdraw and the accompanying brief shows that counsel has complied fully with ***Santiago***'s procedural requirements. Counsel has provided a procedural history detailing the events relevant to this appeal with appropriate citations to the record. ***See*** Brief for Matson at 5-6. Counsel has identified only one issue that Matson might seek to pursue on appeal: "Whether the sentence imposed by the lower court was legal since the violation occurred before [Matson] began serving his probation and, therefore, did not constitute a violation of probation?" ***Id.*** at 4 (capitalization modified). Counsel also observes that Matson did not file a post-sentence motion for reconsideration of his sentence, which precludes a challenge to the discretionary aspects of his sentence. ***Id.*** at 6; ***see Nischan***, 928 A.2d at 355.

Counsel has addressed the record and the applicable case law and has concluded that Matson has no non-frivolous claims to present on appeal. Brief for Matson at 8-9. Counsel sent Matson a letter dated March 10, 2014, informing him that she had found no non-frivolous issues to pursue on appeal. Counsel further informed Matson that she had filed a petition to withdraw along with the ***Anders/Santiago*** brief that was provided to Matson with the letter. Counsel's letter, a copy of which she attached to her petition to withdraw, duly informed Matson that he could proceed *pro se* and submit his own brief to this Court, or that he could retain new counsel. Petition to Withdraw as Counsel, 3/12/2014, Exh. A. Therefore, counsel has

complied with all of the requirements set forth in ***Santiago***, ***Nischan***, and ***Millisock***.

We now must conduct an independent review of the record to determine whether there are any non-frivolous issues for Matson to pursue on appeal. ***Santiago***, 978 A.2d at 354 (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 . . . .").

The sole issue presented by counsel as worthy of our consideration on appeal is whether the Court could revoke Matson's probation before his probationary period began. This Court confronted this issue in ***Commonwealth v. Ware***, 737 A.2d 251 (Pa. Super. 1999), in which we affirmed the trial court's revocation of a parolee's probation for a violation that occurred before the defendant's probation began:

> [T]he court had the authority to revoke appellant's probation despite the fact that, at the time of revocation of probation, appellant had not yet begun to serve the probationary portion of her split sentence and even though the offense upon which revocation of probation was based occurred during the parole period and not the probationary period.

Id. at 253. Relying upon our decisions in ***Commonwealth v. Dickens***, 475 A.2d 141 (Pa. Super. 1984), and ***Commonwealth v. Wendowski***, 420 A.2d 628 (Pa. Super. 1980), we held that a sentencing court may revoke probation at any time before the maximum period of probation has ended, including during the period before the probationer begins serving his

probationary sentence, if the defendant demonstrates that he or she is unworthy of probation and granting probation is not in the best interest of the public or the defendant. ***See Ware***, 737 A.2d at 253. We observed that a defendant on probation or parole is still a person convicted of a crime, and emphasized that denying trial courts the discretion to revoke probation before it begins would enable defendants who are serving probation or parole on one charge to violate their pending probation or parole on another charge without repercussions. ***Id.*** at 254; ***Wendowski***, 420 A.2d at 630. The ***Ware*** Court continued:

> [I]t is clear that the court in the instant matter had the proper authority to revoke not only appellant's parole, but also to revoke appellant's probation. Moreover, once the court revoked appellant's probation, it had the same sentencing options available that existed at the time of the original sentencing.

Ware, 737 A.2d at 254; ***see Commonwealth v. Smith***, 669 A.2d 1008, 1011 (Pa. Super. 1996).

The instant case is controlled by ***Ware***. Although Matson had been recommitted when he threatened the Keystone staff and, therefore, had not yet begun to serve his probation, that probation nonetheless could be revoked. Because ***Ware*** so clearly contradicts any suggestion that the trial court could not sentence Matson for a violation of a probation sentence he had not yet begun to serve, any argument to that effect would be frivolous.

Having addressed the sole issue presented by counsel in this matter, we must review independently the entire record to confirm the absence of

non-frivolous issues that might necessitate the filing of an advocate's brief on Matson's behalf. We begin by considering the issues raised by counsel in Matson's Rule 1925(b) statement but not addressed in counsel's brief. Excluding the issue considered and rejected above, counsel presented the following three issues to the trial court:

> A. Whether the sentences imposed were inappropriately harsh and excessive and an abuse of discretion?
>
> B. Whether the lower court committed an error and an abuse of discretion when it sentenced [Matson] to incarceration for a technical violation?
>
> * * * *
>
> D. Whether there was an error committed when [Matson] did not receive any credit for time served in incarceration?

Concise Statement of Matters Complained of on Appeal, 12/18/2013.

The first two issues concern the discretionary aspects of sentencing. ***See Commonwealth v. Ahmad***, 961 A.2d 884, 886 (Pa. Super. 2008) (excessiveness); ***Commonwealth v. Crump***, 995 A.2d 1280, 1282 (Pa. Super. 2010) (total confinement for a technical violation of parole). We may easily dispense with these contentions. Issues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by otherwise presenting the claim to the trial court during the sentencing proceedings. When a defendant fails to do so, any objection to the discretionary aspects of sentencing is waived. ***Commonwealth v. Griffin***, 65 A.3d 932, 936 (Pa. Super. 2013). Our review of the sentencing transcript and the certified record confirms counsel's conclusion that Matson

did not challenge the discretionary aspects of his sentence in open court or by the filing of post-sentencing motions. Consequently, had counsel sought to present these issues, they could not have prevailed, rendering them frivolous on their face, precisely as counsel concluded.

The last claim raised by Matson in his Rule 1925(b) statement pertains to the time credit Matson was or was not given against his sentences for aggravated assault and terroristic threats. "A challenge to the trial court's failure to award credit for time served prior to sentencing involves the legality of a sentence." ***Commonwealth v. Menezes***, 871 A.2d 204, 207 (Pa. Super. 2005). Such a challenge can never be waived and may be reviewed *sua sponte* by this Court. ***Commonwealth v. Randal***, 837 A.2d 1211, 1214 (Pa. Super. 2003). Thus, unlike Matson's challenges to the discretionary aspects of the sentence imposed, counsel could not have deemed the issue so frivolous as to not warrant discussion on the basis of waiver. In any event, it is incumbent upon us to examine the potential merit of this issue.

On November 6, 2013, the court sentenced Matson to a total of twenty-four months to forty-eight months' incarceration followed by three years' special probation. The trial court did not credit Matson for time served. By letter dated February 24, 2014, the Department of Corrections ("DOC") inquired of the trial court regarding whether credit was due for Matson's incarceration from October 28, 2008 to August 31, 2010.

The trial court responded to DOC's inquiry by filing on Order on March 12, 2014 directing that no credit was due. In a letter to DOC dated the same day and filed in the record, the trial court explained that no credit was due because the time requested by Matson already had been awarded in connection with his original underlying sentence. He was not entitled to receive the same credit twice. ***See*** Trial Court Letter to DOC, 3/12/2014, at 1. The trial court reiterated this reason for denying Matson credit in its Rule 1925(a) opinion. ***See*** T.C.O. at 20-21. Specifically, the trial court noted that the time in question had been credited against Matson's original sentence on the aggravated assault charge in question. ***Id.*** at 2. The trial court emphasized the point by noting that it was precisely the award of this credit that resulted in Matson leaving prison into supervision so quickly after receiving his original sentence.

It is beyond cavil that an incarcerated defendant is not entitled to credit for time served on a sentence for a violation of probation when the time in question already has been credited against his underlying sentence. ***See, e.g., Commonwealth v. Bowser***, 783 A.2d 348, 350 (Pa. Super. 2001). However, the sum of the time he serves on a given conviction may not exceed the statutory maximum sentence for the crime in question. Thus, in ***Commonwealth v. Williams***, 662 A.2d 658 (Pa. Super. 1995), when the trial court imposed a revocation sentence equal to the statutory maximum for the underlying charge, but the defendant already had served twenty-three months on that charge, it was necessary to

reduce the revocation sentence by twenty-three months to ensure that the revocation sentence imposed was not rendered illegal. ***Id.*** at 659; ***see Commonwealth v. Infante***, 68 A.3d 358, 367 (Pa. Super. 2013).

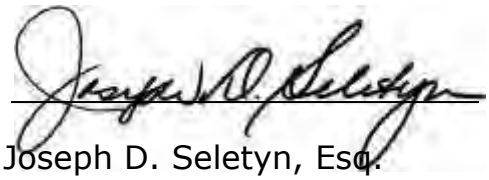
Aggravated assault is classified as a second-degree felony with a maximum sentence of ten years' incarceration. 18 Pa.C.S. § 2702(b); 18 Pa.C.S. § 1103. Matson initially served approximately twenty-two months for aggravated assault, and the trial court resentenced Matson to an additional twenty-four to forty-eight months. Thus, under this sentencing scheme, even without the benefit of credit for time served, Matson will serve no more than approximately seventy months' incarceration for a second-degree felony, which is well within the statutory limit.

The trial court found and the record confirms that Matson received credit for the time he already served on his aggravated assault charge, which was applied against that original sentence. As set forth above, he was not entitled to have credit for the same period of incarceration credited against his revocation sentence. Thus, the trial court correctly rejected this issue on the merits. Given the clarity of our case law on this issue, it would be frivolous to direct counsel to file an advocate's brief on this question.

For the foregoing reasons, we agree with counsel that it would have been frivolous to pursue the issues Matson raised in his Rule 1925(b) statement. Moreover, we have conducted an independent review of the record and identified no other issues that would sustain a non-frivolous appeal in this case.

Judgment of sentence affirmed. Counsel's motion to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/25/2014