NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JERRY LEE RITCHEY, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 38 WDA 2013

Appeal from the Judgment of Sentence August 10, 2012
In the Court of Common Pleas of Clearfield County
Criminal Division at No(s): CP-17-CR-0000265-2012

BEFORE: FORD ELLIOTT, P.J.E., GANTMAN, J., and SHOGAN, J.

MEMORANDUM BY GANTMAN, J.: **FILED JANUARY 09, 2014**

Appellant, Jerry Lee Ritchey, Jr., appeals from the judgment of sentence entered in the Clearfield County Court of Common Pleas, following his negotiated guilty plea to two counts of criminal solicitation and one count of terroristic threats.[1] We affirm and grant counsel's petition to withdraw.

The relevant facts and procedural history of this case are as follows. On August 9, 2012, Appellant entered a negotiated guilty plea to two counts of criminal solicitation to commit aggravated assault and one count of terroristic threats, in connection with Appellant's solicitation of an inmate to kill Appellant's ex-wife, her boyfriend, and Appellant's current wife. The court sentenced Appellant on August 10, 2012, to three to six years'

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[1] 18 Pa.C.S.A. §§ 902 (2702 related) and 2706.

imprisonment for each criminal solicitation conviction to run concurrent to one another (and consecutive to a sentence Appellant received at docket No. CP-17-CR-747-2011 of four to sixteen years' imprisonment); and one to three years' imprisonment for the terroristic threats conviction to run consecutive to the criminal solicitation sentences. On August 16, 2012, Appellant timely filed a post-sentence motion asserting his new aggregate sentence was excessive because it was to run consecutive to the sentence imposed at docket No. CP-17-CR-747-2011, warranting a reduction. In that motion, plea counsel also requested to withdraw his representation.

On September 11, 2012, the court granted plea counsel's motion to withdraw and granted Appellant an extension of time to file a supplemental post-sentence motion with replacement counsel. Replacement counsel subsequently filed a supplemental post-sentence motion raising various claims of plea counsel's ineffectiveness. The supplemental post-sentence motion also incorporated by reference the excessiveness claim raised in Appellant's initial post-sentence motion.

On December 6, 2012, the court denied the post-sentence motion, declining to reach Appellant's ineffectiveness of counsel claims without prejudice to Appellant's right to raise them on collateral review. Appellant timely filed a notice of appeal on January 3, 2013. The next day, the court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant timely complied.

As a preliminary matter, replacement/appellate counsel seeks to withdraw his representation pursuant to ***Anders v. California***, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)[2] and ***Commonwealth v. Santiago***, 602 Pa. 159, 978 A.2d 349 (2009).[3] ***Anders*** and ***Santiago*** require counsel to: 1) petition the Court for leave to withdraw, certifying that after a thorough review of the record, counsel has concluded the issues to be raised are wholly frivolous; 2) file a brief referring to anything in the record that might arguably support the appeal; and 3) furnish a copy of the brief to the appellant and advise him of his right to obtain new counsel or file a *pro se* brief to raise any additional points the appellant deems worthy of review. ***Id.*** at 173-79, 978 A.2d at 358-61. Substantial compliance with these requirements is sufficient. ***Commonwealth v. Wrecks***, 934 A.2d 1287 (Pa.Super. 2007).

In ***Santiago, supra***, our Supreme Court addressed the briefing requirements where court-appointed appellate counsel seeks to withdraw representation:

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[2] ***See also Commonwealth v. McClendon***, 495 Pa. 467, 434 A.2d 1185 (1981).

[3] Counsel initially filed an ***Anders*** brief on June 19, 2013, but did not include a separate petition to withdraw as counsel or comply with the technical requirements of ***Anders*** and its progeny. Consequently, this Court remanded with instructions for counsel to file either an advocate's brief or a brief and accompanying motion to withdraw in full compliance with ***Anders*** and its progeny. On December 2, 2013, counsel complied with our directive and filed an ***Anders*** brief and motion to withdraw as counsel.

> Neither ***Anders*** nor ***McClendon*** requires that counsel's brief provide an argument of any sort, let alone the type of argument that counsel develops in a merits brief. To repeat, what the brief must provide under ***Anders*** are references to anything in the record that might arguably support the appeal.
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> Under ***Anders***, the right to counsel is vindicated by counsel's examination and assessment of the record and counsel's references to anything in the record that arguably supports the appeal.

Santiago, supra at 176, 177, 978 A.2d at 359, 360. Thus, the Court held:

> [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.

Id. at 178-79, 978 A.2d at 361.

Instantly, counsel filed a petition for leave to withdraw representation. The petition states that following counsel's careful review of the record, he determined the appeal is wholly frivolous. Counsel indicates he notified Appellant of the withdrawal request. Counsel also supplied Appellant with a copy of the brief and a letter explaining Appellant's right to proceed *pro se* or with new privately retained counsel to raise any additional points or arguments that Appellant believes have merit. (***See*** Letter to Appellant, dated 11/26/13, attached to ***Anders*** Brief, filed 12/2/13, at Appendix G).

In the ***Anders*** brief, counsel provides a summary of the facts and procedural history of the case. Counsel refers to evidence in the record that might arguably support the issues raised on appeal and provides citations to relevant law. Counsel also states the reasons for his conclusion that the appeal is wholly frivolous. Therefore, counsel has substantially complied with the requirements of ***Anders*** and ***Santiago***. ***See Wrecks, supra***.

As Appellant has filed neither a *pro se* brief nor a counseled brief with new privately retained counsel, we review this appeal based on the issues raised in the ***Anders*** brief:

> THAT [PLEA COUNSEL] WAS INEFFECTIVE AS [AN] ATTORNEY FOR [APPELLANT] AND THE [TRIAL] COURT ERRED IN DENYING [APPELLANT] RELIEF WITHOUT A HEARING OR ARGUMENT ON THE ISSUES.
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> THAT THE ORDER OF THE COURT SENTENCING [APPELLANT] TO A TERM OF FOUR (4) TO NINE (9) YEARS, TO RUN CONSECUTIVELY TO DOCKET CP-17-CR-747-2011 WAS EXCESSIVE AND AN ABUSE OF DISCRETION BY THE SENTENCING JUDGE.

(***Anders*** Brief at 6).[4]

Initially, with regard to Appellant's first issue, we observe that ineffective assistance of counsel claims are generally reserved for collateral review. ***Commonwealth v. Grant***, 572 Pa. 48, 813 A.2d 726 (2002). In ***Commonwealth v. Bomar***, 573 Pa. 426, 826 A.2d 831 (2003), *cert. denied*, 540 U.S. 1115, 124 S.Ct. 1053, 157 L.Ed.2d 906 (2004), our

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[4] For purposes of disposition, we have reordered Appellant's issues.

Supreme Court determined that an ineffectiveness claim **might** be raised on direct appeal if: (1) the appellant raised his claim(s) in a post-sentence motion; (2) an evidentiary hearing was held on the claim(s); and (3) a record devoted to the claim(s) has been developed. More recently, this Court revisited the ***Bomar*** exception in ***Commonwealth v. Barnett***, 25 A.3d 371 (Pa.Super. 2011) (*en banc*), determining "the Supreme Court has limited the applicability of ***Bomar***" such that most "assertions of ineffective assistance are appropriately raised only on collateral review." ***Id.*** at 373. This Court stated: "[D]efendants are not entitled to two chances at collateral review, once on direct appeal and once pursuant to the PCRA." ***Id.*** at 376. Thus, "this Court cannot engage in review of ineffective assistance of counsel claims on direct appeal absent an 'express, knowing and voluntary waiver of PCRA review.'" ***Id.*** at 377. "With the proviso that a defendant may waive further PCRA review in the trial court, …this Court…will no longer consider ineffective assistance of counsel claims on direct appeal." ***Id.***[5]

Instantly, Appellant did not make an express, knowing, and voluntary waiver of his right to pursue collateral review of his ineffectiveness claims. Moreover, the court specifically declined to address the ineffectiveness of counsel claims and dismissed them without prejudice to collateral review.

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[5] Recently, our Supreme Court's decision in ***Commonwealth v. Holmes***, ___ Pa. ___, 79 A.3d 562 (2013), addressed the continued viability and limited scope of the ***Bomar*** exception.

Absent waiver and a complete record, we decline to consider Appellant's first issue on direct appeal. ***See id.*** Thus, we deny Appellant's ineffectiveness claims without prejudice to his right to raise them in a timely-filed petition per the PCRA, along with any other collateral claims he might wish to pursue.[6]

In his remaining issue on appeal, Appellant argues his new, aggregate 4-9 year sentence is excessive, where the court imposed his criminal solicitation sentences consecutive to the sentence Appellant received at docket No. CP-17-CR-747-2011. As presented, Appellant's claim challenges the discretionary aspects of his sentence. ***See Commonwealth v. Pass***, 914 A.2d 442 (Pa.Super. 2006) (explaining claim that court improperly imposed sentence to run consecutive to sentence previously imposed on separate case challenges discretionary aspects of sentence).

A challenge to the discretionary aspects of sentencing is not automatically reviewable as a matter of right. ***Commonwealth v. Hunter***, 768 A.2d 1136 (Pa.Super. 2001), *appeal denied*, 568 Pa. 695, 796 A.2d 979 (2001). Prior to reaching the merits of a discretionary sentencing issue:

> [W]e conduct a four-part analysis to 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

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[6] Appellant mentions that he wants to withdraw his guilty plea, however, he makes this request in the context of his ineffectiveness claim, arguing plea counsel unlawfully induced his guilty plea. Thus, we do not treat Appellant's challenge to the validity of his plea as a distinct argument.

> 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.A. § 9781(b).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted).

What constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Paul***, 925 A.2d 825, 828 (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, 913 (Pa.Super. 2000) (quoting ***Commonwealth v. Brown***, 741 A.2d 726, 735 (Pa.Super. 1999) (*en banc*), *appeal denied*, 567 Pa. 755, 790 A.2d 1013 (2001)).

A claim of excessiveness can raise a substantial question as to the appropriateness of a sentence under the Sentencing Code, even if the sentence is within the statutory limits. ***Commonwealth v. Mouzon***, 571 Pa. 419, 430, 812 A.2d 617, 624 (2002). Bald allegations of excessiveness, however, do not raise a substantial question to warrant appellate review. ***Id.*** at 435, 812 A.2d at 627. Rather, a substantial question will be found "only where the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence violates either a specific provision of the

sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process…." ***Id.*** "[A] defendant **may** raise a substantial question where he receives consecutive sentences within the guideline ranges if the case involves circumstances where the application of the guidelines would be clearly unreasonable, resulting in an excessive sentence; however, a bald claim of excessiveness due to the consecutive nature of a sentence will not raise a substantial question." ***Commonwealth v. Dodge***, 77 A.3d 1263, 1270 (Pa.Super. 2013) (emphasis in original). ***See also Commonwealth v. Moury***, 992 A.2d 162 (Pa.Super. 2010) (explaining challenge to court's imposition of consecutive sentences ordinarily does not raise substantial question; only in most extreme circumstances, such as where aggregate sentence is unduly harsh considering nature of crimes and length of imprisonment, will challenge to consecutive nature of sentences raise substantial question).

Instantly, Appellant does not contend that his aggregate sentence itself is unduly harsh, given the nature of his crimes and the length of imprisonment. Rather, Appellant merely asserts the court's imposition of his aggregate sentence to run consecutive to the sentence he received at docket No. CP-17-CR-747-2011 constituted an excessive sentence. Appellant's bald allegation of excessiveness does not raise a substantial question warranting our review. ***See Dodge, supra***; ***Moury, supra***. Moreover, the trial court explained:

> Concerning the charges in the instant case, [Appellant] was incarcerated pending trial in the previous case docket. While incarcerated, [Appellant] attempted to hire a fellow inmate to kill his ex-wife, her boyfriend, and his current wife. He provided the potential hitman with information concerning the layout and address of his current wife's home, and the address and information relating to his ex-wife's home and habits. The inmate-turned-informant relayed that [Appellant] would inquir[e] about his willingness to perform the murders every time the two spoke.
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> This [c]ourt does not find that [Appellant's] aggregate sentence is excessive in light of the criminal conduct at issue. In the prior docket, [Appellant] was found guilty of burglarizing multiple local businesses, and has or did have pending related charges in at least two other counties. While incarcerated, he threatened the lives of three people, including his wife and ex-wife, and arguably the lives of his children. He was also persistent in his pursuit to have these people killed or maimed. During his sentencing in this matter, [Appellant's] ex-wife spoke to the [c]ourt of her fear for her life as well as her children's lives. Further, [Appellant] never expressed any regret, remorse, or apology to those he was intending to have harmed. He only accuses his ex-wife of previously filing false reports against him and lying to police officers. The [c]ourt finds that [Appellant] is dangerous, has a history of criminal activity, offers no remorse for these crimes, and that the nature of the crimes was particularly troubling due to his strong desire to go forward with his proposed killings.
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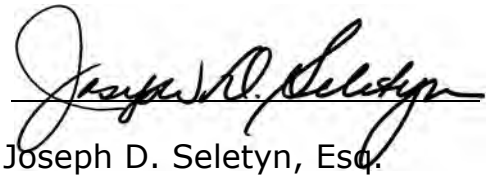
> Therefore, the [c]ourt finds that the consecutive sentence for dockets CP-17-CR-747-2011 and this matter, CP-17-CR-265-2012, is not excessive in relation to [Appellant's] criminal conduct for the reasons stated above. Further, [Appellant's] aggregate sentence is eight (8) to twenty-five (25) years. The [c]ourt does not find that this amounts to a virtual life-sentence for [Appellant], and therefore is not so manifestly excessive as to raise a substantial question.

(Trial Court Opinion, filed 5/3/13, at 4-6) (internal citations and footnotes omitted). We see no reason to disrupt the court's analysis. Accordingly, we affirm and grant counsel's petition to withdraw.

Judgment of sentence affirmed; counsel's petition to withdraw is granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/9/2014