NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MICHELLE M. LISEK,	:	
	:	
Appellant	:	No. 695 WDA 2013

Appeal from the Judgment of Sentence Entered March 28, 2013,
In the Court of Common Pleas of Erie County,
Criminal Division, at No. CP-25-CR-0000526-2012.

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

MEMORANDUM BY SHOGAN, J.: FILED: November 7, 2013

Appellant, Michelle M. Lisek, appeals from the judgment of sentence entered following her convictions of driving under the influence ("DUI") and disorderly conduct. In addition, counsel has filed a petition to withdraw and a brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). Upon review, we grant counsel's petition to withdraw and affirm Appellant's judgment of sentence.

We summarize the procedural history of this case as follows. On February 1, 2012, Appellant was involved in a motor vehicle accident with a parked car. Appellant refused to provide a sample of her breath or blood for

chemical testing. In addition, Appellant became physically aggressive with the responding police officers. In an information filed on March 22, 2012, Appellant was charged with one count each of DUI, resisting arrest, disorderly conduct, accidents involving damage to unattended vehicle or property, and careless driving on private property.

On February 4, 2013, Appellant entered a plea of guilty to one count of DUI and one count of disorderly conduct. In exchange for Appellant's guilty plea, the Commonwealth agreed to *nol pros* the remaining charges. On March 28, 2013, the trial court sentenced Appellant to serve a term of incarceration of eight to thirty-six months for the DUI conviction. Appellant received a sentence of no further penalty imposed for the disorderly conduct conviction. On April 3, 2013, Appellant filed a timely post-sentence motion for modification of sentence, which the trial court denied on April 4, 2013. This timely appeal followed.

At the outset, we note that "[w]hen faced with a purported ***Anders*** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw." ***Commonwealth v. Rojas***, 874 A.2d 638, 639 (Pa. Super. 2005). Furthermore, there are clear mandates that counsel seeking to withdraw pursuant to ***Anders***, ***McClendon***, and ***Santiago*** must follow:

> In order for counsel to withdraw from an appeal pursuant to ***Anders*** … certain requirements must be met:

> (1) counsel must 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) counsel must 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) counsel must furnish a copy of the brief to defendant and advise him of his right to retain new counsel, proceed pro se or raise any additional points that he deems worthy of the court's attention.

Commonwealth v. Millisock, 873 A.2d 748, 751 (Pa. Super. 2005).

In ***Santiago***, the Supreme Court set forth specific requirements for the brief accompanying counsel's petition to withdraw:

> [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.

In the case before us, Appellant's counsel has complied with the requirements of ***Santiago***, and our review of counsel's petition to withdraw, supporting documentation, and ***Anders*** brief reveals that counsel has satisfied all of the foregoing requirements. Counsel has furnished a copy of the brief to Appellant; she has advised Appellant of her right to retain new

counsel, proceed *pro se,* or raise any additional points that she deems worthy of this Court's attention; and she has attached a copy of the letter sent to Appellant as required under ***Millisock***. Counsel also avers that the appeal is frivolous. ***Anders*** Brief at 10.

Once counsel has met her obligations, "it then becomes the responsibility of the reviewing court to make a full examination of the proceedings and make an independent judgment to decide whether the appeal is in fact wholly frivolous." ***Santiago***, 978 A.2d at 355 n.5. Thus, we will now examine the issue presented by counsel in the ***Anders*** brief.

Counsel sets forth the following issue for our review:

> Whether the Appellant's sentence is manifestly excessive, clearly unreasonable and inconsistent with the objectives of the Pennsylvania Sentencing Code?

Anders Brief at 3.

We note that this issue implicates the discretionary aspects of Appellant's sentence. It is well settled that there is no absolute right to appeal the discretionary aspects of a sentence. ***Commonwealth v. Hartle***, 894 A.2d 800, 805 (Pa. Super. 2006). Rather, an appellant's appeal should be considered to be a petition for allowance of appeal. ***Commonwealth v. W.H.M.***, 932 A.2d 155, 162 (Pa. Super. 2007).

As we observed in ***Commonwealth v. Moury***, 992 A.2d 162 (Pa. Super. 2010):

> An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:
>
> > [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 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).

Id. at 170 (citing ***Commonwealth v. Evans***, 901 A.2d 528 (Pa. Super. 2006)).

Whether a particular issue constitutes a substantial question about the appropriateness of sentence is a question to be evaluated on a case-by-case basis. ***Commonwealth v. Kenner***, 784 A.2d 808, 811 (Pa. Super. 2001). As to what constitutes a substantial question, this Court does not accept bald assertions of sentencing errors. ***Commonwealth v. Malovich***, 903 A.2d 1247, 1252 (Pa. Super. 2006). An appellant must articulate the reasons the sentencing court's actions violated the sentencing code. ***Id***.

Herein, the first three requirements of the four-part test are met, those being that Appellant brought an appropriate appeal, raised the challenge in her post-sentence motion, and included in her appellate brief the necessary separate concise statement of the reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f). Therefore, we will next

determine whether Appellant raises a substantial question requiring us to review the discretionary aspects of the sentence imposed by the trial court.

Appellant claims that the sentencing court failed to properly consider the factors set out in 42 Pa.C.S.A. § 9721(b) when it fashioned Appellant's sentence.[1] We conclude that, in this instance, Appellant has raised a substantial question. ***See Commonwealth v. Fullin***, 892 A.2d 843, 847 (Pa. Super. 2006) (concluding that the appellant raised a substantial question where it was alleged that the trial court failed to consider the factors set forth in 42 Pa.C.S.A. § 9721(b)). Accordingly, because Appellant has stated a substantial question, we will consider her issue on appeal. Nevertheless, we conclude that Appellant is entitled to no relief on this claim, as the record reveals that the sentencing court did consider the objectives of protecting the public, the gravity of the offense, and Appellant's rehabilitative needs.

It is undisputed that sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. ***Fullin***, 892 A.2d at 847. In this context, an abuse of discretion is not shown merely by an error in judgment. ***Id***. Rather, the appellant must establish, by reference to the

[1] The factors to be considered under 42 Pa.C.S.A. § 9721(b) include the protection of the public, gravity of offense in relation to impact on victim and community, and rehabilitative needs of the defendant.

record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. ***Id***.

Moreover, "a court is required to consider the particular circumstances of the offense and the character of the defendant." ***Commonwealth v. Griffin***, 804 A.2d 1, 10 (Pa. Super. 2002). "In particular, the court should refer to the defendant's prior criminal record, his age, personal characteristics and his potential for rehabilitation." ***Id***.

Our review of the record reflects that, at the time of sentencing, the court listened to Appellant's explanation for her behavior on the night of the incident. Specifically, Appellant stated the following to the sentencing court:

> Your Honor, I know that I have a drinking problem, and I was doing very, very well until my dad passed away on Christmas day of 2011. And I did pick back up, and obviously it only took two months for me to get into trouble again. My father is all I had here in Erie.
>
> I have recently moved to Indiana state to be with my brother. He's a very positive influence, him and his family. They're good Christian people. They're going to watch over me and protect me and make sure that I'm doing the right things in life. I have a Section 8 voucher. Monday I do have -- am signing a lease with my Section 8 voucher for my son and I. I'm getting a job there, because I worked for my father. He owned his own car lot, so I lost my job at the same time and had to close up his business.
>
> I would like to know if you could give me the monitor and let me go back to Indiana. Erie is not good for me. I've moved to Pittsburgh in my past, never got into trouble, did positive things. I lived in New York City, never got into trouble, did positive things. I came back because my dad was sick and to

> help him out with the business, and now he's passed away, and I -- I just -- Erie's not good for me, you know, people, places, and things.
>
> * * *
>
> I want help with my addiction.

N.T., 3/28/13, at 8-9.

The sentencing court also heard from Appellant's counsel who reiterated various factors relating to Appellant's history and the incident at bar. Appellant's counsel stated the following:

> Your Honor, my client is 42 years of age. This offense did occur a little over a year ago. The victim did fill out a victim impact statement in which the victim basically indicates he was not impacted at all, to her -- to her benefit, of course. Obviously this is a second offense within ten years, Judge. Her prior record is just littered with alcohol-related offenses, which obviously show signs of an alcohol addiction. She had a DUI in '91, in '99, in 2004, and then unfortunately this DUI.
>
> After she got this DUI, Judge, she did go to treatment. It's not reflected in the pre-sentence report, but she did do 28 days of in-patient treatment last February. Since she has gotten out of treatment she's gotten her life together. Obviously she has not committed any new offenses within the past year. She has since moved to Indiana about a month-and-a-half ago where her brother resides, because she really doesn't have any ties to Erie anymore.
>
> Obviously she's the type of person, Judge, that needs to go to AA every day, this being her fourth lifetime offense.
>
> We're asking the Court -- despite the fact that she was given a jail sentence back in 2005, we're asking the Court to consider [a Restrictive Intermediate Punishment] sentence here and allow supervision to be transferred back to Indiana since it does seem that over the past year she has at least made some effort to get her life back on track.

N.T., 3/28/13, at 7-8.

The record further reflects that the sentencing court offered the following explanation for the imposition of a prison sentence upon Appellant to address her rehabilitative needs, the gravity of the offense and the protection of the public:

> All right. The Court has considered the Pennsylvania Sentencing Code, the pre-sentence report, and the Pennsylvania Guidelines on Sentencing. The Court has also considered the statements of defense counsel, the defendant, and the attorney for the Commonwealth. The Court has considered this defendant's age, her background, her character and rehabilitative needs, the nature, circumstances, and seriousness of the offense, and the protection of the community.
>
> The Court would note that the defendant has pled guilty and accepted responsibility for her actions here. On the night in question the defendant's actions certainly were indicative of someone who was definitely under the influence of alcohol. She was uncooperative, she was involved in an accident, she refused the field sobriety -- or excuse me, the blood testing, and she caused problems for the police continually from the beginning of the incident till the end of the incident.
>
> The defendant comes before the Court with three prior DUIs. Her first one, back in 1991, I placed her on ARD probation. That apparently did not deter her or allow her to engage in rehabilitation. She had a second DUI in 1999. Judge Bozza then gave her Restrictive Intermediate Punishment. That didn't deter you or rehabilitate you. The third one, in 2005, Judge DiSantis placed you in prison. That did not deter or rehabilitate you. And you're back here for a fourth time.
>
> Your blood alcohol levels on the two that were measured were .20, which is two-and-a-half times the legal limit. The last two were refusals.
>
> Your problem is not your alcohol, although that is a problem. Your problem is getting behind the wheel of a motor

> vehicle after you drink. You continue to do that and have done it now four separate times. Each time you've done it you've placed the members of this community in danger, because you're behind the wheel of a 6,000 pound deadly weapon under the influence of alcohol to a significant degree, and you continue to do it especially in light of the fact that you've been on probation, you've had Intermediate Punishment, you've been incarcerated, you've been on parole, and here you are back again.
>
> Between your last DUI and this DUI you've had a harassment conviction, a disorderly conduct conviction, a public drunkenness conviction, and another public drunkenness conviction.
>
> I certainly applaud your efforts to remain alcohol-free, but, as I said, the problem isn't alcohol, the problem is getting behind the wheel of a deadly weapon after you drink, and you continue to do that. If you want to drink, frankly, I can't do anything about it. But as I said to the last defendant, when you get behind the wheel of a motor vehicle and you're drunk, then it becomes my problem, and I'm the one that has to do something about that.
>
> You need to be incapacitated at this point. You need to realize that there are not only consequences for your conduct, but the fact that you continue to engage in this conduct exacerbates those consequences and makes it imperative that the community be protected from you, because nothing that's been done in the past has deterred you or rehabilitated you.
>
> Therefore the Court will order the following sentence, which is from the standard range of the Pennsylvania Sentencing Guidelines and will be as follows ... The defendant will be ordered incarcerated the minimum period of which will be 8 months, the maximum of which will be 36 months. The defendant is not RRRI eligible, and that will be a state sentence.

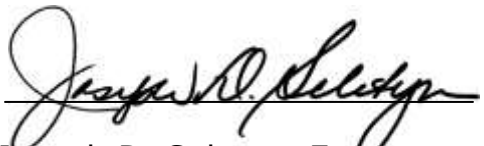
N.T., 3/28/13, at 10-13.

Upon review, we discern no abuse of discretion because the trial court carefully considered the appropriate factors when imposing Appellant's sentence. Accordingly, Appellant is entitled to no relief.

In summary, it is our determination that Appellant's counsel has complied with the requirements of ***Anders*** and that an appeal in this case would be wholly frivolous. Furthermore, we have conducted our own, independent review of the record. We do not discern any non-frivolous issues that Appellant could have raised. In light of the foregoing, we grant counsel's petition to withdraw and affirm the judgment of sentence.

Petition to withdraw granted. Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/7/2013