

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

TIMOTHY GORMONT,

Appellant

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

No. 1976 EDA 2013

Appeal from the Judgment of Sentence April 24, 2013
In the Court of Common Pleas of Bucks County Criminal Division at
No(s): CP-09-CR-0003620-2012

BEFORE: SHOGAN, J., JENKINS, J., and PLATT, J.*

MEMORANDUM BY JENKINS, J.

FILED APRIL 28, 2014

On April 24, 2013, Timothy Gormont pled guilty to driving under the influence of a controlled substance (oxycodone), his second offense for the purposes of sentencing. The trial court sentenced Gormont to 1-3 years of imprisonment. On May 3, 2013, Gormont filed a timely motion for reconsideration of sentence. Following a hearing on June 12, 2013, the court denied this motion. Through counsel, Gormont filed a timely notice of appeal and a timely statement of matters complained of on appeal.

* Retired Senior Judge assigned to the Superior Court.

Counsel for Gormont has filed an **Anders** brief¹ brief together with a petition to withdraw as counsel. We affirm the judgment of sentence and grant counsel's petition to withdraw.

The trial court aptly summarized the factual and procedural history of this case as follows:

The facts in this case are not in dispute. Notes of Testimony ('N.T.') 4/24/2013, pp. 18-19. At 9:23 a.m. on March 7, 2012, a Doylestown Borough police officer found Gormont operating a car that had collided with a utility pole. N.T. 4/24/2013, pp. 16-17. The officer believed Gormont was under the influence of drugs to a degree that he was incapable of safe driving, and a subsequent chemical test of Gormont's blood was positive for oxycodone. N.T. 4/24/2013, p. 17.

Gormont's criminal history is similarly undisputed. N.T. 4/24/2013, p. 19. The instant offense constituted Gormont's fifth conviction for driving under the influence (DU1). NT. 4/24/2013, p. 17. At the time Gormont committed the instant offense, he was on bail for a prior DUI offense, to which he pleaded guilty and for which he received deferred sentencing on February 22, 2012. N.T. 4/24/2013, pp. 17, 19. In addition to his five DUI convictions, Gormont has prior convictions for involuntary manslaughter (February 6, 1987), possession of paraphernalia (September 1998), and simple assault (September 20, 1999). N.T. 4/24/2013, pp. 17-18.

At his plea and sentencing hearing, Gormont admitted to his conduct, conceded to the above recitation of his criminal history, and pleaded guilty to violating 75 Pa. Cons. Stat. § 3802(d)(1)(ii). N.T. 4/24/2013, p. 19. As this was his second conviction for violating § 3802(d), his instant conviction carried a mandatory minimum term of 90 days incarceration. 75 Pa. Cons. Stat.. § 3804(c)(2)(i). The Sentencing Guidelines recommended a standard range

¹ **Anders v. California**, 386 U.S. 738 (1967).

of twelve to eighteen months' incarceration, a mitigated range of nine months' incarceration, and an aggravated range of twenty-one months' incarceration.

Gormont raised several mitigating factors which he argued justified either house arrest or a sentence that could be served at Bucks County prison. N.T. 4/24/2013, pp. 25-26. Specifically, Gormont argued the following as mitigating factors: the oxycodone had been prescribed to him, that he has a long-existing drug and alcohol addiction, that he had largely been self-sufficient since the age of sixteen due to family problems, and that he had been diagnosed with a traumatic brain injury. N.T. 4/24/2013, pp. 20-22. In addition, Gormont argued that house arrest or a Bucks County prison sentence would most readily address his rehabilitative needs by ensuring access to his family and the support they provide. N.T. 4/24/2013, pp. 28-29.

The Court acknowledged the 'mental health component to this matter,' but also recognized the clear community risks posed by Gormont's frequent and severe disregard for the criminal justice system and the laws proscribing driving under the influence. N.T. 4/24/2013, pp. 30-31. Specifically, the Court made note of the fact that despite multiple sentences of incarceration and probation, Gormont was completely undeterred from driving under the influence. N.T. 4/24/2013, p. 30. In addition, the Court noted that Gormont committed the instant offense while released on bail pending sentencing for another DUI conviction. N.T. 4/24/2013, p. 31. Given Gormont's lengthy criminal history in general, and regarding driving under the influence in particular, and the community risk evidenced therein, the Court imposed a sentence of not less than one nor more than three years incarceration in a state correctional institution. N.T. 4/24/2013, p. 32. This sentence was within the standard range, of twelve to eighteen months' incarceration, recommended by the sentencing guidelines. See 204 Pa. Code § 303.9 (noting all numerical recommendations under guidelines are suggested months of minimum confinement). The Court acknowledged the mitigating factors proffered by Gormont and recommended that Gormont be permitted to serve his sentence in a therapeutic community 'that can address

those issues raised' by Gormont and his attorney. N.T. 4/24/2013, p. 32.

Gormont filed a Motion to Reconsider Sentence, which was heard and adjudicated on June 12, 2013. The motion was largely based on medical problems suffered by Gormont after his sentence was imposed; Gormont suffered a heart attack after he was transported to a state correctional facility. N.T. 6/12/2013, p. 2. In addition to, and in part because of, his medical problems, Gormont sought to be incarcerated closer to his family, and thus asked for a sentence that could be served in Bucks County Prison. N.T. 6/12/2013, p. 3. Again, Gormont primarily relied on the fact that the oxycodone which he had taken prior to crashing into the utility pole had been prescribed, and that it 'wasn't something that he went and picked up off the street and took.' N.T. 6/12/2013, p. 4. Gormont conceded that while he was incarcerated, he received treatment for his heart condition, including a stent, as well as several medications for high blood pressure and cholesterol, all of which were provided to him while serving his sentence in a state institution. N.T. 6/12/2013, p. 6. The Court reiterated that intermediate punishment through a sentence at a county level was inappropriate and found that there was no reason to believe the health care he received at the state institution was inadequate or deficient. N.T. 6/12/2013, p. 7-8. As a result, the Court denied the motion.

Trial Court Opinion, pp. 1-4.

Before addressing the issue presented in Gormont's brief, we must first pass on counsel's petition to withdraw. ***Commonwealth v. Goodwin***, 928 A.2d 287, 290 (Pa.Super.2007) (*en banc*) ("when faced with a purported *Anders* brief, this Court may not review the merits of any possible underlying issues without first examining counsel's request to withdraw"). To obtain permission to withdraw, counsel

must file an **Anders** brief that meets the requirements established by our Supreme Court in **Commonwealth v. Santiago**, 602 Pa. 159, 978 A.2d 349 (2009). The brief 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., 978 A.2d at 361. Counsel must provide the appellant a copy of the **Anders** brief with a letter that advises the appellant 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). Substantial compliance with these requirements is sufficient. **Commonwealth v. Wrecks**, 934 A.2d 1287, 1290 (Pa.Super.2007). "After establishing that the antecedent requirements have been met, this Court must then make an independent evaluation of the record to determine whether the appeal is, in fact, wholly frivolous." **Commonwealth v. Palm**, 903 A.2d 1244, 1246 (Pa.Super.2006).

Here, counsel's petition and **Anders** brief state that she fully and completely reviewed the record and the applicable law and determined there were no non-frivolous issues to be raised on appeal. Counsel explains that she notified Gormont of the withdrawal request, supplied him with a copy of the **Anders** brief, and sent him a letter explaining his right to proceed *pro se* or with new, privately-retained counsel to file his own brief in this appeal. **See** Letter to Appellant, December 24, 2013, attached as Exhibit C to **Anders** brief. The **Anders** brief provides a summary of the facts and procedural history of the case with citations to the record, refers to evidence of record that might arguably support the issue raised on appeal, provides citations to relevant case law, and states counsel's conclusion that the appeal is wholly frivolous and his reasons therefore. Accordingly, counsel has substantially complied with the requirements of **Anders** and **Santiago**.

As Gormont did not file a *pro se* brief or a counseled brief with new, privately-retained counsel, we review this appeal based on the issue raised in the **Anders** brief: "The sentence imposed by the trial court was excessive in that it (1) exceeds what is necessary to protect the public and to rehabilitate [Gormont], and (2) failed to take into consideration the mitigating factors raised by [Gormont] at his sentenc[ing] [hearing]."

This question seeks review of the discretionary aspects of Gormont's sentence. This Court has repeatedly held that we cannot review the discretionary aspects of a defendant's sentence unless he "raises a substantial question that the sentence is appropriate under the sentencing code." **Commonwealth v. Christine**, 78 A.3d 1, 10 (Pa.Super.2013) (citing **Commonwealth v. Carrillo-Diaz**, 64 A.3d 722, 725 (Pa.Super.2013)). We will find a "substantial question"

[']where the defendant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the [sentencing] code or is contrary to the fundamental norms which underlie the sentencing process.' **Commonwealth v. Booze**, 953 A.2d 1263, 1278 (Pa.Super.2008) (citation omitted), **appeal denied**, 608 Pa. 659, 13 A.3d 474 (2010); **see also** 42 Pa.C.S.A. § 9781(b). 'We determine whether a particular case raises a substantial question on a case-by-case basis.' **Commonwealth v. Corley**, 31 A.3d 293, 297 (Pa.Super.2011) (citation omitted). 'Additionally, we cannot look beyond the statement of questions presented and the prefatory 2119(f) statement to determine whether a substantial question exists.' [**Commonwealth v. Provenzano**, [50 A.3d 148, 154 (Pa.Super.2012)]].

Christine, supra, 78 A.3d at 10.

Gormont's claims do not raise a substantial question that his sentence is appropriate. His generic claim that his sentence was "excessive" does not raise a substantial question for our review. **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").

Gormont's claim that the court failed to take mitigating factors into account also fails. This Court has repeatedly held that "an allegation that the trial court failed to consider particular circumstances or factors in an appellant's case go to the weight accorded to various sentencing factors and do not raise a substantial question." **Christine, supra**, 78 A.3d at 10-11; **see also Commonwealth v. Edwards**, 71 A.3d 323, 330 (Pa. Super. 2013) (allegation that sentencing court failed to consider or did not adequately consider various factors does not raise substantial question that sentence was inappropriate); **Commonwealth v. Griffin**, 65 A.3d 932, 936 (Pa. Super. 2013) (claim that sentencing court failed to take into account appellant's rehabilitative needs under 42 Pa.C.S. § 9721(b) failed to raise substantial question); **Commonwealth v. Cannon**, 954 A.2d 1222, 1228-1229 (Pa. Super. 2008) (claim that trial court failed to consider appellant's rehabilitative needs, age, and educational background did not present substantial question). Thus, we decline to review these claims on the merits.

Even if we reviewed Gormont's claims on the merits, he would not be entitled to relief. Sentencing is vested in the discretion of the trial court and will not be disturbed absent an abuse of discretion.

Commonwealth v. Malovich, 903 A.2d 1247, 1252-53 (Pa.Super.2006). An abuse of discretion involves a sentence which is manifestly unreasonable or which results from partiality, prejudice, bias or ill will. It is more than just an error in judgment. ***Id.*** at 1253.

Gormont's sentence was well within the trial court's discretion. His DUI offense was his second offense for purposes of sentencing and thus required a mandatory minimum sentence of 90 days imprisonment. His Sentencing Guideline ranges were 9-12 months in the mitigated range, 12-18 months in the standard range and 18-21 months in the aggravated range. N.T., 4/24/13, pp. 15-16. The sentence imposed was in the standard range of the Sentencing Guidelines. During sentencing and post-sentence proceedings, and also in its opinion, the court weighed all relevant factors, including Gormont's rehabilitative needs, the public's need for protection, the gravity of his offense, Gormont's character, his recidivist criminal record, and his family situation. N.T., 4/24/13, pp. 30-32. Trial Court Opinion, pp. 5-7. The court properly weighed the evidence, and its sentence was not manifestly unreasonable nor the product of partiality, prejudice or ill will.

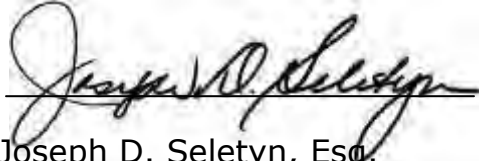
We have conducted an independent review of the record. We agree with counsel that the issue Gormont seeks to litigate in this appeal is wholly frivolous. Additionally, we have discovered no other

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issues of arguable merit that would sustain a non-frivolous appeal in this case.

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

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: 4/28/2014