

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JOSE RIVERA-CABRERA

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1157 EDA 2012

Appeal from the Judgment of Sentence March 6, 2012
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0004045-2011,
CP-39-CR-0004186-2011

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and MUSMANNO, J.

MEMORANDUM BY LAZARUS, J.

Filed: April 2, 2013

Jose Rivera-Cabrera appeals from the judgment of sentence entered in the Court of Common Pleas of Lehigh County after he entered a guilty plea to two counts of robbery.¹ Counsel has petitioned this Court to withdraw his representation of Rivera-Cabrera pursuant to *Anders*, *McClendon* and *Santiago*.² Upon review, we grant counsel's petition to withdraw and affirm Rivera-Cabrera's judgment of sentence.

The facts of this case were set forth by the trial court as follows:

¹ 18 Pa.C.S.A. § 3701(a)(1)(iv).

² *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).

[On September 14, 2011 at approximately 1:25 p.m.], members of the Whitehall Township Police Department . . . responded to a robbery that had just occurred in the parking lot of the Pet Smart [in] Whitehall Township, Lehigh County[.] The victim in this matter, Tammy Fegley, was found injured and laying down in the parking lot. Ms. Fegley stated that she was loading her shopping bags into her vehicle when a white Hispanic male, with his hair in a ponytail, got out of a gold colored Chevy Malibu. The male grabbed her purse [containing \$200 in cash] from the shopping cart and ran back to his car. Ms. Fegley then went towards the car to try and get her purse back, but the defendant blocked her with his car door. He then drove into Ms. Fegley, causing her head to hit the car. He then gunned the car and hit her with the car a second time, knocking her to the ground. [The defendant then drove off.]

Ms. Fegley reported to the police that the [defendant] could have avoided her and that her head was almost run over by the wheels of the defendant's car. . . . Ms. Fegley was transported to the hospital for injuries she sustained as a result of this incident. . . . A subsequent investigation revealed that the [defendant] used Ms. Fegley's stolen credit cards at various stores in Allentown and Bethlehem. [Defendant was subsequently identified after police connected his name with one of the fraudulent purchases made with Ms. Fegley's credit cards.]

. . .

As a result of this incident, Ms. Fegley suffered injuries to her back in the nature of a cervical thoracic lumbar strain. To this day she still has a loss of feeling in her arms and hands, and left leg control [sic]. She has possible pinched nerves in her back, she is still undergoing therapy and remains [in pain and] under a doctor's care[.]

. . .

On [September 10, 2011] at approximately 4:38 in the afternoon, officers responded to the report of a strong arm robbery at the Giant Food Store at Village West Shopping Center [in] South Whitehall Township, Lehigh County[.] [The victim, Francine Holzapple, reported to police] that she had her purse stolen from her shopping cart by a Hispanic male who ran to a gold color Chevy Malibu. Ms. Holzapple gave chase and reached in the car window to retrieve her purse. The driver gunned the engine, dragging Ms. Holzapple until she lost her grip. She fell to the pavement, suffering bumps, bruises and pain. A witness gave a description of the gold Chevy Malibu registration. Later that evening, attempts were made to use Ms. Holzapple's stolen Master Card. [The defendant was subsequently apprehended and admitted to the incident in the Giant parking lot.]

Trial Court Opinion, 7/17/12, at 2-3 (internal citations omitted).

Rivera-Cabrera entered a guilty plea before the Honorable Kelly L. Banach on February 7, 2012. On March 6, 2012, Judge Banach sentenced him to two consecutive terms of 18 months' to 10 years' incarceration. Rivera-Cabrera filed post-sentence motions, which were denied on March 14, 2012. This timely appeal followed.

As noted above, counsel seeks to withdraw from his representation of Rivera-Cabrera pursuant to **Anders**, **McClendon** and **Santiago**. "When 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). In order to withdraw pursuant to **Anders** and **McClendon**, counsel must: (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 that the appellant deems worthy of review. ***Commonwealth v. Hernandez***, 783 A.2d 784, 786 (Pa. Super. 2001). In ***Santiago***, the Pennsylvania Supreme Court altered the requirements for withdrawal under ***Anders*** to mandate the inclusion of a statement detailing counsel's reasons for concluding the appeal is frivolous.

Instantly, counsel's petition states that he has made an examination of the record and concluded the appeal is wholly frivolous. Counsel supplied Rivera-Cabrera with a copy of the brief and a letter explaining Rivera-Cabrera's right to proceed *pro se*, or with newly-retained counsel, and to raise any other issues he believes might have merit.³ Counsel also has submitted a brief, setting out in neutral form a single issue of arguable merit. Finally, counsel has explained, pursuant to the dictates of ***Santiago***, why he believes the issue to be frivolous. ***See Anders*** Brief, at 13-14. Thus, counsel has substantially complied with the ***Anders/McClendon/Santiago*** requirements.

³ Rivera-Cabrera has not filed a *pro se* response or brief.

Counsel having satisfied the procedural requirements for withdrawal, we now conduct our own review of the proceedings and render an independent judgment as to whether the appeal is, in fact, wholly frivolous. ***Commonwealth v. Wright***, 846 A.2d 730, 736 (Pa. Super. 2004). In his ***Anders*** brief, counsel raises the following issue on behalf of Rivera-Cabrera: Whether the trial court abused its sentencing discretion by imposing a maximum sentence which Rivera-Cabrera believes is excessive or otherwise not justified.

When the discretionary aspects of a judgment of sentence are challenged, an appeal is not guaranteed as of right. ***Commonwealth v. Moore***, 617 A.2d 8, 11 (Pa. Super. 1992). Rather, two criteria must be met before an appeal may be taken. First, the appellant must “set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of the sentence.” Pa.R.A.P. 2119(f); ***Commonwealth v. Zugay***, 745 A.2d 639, 653 (Pa. Super. 2000) (citation omitted). Second, an appeal will only be granted when a “substantial question” has been presented. 42 Pa.C.S.A. § 9781(b); ***id.*** An appellate court will find a “substantial question” and review the decision of the trial court only where an aggrieved party can articulate clear reasons why the sentence imposed by the trial court compromises the sentencing scheme as a whole. ***Commonwealth v. Tuladziecki***, 522 A.2d 17 (Pa. 1987).

Here, Rivera-Cabrera has included in his brief a concise statement pursuant to Rule 2119(f), setting forth the reasons in support of his appeal, and has thus complied with the technical requirements. Specifically, Rivera-Cabrera claims that the trial court did not balance all factors necessary in determining the maximum sentence and that the maximum sentence was excessive and not necessary based upon Rivera-Cabrera's history, background, criminal record and need for rehabilitation. Rivera-Cabrera also asserts that the trial court did not allow him sufficient time to express his remorse and request forgiveness, which he believes would have led the court to fashion a lesser sentence.

Rivera-Cabrera's minimum sentences of 18 months' imprisonment for each robbery conviction fell within the standard range of the sentencing guidelines. **See** 24 Pa. Code § 303.16. This Court has held that "when the sentence is within the range prescribed by statute, a challenge to the maximum sentence imposed does not set forth a substantial question as to the appropriateness of the sentence under the guidelines." **Commonwealth v. Yeomans**, 24 A.3d 1044, 1049 (Pa. Super. 2011). Here, Rivera-Cabrera's maximum sentence is within the statutory range⁴

⁴ **See** 18 Pa.C.S.A. § 1103(2) (providing maximum penalty of ten years' incarceration for second-degree felony).

and, accordingly, his claim regarding his maximum sentence fails to raise a substantial question for our review. ***See id.***

Moreover, Rivera-Cabrera's claim that the court did not allow him sufficient time to express his remorse and request forgiveness⁵ similarly fails to raise a substantial question. ***Commonwealth v. Corley***, 31 A.3d 293, 297 (Pa. Super. 2011), citing ***Commonwealth v. Johnson***, 961 A.2d 877 (Pa. Super. 2008) (claim that the court failed to consider certain mitigating factors does not present substantial question). ***But see Commonwealth v. Downing***, 990 A.2d 788 (Pa. Super. 2010) (failure to take into account defendant's rehabilitative needs in sentencing raises substantial question).

Judgment of sentence affirmed; motion to withdraw granted.

⁵ In addition to not raising a substantial question, this claim is patently false. Rivera-Cabrera was given an opportunity to address the court, at which time he discussed his addiction, remorse, family situation and willingness to take responsibility for his actions. N.T. Sentencing, 3/6/12, at 43-45, 49-51.