

# APPENDIX 7

J. A33031/08 **NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF  
 : PENNSYLVANIA  
 Appellee :  
 :  
 v. :  
 :  
 MICHAEL GEORGE DEEP, :  
 :  
 Appellant : No. 736 WDA 2007

Appeal from the Judgment of Sentence entered on March 22, 2007  
in the Court of Common Pleas of Washington County,  
Criminal Division, No. 1722 of 2005

BEFORE: MUSMANNO, DONOHUE and COLVILLE\*, JJ.

MEMORANDUM: FILED: April 15, 2009

Michael George Deep ("Deep") appeals from the judgment of sentence entered following his conviction of two counts each of sexual assault, endangering the welfare of children and corruption of minors.<sup>1</sup> We affirm.

On August 7, 2005, K.D. arrived home and discovered her husband, Deep, sexually assaulting her daughter (Deep's step-daughter), H.D. (d.o.b. 4/14/89). H.D. asserted that Deep had been sexually assaulting her since the age of 10. Police subsequently arrested Deep and charged him with 87 counts each of sexual assault and corruption of minors. Police also charged Deep with 87 counts each of statutory sexual assault, involuntary deviate sexual intercourse (victim less than 16 years of age), rape by forcible compulsion, aggravated sexual assault, and endangering the welfare of

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<sup>1</sup> 18 Pa.C.S.A. §§ 3124.1, 4304(a), 6301(a)(1).

\*Retired Senior Judge assigned to Superior Court.

children.<sup>2</sup> At the preliminary hearing, the Commonwealth dismissed all but six counts of each statutory violation set forth above.

On October 27, 2006, a jury convicted Deep of the two counts each of sexual assault, endangering the welfare of children and corruption of minors. On March 22, 2007, the trial subsequently sentenced Deep to consecutive prison terms of five to ten years for each of Deep's convictions of sexual assault, one to seven years for each of his convictions of endangering the welfare of children, and one to five years for each of his convictions of corruption of minors. Thus, the trial court imposed an aggregate sentence of 14 to 44 years in prison.

On April 2, 2007, Deep filed timely post-sentence Motions. However, on April 19, 2007, prior to the trial court's disposition of Deep's post-trial Motions, Deep filed the instant appeal. The trial court Ordered Deep to file a Concise Statement of matters complained of on appeal, and Deep timely complied with the trial court's Order. On August 2, 2007, the trial court entered an Order on the record denying Deep's post-sentence Motions by operation of law. Thus, Deep's judgment of sentence was rendered final by the trial court's August 2, 2007 Order denying his post-sentence Motions. Because the judgment of sentence is now final, we will address the issues raised in Deep's appeal.

Deep presents the following claims for our review:

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<sup>2</sup> 18 Pa.C.S.A. §§ 3122.1, 3123(a)(7), 3121(a)(1), 3125, 4304(a).

- I. Whether the trial court erred in failing to grant [Deep] a new trial due to after-discovered evidence[?]
- II. Whether the trial court erred in admitting the improper medical diagnosis testimony of Nurse Catherine Dames as proper expert testimony because Nurse Dames was not qualified to give such testimony[?]
- III. Whether the trial court erred in admitting evidence that the victim had a sexually transmitted disease[?]
- IV. Whether the trial court erred in failing to grant [Deep] a new trial due to prosecutorial misconduct[?]
- V. Whether the trial court erred in failing to grant [Deep] a new trial due to the Commonwealth's failure to comply with Pennsylvania Rule of Criminal Procedure 573[?]
- VI. Whether the trial court abused its discretion in sentencing [Deep] to consecutive sentences in the aggravated range of the sentencing guidelines[?]

Brief for Appellant at 9.

Based on our review of the record, we conclude that the trial court's extensive and well-written Opinion sets forth the appropriate law regarding Deep's first five claims, and correctly concludes that each claim lacks merit. We therefore affirm on the basis of the trial court's Opinion with regard to Deep's first five claims of error. **See** Trial Court Opinion, 10/9/07, at 4-5 (addressing Deep's claim of error based upon after-discovered evidence); 6-16 (addressing the admissibility of Nurse Catherine Dames's testimony); 16-19 (deeming waived and without merit Deep's challenge to the admissibility of evidence that the victim was diagnosed with a sexually transmitted disease one year after the sexual assault); 19-21 (addressing Deep's claim

of prosecutorial misconduct); 21-27 (addressing Deep's claim that the Commonwealth failed to comply with Pennsylvania Rule of Criminal Procedure 573).<sup>3</sup>

In his sixth claim of error, Deep challenges the discretionary aspects of his sentence. Specifically, Deep claims that the trial court abused its discretion when it imposed consecutive sentences in the aggravated range of the sentencing guidelines without sufficiently setting forth the reasons for its sentence. Brief for Appellant at 45. Deep further argues that his sentence was unreasonable as it exceeded the minimum sentence consistent with the protection of the public, the gravity of the offense, and Deep's rehabilitative needs. *Id.* Deep contends that the trial court's sentence was the result of ill-will and bias and that the trial court relied on improper factors when imposing its sentence. *Id.* at 46. The claims raised by Deep challenge the discretionary aspects of his sentence.

The right to appeal a challenge to the discretionary aspects of a sentence is not absolute. *Commonwealth v. Williams*, 787 A.2d 1085, 1087 (Pa. Super. 2001). "Rather, to reach the merits of a discretionary sentencing issue, we must determine: (1) whether the appellant has filed a timely notice of appeal; (2) whether the issue was properly preserved at

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<sup>3</sup> We note that on page 21 of the trial court's Opinion, the trial court erroneously refers to Pennsylvania Rule of Criminal Procedure 753, rather than Rule 573. This appears to be a typographical error and not a substantive legal error.

sentencing or in a motion to reconsider and modify sentence, **See** Pa.R.Crim. P. 720; (3) whether the appellant's brief has a fatal defect, **See** Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is inappropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b)." **Williams**, 787 at 1087-88 (citing **Commonwealth v. Petaccio**, 764 A.2d 582 (Pa. Super. 2000)).

Our review of the record discloses that Deep did not properly preserve the sentencing claim that he now raises on appeal. In his post-sentence Motion, Deep raised the following challenges to the legality of his sentence:

1. The sentence in the above[-]referenced matter as delivered by the Court exceeded the standard range of the Pennsylvania Sentencing [G]uidelines.
2. The standard range of the guidelines is mandatory.
3. That the United States Supreme Court decision in **Cunningham vs. California**[, 549 U.S. 270 (2007)] ... requires that any aggravated circumstance or matter that would enhance the exposure of a defendant to an increased sentence must be found by a jury and beyond a reasonable doubt.
4. The sentence of [Deep] by this Court is illegal and violative of the Pennsylvania Sentencing rules as well as the Pennsylvania and United States Constitutions.

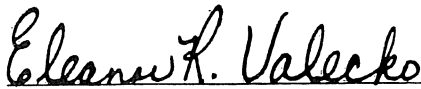
Post-Sentence Motions (Motion for Modification of Sentence), at 5. Deep's present challenge to the discretionary aspects of his sentence was not raised in his post-sentence Motions and accordingly, it is waived. **See** Pa.R.A.P. 302(a) (stating that an issue cannot be raised for the first time on appeal).

We additionally point out that Deep's Concise Statement of matters complained of on appeal, filed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), merely incorporates by reference the issues set forth in his post-sentence Motions. Accordingly, the sentencing claim raised by Deep is waived based upon Deep's failure to raise this claim in his Rule 1925(b) Concise Statement. **See Commonwealth v. Lord**, 719 A.2d 306, 309 (Pa. 1998) (holding that "[a]ny issues not raised in a Rule 1925(b) statement will be deemed waived").

Judgment of sentence affirmed.

Colville, J., files a concurring memorandum.

Judgment Entered:



Deputy Prothonotary

DATE: April 15, 2009

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MICHAEL GEORGE DEEP,

Appellant

IN THE SUPERIOR COURT OF  
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No. 736 WDA 2007

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Criminal Division, at No. 1722-2005.

BEFORE: MUSMANNO, DONOHUE and COLVILLE\*, JJ.

CONCURRING MEMORANDUM BY COLVILLE, J.:

Appellant has chosen to raise no fewer than six issues in a case involving five days of trial, a sentencing hearing, more than seven hundred and fifty transcript pages, and numerous other record documents. In violation of Pa.R.A.P. 2117(c), his brief does not contain a Statement of Place or Raising or Preservation of Issues. This noncompliance with the appellate rules impedes meaningful appellate review, and I would find his issues waived.

I also note the following. While Appellant did apparently object to the claimed prosecutorial misconduct, the court sustained his objection. He got what he asked for. He did not ask, during trial, for a curative instruction or a mistrial. On this appeal, however, he asks for a new trial. Having not asked for a new trial when the alleged misconduct occurred, he is not

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\* Retired Senior Judge assigned to the Superior Court.



entitled to do so now and is not entitled to appellate review of such a request. **Commonwealth v. West**, 837 A.2d 516, 524 (Pa. Super. 2007). Appellant did ask for a new trial in his post-sentence motions, but doing so at that juncture did not remedy his failure to make the request during trial. **Commonwealth v. Williams**, 326 A.2d 300, 302 (Pa. Super. 1974). Accordingly, the Majority affords merits review of, and rules on, a request Appellant is not entitled to make.<sup>1</sup>

As to Appellant's claim of after-discovered evidence, Appellant fails to develop his argument in that he fails to apply the four-part test for after-discovered evidence. **See Commonwealth v. Randolph**, 873 A.2d 1277, 1283 (Pa. 2005). Instead, he describes the evidence only generally, claiming it showed the victim had mental disabilities and problems, without specifying the exact items of evidence for us. Having not developed his argument, he is not entitled to appellate review. **Commonwealth v. Hardy**, 918 A.2d 766 (Pa. Super. 2007).<sup>2</sup>

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<sup>1</sup> This action effectively forecloses any related ineffectiveness claim without affording Appellant advocacy thereupon.

<sup>2</sup> Again, disposing of this claim on the basis of an undeveloped argument effectively forecloses any properly developed ineffectiveness claim.

As is apparent from the foregoing discussion, relying on the trial court opinion is ill advised. There are several substantial briefing defects lurking behind the initial defect wherein Appellant failed to comply with Pa.R.A.P. 2117(c).

Litigants are entitled to have this Court decide each case objectively, fairly, according to the published rules, not affording one party advantage to the possible detriment of the other by overlooking substantial noncompliance with a rule. **See Commonwealth v. Flores**, 921 A.2d 517, 526 (Pa. Super. 2007) (abrogated in part on other grounds by **Commonwealth v. Goodwin**, 928 A.2d 287, 293 n.2 (Pa. Super. 2007)).

Additionally, overlooking substantial noncompliance with the rules is systemically destabilizing and unfair to parties in other cases. In this regard, we have opined:

[Appellate rules] are designed to foster the uniform consideration of the substantive issues in all cases. We must not proceed haphazardly-following procedure in one case, ignoring it in another-under the guise of reaching those substantive issues. While doing so might lead us to resolve the merits in any one matter, it would be unfair to litigants and counsel in so many other cases who do follow the rules. It would also be unfair to those who do not follow the rules and against whom we enforce those rules. Moreover, disregarding procedure would diminish predictability, breed uncertainty and quickly erode the law and order we seek to protect, placing in their stead whim and chaos.

Rules are at the heart of what lawyers do. These rules are written to permit fair adjudications and to engender a sense among the citizenry that their claims will be considered when the rules are followed.

**Id.**

For the foregoing reasons, I would find Appellant's issues waived and allow Appellant the opportunity for full, properly advocated litigation of these claims under the rubric of ineffective assistance of counsel in a Post Conviction Relief Act proceeding.

DA  
Robert Brady Esq  
J. Porosky