

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA

Appellee

v.

JOSEPH DURBIN,

Appellant

No. 382 WDA 2003

Appeal from the Judgment of Sentence entered on October 28, 2002
in the Court of Common Pleas of Washington County,
Criminal Division, No. 1249 of 2001

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA

Appellee

v.

JOSEPH DURBIN,

Appellant

No. 383 WDA 2003

Appeal from the Judgment of Sentence entered on October 28, 2002
in the Court of Common Pleas of Washington County,
Criminal Division, No. 384 of 2002

BEFORE: JOHNSON, MUSMANNO, JJ. and McEWEN, P.J.E.

MEMORANDUM:

FILED: November 10, 2003

Joseph Durbin ("Durbin") appeals from the judgment of sentence imposed after he was convicted, at two separate informations, of indecent assault, involuntary deviate sexual intercourse, corruption of minors, and aggravated indecent assault (two counts).¹ We affirm.

¹ 18 Pa.C.S.A. §§ 3126(a)(7), 3123(a)(6), 6301(a)(1), 3125(7).

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The charges arose as a result of sexual contact between Durbin and M.R., the minor daughter of Durbin's girlfriend, Karen Renz, with whom Durbin lived. M.R., who was thirteen at the time of trial, alleged that the incidents began in 1996 and continued over a period of years, until May 2001, when Karen Renz learned of the abuse.² After a jury trial, Durbin was convicted of the above-cited charges, and the trial court conducted a hearing to determine if Durbin was a sexually violent predator. The trial court determined that the evidence supported an assessment that Durbin is a sexually violent predator, and sentenced Durbin to prison terms of one to two years for indecent assault, six to twelve years for involuntary deviate sexual intercourse, one to two years for corruption of minors, and three to six years for aggravated indecent assault. The trial court ordered all of the sentences to run consecutively, for an aggregate sentence of eleven to twenty-two years.

Durbin subsequently filed post-sentence Motions, which the trial court denied. Durbin then filed the instant timely appeal and a Statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b), as ordered by the trial court. Durbin raises the following issues on appeal, all of which were raised in his Rule 1925(b) Statement:

1. Whether the trial court erred in finding that the guilty verdicts were not against the weight of the evidence?

² The trial court set forth in detail the pertinent facts and procedural history of this case. **See** Trial Court Opinion, 3/31/03, at 1-8.

2. Whether the trial court erred in refusing to allow the jury to hear a reading of M.R.'s testimony when the jury requested such reading in a question to the court?

3. Whether the trial court erred in finding that it had not abused its discretion in sentencing Durbin to an aggregate prison term of 11-22 years?

See Brief of Appellant at 8.

We have reviewed the applicable law and the certified record in regard to each of Durbin's contentions. With regard to Durbin's first two issues, we rely on the trial court's well-reasoned Opinion, and affirm on that basis. **See** Trial Court Opinion, 3/31/03, at 8-10.³

In his third issue on appeal, Durbin contends that the trial court erred in sentencing him to an aggregate prison term of 11 to 22 years. Durbin appears to argue that the trial court erred in imposing consecutive sentences. **See** Brief of Appellant at 16-17.

When a defendant raises an issue that implicates the discretionary aspects of his sentence, the defendant must petition this Court for permission to appeal and demonstrate that there is a substantial question that the sentence imposed was not appropriate under the Sentencing Code or was contrary to the fundamental norms that underlie the sentencing process. **See** 42 Pa.C.S.A. § 9781(b); **Commonwealth v. Tuladziecki**, 522 A.2d 17 (Pa. 1987). In seeking such an appeal, a defendant

³ The trial court has set forth the appropriate standards of review, for all three issues on appeal, in its Opinion.

must include in his brief a concise statement of the reasons relied upon in support of his request for an appeal. Pa.R.A.P. 2119(f). We will grant permission to appeal only where the defendant has advanced a colorable argument that the sentence imposed is inconsistent with the Sentencing Code, or is "contrary to the fundamental norms which underlie the sentencing process." **Commonwealth v. Martin**, 727 A.2d 1136, 1143 (Pa. Super. 1999). "To demonstrate that a substantial question exists, a party must articulate reasons why a particular sentence raises doubts that the trial court did not properly consider the general guidelines provided by the legislature in 42 Pa.C.S.A. § 9781." **Commonwealth v. Koehler**, 737 A.2d 225, 244 (Pa. 1999).

In the instant case, Durbin failed to set forth the required Pa.R.A.P. 2119(f) statement.⁴ However, such an omission "is not fatal to the Appellant's claim if the presence or absence of a substantial question can easily be determined from the Appellant's brief." **Commonwealth v. Davis**, 734 A.2d 879, 882 (Pa. Super. 1999). Here, we discern from Durbin's brief that he objects to the imposition of consecutive sentences, and that the trial court "overlooked pertinent facts . . . and disregarded the force of the evidence presented against him at the trial and the sentencing in the matter." **See** Brief of Appellant at 17.

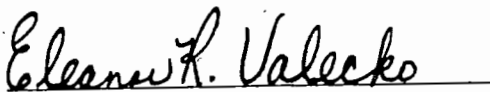
⁴ The Commonwealth did not file a brief in this case, and did not object to the defect in Durbin's brief.

The Sentencing Code permits the trial court to impose consecutive sentences. **See** Pa.C.S.A. § 9721(a). In addition, a claim that the trial court did not adequately consider mitigating factors when imposing sentence does not raise a substantial question. **Commonwealth v. Byrd**, 657 A.2d 961, 963 (Pa. Super. 1995). Durbin's claim that the sentencing court "overlooked pertinent facts" and "disregarded the force of the evidence" appears to be a claim that the sentencing court did not adequately consider mitigating factors. Thus, Durbin has not set forth a substantial question.

Even if Durbin had properly preserved his appeal of the discretionary aspects of his sentence, we would affirm for the reasons stated in the trial court's Opinion on this issue. **See** Trial Court Opinion, 3/31/03, at 10-12.

Judgment of sentence affirmed.

Judgment Entered:


Deputy Prothonotary

Date: November 10, 2003