NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. STEVEN GESER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1026 EDA 2012

Appeal from the Judgment of Sentence October 4, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at Nos.: CP-51-CR-0000401-2011
CP-51-CR-0000402-2011

BEFORE: MUSMANNO, J., WECHT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: February 4, 2013

Appellant, Steven Geser, appeals from the judgment of sentence entered on October 4, 2011, following his guilty plea to two counts of aggravated assault and one count of possession of an instrument of crime (PIC). We affirm.

The charges arose from a September 14, 2010, incident wherein Appellant, who was using illegal narcotics, was brandishing a gun, which was later found to be a BB gun, at a crowded intersection in Philadelphia. When the police arrived, Appellant defied their orders to relinquish the gun and, instead, pointed the gun at the police multiple times. The police were

---

* Retired Senior Judge assigned to the Superior Court.

ultimately forced to discharge their weapons, striking him and causing him to be paralyzed below the waist. At the time of the incident, many members of the public who were present at the scene, including three juveniles who witnessed the entire incident, fled into a corner store.

Appellant entered his open guilty pleas on August 24, 2011. On October 4, 2011, the trial court sentenced Appellant to an aggregate term of not less than three nor more than six years of incarceration to be followed by nine years of probation. Appellant filed a post-sentence motion challenging the discretionary aspects of sentence. The motion was denied by operation of law on February 13, 2012. The instant appeal followed on March 13, 2012.[1] On May 16, 2012, this Court issued an order to show cause as to why the appeal should not be dismissed as untimely. Appellant filed a response on May 22, 2012.

On appeal, Appellant raises the following issues for our review:

> Did not the court err in imposing sentence as it disregarded the sentencing guidelines and instead used the statutory maximum of the offenses as the starting point in determining an appropriate sentence?
>
> Did not the court err in imposing sentence as it erroneously relied on the seriousness of the offense, a preconsidered factor incorporated within the guidelines, in giving [A]ppellant an aggravated sentence?

---

[1] Appellant filed a timely statement and a supplemental statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On May 21, 2012, the trial court issued an opinion, indicating that the appeal should be quashed as untimely filed. (***See*** Trial Court Opinion, 5/21/12, at 1-2).

> Did not the court err in imposing sentence as it failed to give individualized consideration to Appellant's personal history and background?
>
> Did not the court err in imposing sentence as it [sic] the sentence imposed far surpassed what was required to protect the public and address [A]ppellant's rehabilitative needs?

(Appellant's Brief, at 3).

Prior to addressing the merits of Appellant's appeal, we must decide if it is properly before us. Timeliness of an appeal is a jurisdictional question. "When a statute fixes the time within which an appeal may be taken, the time may not be extended as a matter of indulgence or grace." ***Commonwealth v. Pena***, 31 A.3d 704, 706 (Pa. Super. 2011) (citation omitted). Our Rules of Appellate Procedure mandate that the notice of appeal "shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a). Time limitations on filing appeals are strictly construed. ***Commonwealth v. Perez***, 799 A.2d 848, 851 (Pa. Super. 2002).

The dispute regarding the timeliness of the instant appeal centers on when Appellant filed his post-sentence motion. The Pennsylvania Rules of Criminal Procedure provide that the filing of a **timely** post-sentence motion tolls the filing of a notice of appeal until thirty days from the date the motion is either decided or withdrawn. ***See*** Pa.R.Crim.P. 720(A)(2). However, the filing of an untimely post-sentence motion does not toll the thirty-day period

to file an appeal from the judgment of sentence. ***See Commonwealth v. Dreves***, 839 A.2d 1122, 1127 (Pa. Super. 2003) (*en banc*).

In its 1925(a) opinion, the trial court contended that the post-sentence motion was filed on October 17, 2011, and, therefore, was untimely. (***See*** Trial Ct. Op., 5/21/12, at 1). However, Appellant contends that there was a docketing error and that the motion was timely filed on October 14, 2011. (***See*** Appellant's Brief, at 5 n.1). Our review of the record demonstrates that Appellant is correct, the Court of Common Pleas date-stamped the motion on October 14, 2011. (***See*** Post Sentencing Motion, 10/14/11, at 1). It is not apparent from the record why the docket lists the motion as being filed on October 17, 2011; however, it is clearly error. Thus, as we find that Appellant timely filed the post-sentence motion on October 14, 2011, and timely filed the notice of appeal on March 13, 2012, thirty days after the denial of the post-sentence motion, the appeal is timely.

Appellant challenges the discretionary aspects of his sentence on appeal.[2] The right to appeal the discretionary aspects of a sentence is not absolute. ***See McAfee***, ***supra*** at 274. When an appellant challenges the discretionary aspects of the sentence imposed, he must present "a

---

[2] We note that Appellant preserved his discretionary aspects of sentence claim by filing a timely post-sentence motion for reconsideration of sentence. ***See Commonwealth v. McAfee***, 849 A.2d 270, 275 (Pa. Super. 2004), *appeal denied*, 860 A.2d 122 (Pa. 2004).

substantial question as to the appropriateness of the sentence." ***Commonwealth v. Anderson***, 830 A.2d 1013, 1017 (Pa. Super. 2003) (citations omitted). An appellant must, pursuant to Pennsylvania Rule of Appellate Procedure 2119(f), articulate "a colorable argument that the sentence violates a particular provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing scheme." ***Commonwealth v. Kimbrough***, 872 A.2d 1244, 1263 (Pa. Super. 2005) (*en banc*), *appeal denied*, 887 A.2d 1240 (Pa. 2005) (citation omitted). If an appellant's Rule 2119(f) statement meets these prerequisites, we determine whether a substantial question exists. ***See Commonwealth v. Goggins***, 748 A.2d 721, 727 (Pa. Super. 2000) (*en banc*), *appeal denied*, 759 A.2d 920 (Pa. 2000). "Our inquiry must focus on the **reasons** for which the appeal is sought, in contrast to the **facts** underlying the appeal, which are necessary only to decide the appeal on the merits." ***Id.*** (emphasis in original).

Here, Appellant has included a Rule 2119(f) statement in his brief. (***See*** Appellant's Brief, at 7-10). Appellant argues that the sentence was manifestly excessive and unreasonable because the sentencing court: (1) improperly disregarded the sentencing guidelines; (2) sentenced Appellant in the aggravated range based on factors already considered within the sentencing guidelines; (3) failed to consider mitigating circumstances; and (4) failed to consider Appellant's rehabilitative needs, and failed to

appropriately address what was needed to protect the public. (***See id.*** at 7).

Appellant first claims that the sentencing court failed to consider the sentencing guidelines and instead relied on the statutory maximum as the starting point in determining Appellant's sentence. (***See id.*** at 15-17). A claim that the sentencing court failed to adequately consider the sentencing guidelines raises a substantial question. ***See Commonwealth v. Twitty***, 876 A.2d 433, 438 (Pa. Super. 2005), *appeal denied*, 892 A.2d 823 (Pa. 2005). Therefore, we will address the merits of Appellant's claim.

Our review of the record demonstrates that there is no support for Appellant's contention. In arguing that the sentencing court used the statutory maximum rather the sentencing guidelines as the starting point, Appellant picks out two out-of-context remarks by the sentencing court and inserts phrases not used by the sentencing court. (***See*** Appellant's Brief, at 16).

In the first instance, the record reflects that there was a discrepancy between the CPCMS records, the FBI extract, and the pre-sentence report regarding the grading of one of Appellant's prior convictions. (***See*** N.T. Sentencing, 10/04/11, at 4-5). The parties were unable to tell from the record whether the conviction in question was a felony of the first or third degree, and the difference in grading would change the sentencing guidelines by six months. (***See id.*** at 5). The parties had been unable to

obtain any guidance on the issue. (***See id.*** at 5-8). In discussing the problem, the sentencing court noted that Appellant was facing a maximum possible sentence of twenty-two and a half to forty-five years, thus, he was not sure how much difference the grading would make in the overall scheme, but then noted that he would use the lower grading. (***See id.*** at 7-8). We see nothing in this remark that would demonstrate that the sentencing court intended to disregard the sentencing guidelines, rather the sentencing court made a ruling to Appellant's benefit by using the lower guidelines range.

The second incident occurred after sentencing, when defense counsel protested that Appellant had been sentenced in the aggravated range. (***See id.*** at 49-50). The trial court proceeded to explain that Appellant had not been sentenced in the aggravated range on each individual crime but rather the sentences had been run consecutively; the trial judge then noted that he believed his earlier recitation of the statutory maximums was incorrect and put the correct maximums on the record. (***See id.*** at 50). Again, we see nothing in this discussion that supports Appellant's contentions.

Further, the record reflects that the guidelines range was placed on the record (***see id.*** at 8), that the sentencing court considered them in imposing sentence (***see id.*** at 47), and sentenced Appellant squarely within the standard range on each of the charges. (***See id.*** at 49-50). Appellant's claim is meritless.

In his second claim, Appellant argues that the sentencing court sentenced Appellant in the aggravated range based on factors already considered within the sentencing guidelines. (***See*** Appellant's Brief, at 17-18). This claims states a substantial question and, therefore, will be reviewed on its merits. ***Commonwealth v. Rhodes***, 990 A.2d 732, 745 (Pa. Super. 2009), *appeal denied*, 14 A.3d 827 (Pa. 2010). Initially, we note that the record, as noted above, belies Appellant's claim that he was sentenced in the aggravated range. (***See*** N.T. Sentencing, ***supra*** at 49-50). Rather, Appellant was sentenced in the standard range on each individual charge and the trial court chose to run two of the sentences consecutively, a decision Appellant has not challenged. (***See id.*** at 48-49; ***see also*** Appellant's Brief, at 5-10). In any event, the record does not support the contention that the trial court focused only on the seriousness of the offense. The record reflects that the trial court considered the PSI; that Appellant was awaiting sentence on two other matters; Appellant's failures to respond to rehabilitation; that juveniles were present at the crime and suffered the trauma of both seeing a man waving a gun around and seeing him shot; the testimony from Appellant's friends; the psychiatric evaluation of Appellant; the testimony regarding the ability of the prison system to meet Appellant's medical needs; and Appellant's statements and demeanor throughout the trial and at sentencing. (***See*** N.T. Sentencing, ***supra*** at 40-47). Appellant's contention is lacking in merit.

Appellant also claims that the sentencing court failed to properly consider mitigating factors such as his personal history and current circumstances. (***See*** Appellant's Brief, at 13, 18). It is well settled that a claim "that a sentencing court failed to consider or did not adequately consider certain factors does not raise a substantial question that the sentence was inappropriate." ***Commonwealth v. Johnson***, 961 A.2d 877, 880 (Pa. Super. 2008), *appeal denied*, 968 A.2d 1280 (Pa. 2009) (citation omitted). Thus, Appellant's claim that the sentencing court abused its discretion by failing to consider mitigating factors does not present a substantial question. Accordingly, we decline to review this issue.

Appellant next claims that the sentencing court failed to consider Appellant's rehabilitative needs. (***See*** Appellant's Brief, at 18-19). Such a claim does not present a substantial question. ***See Commonwealth v. Bershad***, 693 A.2d 1303, 1309 (Pa. Super. 1997), *disapproved on other grounds*, ***Commonwealth v. Dixon***, 985 A.2d 720 (Pa. 2009).[3] Accordingly, we decline to address this issue.

---

[3] A panel of this Court in ***Commonwealth v. Downing***, 990 A.2d 788, 793 (Pa. Super. 2010), noted that a claim that the sentencing court did not consider the defendant's rehabilitative needs raised a substantial question. While the decision cites ***Commonwealth v. Ventura***, 975 A.2d 1128 (Pa. Super. 2009), *appeal denied*, 987 A.2d 161 (Pa. 2009), as the sole support for this proposition, the Court in ***Ventura*** did not hold that this contention raises a substantial question. ***See Ventura***, ***supra*** at 1133-35. Rather, the Court in ***Ventura*** disposed of all of appellant's sentencing claims by noting that the trial court had the benefit of a presentence report at the time of

(Footnote Continued Next Page)

Appellant last argues that his sentence was harsh and excessive because it surpassed what was required to protect the public. (***See*** Appellant's Brief, at 18-19). A claim that a sentence was excessive and unreasonable can raise a substantial question. ***See Commonwealth v. Mouzon***, 812 A.2d 617, 627 (Pa. 2002). However,

> [w]hen imposing a sentence, a court is required to consider the particular circumstances of the offense and the character of the defendant. . . . Where the sentencing court had the benefit of a presentence investigation report ("PSI"), we can assume the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. Further, where a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code.

Commonwealth v. Moury, 992 A.2d 162, 171 (Pa. Super. 2010) (internal quotation marks and citations omitted). Here, the sentencing court stated that it had reviewed the PSI. (***See*** N.T. Sentencing, ***supra*** at 40). The sentencing court then sentenced Appellant in the standard range; thus, the sentence is not excessive or unreasonable. ***See Commonwealth v. Cruz-Centeno***, 668 A.2d 536, 545-46 (Pa. Super. 1995), *appeal denied*, 676 A.2d

(Footnote Continued) ————————————————

sentencing and that since the sentence was not outside of the guidelines or unreasonable there was no merit to any of the sentencing claims. ***See id.*** Further, there is a long line of cases holding that a claim that the sentencing court failed to consider properly a defendant's rehabilitative needs does not raise a substantial question. ***See, e.g.***, ***Commonwealth v. Berry***, 785 A.2d 994, 997 (Pa. Super. 2001); ***Commonwealth v. Cleveland***, 703 A.2d 1046, 1048 (Pa. Super. 1997), *appeal denied*, 725 A.2d 1218 (Pa. 1998); ***Commonwealth v. Lawson***, 650 A.2d 876, 881 (Pa. Super. 1994), *appeal denied*, 655 A.2d 985 (Pa. 1995).

1195 (Pa. 1996) (stating combination of PSI and standard range sentence, absent more, cannot be considered excessive or unreasonable). Therefore, Appellant has not raised a substantial question that his sentence was excessive and unreasonable, and we decline to address this issue.

Judgment of sentence affirmed. Jurisdiction relinquished.