NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	
BRIAN THOMAS BELL,	:	No. 1039 WDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, March 13, 2012,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0000857-2011

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND OTT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: FILED: January 14, 2014

This is an appeal from the judgment of sentence entered on March 13, 2012, in the Court of Common Pleas of Allegheny County. Following a jury trial, appellant was convicted of one count of possession of a firearm prohibited, 18 Pa.C.S.A. § 6105(a)(1); one count of possession of marijuana, 35 P.S. § 780-113(a)(16); and one count of possession of drug paraphernalia, 35 P.S. § 780-113(a)(32). Appellant was acquitted of possession with intent to deliver marijuana. Appellant was sentenced to five to ten years' incarceration, with one day of credit for time served. Additionally, the court sentenced appellant to three years of probation with the requirement that he undergo random drug screening. Appellant filed a timely motion to modify his sentence. Following a hearing, the motion was

denied and this appeal followed.[1] Appellant was directed to file a concise statement of errors complained of on appeal, and he complied.

We now proceed with the factual history of this matter. On December 16, 2010, East McKeesport Police Officer Philip Frederick Hathaway ("Officer Hathaway") responded to a call for shots fired in a wooded area within the borough of Wall. After arriving on the scene, Officer Hathaway began canvassing the dense wooded area. As he drove his police vehicle down a single-vehicle road that led to a residence, Officer Hathaway noticed a man in the woods wearing hunting gear. According to Officer Hathaway, the man wore brown overalls, an orange hat, and carried a shotgun. Officer Hathaway estimated the wooded area was approximately 300 yards wide.

Upon seeing this man, Officer Hathaway drew his gun and ordered him out of the woods. The man complied and identified himself as Brian Bell, appellant herein. When asked what he was doing, appellant responded that he had just shot a deer. Officer Hathaway informed appellant that deer were not in season, and appellant stated it was "okay" because he only shot a doe. Officer Hathaway informed appellant that doe was not in season either, and out of concern for the safety of others in the area,

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[1] On August 10, 2012, counsel filed an application for bail pending appeal. A hearing was held on August 23, 2012, after which the trial court granted the application and placed appellant on house arrest during the pendency of his direct appeal.

Officer Hathaway told appellant he would be taking his shotgun. Appellant was informed he could retrieve the gun from the Chief of Police at a later time. Before leaving appellant, Officer Hathaway explained the implications of shooting deer out of season and informed appellant the Game Commission would be notified. At trial, Officer Hathaway identified the shotgun he seized as a 12-gauge Mossberg pump-action shotgun.

Officer Hathaway returned to the police station, secured the shotgun, and contacted the Game Commission. Officer Hathaway spoke to Officer Regis Denne ("Officer Denne") who subsequently met Officer Hathaway at the police station. Both officers went to appellant's home and returned the shotgun to him. Officer Denne spoke to appellant about shooting deer out of season. Before leaving appellant's home, Officer Denne seized the deer that had appellant shot.

The next day, Officer Hathaway learned that appellant was prohibited from possessing any firearms as he was a convicted felon. After confirming this information, Officer Hathaway applied for a search warrant for the shotgun and "any and all firearms, ammunition, controlled substances, paraphernalia used for the ingestion, packaging or manufacturing of controlled substances, indicia of residency, unlawfully obtained animal game parts." The search warrant was approved by Magistrate Robert Barner.

On December 19, 2010, Officer Hathaway and another officer from the East McKeesport Police Department along with three officers from the

State Game Commission executed the warrant at appellant's residence. Once inside the residence, the officers found the Mossberg shotgun leaning against the wall in between the refrigerator and a Tupperware container. When Officer Hathaway went to move the Tupperware container in order to seize the shotgun, he noticed an open yellow bag of dog food on the ground next to it. Officer Hathaway testified that he looked in the bag and noticed what appeared to be marijuana. Upon further investigation, Officer Hathaway discovered that the bag of dog food contained multiple individually packaged bags of what was later confirmed to be marijuana. Also located in the kitchen area, the police recovered a bag of marijuana in the freezer, a beam scale, shotgun ammunition, empty rifle shells, a metal grinder, rolling papers, and three porcelain jars containing marijuana. Aside from the Mossberg shotgun, no other firearms were found in appellant's residence.

In appellant's master bedroom, the police found suspected marijuana pipes in a dresser. In an adjoining room, police discovered multiple light ballasts and marijuana plants of various sizes. In the basement, the police found multiple buckets containing red filtration rocks connected to a hose system.

As a result of killing a deer out of season, appellant lost his hunting privileges for three years and was ordered to pay a $1,500 fine. Appellant testified he has smoked marijuana for 40 years for medicinal purposes.

Appellant testified that he does not sell the marijuana, but rather divides the marijuana in small bags for personal use and uses the bigger bags for cooking. Appellant had a prior conviction for aggravated assault in 1994 which legally prohibited him from possessing a firearm.

Appellant raises three issues:

> I. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS ALL PHYSICAL EVIDENCE SEIZED FROM HIS RESIDENCE AS THE DESCRIPTION OF THE ITEMS TO BE SEIZED LISTED ON THE APPLICATION FOR SEARCH WARRANT WAS UNCONSTITUTIONALLY OVERBROAD AND AMOUNTED TO A GENERAL SEARCH AND SEIZURE?
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> II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S PRE-TRIAL MOTION TO SEVER THE CHARGE OF PERSON NOT TO POSSESS A FIREARM FROM THE THREE CHARGES RELATING TO VIOLATIONS OF THE CONTROLLED SUBSTANCE, DRUG, DEVICE AND COSMETIC ACT, WHERE EVIDENCE OF APPELLANT'S PRIOR CONVICTION WAS UNDULY PREJUDICIAL AT TRIAL?
>
> III. DID THE TRIAL COURT ABUSE ITS DISCRETION BY SENTENCING APPELLANT TO A LENGTHY TERM OF INCARCERATION WITHOUT PROPERLY CONSIDERING THE PROTECTION OF THE PUBLIC AND THE GRAVITY OF THE OFFENSE AS IT RELATES TO THE IMPACT ON THE COMMUNITY?

Appellant's brief at 6.

Prior to the start of trial, the trial court conducted a hearing on appellant's motion to suppress. The hearing consisted of argument

addressing the language contained in the search warrant. Specifically, the search warrant listed as items to be searched for and seized:

> Any and all firearms, ammunition, controlled substances, paraphernalia used for the ingestion, packaging or manufacturing of controlled substances, indicia of residency, unlawfully obtained animal game parts.

Application for Search Warrant and Authorization.

Initially, the Commonwealth conceded "that there would not be probable cause to look for any grow operation or controlled substances or paraphernalia used for the ingestion o[r] packaging or manufacturing of controlled substances." (Suppression hearing, 12/13/11 at 3.) The Commonwealth then pointed out it believed there was probable cause for firearms and ammunition. (***Id.*** at 3-4.) After pointing out that the Mossberg shotgun was in appellant's kitchen in plain view and that appellant did not possess additional firearms, defense counsel argued that the entire search should be invalidated. (***Id.*** at 5-7.) The trial court concluded that while the warrant was "overly broad," the police "still have the right to search for the guns. If they find other contraband during the course of the search, so be it." (***Id.*** at 7-8.) The trial court then denied the motion to suppress.

Instantly, appellant argues the description of the items listed on the search warrant was unconstitutionally overbroad and amounted to a general search and seizure. In ***Commonwealth v. Jones***, 605 Pa. 188, 988 A.2d

649 (2010), our supreme court set out our standard and scope of review regarding suppression court rulings:

> Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. ***Commonwealth v. Bomar***, 573 Pa. 426, 826 A.2d 831, 842 (2003). Where, as here, the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, "whose duty it is to determine if the suppression court properly applied the law to the facts." ***Commonwealth v. Mistler***, 590 Pa. 390, 912 A.2d 1265, 1269 (2006) (quoting ***Commonwealth v. Nester***, 551 Pa. 157, 709 A.2d 879, 881 (1998)). Thus, the conclusions of law of the courts below are subject to our plenary review. ***Mistler***, ***supra***; ***Commonwealth v. Morley***, 545 Pa. 420, 681 A.2d 1254, 1256 n. 2 (1996).

Id. at 197-198, 988 A.2d at 654.

Under the Fourth Amendment to the United States Constitution, it is a fundamental requirement that a search warrant must describe with

particularity the place to be searched and the items to be seized.[2] ***Lo-Ji Sales, Inc. v. New York***, 442 U.S. 319 (1979). The Pennsylvania Constitution provides that no warrant to seize any "things shall issue without describing them as nearly as may be." Pa. Const. Art. I § 8. In keeping with the constitutional standard, Rule 205 of the Pennsylvania Rules of Criminal Procedure specifies that a search warrant must "identify specifically the property to be seized." Pa.R.Crim.P. 205(2). Our supreme court has held that "where the items to be seized are as precisely identified as the nature of the activity permits . . . the searching officer is only required to describe the general class of the item he is seeking." ***Commonwealth v. Rega***, 593 Pa. 659, 685, 933 A.2d 997, 1012 (2007) (citations omitted).

The ***Rega*** court continued by discussing the relationship between the description of the items in the warrant and whether there was probable cause to search for those items when the warrant was issued:

> A warrant is defective when its explanatory narrative does not describe as clearly as possible those items for which there is probable cause to search. In assessing the validity of a description contained in a

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[2] The Warrant Clause of the Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

> warrant, a court must initially determine for what items there was probable cause to search. The sufficiency of the description [in the warrant] must then be measured against those items for which there was probable cause. Any unreasonable discrepancy between the items for which there was probable cause [to search] and the description in the warrant requires suppression.

Id. (citation and quotation omitted).

In the instant case, the affidavit of probable cause reveals that the search of appellant's house was based entirely on the hunting encounter where Officer Hathaway caught appellant in the act of hunting out of season and confiscated his Mossberg shotgun on December 16, 2010. In the affidavit, Officer Hathaway identified the firearm he returned to appellant as a "Mosberg [sic] shotgun." The affidavit of probable cause went on to note that Officer Hathaway had been advised that a check of appellant's criminal history revealed that he was a convicted felon; on June 25, 1992, guilty pleas were entered for criminal conspiracy, a felony 3; possession with intent to deliver a controlled substance, a felony 2; and aggravated assault, a felony 2.

The search warrant listed the "items to be searched for and seized" as "any and all firearms, ammunition, controlled substances, paraphernalia used for the ingestion, packaging or manufacturing of controlled substances, indicia of residency, unlawfully obtained animal game parts." Clearly, there was probable cause to believe the Mossberg shotgun would be located at appellant's residence. However, the affidavit of probable cause clearly did

not establish probable cause to search for any controlled substances or related items. With respect to that part of the search warrant, we find it invalid.

Appellant argues the search warrant was overbroad when it listed "any and all firearms" as well as "ammunition." In support of his position, appellant relies on ***Commonwealth v. Santner***, 454 A.2d 24 (Pa.Super. 1982), ***cert. denied***, 468 U.S. 1217 (1984). In ***Santner***, this court held that the warrant authorized a far broader search than was justified. The information contained in the affidavit of probable cause described how the appellant was suspected of unlawfully engaging in the practice of medicine while improperly prescribing controlled substances for known addicts. ***Id.*** at 27. Specifically, the affidavit identified eight named individuals whom the officers knew or interviewed and set forth two specific time periods during which the activity in question occurred. ***Id.*** "Despite this specificity," the court explained,

> the warrant was not restricted either to the files of the eight named individuals, or to the files of the class of individuals who had been examined, or as to time. Instead, it authorized the seizure of ***all*** of the patients' "records and charts," and ***all*** "ledgers and bookkeeping pertaining to patients," whether the patients were or were not taking any drugs, and whether they were current patients or had not been patients for many years.

Id. at 27-28 (emphasis in original). We held that the trial court erred in denying the motion to suppress and ordered a new trial. ***Id.*** at 31.

Appellant also refers this court to ***Commonwealth v. Grossman***, 521 Pa. 290, 555 A.2d 896 (1989), for support. In ***Grossman***, the affidavit established probable cause for three specific files, yet the police expanded the search to include "all insurance files, payment records, receipt records, copies of insurance applications and policies [and] canceled checks." ***Id.*** at 291, 555 A.2d at 897. Some 2,000 files were seized by the police. Our supreme court held that the warrant authorizing the seizure of "all files" was unconstitutionally overbroad in its failure to describe as specifically as reasonably possible the three files described in the affidavit for which there was probable cause. ***Id.*** at 298, 555 A.2d at 900.

Again, we believe that probable cause for the search of the shotgun is obvious. The question is whether the use of the word "firearms" in the items to be searched for is reasonable. The police knew appellant, a convicted felon, had committed a crime by possessing a shotgun that he was prohibited from having. Was it then reasonable for the police to believe that appellant was more likely than not in possession of additional firearms in his home? ***See Commonwealth v. Gannon***, 454 A.2d 561, 565 (Pa.Super. 1982) ("The critical element in a reasonable search is not that the owner of the property is suspected of crime but that the specific 'things' to be searched for and seized are located on the property to which entry is sought.").

We believe that it was reasonable to search for "any and all firearms" as well as "ammunition." We believe the facts of the matter before us are unlike ***Santner*** or ***Grossman*** where the warrant was unconstitutional for overbreadth when it authorized in clear or specific terms the seizure of an entire set of items or documents, many of which proved unrelated to the crime or investigation.

We liken this situation to a case where the selling of narcotics is involved. In ***Commonwealth v. Rivera***, 816 A.2d 282 (Pa.Super. 2003), ***appeal denied***, 573 Pa. 715, 828 A.2d 350 (2003), police officers obtained a search warrant for a residence at which two individuals were suspected of dealing cocaine. The warrant authorized the search and seizure of "any assets, paraphernalia or other materials related to the sale or use of [cocaine]." ***Id.*** at 292. We found that the items listed in the search warrant were not overbroad because they specifically related to the sale of cocaine. ***Id.***

In the instant case, given appellant's status as a felon, any firearm possessed by him was evidence of a crime. According to 18 Pa.C.S.A. § 6105,

> **Persons not to possess, use, manufacture, control, sell or transfer firearms,**
>
> **(a) Offense defined.--**
>
> (1) A person who has been convicted of an offense enumerated in subsection (b), within or without

> this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth.

Our supreme court has held that "where the items to be seized are as precisely identified as the nature of the activity permits . . . the searching officer is only required to describe the general class of the item he is seeking." ***Commonwealth v. Matthews***, 446 Pa. 65, 285 A.2d 510 (1971). Appellant was hunting out of season. It is not unreasonable to think he may possess other firearms. Additionally, appellant contends it was not illegal for him to possess ammunition. As set out above, the statute makes it illegal for appellant to possess or use firearms. As appellant had obviously fired his shotgun to kill a deer, evidence of ammunition goes to prove that appellant used the firearm. Thus, the inclusion of ammunition in the search warrant was not in error.

Our analysis of this issue is not finished. Because the search warrant was valid with respect to firearms and ammunition, the police lawfully entered appellant's house. Officer Hathaway described what occurred after entering appellant's house:

> The Commonwealth: After [defendant, his girlfriend and two dogs were out of the house], did you do a search of the Defendant's home?

Officer Hathaway: Yes.

Q. Looking for guns?

A. Yes.

Q. Looking for firearms?

A. Yes.

Q. Did you find Commonwealth's Exhibit 1 [the Mossberg shotgun] in the Defendant's house?

A. Yes.

Q. Where did you find it at [sic]?

A. It was leaning against the wall in between the refrigerator and a Tupperware container with hunting clothes on top of it. The butt of the gun was on the ground, and the barrel was facing upward.

Q. Did you seize that then?

A. Yes.

Q. While you were doing that, did you see anything else in the Defendant's kitchen area that caught your attention?

A. Yes. While I was looking trying to push the clothes and the Tupperware container away to remove the firearm so I could secure it, there was an open yellow bag of dog food that was on the ground next to it; and when I looked in the bag, I saw what appeared to be suspected marijuana.

Q. And could you describe how the marijuana was packaged?

> A. There was [sic] 18 separate bags in the bag of dog food. In the one bag there was [sic] 45 individually-wrapped bags of marijuana of various weights, and the other 17 were also of various weights.

Notes of testimony, 12/14/11 at 45-46.

The plain view doctrine has been described as follows:

> Generally, a warrant stating probable cause is required before a police officer may search for or seize evidence. However, [t]he plain view doctrine provides that evidence in plain view of the police can be seized without a warrant[.] The plain view doctrine applies if 1) police did not violate the Fourth Amendment during the course of their arrival at the location where they viewed the item in question; 2) the item was not obscured and could be seen plainly from that location; 3) the incriminating nature of the item was readily apparent; and 4) police had the lawful right to access the item.

Commonwealth v. Harvard, 64 A.3d 690, 698 (Pa.Super. 2013), ***appeal denied***, ___ A.3d ___ (Pa. Oct 10, 2013) (Table, No. 266 WAL 2013).

Based on the above testimony, the police lawfully seized the marijuana under the plain view exception to the warrant requirement. The incriminating nature of the bags of marijuana was readily apparent and in plain view. Moreover, as the police continued to lawfully search for firearms and ammunition in accordance with the search warrant, they discovered other drug paraphernalia. ***See Commonwealth v. Anderson***, 40 A.3d 1245 (Pa.Super. 2012) (cocaine and drug paraphernalia were lawfully seized from defendant's home under plain view doctrine, even though portion of search warrant allowing police to search for cocaine and drug paraphernalia

was invalid; during legal search for marijuana, police discovered the other items, whose criminal nature was readily apparent), ***appeal denied***, 616 Pa. 666, 51 A.3d 837 (2012); ***Commonwealth v. Santiago***, 736 A.2d 624, 633 (Pa.Super. 1999) (seizure of drugs in plain view permissible where officers were lawfully in apartment), ***appeal denied***, 561 Pa. 674, 749 A.2d 470 (2000).

In his second issue, appellant argues the trial court abused its discretion in denying appellant's pre-trial motion to sever the charge of person not to possess a firearm, 18 Pa.C.S.A. § 6105(a)(1), from the three charges relating to violations of the controlled substance, drug, device, and cosmetic act, where evidence of appellant's prior conviction was unduly prejudicial at trial.

This case presents a unique procedural posture in that the trial court has asked this court to remand the case for a new trial. Specifically, in its Rule 1925(a) opinion, the trial court advises that it should have granted appellant's pre-trial motion to sever. (Trial court opinion, 12/13/12 at 1.) A review of the transcript from the hearing on the motion to sever indicates the attorney for the Commonwealth agreed that the charges should be severed. (Motion to Sever Hearing, 12/14/11 at 3.) In its brief to this court, the Commonwealth states that it does not contest a remand for retrial on the drug charges; however, it believes appellant is not entitled to a retrial on the VUFA charge. (Commonwealth's brief at 19.)

Section 6105 prohibits persons who have been convicted of certain offenses from possessing, using, manufacturing, controlling, selling, or transferring firearms, and when leveling a charge under that section, the Commonwealth generally must present evidence to the fact-finder that the defendant had such a prior conviction. 18 Pa.C.S.A. § 6105(a)(1); ***Commonwealth v. Jones***, 858 A.2d 1198, 1207 (Pa.Super. 2003). Here, the trial court asked defense counsel if she would be willing to stipulate that appellant was disqualified from possessing a firearm to avoid mentioning the specific conviction. (Notes of testimony, 12/14/11 at 71-72.) The court explained that all the jury would hear was that "under this section [6105] there are certain enumerated felonies to which an individual becomes disqualified, and the conviction that [appellant] had is one of the enumerated felonies." (***Id***. at 72.) Defense counsel agreed to this stipulation. (***Id.***)

However, the trial court disregarded the stipulation when, following the presentation of evidence, the trial court asked the Commonwealth's attorney whether he had a copy of appellant's prior felony conviction and stated, "I'll allow you to put that into evidence in front of the jury." (Notes of testimony, 12/16/11 at 286.) The Commonwealth then proceeded to read the certified record in front of the jury, detailing that appellant had a 1994 conviction for aggravated assault, which legally prohibited him from possessing a firearm. (***Id.***)

In its Rule 1925(a) opinion, the trial court cites ***Jones***, ***supra***, as does appellant to support his argument that his motion to sever should have been granted. In ***Jones***, the appellant faced a Section 6105 charge as well as other charges that did not require the fact-finder to know of his previous convictions. The trial court denied the request for severance of the Section 6105 charge, but on appeal we noted that normally "evidence of prior crimes committed by a particular defendant is not admissible and any reference . . . constitutes reversible error." ***Id.*** at 1207. Specifically, the ***Jones*** court noted:

> [t]he purpose of this rule is to prevent the conviction of an accused for one crime by the use of evidence that he has committed other unrelated crimes, and to preclude the inference that because he has committed other crimes, he was more likely to commit that crime for which he is being tried.

Id. Moreover, "unless evidence of prior criminal conduct is otherwise admissible—for instance, to prove intent, identity, motive or a common scheme—a trial court should grant a defendant's motion to sever the charge of former convict not to own a firearm from the other charges." ***Id.*** at 1208.

Instantly, appellant asserts that trying the Section 6105 charge together with the drug charges prejudiced him with regard to the drug charges, which did not require or involve a prior conviction as an element of those crimes. ***See***, ***e.g.***, ***Jones***, ***supra***; ***Commonwealth v. Galassi***, 442 A.2d 328 (Pa.Super. 1982); ***Commonwealth v. Carroll***, 418 A.2d 702 (Pa.Super. 1980). It is without question that appellant was prejudiced on

the charges that did not require evidence of his prior conviction. Accordingly, the trial court erred when it denied appellant's motion to sever. Appellant is entitled to a new trial on the drug charges.

Last, appellant challenges his five to ten-year sentence of incarceration for possession of a firearm prohibited. Appellant is challenging the discretionary aspects of sentencing for which there is no automatic right to appeal. ***Commonwealth v. Koren***, 646 A.2d 1205, 1207 (Pa.Super. 1994). This appeal is, therefore, more appropriately considered a petition for allowance of appeal. 42 Pa.C.S.A. § 9781(b). Two requirements must be met before a challenge to the judgment of sentence will be heard on the merits. ***Koren***, ***supra***. 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 his sentence. ***Id.***; Pa.R.A.P. 2119(f). Second, he must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. 42 Pa.C.S.A. § 9781(b); ***Commonwealth v. Urrutia***, 653 A.2d 706, 710 (Pa.Super. 1995).

The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. ***Commonwealth v. Maneval***, 688 A.2d 1198, 1199-1200 (Pa.Super. 1997). Generally, however, in order to establish a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code

or contrary to the fundamental norms underlying the sentencing process. ***Id.***

Appellant has included in his brief the mandatory concise statement of reasons relied upon for allowance of appeal from the discretionary aspects of his sentence. (Appellant's brief at 39-43.) Therein, appellant complains that the sentence was within the statutory limit and the standard recommended range; however, the sentence was manifestly excessive, unreasonable, and an abuse of discretion as the trial court failed to consider the mitigating circumstances surrounding appellant's possession of a firearm. (***Id.*** at 41.) Appellant also notes that the trial court failed to provide reasons on the record to support the five to ten year sentence he imposed. According to appellant, the trial court focused exclusively on the marijuana possession and drug paraphernalia counts. (***Id.***)

Our review of the sentencing transcript reveals the following:

> The Court: Mr. Bell, I'm going to read the pre-sentence reports that have been prepared on you. I also recall the testimony very vividly, in particular, your testimony with respect to why you should be able to smoke and grow marijuana, and I also recall the large quantities of marijuana that were found in the residence when we were looking for the shotgun and other weapons and also the hydroponic system that was set up in your basement.
>
> The Defendant: Your Honor, there was no hydroponic system.
>
> The Court: Mr. Bell, I didn't interrupt you. I also recall your testimony that you had the right so

> smoke marijuana, and you had the right to do whatever you think. Well, that's wrong. You don't. We have certainly rules and regulations that are the norms of this society, and we expect people to follow them, not to make their own set of rules.
>
> In light of the testimony and facts of your case, the pre-sentence reports that I've review and the guidelines in your case, I'm going to sentence you to a period of incarceration of not less than five nor more than ten years to be followed by -- it's a standard range sentence -- to be followed by a period of probation of three years. During which time you are to undergo random drug screening.

Sentencing hearing, 3/13/12 at 16-17.

Appellant filed a timely motion to modify his sentence. At that hearing as well as the sentencing hearing, the court heard testimony that appellant supports his daughter and granddaughter, who is seriously ill. The court also heard testimony that appellant's conviction for aggravated assault was 19 years ago for beating up one of his friends who appellant learned had beaten his children while babysitting them. (***Id.*** at 10-11.) The Commonwealth noted "this is not the normal case that we usually see involving a gun." (***Id.*** at 15.) Appellant was not "advancing a criminal enterprise with the gun," but was hunting out of season. (***Id.***)[3]

Clearly, the trial court did not discuss its reasons for the sentence and instead focused on the drug convictions which we have vacated. As a result, we now vacate the sentence imposed for possession of firearm prohibited

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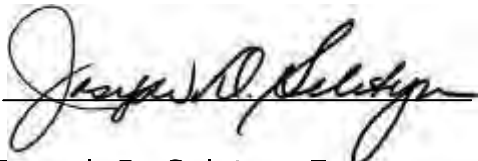
[3] In its brief, the Commonwealth states, "the equity in this case might weigh in favor of a lesser sentence." (Commonwealth's brief at 25.)

and remand for resentencing. ***See Commonwealth v. Bastone***, 467 A.2d 1339, 1341 (Pa.Super. 1983) (where trial court failed to state reasons for imposition of sentence on the record, and defendant filed a timely petition to vacate or modify sentence, raising the issue, but trial court failed to correct the error, the superior court could vacate the judgment of sentence and remand case for resentencing).

Appellant's judgment of sentence as to possession of firearm prohibited is vacated and remanded for resentencing. Appellant's judgment of sentence for drug charges is vacated, and case remanded for further proceedings. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/14/2014