

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
| Appellee | : | |
| | : | |
| v. | : | |
| | : | |
| BRANDON BISHOP, | : | |
| | : | |
| Appellant | : | No. 1069 EDA 2012 |

Appeal from the Judgment of Sentence February 14, 2012
 In the Court of Common Pleas of Lehigh County
 Criminal Division No(s): CP-39-CR-0003144-2011

BEFORE: DONOHUE, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

Filed: April 29, 2013

Appellant, Brandon Bishop, appeals from the judgment of sentence entered in the Lehigh County Court of Common Pleas after he pleaded guilty to aggravated assault.¹ He challenges the discretionary aspects of his sentence, which was the statutory maximum, and alleges that his sentence unreasonably exceeded the sentencing guidelines. We affirm.

The factual summary presented by Commonwealth at the guilty plea hearing established the following. Appellant began living with his fiancée,

* Former Justice specially assigned to the Superior Court.

¹ 18 Pa.C.S. § 2702(a)(1).

C.W.,² and C.W.'s two-year-old daughter, K.H., on March 7, 2011. N.T., 12/14/11, at 7. C.W. left K.H. in Appellant's care while she was at work.

Id.

[O]n May 19th of 2011 a woman by the name of [T.H.] brought the victim in this case, [K.H.], who was two years of age at the time, to her local police station in Lower Salford Township.

When there, it was determined that the child had a number of injuries[.]

When [K.H.] was brought [to the Lehigh County Child Advocacy Center], she literally had bruises all over her body[.]

She also had clumps of hair that were missing [and] she was walking with a limp.

[T]he nurse took one look at [K.H.] and said, "We can't examine her here. She has to go to the hospital," and [K.H.] was sent to . . . Lehigh Valley Hospital.

While there it was determined that she had an occipital skull fracture, petechia in her eyes, and bruising all over her body. And by [sic] all over her head, her body, her arms, her legs, her vagina. Everywhere on her body, there were bruises of different ages.

* * *

[Appellant] was interviewed by Detective Buckwalter of the Allentown Special Victim's Unit.

[Appellant] indicated that he was the babysitter of [K.H.] since they moved in. He acknowledged that for the last three months he had been abusing [K.H.] He told detective Buckwalter that he punched her in the face,

² We redacted the names to protect the child's identity.

punched her in the head, punched her in the back, punched her in the vagina.

He indicated that he would kick her in the back, kick her in the legs, and kick her in the body.

He indicated that he would pick her up by her hair and throw her to the ground, that he would cover her mouth with his hand so she couldn't breathe for up to a minute. That he would grab her by the neck, again, for up to a minute. That he would pick her up and drop her on the floor. That he would punch her in the stomach, and that he would hit her with a metal spoon in the head.

He indicated that he did these things because she was a princess and she needed to be tougher.

* * *

[D]octors at the hospital [indicated] that the bruising, the skull fracture, and the petechia are all consistent with what [Appellant] described.

Id. at 5–9.

Appellant was arrested on June 3, 2011, and charged with attempted criminal homicide, simple assault, aggravated assault, and endangering the welfare of a child.³ On December 14, 2011, Appellant entered an open guilty plea to one count of aggravated assault, a felony of the first degree⁴ that carried a maximum sentence of twenty years' imprisonment.⁵ *Id.* at 3.

³ 18 Pa.C.S. §§ 2501(a), 2701(a)(1), 4304(a)(1).

⁴ 18 Pa.C.S. § 2702(6).

⁵ 18 Pa.C.S. § 1103(1).

In exchange, the Commonwealth agreed not to pursue a mandatory five-year sentence⁶ and not to pursue the other counts of the information.

The trial court ordered a presentence investigation. *Id.* at 10. At the sentencing hearing on February 14, 2012, the trial court stated: "I have received and reviewed the pre-sentence report[] along with the attachments. [T]here were a number of letters and an additional evaluation provided by counsel. I have reviewed all of those. I also received a letter from [Appellant] himself and I read that." N.T., 2/14/12, at 5.

At the close of the sentencing hearing, the trial court observed:

You, [Appellant], suddenly suffer from some amnesia. But the most accurate recollection of what happened to that little girl was demonstrated by you on that video [of Appellant's interview with Detective Buckwalter]. You beat her. You kicked her. You choked her. You smothered her. You kicked her into walls. You threw her on the ground. You pulled out clumps of her hair. You broke her bone.

And you write me a letter and say you want A.R.D. and that you have learned your lesson after eight months in prison. You don't want to be perceived to others as a monster. But you are.

Id. at 35. The trial court found that "[t]he cruelty that [Appellant] demonstrated is of a level that nears torture." *Id.* at 36. The court stated specifically, "those bruises that covered [K.H.] from head to toe were in various stages of healing, which means they didn't all happen at one time. It was not one incident. It was over, and over, and over." *Id.* at 37.

⁶ The record does not indicate what type of mandatory sentence the Commonwealth agreed not to pursue.

The trial court sentenced Appellant to ten to twenty years' imprisonment on the aggravated assault charge, noting that the "sentence will be the maximum allowable by the law." *Id.* at 39. The trial court acknowledged that it was sentencing Appellant above the sentencing guidelines⁷ and provided four reasons for doing so: "the victim's vulnerability due to her age, [Appellant's] position as a caretaker of the child, the fact that [Appellant] show[ed] little to no remorse, and the ongoing nature of the injuries inflicted by [Appellant] to the child." *Id.* at 39–40.

On February 24, 2012, Appellant filed a motion for reconsideration of sentence, averring that the trial court inadequately considered mitigating circumstances, including: (1) the psychological evaluation performed by Jonathan A. Roberds, Psy.D.; (2) the letters; (3) the sentencing guidelines; and (4) the presentence investigation report's recommended sentence of eight to twenty years. Appellant's Mot. for Reconsideration of Sentence, 2/24/12, at 1–2. According to the motion, the trial court imposed a sentence that was "manifestly unreasonable and unduly harsh under the circumstances" because it exceeded the sentencing guidelines and the presentence investigation report's recommendation. *Id.* at 2.

The court denied the motion on February 29, 2012. This timely appeal followed. Appellant filed a timely court-ordered Pa.R.A.P. 1925(b) statement

⁷ For aggravated assault, the standard range of the sentencing guidelines is forty-eight to sixty-six months' imprisonment. 204 Pa. Code § 303.16. The aggravated range is a sentence of up to seventy-eight months. *Id.*

of errors complained of on appeal. The trial court filed a response incorporating its opinion of February 29.

Appellant raises the following issue for our review:

Did the Trial Court abuse its discretion in sentencing Appellant to a statutory maximum penalty of not less than one hundred twenty (120) months nor more than two hundred forty (240) months of imprisonment on the charge of Aggravated Assault; where the Sentencing Guidelines applicable to said offense called for a sentence of thirty six (36) months in the Mitigated Range; forty eight (48) months to sixty six (66) months in the Standard Range and seventy eight (78) months in the Aggravated Range?

Appellant's Brief at 4.

Appellant challenges the discretionary aspects of his sentence.

Initially, we must determine whether Petitioner has the right to seek permission to appeal the sentencing court's exercise of its discretion. Where a defendant pleads guilty without any agreement as to sentence, the defendant retains the right to petition this Court for allowance of appeal with respect to the discretionary aspects of sentencing.

Commonwealth v. Brown, 982 A.2d 1017, 1018–19 (Pa. Super. 2009).

Instantly, there was no agreement as to sentencing, thus Appellant has the right to seek permission to appeal. ***See id.***

This Court has stated,

A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute. Two requirements must be met before we will review this challenge on its merits. First, an 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 a sentence. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. In order to establish a substantial question, the appellant must show actions by the trial court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process. **See** Pa.R.A.P. 2119(f).

Moreover, we note that when determining whether an appellant has set forth a substantial question 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.

Commonwealth v. Bricker, 41 A.3d 872, 874–75 (Pa. Super. 2012) (emphasis in original) (internal quotation mark, citation, and footnote omitted).

Instantly, Appellant’s brief includes the necessary Rule 2119(f) statement. According to his Rule 2119(f) statement, his sentence is “manifestly unreasonable, unduly excessive and extremely vindictive.” Appellant’s Brief at 19. When the trial court imposed the statutory maximum sentence of ten to twenty years, Appellant asserts, it “failed to consider any of the information contained [in the presentence report, psychological evaluation, and letters] as relating to the history and characteristics of Appellant, as well as his rehabilitative needs.” ***Id.*** at 18. Instead, he avers, the trial court “focused solely on the serious nature of the offense and the injuries inflicted upon the victim as justification for imposing a statutory maximum sentence.” ***Id.*** at 19.

We find that Appellant's Rule 2119(f) statement presents a substantial question. *See Bricker*, 41 A.3d at 875 (“[A]n averment that the court sentenced based solely on the seriousness of the offense and failed to consider all relevant factors raises a substantial question.”) (quoting *Commonwealth v. Macias*, 968 A.2d 773, 776 (Pa. Super. 2009)); *Commonwealth v. Tirado*, 870 A.2d 362, 365–66 (Pa. Super. 2005) (“[A] claim that the sentencing court imposed an unreasonable sentence by sentencing outside the guidelines presents a substantial question.”). Therefore, we will review the merits of Appellant's challenge to the discretionary aspects of his sentence.

Appellant argues on appeal that the trial court unreasonably imposed a sentence outside of the sentencing guidelines. First, he asserts that the trial court overemphasized the nature and circumstances of the offense while placing too little weight on the fact that he was a victim of sexual molestation as a child, was diagnosed with attention deficit hyperactivity disorder and post-traumatic stress disorder, and expressed a level of remorse consistent with his psychological profile. Appellant's Brief at 24–25. Next, he claims that the trial court “observed [him] in a predetermined light” and inadequately considered the presentence investigation report. *Id.* at 28. He states that although he apologized and accepted full responsibility for the victim's injuries, “the trial court nevertheless characterized him as showing little to no remorse for his actions.” *Id.* at 26. Third, he avers that

“other than making blanket statements without any further explanation or support in the record, the [t]rial court failed to cite adequate reasons upon which the sentence was based.” *Id.* at 29. The trial court did not refer to “any of the information, conclusions or opinions contained [in the] Presentence Report and/or the Report of the Psychological Evaluation that was performed on Appellant.” *Id.* at 26–27. Finally, Appellant argues that the trial court did not adequately consider the sentencing guidelines in that it “never even mentioned, let alone considered, the guidelines inasmuch as the mitigated, standard, and/or aggravated ranges were concerned.” *Id.* at 29.

Our standard of review is as follows:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. More specifically, 42 Pa.C.S.[] § 9721(b) offers the following guidance to the trial court's sentencing determination:

[T]he sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. 42 Pa.C.S.[] § 9721(b).

Furthermore, section 9781(c) specifically defines three instances in which the appellate courts should vacate a sentence and remand: (1) the sentencing court applied the guidelines erroneously; (2) the sentence falls within the guidelines, but is “clearly unreasonable” based on the circumstances of the case; and (3) the sentence falls outside of the guidelines and is “unreasonable.” 42

Pa.C.S. § 9781(c). Under 42 Pa.C.S. § 9781(d), the appellate courts must review the record and consider the nature and circumstances of the offense, the sentencing court's observations of the defendant, the findings that formed the basis of the sentence, and the sentencing guidelines. The weighing of factors under 42 Pa.C.S. § 9721(b) is exclusively for the sentencing court, and an appellate court could not substitute its own weighing of those factors. The primary consideration, therefore, is whether the court imposed an individualized sentence, and whether the sentence was nonetheless unreasonable for sentences falling outside the guidelines, or clearly unreasonable for sentences falling within the guidelines, pursuant to 42 Pa.C.S. § 9781(c).

Bricker, 41 A.3d at 875–76 (alterations and some internal citations omitted).

Our Supreme Court has stated:

Where pre-sentence reports exist, we . . . presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. [W]e state clearly that sentencers are under no compulsion to employ checklists or any extended or systematic definitions of their punishment procedure. Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed. This is particularly true . . . where it can be demonstrated that the judge had any degree of awareness of the sentencing considerations, and there we will presume also that the weighing process took place in a meaningful fashion.

Commonwealth v. Devers, 546 A. 2d 12, 18 (Pa. 1988).

"Where an excessive sentence claim is based on deviation from the sentencing guidelines, we look for an indication that the sentencing court understood the suggested sentencing range." **Tirado**, 870 A.2d at 366.

"[T]he court 'need not recite the numeric ranges of sentences within the guidelines so long as the record demonstrates the court's recognition of the applicable sentencing range and the deviation of sentence from that range.'" *Commonwealth v. Twitty*, 876 A.2d 433, 438 (Pa. Super. 2005) (quoting *Commonwealth v. Rodda*, 723 A.2d 212, 213 (Pa. Super. 1999) (*en banc*)).

In the instant case, the trial court imposed Appellant's sentence after considering the particular facts of the case, including the victim's young age, Appellant's position of trust, his lack of remorse, and the ongoing nature of the abuse. The trial court also based its findings on the "unbelievably horrific facts" set forth in the presentence investigation report. Trial Ct. Op. at 3. Specifically,

[Appellant] admitted to being the primary caretaker of the toddler while her mother was at work or school. [He] further admitted to punching the child in her stomach, back and head; dropping her on the concrete floor; kicking her in the genital area; pulling and carrying her around by her hair; and choking her and using his hand to cover her mouth for an estimated thirty (30) seconds. The Defendant confessed that these incidents happened several times per week.

Id. Furthermore, the trial court "was aware of [Appellant's] childhood, his own sexual victimization, his diagnosis of A.D.H.D. and other learning disabilities and his future prognosis." *Id.* at 4.

The trial court imposed the statutory maximum sentence "[w]ith **all** of this information in mind." *Id.* (emphasis in original). Although it did not

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recite the sentencing guidelines on the record, the trial court acknowledged them and stated its reasons for departing from them. **See *Twitty***, 876 A.2d at 438. Accordingly, after examining the record as a whole, we find that the trial court imposed an individualized sentence that was reasonable despite falling outside the guidelines. **See *Bricker***, 41 A.3d at 876.

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.