NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
THOMAS TAYLOR,	:	
Appellant	:	No. 1077 WDA 2010

Appeal from the Judgment of Sentence Entered June 10, 2010,
In the Court of Common Pleas of Allegheny County,
Criminal Division, at No. CP-02-CR-0015084-2009.

BEFORE: SHOGAN, OTT and STRASSBURGER*, JJ.

MEMORANDUM BY SHOGAN, J.: Filed: May 14, 2013

Appellant, Thomas Taylor, appeals from the judgment of sentence entered on June 10, 2010. We affirm.

The trial court summarized the factual history as follows:

> In September of 2009 Appellant was residing (boarding) with his brother, John Taylor, on Flagler Street in the City of McKeesport, Allegheny County. Appellant had developed an alcohol and anger problem that at times disrupted that household.
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> On the afternoon of September 12, 2009 a third brother, Nathaniel Taylor, visited John Taylor's home. Nathaniel originally went there to work on his truck, and afterwards he and John were seated at the dining room table talking and playing cards. Appellant had been drinking that afternoon and was in an angry and confrontative mood. Appellant interjected himself into the conversation between John and Nathaniel, talking about "killing things," including John's two (2) German Shepard dogs. John and Appellant became involved in a heated verbal exchange that resulted in a physical scuffle between the two

*Retired Senior Judge assigned to the Superior Court.

> brothers. The scuffle was brief and did not result in injury to either brother, and at its conclusion John removed himself to the upstairs of the residence. Some water had spilled during the scuffle and clean-up efforts were being made when Helen Taylor, a sister, arrived at the residence. Helen was informed of the altercation between her brothers and sat down at the dining room table with Nathaniel. Appellant again interjected himself and began to argue with Nathaniel about "minding his own business", and who "won the fight". When Nathaniel told him that John won the fight, Appellant left the dining room. He returned shortly thereafter and stood next to Nathaniel, who was still seated at the dining room table shuffling a deck of cards. Appellant told Nathaniel to "say something", to which Nathaniel said, "what"; whereupon Appellant stabbed him with a knife in the upper right side of the chest. The knife was approximately twelve (12) inches in length and had been retrieved by Appellant when he left the room. Appellant ran into the kitchen, threw the knife in a trashcan and returned to the dining room. Blood began to ooze from Nathaniel's chest wound and Helen Taylor called 911 and put pressure on the wound until the medics arrived. Nathaniel was life flighted to Presbyterian University Hospital. He was hospitalized for six (6) days for treatment of the stab wound of the chest. During the hospitalization and as a result of the treatment he developed a serious infection of the groin and leg for which he was still being treated at the time of trial. Appellant was arrested and charged with the assault of Nathaniel . . . .

Trial Court Opinion, 9/30/11, at 3-5 (citations omitted).

Appellant was convicted by a jury of two counts of aggravated assault[1] on March 10, 2010. On June 10, 2010, the trial court sentenced Appellant to seven to fifteen years of imprisonment for aggravated assault causing

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[1] The two counts are delineated as aggravated assault, serious bodily injury, 18 Pa.C.S.A. § 2702(a)(1), and aggravated assault, deadly weapon, 18 Pa.C.S.A. § 2702(a)(4). The trial court ordered withdrawal of a third count, terroristic threats, on March 10, 2010.

serious bodily injury and imposed no further penalty for aggravated assault with a deadly weapon. This appeal followed.[2]

Appellant raises the following two issues on appeal:

> I. The Commonwealth failed to meet its burden of proof where evidence of record failed to prove beyond a reasonable doubt that Defendant acted with the *mens rea* required for a conviction pursuant to Aggravated Assault, Cause Serious Bodily Injury.
>
> II. The trial court abused its discretion when it sentenced Defendant to an aggravated range sentence without adequately stating its reasons on the record and without due consideration of the sentencing factors set forth at 42 Pa.C.S.A. §9721.

Appellant's Brief at 4 (*verbatim*).

Appellant first argues that the evidence supporting his conviction for aggravated assault causing serious bodily injury[3] is insufficient because the Commonwealth failed to prove that he acted with the requisite *mens rea*. He asserts that although he threatened his brother, Nathaniel, in the past,

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[2] On August 30, 2010, the trial court granted the removal of public defender counsel and appointed private counsel. Appellant filed a motion to proceed *pro se* on May 9, 2012, and sought a remand of the record from this Court. We remanded the record on May 14, 2012, for a hearing pursuant to ***Commonwealth v. Grazier***, 552 Pa. 9, 713 A.2d 81 (1998), which the trial court held on October 23, 2012. The trial court determined the issue was moot since Appellant expressed his desire to be represented by counsel. As a result, the trial court granted private counsel's motion to withdraw and appointed current counsel to represent Appellant.

[3] Appellant confines his sufficiency-of-the-evidence argument to his conviction pursuant to 18 Pa.C.S.A. § 2702(a)(1).

the fact that he made no threats on the date of the crime rendered the evidence insufficient.

When reviewing a challenge to the sufficiency of the evidence, our standard of review is as follows:

> The standard we apply . . . is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [trier] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part, or none of the evidence.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa. Super. 2011) (citation omitted).

The Pennsylvania Crimes Code defines aggravated assault causing serious bodily injury as follows:

> **§ 2702. Aggravated assault**
>
> **(a) Offense defined.—**A person is guilty of aggravated assault if he:
>
> (1) attempts to cause serious bodily injury to another, or causes such injury intentionally,

> knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;

18 Pa.C.S. § 2702(a)(1). "Bodily injury" is defined as "impairment of physical condition or substantial pain," while the Crimes Code defines "serious bodily injury" as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.A. § 2301.

Criminal attempt occurs when a person "with intent to commit a specific crime . . . does any act which constitutes a substantial step toward the commission of that crime." 18 Pa.C.S.A. § 901(a). The Crimes Code defines the *mens rea* of "intent" as follows:

> **§ 302. General requirements of culpability**
>
> **(b) Kinds of culpability defined.--**
>
> (1) A person acts intentionally with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

18 Pa.C.S.A. § 302(b)(1)(i–ii).

Appellant contends the Commonwealth failed to sustain its burden of proof and, therefore, he is entitled to a new trial.[4] His support for this claim is as follows: the victim initially did not realize he had been stabbed, he described the stabbing as initially feeling like "a tickle," he requested a transfer to a different hospital from the one to which he had been admitted, the nature of the assault was brief in that Appellant exhibited only "one stabbing motion," and the wound did not spurt blood, it merely oozed blood. Appellant's Brief at 12. None of these factors convinces us that the Commonwealth failed to sustain its burden of proof.

Appellant describes various factual situations and holdings in a litany of cases in which the appellants challenged the sufficiency of the evidence, but he fails to make any specific argument regarding their applicability to the instant case. ***See***, ***e.g.***, ***Commonwealth v. O'Hanlon***, 539 Pa. 478, 653 A.2d 616 (1995) (holding that driving while intoxicated, standing alone, is insufficient to establish the *mens rea* for aggravated assault); ***Commonwealth v. Lenhart***, 520 Pa. 189, 553 A.2d 909 (1989) (holding that Commonwealth failed to present sufficient evidence that the appellant's vehicle struck and killed the victim); ***Commonwealth v. Roche***, 783 A.2d

[4] A valid claim challenging the sufficiency of the evidence precludes retrial under double jeopardy provisions, whereas a claim challenging the weight of the evidence permits a second trial. ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745 (2000). Despite Appellant's erroneous prayer for relief, his argument clearly relates to the sufficiency, not weight, of the evidence.

766 (Pa. Super. 2001) (holding single punch to victim did not establish requisite intent to cause serious bodily harm); and ***Commonwealth v. Wilson***, 312 A.2d 430 (Pa. Super. 1973) (holding Commonwealth's evidence was speculative regarding whether the appellant was the intoxicated driver of the vehicle). None of these cases bears any resemblance to the case at hand. Indeed, ***Roche*** was abrogated by an *en banc* decision of this Court. ***See Commonwealth v. Burton***, 2 A.3d 598 (Pa. Super. 2010), *appeal denied*, 613 Pa. 641, 32 A.3d 1275 (2011).

The evidence of record viewed in the light most favorable to the Commonwealth, as described by the eyewitnesses and the police officer at the scene, reveals that Appellant, wielding a twelve-inch knife, stabbed his brother, Nathaniel, in the chest, a vital part of the body. N.T., 3/10/10, at 38–40, 63, 72. The facts that the victim initially did not realize he had been stabbed, the wound did not spurt blood, and Appellant stabbed the victim only once have no bearing upon whether Appellant attempted or caused the victim serious bodily injury. Appellant had to be life-flighted to UPMC Presbyterian Hospital, where he was confined for seven days. ***Id***. at 42, 65, 79, 85. As a result of the stabbing, he developed an infection for which he continued to receive treatment twice per week at the time of trial, which was six months after the attack. ***Id***. at 43–44. As the trial court concluded,

"This conduct [by Appellant] clearly evinced the required specific intent to cause serious bodily injury to the victim." Trial Court Opinion, 9/30/11, at 9.

"Where the intention of the actor is obvious from the act itself, the [fact-finder] is justified in assigning the intention that is suggested by the conduct." ***Commonwealth v. Matthew***, 589 Pa. 487, 495, 909 A.2d 1254, 1259 (2006). The evidence adduced at trial was sufficient to support the jury's determination that Appellant's act of stabbing his brother in the chest with a twelve-inch knife demonstrated that Appellant possessed the specific intent to inflict serious bodily injury upon the victim.

Appellant next asserts that his sentence was manifestly excessive, and the trial court failed to consider mitigating factors in imposing sentence. The standard of review and applicable law are well settled:

> "[T]he proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion." [***Commonwealth v.***] ***Walls***, 592 Pa. [557,] 564, 926 A.2d [957,] 961 (2007). An abuse of discretion "is more than a mere error of judgment; thus, a sentencing court will not 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.'" ***Id***. (citation omitted). An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion. ***Id***.

Commonwealth v. Perry, 612 Pa. 557, 564–565, 32 A.3d 232, 236 (2011); ***Commonwealth v. Moury***, 992 A.2d 162, 169–170 (Pa. Super. 2010).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right, and his challenge in this regard is properly viewed as a petition for allowance of appeal. ***See*** 42 Pa.C.S.A. § 9781(b); ***Commonwealth v. Tuladziecki***, 513 Pa. 508, 522 A.2d 17 (1987); ***Commonwealth v. Sierra****,* 752 A.2d 910 (Pa. Super. 2000). An appellant challenging the discretionary aspects of his sentence must satisfy a four-part test. We evaluate: (1) whether Appellant filed a timely notice of appeal; (2) whether Appellant preserved the issue at sentencing or in a motion to reconsider and modify sentence; (3) whether Appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the Sentencing Code. ***Commonwealth v. Carrillo-Diaz***, __ A.3d __, 2013 PA Super 75 (Pa. Super. 2013) (decided April 9, 2013). An appellant must articulate the reasons the sentencing court's actions violated the sentencing code. ***Moury***, 992 A.2d at 170; ***Sierra***, 752 A.2d at 912–913.

In the instant case, Appellant filed a timely appeal on July 9, 2010. Although he failed to file a post-sentence motion, Appellant raised a purported issue to the trial court at his sentencing hearing, complaining about a second presentence report that had been prepared in 1990. ***See Commonwealth v. Nischan***, 928 A.2d 349, 355 (Pa. Super. 2007) ("[A]n

appellant can seek to appeal discretionary sentencing issues only after preserving them during the sentencing hearing or in post-sentence motions. ***Commonwealth v. Malovich***, 903 A.2d 1247, 1250 (Pa. Super. 2006).").

Despite the Commonwealth's mistaken representation that Appellant failed to include a statement in his brief pursuant to Pa.R.A.P. 2119(f), such statement does appear. ***See*** Appellant's Brief at 7. It is, however, woefully inadequate and completely fails to comply with the mandate of our rules of court. It did not challenge any discretionary aspects of his sentence. While the statement does reference the word "excessive" and baldly asserts that the court failed to consider mitigating factors, it certainly does not state a challenge to the discretionary aspects of sentencing "with specificity and particularity" as is required by Pa.R.Crim.P. 720(B)(1)(a). In evaluating the propriety of an asserted substantial question, this Court does not accept bald assertions of sentencing errors. ***Malovich***, 903 A.2d at 1252. Clearly, the issue is waived.

Even if not waived, the issue has no merit.

> In order to raise a substantial question, an appellant's Pa.R.A.P. 2119(f) statement must argue the manner in which the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process. ***Commonwealth v. Mouzon***, 571 Pa. 419, 435, 812 A.2d 617, 628 (2002).

Commonwealth v. Riggs, __ A.3d __, __, 2012 PA Super 187, *5, (Pa. Super. 2012) (decided September 6, 2012).

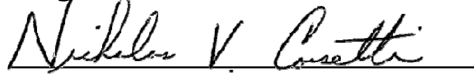
Here, Appellant asserts the sentence is excessive, identifying it as an aggravated range sentence. In truth, the trial court imposed a middle-of-the-range standard sentence. He baldly posits that the trial court did not consider all of the mitigating factors in fashioning his sentence, but he does not identify those factors. A claim that the trial court failed to consider mitigating factors in sentencing generally does not raise a substantial question. ***Commonwealth v. Rhoades***, 8 A.3d 912, 918–919 (Pa. Super. 2010). ***See Commonwealth v. Johnson***, 961 A.2d 877, 880 (Pa. Super. 2008) (claim that court failed to consider mitigating factors in imposing consecutive sentences did not raise substantial question); ***Commonwealth v. Bullock***, 868 A.2d 516, 529 (Pa. Super. 2005) (where no specific provision of sentencing code or fundamental norm is identified in claim that court failed to consider mitigating factors, no substantial question raised).

At the sentencing hearing, the court indicated it had the current pre-sentence report as well as a prior report prepared in July 1990. The court expressly indicated that it took into consideration the age of the prior report, and further, it permitted Appellant to identify any corrections to the current report. N.T. (Sentencing), 6/10/10, at 3–4. Moreover, we assume, when a sentencing court was provided a pre-sentence investigation report, that the trial court was aware of the relevant information regarding the defendant's character and weighed that information with other relevant mitigating

factors. ***Rhoades***, 8 A.3d at 919. Accordingly, Appellant's claim has no merit.

Judgment of sentence affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 5/14/2013