

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
AUDREY ALICIA HARRIS,	:	
	:	
Appellant	:	No. 1123 WDA 2012

Appeal from the Judgment of Sentence Entered June 18, 2012,
In the Court of Common Pleas of Mercer County,
Criminal Division, at No. CP-43-CR-0000448-2011.

BEFORE: DONOHUE, SHOGAN and WECHT, JJ.

MEMORANDUM BY SHOGAN, J.:

Filed: March 8, 2013

Appellant, Audrey Alicia Harris, appeals from the judgment of sentence entered on June 18, 2012 in the Mercer County Court of Common Pleas. We affirm.

The relevant facts and procedural history of this matter were set forth in the trial court’s opinion as follows:

A criminal complaint was filed on March 22, 2011, charging [Appellant] with Aggravated Assault under 18 Pa. C.S. § 2702 [(a)](1) [a felony of the first degree] [and 18 Pa. C.S. § 2702 (a) (4)], a Felony of the [second] Degree, [two counts of] Simple Assault [one graded as misdemeanor of the second degree and the other graded as a misdemeanor of the third degree], and Recklessly Endangering Another Person under 18 Pa. C.S. § 27[05], a Misdemeanor of the Second Degree. The charges arose out of the allegation that [Appellant] struck Kimberly Hogue in the head with a drinking glass causing a laceration.

A preliminary hearing was held on March 31, 2011, before Magisterial District Judge Ronald Antos. [Appellant] was ordered held for trial on all charges at the conclusion of that hearing.

[Appellant] waived arraignment on July 25, 2011.

A Bench Warrant was issued for [Appellant] on September 12, 2011, when [Appellant] failed to appear for a pre-trial hearing. [Appellant] was arrested on the warrant on March 12, 2012.

A jury trial commenced on April 12, 2012. At that trial, Kimberly Hogue testified [Appellant], without provocation, struck her above the left eye with a drinking glass. The blow caused a laceration which required 4 stitches to close.

At the conclusion of the trial, the jury returned verdicts of guilty on Simple Assault, M-2; Simple Assault, M-3; and Recklessly Endangering Another Person, M-2; and not guilty on Aggravated Assault, causing serious bodily injury, and Aggravated Assault, causing bodily injury with a deadly weapon.

Sentencing was scheduled for June 1, 2012. [Appellant] failed to appear for sentencing and a bench warrant was issued for her arrest. [Appellant] was arrested on the bench warrant on June 16, 2012. [Appellant] was sentenced on June 18, 2012. On the charge of Recklessly Endangering Another Person, [Appellant] received a term of imprisonment of not less than 9 months nor more than 2 years.¹ On the charge of Simple Assault, M-2, [Appellant] received a concurrent term of imprisonment of not less than 3 months nor more than 24 months.² No sentence was imposed on the charge of Simple Assault, M-3; on the grounds it merged with the charge of Simple Assault, M-2.

¹ The sentence was in both the Standard Range of both the Basic Sentencing Matrix and the Deadly Weapon-Used Matrix. The Offense Gravity Score is 3 and the Prior Record Score is 4. The standard range of the Basic Sentencing Matrix is 3 to 12 months. The standard range of the Deadly Weapon-Used Matrix is 9 to 12 months.

² The sentence is within the standard range of the Basic Sentencing Matrix. The Offense Gravity Score is 3 and the prior record score is 4. The standard range is 3 to 12 months.

Trial Court Opinion, 8/17/12, at 1-3 (footnotes in original). Post-sentence motions were filed and denied, and Appellant timely appealed.

On appeal, Appellant raises one issue for our consideration:

Whether the Sentencing Court erroneously and contrary to the law applicable to the sentencing guidelines mistakenly and unlawfully applied the deadly weapon sentencing matrix enhancement when the jury acquitted [Appellant] of two aggravated assault charges involving the alleged use of a deadly weapon and the Sentencing Court erroneously stated on the record at the sentencing hearing that the Court was bound by the jury determination that [Appellant] used a deadly weapon when in fact there was no finding or determination by the jury at any time that [Appellant] possessed or used a deadly weapon in the commission of a criminal offense.

Appellant's Brief at 4.

Appellant's challenge to the trial court's application of the deadly weapon (used) enhancement on the recklessly endangering another person conviction is a challenge to the discretionary aspects of her sentence. ***Commonwealth v. Rhoades***, 8 A.3d 912, 915 (Pa. Super. 2010). Where an appellant challenges the discretionary aspects of a sentence there is no automatic right to appeal, and the appeal should be deemed a petition for allowance of appeal. ***Commonwealth v. W.H.M.***, 932 A.2d 155, 162 (Pa. Super. 2007). As we observed in ***Commonwealth v. Moury***, 992 A.2d 162 (Pa. Super. 2010):

[a]n appellant challenging the discretionary aspects of [her] sentence must invoke this Court's jurisdiction by satisfying a four-part test:

[W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, **see** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Id. at 170 (citing **Commonwealth v. Evans**, 901 A.2d 528 (Pa. Super. 2006)). Whether a particular issue constitutes a substantial question about the appropriateness of sentence is a question to be evaluated on a case-by-case basis. **Commonwealth v. Kenner**, 784 A.2d 808, 811 (Pa. Super. 2001), *appeal denied*, 568 Pa. 695, 796 A.2d 979 (2002).

Here, the first two requirements of the four-part test are met because Appellant filed a timely appeal and filed a timely motion for modification of her sentence. **Moury**, 992 A.2d at 170. However, Appellant has not satisfied the third prong, as she has failed to provide a Pa.R.A.P. 2119(f) statement. Nevertheless, where the Commonwealth does not object to the omission of a Pa.R.A.P. 2119(f) statement, the error is not fatal, and we will not deem the issue waived. **Commonwealth v. Pollard**, 832 A.2d 517, 525 (Pa. Super. 2003). Upon review of the Commonwealth's brief, we note that the Commonwealth has not objected to Appellant's failure to include a

Pa.R.A.P. 2119(f) statement. We will thus determine whether Appellant raises a substantial question requiring us to review the discretionary aspects of the sentence imposed.

A substantial question exists where an appellant sets forth a plausible argument that the sentence violates a particular provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing process. *Commonwealth v. Hartle*, 894 A.2d 800, 805 (Pa. Super. 2006). In her statement of questions presented, Appellant alleges that the sentencing court improperly applied the deadly weapon (used) enhancement. Appellant's Brief at 4. An allegation that the trial court misapplied the deadly weapon enhancement presents a substantial question. *Commonwealth v. Pennington*, 751 A.2d 212, 216 (Pa. Super. 2000).

Appellant argues that because she was acquitted of aggravated assault with a deadly weapon, the jury must have found that she did not use the drinking glass to strike the victim. Appellant's Brief at 11. Therefore, she claims the trial court erred in applying the deadly weapon (used) enhancement. *Id.* We are constrained to disagree.

The subsections of the aggravated assault statute for which Appellant was charged are defined in the Crimes Code as follows:

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;

* * *

(4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon;

18 Pa.C.S.A. § 2702(a)(1) and (4). Conversely, recklessly endangering another person is defined as:

Recklessly endangering another person

A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

18 Pa.C.S.A. § 2705.

From the definitions, it is evident that aggravated assault requires an attempt to cause serious bodily injury or intent to cause bodily injury, while recklessly endangering another person does not. The jury could reasonably have found that the injury did not rise to the level of serious bodily injury. Additionally, the jury could have reasonably concluded that Appellant did not attempt to cause serious bodily injury or did not intend to cause bodily injury. While Appellant was found not guilty of aggravated assault, that determination does not mean that Appellant did not use a deadly weapon in recklessly endangering the victim. Thus, an acquittal on the aggravated assault charges does not preclude a conviction for recklessly endangering

another person and the application of the deadly weapon (used) enhancement.

Appellant points out that the trial court stated on the record that the jury made a determination she used a deadly weapon (N.T., 6/18/12, at 8), but in its opinion, the judge stated that it was a decision he made after considering the evidence presented at trial (Trial Court Opinion, 8/17/12, at 5-6). Although the record reflects this discrepancy, it does not render the trial court's decision to impose the deadly weapon (used) enhancement improper.

The applicable Code section regarding the deadly weapon (used) enhancement reads as follows:

Guideline sentence recommendations: enhancements.

(a) Deadly Weapon Enhancement.

* * *

(2) **When the court determines** that the offender used a deadly weapon during the commission of the current conviction offense, the court shall consider the DWE/Used Matrix (§ 303.18). An offender has used a deadly weapon if any of the following were employed by the offender in a way that threatened or injured another individual:

(i) Any firearm, (as defined in 42 Pa.C.S. § 9712) whether loaded or unloaded, or

(ii) Any dangerous weapon (as defined in 18 Pa.C.S. § 913), or

(iii) Any device, implement, or instrumentality capable of producing death or serious bodily injury.

204 Pa. Code § 303.10(a)(2) (emphasis added). Thus, there was no error under the Code where the trial judge, as opposed to the jury, determined that Appellant used the glass as a deadly weapon during the commission of the crime of recklessly endangering another person. Furthermore, as noted by the trial court, there is no constitutional requirement that the jury make the finding that the defendant used a deadly weapon. Aside from a prior conviction, only facts that increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. ***Apprendi v. New Jersey***, 530 U.S. 466, 489 (2000). Here, the penalty for recklessly endangering another person, which was graded as a misdemeanor of the second degree, was not increased beyond the statutory maximum of two years (18 Pa.C.S.A. § 1104(2)). ***Commonwealth v. Stokes***, 38 A.3d 846, 862-865 (Pa. Super. 2011).¹

For the reasons set forth above, we conclude that Appellant is entitled to no relief. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

¹ ***Cf. Commonwealth v. Lowery***, 784 A.2d 795, 800 (Pa. Super. 2001) (concluding that where ***Apprendi*** is not implicated, trial counsel cannot be held ineffective for failing to object when the trial court, and not the jury, determined the deadly weapon enhancement was applicable).