

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

ROBERT ALLAN SHIPMAN,

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1169 WDA 2012

Appeal from the Judgment of Sentence June 15, 2012
In the Court of Common Pleas of Greene County
Criminal Division at No(s): CP-30-CR-0000465-2011

BEFORE: BOWES, DONOHUE, and MUNDY, JJ.

MEMORANDUM BY BOWES, J.:

FILED: June 5, 2013

The Commonwealth appeals the discretionary aspects of the sentence imposed by the trial court on Appellee, Robert Allan Shipman, contending that the sentence was too lenient. After careful review, we affirm.

Appellee pled guilty to one count each of theft by deception, conspiracy to commit theft by deception, receiving stolen property, and tampering with public records. In addition, Appellee pled guilty to five counts of unlawful conduct and four counts of pollution of waters. The guilty pleas arose after Appellee through his business, Allan's Waste Water, Inc., improperly disposed of industrial gas well production waste water and improperly billed companies for waste disposal services that never were conducted.

As part of the plea arrangement, Appellee paid restitution in the amount of \$257,316.09 on the date of sentencing. Additionally, Appellee and his wife divested themselves of their interest in Allan's Waste Water, Inc., as well as another business entity, Tri-County Waste Water Management. Appellee also paid a fine of \$100,000 to the Pennsylvania Fish and Boat Commission and Clean Water Fund and \$25,000 to the Pennsylvania Attorney General's Office. Further, Appellee agreed to never possess a Pennsylvania Department of Environmental Protection permit and to pay all costs of prosecution within ten days of his sentence. In return, the Commonwealth agreed to withdraw multiple related charges against Appellee and to recommend standard range sentences.

Following Appellee's plea, the court conducted a lengthy sentencing hearing in which it heard from multiple witnesses and had the benefit of a pre-sentence investigation report (PSI). The court noted that it considered Appellee's background, family circumstances and obligations, the PSI, the testimony presented, and a psychological evaluation. Based on this review, the court considered the following circumstances as mitigating factors: Appellee pled guilty and accepted responsibility for his actions, divested himself of his two waste water companies, paid restitution and fines in full, had no prior criminal history, served his community as a fireman and elected official, assisted his neighbors, church, sports teams and recently lost his teenage step-daughter to suicide. In addition, the court was aware that Appellee's wife had attempted suicide and was unable to care for the

couple's children due to her mental state. The court found these mitigating factors outweighed the aggravating circumstances that it also placed on the record.

Ultimately, the court imposed an aggregate seven-year probationary sentence on Appellee, and directed him to complete 1750 hours of community service with the Department of Environmental Protection or other approved environmental groups, and to register with the Greene County probation department's "Monitor Connect" program. The Commonwealth filed a timely motion for modification of sentence contending that the probationary sentence did not adequately address Appellee's criminal conduct.

The Commonwealth incorrectly labeled Appellee's violations as dumping toxic waste, and argued that the court improperly relied on its inability to prove actual damage or provide clean-up costs. It continued that the probationary sentence did not consider that Appellee planned and organized his pollution activities over seven years and used his employees to assist in those violations. According to the Commonwealth, the sentence of probation would "have absolutely no deterrent effect" and would "exacerbate the environmental harm" that the Commonwealth was attempting to thwart. Commonwealth's motion for modification of sentence, at ¶ 7. Strangely, the Commonwealth also maintained that consideration of Appellee's responsibilities to his wife and children were "not legitimate mitigating factors for sentencing purposes and should not have been relied upon by the

Court.” **Id.** at ¶ 9. It also averred that consideration of the death of Appellee’s step-daughter and his wife’s resulting mental health problems “should have no bearing on the sentence imposed[.]” **Id.**

The Commonwealth also maintained that Appellee’s charitable contributions were not mitigating factors because he “used the proceeds of his criminal enterprise to fund these contributions, and then unabashedly sought tax deductions for these same contributions.” **Id.** at ¶ 10. Further, the Commonwealth submitted that Appellee’s divestment of his companies should not have served as a mitigating factor and that he actually received a windfall by selling his businesses.

The trial court denied the Commonwealth’s motion by order, and this timely appeal ensued. Thereafter, the court directed the Attorney General’s Office to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. The Commonwealth complied, and the court authored a Pa.R.A.P. 1925(a) opinion in support of its sentence. The matter is now ripe for this Court’s review. The Commonwealth’s sole contention on appeal is “did the trial court abuse its discretion in imposing a sentence at the low end of the mitigated range of the sentencing guidelines, such that the sentence imposed was unreasonable under the circumstances of this case?” Commonwealth’s brief at 7.

The Commonwealth’s issue relates to the discretionary aspects of Appellee’s sentence. “[I]ssues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the

claim to the trial court during the sentencing proceedings. Absent such efforts, an objection to a discretionary aspect of a sentence is waived.” ***Commonwealth v. Kittrell***, 19 A.3d 532, 538 (Pa.Super. 2011).

In addition, “there is no absolute right to appeal when challenging the discretionary aspect of a sentence.” ***Commonwealth v. Crump***, 995 A.2d 1280, 1282 (Pa.Super. 2010); 42 Pa.C.S. § 9781(b); ***but see*** Pa.Const. Art. V § 9 (“there shall also be a right of appeal from a court of record . . . to an appellate court”). Rather, an “[a]ppel is permitted only after this Court determines that there is a substantial question that the sentence was not appropriate under the sentencing code.” ***Crump, supra*** at 1282.

The Commonwealth presents a substantial question for review if it “sets forth a plausible argument that the sentence violates a provision of the sentencing code or is contrary to the fundamental norms of the sentencing process.” ***Commonwealth v. Naranjo***, 53 A.3d 66, 72 (Pa.Super. 2012) (citations omitted) (discussing how a defendant establishes a substantial question). To properly preserve a discretionary sentencing issue, the Commonwealth must raise the claim at sentencing or in a post-sentence motion and in a court-ordered Pa.R.A.P. 1925(b) concise statement. ***Id.*** In addition, the Commonwealth “must provide a separate statement specifying where the sentence falls in the sentencing guidelines, what provision of the sentencing code has been violated, what fundamental norm the sentence violates, and the manner in which it violates the norm.” ***Id.***

The Commonwealth asserts that the sentencing guidelines for Appellee's theft offenses provide a standard range of nine to sixteen months incarceration. It argues that the probation sentence is "remarkably lenient" and is unreasonable because "the case involved the theft of over a quarter of a million dollars and the dumping of gas well production water into multiple streams in multiple counties." Commonwealth's brief at 14. Though inartfully forwarded in its 2119(f) statement, the Commonwealth's essential position is that the court unreasonably sentenced below the guidelines for Appellee's theft-related convictions. **See Commonwealth v. Felix**, 539 A.2d 371 (Pa.Super. 1988) at 377 (court may look to both Pa.R.A.P. 2119(f) statement and statement of questions presented to determine if substantial question is raised). In **Commonwealth v. Daniel**, 30 A.3d 494 (Pa.Super. 2011), we held that where the Commonwealth maintained that a sentence was unreasonably lenient and "dependent upon improper factors and factual findings unsupported by the record[,]" among other contentions, the Commonwealth presented a substantial question. **Id.** at 497. Hence, we hold that the Commonwealth has raised a substantial question for our review.

Having concluded that the Commonwealth has posited a substantial question, we proceed to examine the merits of its claim. "In reviewing a challenge to the discretionary aspects of sentencing, we evaluate the court's decision under an abuse of discretion standard." **Commonwealth v.**

Stokes, 38 A.3d 846, 858 (Pa.Super. 2011). Additionally, “this Court's review of the discretionary aspects of a sentence is confined by the statutory mandates of 42 Pa.C.S. § 9781(c) and (d).” **Commonwealth v. Macias**, 968 A.2d 773, 776 (Pa.Super. 2009). Section 9781(c) reads:

(c) Determination on appeal.—The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:

- (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
- (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
- (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.

In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

42 Pa.C.S. § 9781(c).

In reviewing the record, we consider:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
- (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
- (3) The findings upon which the sentence was based.
- (4) The guidelines promulgated by the commission.

42 Pa.C.S. § 9781(d).

We begin by noting that the Commonwealth's argument is largely bereft of citation to pertinent case law. The Commonwealth's sole citation to

case law applicable to discretionary sentencing details our applicable standard of review. Aside from this solitary citation in its argument section, the Commonwealth cites to two cases regarding its ability to file a post-sentence motion and that a sentence is not final until the motion is decided and appellate review is completed. The complete failure of the Commonwealth to supply or argue any relevant legal authority as to the merits of its position is telling.

The crux of the Commonwealth's argument is that the sentencing court considered improper factors when imposing its sentence. It contends that the sentencing court considered as a mitigating factor that the Commonwealth has not routinely enforced environmental laws and that this did not serve as a basis for mitigating the theft charge. The Commonwealth then proceeds to engage in discussion of the answer to the Commonwealth's motion before contending that if Appellee had an overwhelming sense of remorse, he would have entered a guilty plea without agreement or expressed remorse to the victims. It adds that Appellee made charitable contributions because he was engaged in a criminal enterprise and argues that Appellee ignored his own family situation.

Appellee counters that he was not required to enter a guilty plea without agreement and that retaining an attorney to assist him in negotiating a plea does not establish that the sentencing court violated the sentencing code. He also avers that although the theft-related counts

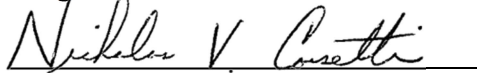
carried the longest possible sentence, failure to impose a jail sentence does not automatically result in the sentence being unreasonable. Appellee highlights that his is the highly unusual case where he paid restitution in full before sentencing and that he agreed to pay a significant fine to the Pennsylvania Clean Water Fund and Fishing and Boat Commission. He also reasons that the sentence was not unreasonable since he paid additional court costs within days of his sentence and that there was no testimony that any environmental clean-up was necessary. Appellee further contends that his family situation was relevant and points out that he apologized for committing his crimes and that the sentencing court was in the best position to fashion an appropriate sentence.

We agree with Appellee that the Commonwealth is not entitled to relief. Here, the sentencing court had the benefit of a pre-sentence investigation. Thus, we are required to presume all sentencing factors were weighed. ***Commonwealth v. Macias***, 968 A.2d 773, 778 (Pa.Super. 2009). Since the court more than adequately considered the pertinent sentencing factors and merely weighed them in a manner inconsistent with the Commonwealth's desires, we find it is not entitled to relief. ***See id.*** The sentencing court did not justify its probationary sentence based solely or primarily on the lack of enforcement of environmental crimes or because Appellee made charitable contributions.

The sentencing court appropriately considered Appellee's family issues and concerns, which are routinely considered as potential mitigating factors in sentencing. It accurately noted that Appellee has several children for whom he must care and a wife who, due to mental health issues relating to the suicide of her teenage daughter, is incapable of providing significant help. Appellee also paid restitution in full, paid a significant amount of money to benefit public environmental organizations, and has no juvenile or adult criminal record. Additionally, Appellee must perform 1750 hours of community service. Appellee's sentence was not clearly unreasonable and the court did not abuse its discretion in fashioning Appellee's sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatti", is written over a horizontal line.

Deputy Prothonotary

Date: 6/5/2013