

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

STEVEN RODRIGUEZ

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1190 EDA 2012

Appeal from the Judgment of Sentence February 23, 2012
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0000800-2011

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY GANTMAN, J.:

Filed: February 1, 2013

Appellant, Steven Rodriguez, appeals from the judgment of sentence entered in the Lehigh County Court of Common Pleas, following his open guilty plea to simple assault and “no contest” pleas to unlawful restraint and terroristic threats.¹ We affirm.

The relevant facts and procedural history of this appeal are as follows. Brielle Wales (“Victim”) is Appellant’s former girlfriend. Shortly before the incident leading to this case, Victim ended her relationship with Appellant and threw him out of her house. The turmoil from the breakup led Victim to stay at her parents’ house for a few days. While Victim was returning to her parents’ home on the morning of January 30, 2011, Appellant was waiting

¹ 18 Pa.C.S.A. §§ 2701(a)(1), 2902(a)(1), and 2706(a)(1), respectively.

for her. He grabbed Victim and forcibly dragged her to his car. When Victim tried to pull away, Appellant told her he had a gun.

Once inside the car, Appellant drove Victim to a location on the north side of Allentown. Appellant parked the car and forced Victim into the back seat, where he brutally beat her. Appellant returned to the front seat of the car and drove to a residence on Fairmount Street. He took Victim inside the house and accused her of having relations with other men. When Victim gave unsatisfactory answers, Appellant would hit Victim in the face or chest. Appellant repeatedly told Victim she was going to die. He threatened to lethally inject Victim with heroin, or alternatively, to shoot Victim. Appellant's violent assault went on for hours before Victim was able to persuade Appellant to take her to a hospital. At the hospital, Victim reported the assault and staff called the police. Doctors treated Victim for a concussion, cracked teeth, and various scars and bruising. Victim's lips were so badly injured that doctors had to stitch them shut.

Police arrested Appellant and charged him with numerous crimes arising from his assault of Victim. On January 17, 2012, Appellant entered an open guilty plea to simple assault and pleas of "no contest" to unlawful restraint and terroristic threats. The court deferred sentencing pending a pre-sentence investigation ("PSI") report. At a sentencing hearing on February 23, 2012, Victim testified about the January 30th assault as well as other incidents when Appellant was abusive toward her. Defense counsel

objected to the admission of “uncharged allegations.” The court overruled the objection, reasoning the history of Victim’s relationship with Appellant was relevant at the sentencing phase of a domestic abuse case. Victim proceeded to testify about two other occasions when Appellant physically assaulted her and produced photographic evidence of bruises she suffered in each attack. The majority of Victim’s testimony addressed the January 30th assault and the physical and emotional impact it had on her. Appellant testified, expressing remorse for his actions and apologizing to Victim. After hearing argument from counsel, the court sentenced Appellant to one (1) to two (2) years’ imprisonment for simple assault, one and a half (1½) to five (5) years’ imprisonment for unlawful restraint, and one and a half (1½) to five (5) years’ imprisonment for terroristic threats. The sentences for unlawful restraint and terroristic threats fell in the aggravated range. The court ordered all sentences to run consecutively, resulting in an aggregate term of four (4) to twelve (12) years’ imprisonment.

On Monday, March 5, 2012, Appellant timely filed post-sentence motions. The court denied Appellant’s motions the following day. On April 3, 2012, Appellant timely filed a notice of appeal. The court ordered Appellant to file a concise statement of errors complained on appeal pursuant to Pa.R.A.P. 1925(b); Appellant timely complied.

Appellant raises one issue for our review:

WHETHER THE [TRIAL] COURT ABUSED ITS DISCRETION
BY IMPOSING A SENTENCE AFTER HAVING CONSIDERED

IMPROPER FACTORS IN ITS DETERMINATION AS TO BOTH
THE LENGTH AND FORM OF THE SENTENCE?

(Appellant's Brief at 7).

Appellant challenges the court's decision to permit Victim to testify at the sentencing hearing about past abuse she sustained from Appellant. In Appellant's view, "unproven and uncharged" allegations of prior abuse are irrelevant to a sentencing decision; and the court should not have considered those events when fashioning its sentence. Appellant contends the court's reliance on those incidents was improper and caused the court to impose an aggravated range sentence. As presented, Appellant's claims implicate the discretionary aspects of sentencing. ***See Commonwealth v. Downing***, 990 A.2d 788, 792 (Pa.Super. 2010) (stating claim that court relied on improper factors when imposing aggravated range sentence challenges discretionary aspects of sentencing).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Commonwealth v. Sierra***, 752 A.2d 910 (Pa.Super. 2000). Prior to reaching the merits of a discretionary sentencing issue: we 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, ***see*** Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence is not appropriate under the

Sentencing Code, *see* 42 Pa.C.S.A. § 9781(b). ***Commonwealth v. Evans***, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830 A.2d 1013 (Pa.Super. 2003). A substantial question exists “only when the appellant advances a colorable argument that the sentencing judge’s actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.” ***Sierra, supra*** at 912-13. A claim that a sentence is manifestly excessive might raise a substantial question if the appellant’s Rule 2119(f) statement sufficiently articulates the manner in which the sentence imposed violates a specific provision of the Sentencing Code or the norms underlying the sentencing process. ***Commonwealth v. Mouzon***, 571 Pa. 419, 435, 812 A.2d 617, 627 (2002). A substantial question exists when a defendant alleges the sentencing court considered improper factors when imposing an aggravated range sentence. ***Commonwealth v. Stewart***, 867 A.2d 589, 592 (Pa.Super. 2005).

In the present case, Appellant filed his notice of appeal within thirty days of the court’s denial of his post-sentence motions. ***See*** Pa.R.A.P. 903. Appellant’s post-sentence motions properly preserved his sentencing challenge for appellate review, as does his brief, which includes a concise

statement pursuant to Rule 2119(f) of reasons for allowance of appeal. **See** Pa.R.Crim.P. 720; Pa.R.A.P. 2119(f). For the crimes of terroristic threats and unlawful restraint, the court's sentence was in the aggravated range. As a result, Appellant's complaint that the court relied on improper factors to impose an aggravated range sentence presents a substantial question. **See Stewart, supra** at 592 (stating same). Therefore, we review the merits of the sentencing issue.²

Sentencing is a matter vested in the sound discretion of the sentencing court. **Commonwealth v. Lee**, 876 A.2d 408, 413 (Pa.Super. 2005). "When imposing a sentence, the sentencing court must consider the factors set out in 42 Pa.C.S.A. § 9721(b), that is, the protection of the public, gravity of offense in relation to impact on victim and community, and rehabilitative needs of the defendant [and], of course, the court must consider the sentencing guidelines." **Commonwealth v. Fullin**, 892 A.2d 843, 847-48 (Pa.Super. 2006). A sentencing court may consider any legal factor in imposing an aggravated range sentence. **Commonwealth v. Bowen**, 975 A.2d 1120, 1122 (Pa.Super. 2009). One legal factor is evidence of uncharged criminal conduct. **See Commonwealth v. P.L.S.**,

² To the extent Appellant is displeased with the court's decision to impose consecutive sentences, that claim does not raise a substantial question and we will not review it. **See Commonwealth v. Gonzalez-Dejusis**, 994 A.2d 595 (Pa.Super. 2010) (reiterating general rule that challenge to court's decision to order consecutive sentences fails to raise substantial question).

894 A.2d 120, 131 (Pa.Super. 2006), *appeal denied*, 588 Pa. 780, 906 A.2d 542 (2006). Provided there is an appropriate evidentiary link between the uncharged conduct and the defendant, the court may consider the conduct as relevant to the “protection of the public” sentencing factor. *See id.* *See also* 204 Pa.Code § 303.5(d) (stating sentencing court may consider “previous convictions, juvenile adjudications or dispositions not counted in the calculation of the Prior Record Score, **in addition to other factors deemed appropriate by the court**”) (emphasis added).

In the present case, Appellant is unable to demonstrate the court abused its discretion in hearing testimony from Victim about Appellant’s abusive history. There was no legal impediment to the court’s decision to allow Victim to testify about past abuse. In fact, this Court’s decisions expressly identify such evidence as a permissible factor in sentencing considerations. *See P.L.S., supra* at 131; *Commonwealth v. Shugars*, 895 A.2d 1270, 1278 (Pa.Super. 2006) (rejecting as “patently false” defendant’s assertion that court could not consider uncharged criminal conduct at sentencing). The court was aware Victim’s testimony concerned only allegations of abuse and there is no indication the court solely relied on evidence of uncharged abuse when sentencing Appellant.

In addition, the portion of Victim’s testimony addressing Appellant’s past abuse comprised only a small part of the court’s sentencing consideration. The court heard evidence on “the horrific facts that formed

the basis for these calculated and chilling crimes” as well as Appellant’s past history of violence. (**See** Trial Court Opinion, dated March 6, 2012, at 3.) Appellant’s violent history included 16 adult arrests and 7 convictions; three of those convictions were for simple assault. The court reviewed the PSI and weighed several mitigating factors, including Appellant’s troubled upbringing, injuries he sustained in a motorcycle accident, and his struggles with drug abuse.

Notwithstanding the presence of mitigating factors, the court was concerned with the nature and circumstances of Appellant’s crime. Appellant hid outside the home of Victim’s parents and forced her into his car. From there, Appellant engaged in an hours-long assault that included several threats to kill Victim. The attack was so vicious that Victim required significant medical attention. The court considered the totality of these factors and concluded Appellant’s violent tendencies made an aggravated range sentence appropriate for the protection of Victim and the public at large. **See** 42 Pa.C.S.A. § 9721(b) (listing relevant factors for sentencing). The record supports the court’s determination, and we reject Appellant’s attempts to disturb the sentence. Accordingly, we conclude Appellant is not entitled to relief on his issue and affirm the judgment of sentence.

Judgment of sentence affirmed.