

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

ROBERT L. PAYNE

Appellant

No. 1319 EDA 2013

Appeal from the Judgment of Sentence April 5, 2013  
In the Court of Common Pleas of Northampton County  
Criminal Division at No(s): CP-48-CR-0003968-2012

BEFORE: GANTMAN, J., DONOHUE, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.:

**FILED DECEMBER 03, 2013**

Appellant, Robert L. Payne, appeals from the judgment of sentence entered in the Northampton County Court of Common Pleas, following his guilty plea to criminal conspiracy to commit burglary of a home (persons not present).<sup>1</sup> We affirm.

The relevant facts and procedural history of this appeal are as follows. On or about September 17, 2012, Appellant conspired with two individuals to commit burglary of the victims' home. On February 7, 2013, Appellant entered a negotiated guilty plea to criminal conspiracy to commit burglary of a home (persons not present). The court sentenced Appellant, on April 5, 2013, to twenty-one (21) to sixty (60) months' incarceration, followed by

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<sup>1</sup> 18 Pa.C.S.A. § 3502(a)(2).

one-hundred-twenty (120) months' state supervision. On April 11, 2013, Appellant filed a counseled post-sentence motion for reconsideration, which the court denied the following day. Appellant timely filed a notice of appeal on April 29, 2013, and a voluntary counseled concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) on May 14, 2013.

Appellant raises the following two issues for our review:

WHETHER THE SENTENCING COURT ERRED AND EXERCISED A LAPSE IN ITS DISCRETION IN FAILING TO ADEQUATELY CONSIDER SEVERAL MITIGATING FACTORS AND BY UTILIZING IMPROPER FACTORS WHEN ARRIVING AT APPELLANT'S SENTENCE?

WHETHER THE SENTENCING JUDGE ERRED AND ABUSED HIS DISCRETION IN FAILING TO RECUSE HIMSELF *SUA SPONTE* FROM APPELLANT'S CASE, KNOWING HE COULD NOT RENDER A NONBIASED, LOWER SENTENCE SINCE HE IS FROM THE SAME AREA THE VICTIMS WERE FROM IN THE LEHIGH VALLEY—THE SLATE BELT AREA?

(Appellant's Brief at 3).

In his first issue, Appellant argues his sentence was unreasonable because the court failed to consider several mitigating factors and utilized improper factors and evidence in sentencing Appellant.<sup>2</sup> Specifically, Appellant alleges the court did not consider: (1) Appellant's cooperation with the government; (2) his assistance in providing the government with information that led to the arrest of one of Appellant's co-defendants; (3)

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<sup>2</sup> Appellant's brief does not elaborate on Appellant's argument regarding the court's utilization of improper factors and evidence during sentencing. Therefore, we give no further attention to this aspect of Appellant's claim.

Appellant's acceptance of full responsibility for the offense; (4) his remorse towards the victims; (5) his work history; and (6) Appellant's two minor children whom he needed to support in addition to providing restitution to the victims. Appellant concludes the court erred in failing to consider these factors before sentencing Appellant. Appellant challenges the discretionary aspects of his sentence.<sup>3</sup> **See Commonwealth v. Lutes**, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive 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:

[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

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<sup>3</sup> "[W]hile a guilty plea which includes **sentence negotiation** ordinarily precludes a defendant from contesting the validity of his...sentence other than to argue that the sentence is illegal or that the sentencing court did not have jurisdiction, **open** plea agreements are an exception in which a defendant will not be precluded from appealing the discretionary aspects of the sentence." **Commonwealth v. Tirado**, 870 A.2d 362, 365 n.5 (Pa.Super. 2005) (emphasis in original). "An 'open' plea agreement is one in which there is no negotiated sentence." **Id.** at 363 n.1. Here, Appellant's plea was "open" as to sentencing, so he can challenge the discretionary aspects of his sentence.

sentence appealed from is not appropriate under the Sentencing Code, 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).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. **Commonwealth v. Mouzon**, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). The concise statement must indicate "where the sentence falls in relation to the sentencing guidelines and what particular provision of the code it violates." **Commonwealth v. Kiesel**, 854 A.2d 530, 532 (Pa.Super. 2004) (quoting **Commonwealth v. Goggins**, 748 A.2d 721, 727 (Pa.Super. 2000), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000)).

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. ***Mouzon, supra*** at 435, 812 A.2d at 627. Generally, “[a]n allegation that a sentencing court failed to consider or did not adequately consider certain factors does not raise a substantial question that the sentence was inappropriate.” ***Commonwealth v. Cruz-Centeno***, 668 A.2d 536, 545 (Pa.Super. 1995), *appeal denied*, 544 Pa. 653, 676 A.2d 1195 (1996) (internal quotation marks omitted).

Instantly, Appellant’s post-sentence motion and Rule 2119(f) statement properly preserved his claim that certain mitigating factors warranted a more lenient sentence. ***See id.*** Nevertheless, the court had the benefit of a Presentence Investigation (“PSI”) report at sentencing. Therefore, we can presume the court considered the relevant facts when sentencing Appellant.<sup>4</sup> ***See Tirado, supra*** (stating where sentencing court had benefit of PSI, law presumes court was aware of and weighed relevant information regarding defendant’s character and mitigating factors).

Additionally, the court addressed Appellant’s issue as follows:

...Appellant contends that the [c]ourt failed to consider the mitigating factors when imposing sentence. We submit that this assertion fails to raise a “substantial question” for appellate review.

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<sup>4</sup> Appellant concedes the PSI report addressed most of the mitigating factors Appellant raises in his brief. (Appellant’s Brief at 10).

The [c]ourt imposed a standard range sentence in this case, albeit in the upper end of the sentencing guidelines. In doing so, the [c]ourt took into account, among other things, the serious violation of privacy that had taken place. Both victims testified that they lost their sense of safety because of this crime.

The [c]ourt also considered Appellant's lengthy prior record; poor prognosis for community supervision; and other factors set forth in the PSI. In our view, these aggravating factors more than offset the mitigating factors identified by Appellant, and justify the standard range sentence imposed.

(Trial Court Opinion, filed July 23, 2013, at 6). As presented, Appellant failed to raise a substantial question that would compel sentencing relief. ***See Mouzon, supra***. Thus, Appellant's first issue warrants no relief.

In his second issue, Appellant argues the sentencing judge's failure to recuse himself *sua sponte* amounted to an abuse of discretion. Appellant claims the judge knew or should have known he was unable to render a non-biased, lesser sentence because the judge was from the community where the offense occurred. Appellant contends he has not waived the issue of recusal because he raised this claim in his Rule 1925(b) statement. Appellant concludes his sentence must be vacated and remanded to a different judge for resentencing. We disagree.

"[A] party seeking recusal or disqualification must raise the objection at the earliest possible moment or that party will suffer the consequence of being time barred." ***Commonwealth v. Pappas***, 845 A.2d 829, 846 (Pa.Super. 2004) (quoting ***Commonwealth v. Stafford***, 749 A.2d 489, 501

(Pa.Super. 2000)) (quotation marks omitted). “This Court presumes judges of this Commonwealth are ‘honorable, fair and competent,’ and when confronted with a recusal demand, have the ability to determine whether they can rule impartially and without prejudice.” **Commonwealth v. Druce**, 577 Pa. 581, 589, 848 A.2d 104, 108 (2004) (citing **Commonwealth v. White**, 557 Pa. 408, 426, 734 A.2d 374, 384 (1999)).

The Pennsylvania Supreme Court has said:

[A] trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can be reasonably questioned. It is presumed that the judge has the ability to determine whether he will be able to rule impartially and without prejudice, and his assessment is personal, unreviewable, and final.

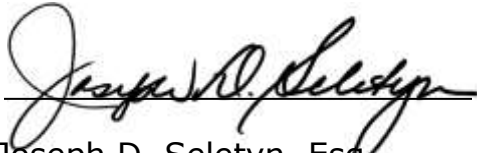
**Commonwealth v. Blakeney**, 596 Pa. 510, 538, 946 A.2d 645, 662 (2008), *cert. denied*, 555 U.S. 1177, 129 S.Ct. 1317, 173 L.Ed.2d 596 (2009) (internal citations omitted).

In the present case, Appellant failed to raise the issue of the judge’s alleged bias or partiality at any time during the guilty plea, at sentencing, or in the counseled post-sentence motion. Appellant filed a *pro se* motion for recusal while still represented by counsel on April 19, 2013, after the court had denied the post-sentence motion. **See generally Commonwealth v. Jette**, 611 Pa. 166, 23 A.3d 1032 (2011) (reiterating rule that court will not consider *pro se* filings of defendant who is represented by counsel of record). Nevertheless, Appellant failed to raise the recusal issue at the

earliest possible opportunity and gave no reason for his delay in presenting it properly. Therefore, Appellant waived his recusal issue. **See Pappas, supra.** **See generally Commonwealth v. Melendez-Rodriguez**, 856 A.2d 1278 (Pa.Super. 2004) (reaffirming principle that defendant cannot rectify failure to preserve issue at trial by proffering it in Rule 1925(b) statement); **Commonwealth v. Watson**, 835 A.2d 786 (Pa.Super. 2003) (holding appellant's claims were waived after he failed to raise them in trial court but later raised them in Rule 1925(b) statement). Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/3/2013