NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
LEIGH ANNE McMAHON,	:	
	:	
Appellant	:	No. 1361 WDA 2012

Appeal from the Judgment of Sentence Entered July 20, 2012,
In the Court of Common Pleas of Erie County,
Criminal Division, at No. CP-25-CR-0003064-2011.

BEFORE: SHOGAN, LAZARUS and PLATT*, JJ.

MEMORANDUM BY SHOGAN, J.: FILED: MAY 28, 2013

Appellant, Leigh Ann McMahon, appeals from the judgment of sentence entered on July 20, 2012, after she pled guilty to one count of identity theft, a violation of 18 Pa.C.S.A. § 4120(c)(1)(ii). We affirm.

The record reveals that Appellant and the victim were involved in a domestic partner relationship for twelve years. When they met in 1999-2000, the victim was about fifty years old, and Appellant was about twenty-three years old. From September 2006 through June 2011, Appellant "used the name, address, social security number, driver's license number, telephone number and/or date of birth of [the victim] to apply for Internet loans, bank accounts and/or credit cards." N.T. (Guilty Plea), 5/8/12, at 12-13. Furthermore, Appellant "obtained funds from these financial institutions

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*Retired Senior Judge assigned to the Superior Court.

having a total value of fifty-nine thousand nine hundred sixty-four dollars and thirteen cents." ***Id.*** at 13.

Appellant was originally charged with more than fifty counts of multiple offenses, including theft, receiving stolen property, access device-unauthorized use, bad checks, forgery, and identity theft. Complaint, 10/20/11. Six counts proceeded to court. Pursuant to a plea agreement, the Commonwealth *nol prossed* Counts I through V, and Appellant pled guilty to one count of identity theft as a third-degree felony; she also agreed to pay $44,707.74 in restitution. N.T. (Guilty Plea), 5/8/12, at 13-14.

The trial court originally sentenced Appellant to incarceration for an aggregate term of one to seven years, plus $44,707.74 in restitution. Sentencing Order, 7/20/12. Appellant received credit for 275 days of time served. ***Id.*** Additionally, Appellant was eligible for the Recidivism Risk Reduction Incentive Program, reducing her confinement to nine months. ***Id.*** This appeal followed. Appellant and the trial court have complied with Pennsylvania Rule of Appellate Procedure 1925.

Appellant presents a single issue for our consideration:

> Whether a sentence in the aggravated range was manifestly excessive and unreasonable after the court failed to properly justify the record with a legally recognized reason for its decision[?]

Appellant's Brief at 3.

Appellant challenges the discretionary aspects of her sentence.[1] In such cases, we have held that there is no automatic right to appeal; rather, an appellant's appeal should be deemed a petition for allowance of appeal. ***Commonwealth v. W.H.M.***, 932 A.2d 155, 162 (Pa. Super. 2007); 42 Pa.C.S.A. § 9781(b). As we observed in ***Commonwealth v. Moury***, 992 A.2d 162 (Pa. Super. 2010):

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

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[1] Appellant's guilty plea does not bar a discretionary sentencing challenge because there was no agreement as to the sentence Appellant would receive. ***Commonwealth v. Hill***, ___ A.3d ___, ___, 2013 PA Super 77 at *3 (Pa. Super. filed April 10, 2013) (citation omitted).

Here, Appellant has satisfied the first three requirements of the four-part ***Moury*** test. She filed a timely appeal on September 4, 2012, and preserved her sentencing issue in a post-sentence motion timely filed on July 30, 2012. Also, she included a statement in her brief pursuant to Pa.R.A.P. 2119(f). Appellant's Brief at 4-5. Thus, we must determine if Appellant's sentencing issue raises a substantial question.

> 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. Riggs, 63 A.3d 780, 786 (Pa. Super. 2012), *appeal denied*, 63 A.3d 776 (Pa. 2013) (citation omitted). This Court does not accept bald assertions of sentencing errors. ***Commonwealth v. Malovich***, 903 A.2d 1247, 1252 (Pa. Super. 2006). Rather, an appellant must articulate the reasons the sentencing court's actions violated the Sentencing Code. ***Id***.; ***Commonwealth v. Mouzon***, 812 A.2d 617, 627 (Pa. 2002). When this Court examines an appellant's Rule 2119(f) statement to determine whether a substantial question exists, "[o]ur inquiry must focus on the reasons for which the appeal is sought, in contrast to the facts underlying the appeal, which are necessary only to decide the appeal on the merits." ***Commonwealth v. Ahmad***, 961 A.2d 884, 886-887 (Pa. Super. 2008) (quoting ***Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa. Super. 2005)).

In her Rule 2119(f) statement, Appellant contends that her sentence violates two specific provisions of the sentencing scheme set forth in the Sentencing Code. First, Appellant cites 42 Pa.C.S.A. § 9781(c)(2), suggesting that her aggravated range sentence is unreasonable. Appellant's Brief at 5. Second, Appellant cites 42 Pa.C.S.A. § 9721(b), suggesting that the trial court failed to consider the sentencing factors set forth therein. ***Id.*** Although very broadly presented, the claims in Appellant's Rule 2119(f) statement appear to raise substantial questions. Closer review of Appellant's specific arguments confirms our impression.

First, Appellant suggests that her sentence violates section 9781(c)(2) because it is manifestly excessive, and, as such, unreasonable. According to Appellant, her sentence is "a period of incarceration that is almost **triple** what the Pennsylvania Sentencing [G]uidelines suggest is appropriate for even the aggravated range of an offense graded as a Felony 3." Appellant's Brief at 7 (emphasis in original). "A claim that a sentence is manifestly excessive such that it constitutes too severe a punishment raises a substantial question." ***Commonwealth v. Simmons***, 56 A.3d 1280, 1286 (Pa. Super. 2012) (quoting ***Commonwealth v. Kelly***, 33 A.3d 638, 640 (Pa. Super. 2011)). Accordingly, we will review Appellant's claim that her sentence violated section 9781(c)(2).

This Court "shall vacate [a] sentence and remand the case to the sentencing court with instructions if [we] find[]: ... (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable[.]" 42 Pa.C.S.A. § 9781(c)(2). In determining whether a sentence is manifestly excessive and, therefore, unreasonable, the appellate court must give great weight to the sentencing court's discretion, as the judge is in the best position to measure factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance, or indifference. ***Riggs***, 63 A.3d at 786.

Here, being in the best position to measure the relevant factors, the trial court found, "in its discretion, that an aggravated sentence was warranted because [Appellant] showed no remorse or acceptance of responsibility for her criminal conduct." Trial Court Opinion, 11/2/12, at 3. The record confirms that over the course of many years, with indifference to the well-being of the woman with whom she shared an intimate relationship, Appellant stole the victim's identity for her own profit, leaving emotional and financial ruin in her wake. N.T. (Sentencing), 7/20/12, at 11. Upon review of this record, including the facts of the case and the criminal conduct involved, as well as the rationale expressed by the trial court, we cannot agree with Appellant that the sentence imposed was so manifestly excessive

as to amount to an unreasonable sentence. Accordingly, we conclude that Appellant's section 9781(c)(2) claim lacks merit.

Next, Appellant posits that the trial court violated section 9721(b) by not considering certain mitigating factors when it imposed the aggravated-range sentence, namely Appellant's lack of any prior criminal record, her eligibility for parole on the date of sentencing, and her romantic relationship with the victim. Appellant's Brief at 8-9. We have held that such a claim raises a substantial question. ***See Commonwealth v. Felmlee***, 828 A.2d 1105 (Pa. Super. 2003) (*en banc*) ("Appellant's claim that the court erred by imposing an aggravated range sentence without consideration of mitigating circumstances raises a substantial question." (citation omitted)). Thus, we will review this section 9721(b) claim.

When a sentencing court has the benefit of a pre-sentence investigation report, we presume that the trial court was aware of the relevant information regarding the defendant's character and weighed that information with other relevant mitigating factors. ***Commonwealth v. Rhoades***, 8 A.3d 912, 919 (Pa. Super. 2010). In the case at hand, the court indicated at the sentencing hearing that it had a current pre-sentence report. N.T. (Sentencing), 7/20/12, at 12. The trial court also indicated on the record that it took into consideration the pre-sentence report and the Sentencing Guidelines, as well as letters and testimony on behalf of the

victim and Appellant. ***Id.*** ***See also*** Trial Court Opinion, 11/2/12, at 2 ("[T]he Court carefully considered all relevant factors in arriving at [Appellant's] sentence."). Thus, upon review of the record before us, we conclude that Appellant is not entitled to relief on this section 9721(b) claim.

Lastly, Appellant contends that "the trial court failed to properly support the record with legally recognizable facts that justify its reason" for imposing an aggravated range sentence. Appellant's Brief at 7. We recognize that a trial court is required to "make as a part of the record, . . . in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed." 42 Pa.C.S.A. § 9721(b). Thus, a claim that the trial court failed to state reasons on the record for its aggravated range sentence presents a substantial question. ***Commonwealth v. Fullin***, 892 A.2d 843 (Pa. Super. 2006). Accordingly, we shall review Appellant's second section 9721(b) claim.

Here, the trial court stated at sentencing:

> I've considered the Pennsylvania Sentencing Code and various factors. As I indicated, I have the benefit of the Pre [sic]. I've got letters from a number of people. I've got the Presentence Report and I've got the guidelines here on the one count of conviction which is RS to nine.

N.T., 7/20/12, at 12. Additionally, the trial court heard a statement by the victim's sister about the devastating effect Appellant's identity theft had on the victim. ***Id.*** at 11-12. Based on the evidence and testimony presented, the trial court discredited Appellant's statements:

> I know she pled guilty, but she wrote me a letter and again – she wrote me a letter which she wrote with a pen and a shovel. And she said in part, this is a life-altering event with a striking resemblance to a nasty divorce. To my eye it's not a resemblance to a nasty divorce. Even in the nastiest of divorces I don't see the degree of sophistication that I see here.
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> Divorces don't end up in criminal court, generally.
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> I had a chance to read the letter. I read that letter with a jeweler's eye. I didn't see a shred of remorse. I see no acceptance of responsibility.
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> I'm going to say the following, in fashioning a sentence here, my determination in reading [Appellant's] letter and listening carefully to her is a degree of just total lack of semblance of responsibility. Even now she wants to get a light sentence so she can begin making restitution, but the focus of– every word that seeps out, her entire focus is on herself. She really talks the game about wanting to make restitution, but it's what is going to happen to her, her, her, her. I don't believe she has any remorse.
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> In this case I'll depart upward and impose a sentence in the aggravated range of the sentencing guidelines of one to seven years as a State sentence. [Appellant] is RRRI eligible, so I have to give her–knock that down to nine. But it's my intention this be a State sentence. I'm going to recommend that she get a mental health evaluation while she's in jail and drug and alcohol evaluation while she's in jail, which I can do but I can only recommend that since this is a State sentence.

N.T. (Sentencing), 7/20/12, at 6, 7, 9, 12-13; Trial Court Opinion, 11/2/12, at 3.

Upon review of the entire record, we conclude that the trial court satisfied its duty to make a record of the reasons for the sentence it imposed. Those reasons included Appellant's lack of remorse, her failure to accept responsibility, the degree of sophistication she demonstrated in defrauding the victim, and her use of a loved one's identity to serve her own needs.[2] In light of the trial court's sufficient record, we conclude that Appellant is not entitled to relief on her second section 9721(b) claim.

Judgment of sentence affirmed.

Judgment Entered.

Deputy Prothonotary

Date: 5-28-2013

[2] The record reveals that, during the course of her relationship with the victim, Appellant "consumed an inordinate amount of beer. It was very clear she had a very severe alcohol problem . . . [a]nd gambling problem[.]" N.T. (Sentencing), 7/20/12, at 8.