NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ROBERT HARDING WHITE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1392 WDA 2012

Appeal from the Judgment of Sentence January 5, 2011
In the Court of Common Pleas of Forest County
Criminal Division at No.: CP-27-CR-0000055-2010

BEFORE: DONOHUE, J., MUNDY, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: March 4, 2013

Appellant, Robert Harding White, appeals *nunc pro tunc* from the judgment of sentence entered after his guilty plea to aggravated indecent assault of a child, 18 Pa.C.S.A. § 3125(b). We affirm.

The Commonwealth filed a criminal complaint against Appellant on June 28, 2010, charging him with two counts each of aggravated indecent assault of a child and indecent assault of a person less than thirteen years of age, related to Appellant's assault of his seven- and two-year-old daughters.

On October 6, 2010, Appellant entered a guilty plea to one count of aggravated indecent assault of his seven-year-old daughter.[1] On January 5,

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* Retired Senior Judge assigned to the Superior Court.

2011, the court sentenced Appellant to no less than seven years nor more than fourteen years' incarceration, plus fines and costs. The court further ordered Appellant to successfully complete a sexual offender's counseling program and to have no contact with his seven-year-old daughter or any of his other minor children during the term of his sentence. On February 4, 2011, Appellant filed a motion for reconsideration of his sentence *nunc pro tunc*, which the trial court denied. Counsel filed an untimely direct appeal on Appellant's behalf that he later withdrew. (***See Commonwealth v. White***, 469 WDA 2011 (Pa. Super. 2011)).

On December 12, 2011, Appellant filed a timely and uncontested petition for post conviction collateral relief, 42 Pa.C.S.A. §§ 9541-9546, based on trial counsel's failure to file a timely appeal. The court granted the petition on August 6, 2012, granting Appellant permission to file a direct appeal *nunc pro tunc*. Appellant filed a timely notice of appeal of his judgment of sentence.[2]

Appellant raises two questions for our review:

(Footnote Continued) ––––––––––––––––––––

[1] The same day, Appellant also pleaded guilty to indecent assault of a person less than thirteen years of age regarding his two-year-old daughter, but was permitted to withdraw the plea. On January 19, 2011, the court granted the Commonwealth's motion and *nolle prossed* both counts of indecent assault of a person less than thirteen years of age and one count of aggravated indecent assault of a child.

[2] Appellant filed a timely statement of errors complained of on appeal on September 21, 2012 and the court filed its opinion on October 9, 2012. ***See*** Pa.R.A.P. 1925.

> A. Whether the trial court's sentence was excessive in light of the reasons given by the court as the grading of the offense took into consideration several of the facts stated by the court for its reasons to deviate from the standard guideline sentence and due to the court stating a reason as fact that was not a part of the record?
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> B. Whether the trial court erred by not allowing [] Appellant to have any contact with his other children who were not the victim [sic] of [] Appellant's crime?

(Appellant's Brief, at 3).

Both of Appellant's issues challenge the discretionary aspects of his sentence, although Appellant does not phrase his second issue as such. ***See, e.g.***, ***Commonwealth v. Hartman***, 908 A.2d 316, 319 (Pa. Super. 2006) (concluding that appellant's challenge of court order prohibiting his possession of a computer or internet access after his conviction of sexual abuse of children raised challenge to discretionary aspects of sentence).

Further,

> A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute. When challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question as to the inappropriateness of the sentence. Two requirements must be met before we will review this challenge on its merits. First, an appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. That is, 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. We examine an appellant's Rule 2119(f) statement to determine whether a substantial question exists. Our 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, 886-87 (Pa. Super. 2008) (case citations, internal quotation marks and footnotes omitted) (emphases in original).

Appellant's brief includes a Rule 2119(f) statement in which he alleges that the court abused its discretion in imposing a sentence in the aggravated range based on improper factors. (***See*** Appellant's Brief, at 11); Pa.R.A.P. 2119(f). This allegation raises a substantial question and we will review Appellant's first issue on the merits. ***See Commonwealth v. Stewart***, 867 A.2d 589, 592 (Pa. Super. 2005) (concluding that appellant raised a substantial question where he argued that court considered improper factors in imposing sentence in aggravated range); ***Commonwealth v. Penrod***, 578 A.2d 486, 490 (Pa. Super. 1990) (concluding allegation that sentencing court considered facts not of record raises substantial question).

However, Appellant's Rule 2119(f) statement does not raise his second issue regarding the sentence's prohibition on any interaction between him and his other minor children. (***See*** Appellant's Brief, at 11). Accordingly, we deem this issue waived. ***See Ahmad***, ***supra*** at 886 ("[A]ppellant must set forth in his brief a concise statement **of the reasons relied upon** for allowance of appeal with respect to the discretionary aspects of a

sentence.") (emphasis added). Moreover, even were it not waived, it would not merit relief.[3]

Our standard of review of a sentencing challenge is well-settled:

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

In reviewing a sentence 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;
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> (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
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> (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.
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> In all other cases[,] the appellate court shall affirm the sentence imposed by the sentencing court.

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[3] Because we are conducting a full merit review of Appellant's first issue, we will address Appellant's second issue in spite of his failure to preserve it in his Rule 2119(f) statement.

42 Pa.C.S.A. § 9781.

Commonwealth v. Glass, 50 A.3d 720, 727 (Pa. Super. 2012) (case citations omitted).

In this case, Appellant argues that the court erred in sentencing him in the aggravated range on the basis that his aggravated indecent assault was against his daughter, "who was under '[his] care and control'" because the offense already "carried a greater sentence because it was against a child or someone that would have been 'under [the] care and control' of [] Appellant at the time of the offense." (Appellant's Brief, at 12-13). We disagree.

Section 3125 of the Crimes Code, Aggravated Indecent Assault, provides, in relevant part, that: "[a] person commits aggravated indecent assault of a child when . . . the complainant is less than 13 years of age." 18 Pa.C.S.A. § 3125(b). There is nothing in the statute that requires that the child be under the care and control of the offender. ***See id.*** at § 3125. Accordingly, Appellant's argument that the court abused its discretion when it sentenced him in the aggravated range because the statute itself already takes into consideration that the child would be under the offender's care and control lacks merit.

Appellant also argues, without citation to any pertinent authority or discussion thereof, that "had the Commonwealth found the charge to be more egregious because the victim was [his] daughter, th[e]n [it] should have charged [him] under the [i]ncest statute[,]" which would have altered

the grading of his sentence. (Appellant's Brief, at 13). Because Appellant fails to develop this argument adequately, it is waived.[4] ***See*** Pa.R.A.P. 2119(a)-(c) (mandating that argument section of brief shall contain pertinent "discussion and citation of authorities"); ***Commonwealth v. Irby***, 700 A.2d 463, 464 (Pa. Super. 1997) ("[A]rguments which are not sufficiently developed are waived.") (citation omitted).

In his final argument in support of his first issue, Appellant claims that the court abused its discretion in relying on facts not of record in support of its imposition of a sentence in the aggravated range. (***See*** Appellant's Brief, at 14-15). Specifically, Appellant argues that the court improperly sentenced Appellant in the aggravated range due, in part, to physical injuries he inflicted on the victim when there was no evidence in the record of such injuries. (***See id.*** at 14). This issue lacks merit.

First, the record belies Appellant's argument. As noted by the trial court, "[t]he Affidavit of Probable Cause also asserts that a medical exam was conducted on [the victim,] which 'indicated trauma to [her] hymen[.]'" (Trial Court Opinion, 10/09/12, at unnumbered page 5 (citing Affidavit of

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[4] Moreover, it would not merit relief. Appellant does not provide, and after diligent research this Court has been able to unearth any precedent in support of Appellant's argument that, merely because the Commonwealth could have charged him with another crime, the court cannot consider facts that would have been included in that other crime as an aggravating factor.

Probable Cause, 6/28/10)). Accordingly, Appellant's argument that the court relied on a fact not of record lacks merit.

Moreover, we note that, at the time of sentencing, "the [c]ourt considered: comments from [Appellant], [Appellant's] wife and mother of the victim and the attorneys; the pre-sentence investigation report [(PSI)]; the Criminal Complaint; the Affidavit of Probable Cause; a letter from . . . the Warren County Jail; and the report of the Sexual Offenders Assessment Board." (***Id.*** at unnumbered pages 4-5 (citing N.T., 1/05/11, at 13)). The record reveals that Appellant pleaded guilty in this case, was suspected of molesting another daughter and assaulting a minor son, that both daughters suffered physical injuries as a result of the molestation, and that the victim has suffered nightmares as a result of the assault. (***See id.*** at unnumbered pages 5-6).

Based on our independent review of the record, we conclude that the court did not abuse its discretion in sentencing Appellant in the aggravated range and his first issue lacks merit. ***See Commonwealth v. Walls***, 926 A.2d 957, 966-68 (Pa. 2007) (holding that, there is no abuse of discretion so long as trial court imposed a reasonable, individualized sentence); ***see also Glass***, ***supra*** at 727.

In Appellant's second issue, he claims that the trial court erred in barring him from having access to any of his minor children during the term of his sentence. (***See*** Appellant's Brief, at 16-18). As already stated, this

issue is waived for Appellant's failure to raise it as a reason for allowance of appeal in his Rule 2119(f) statement. ***See Ahmad***, ***supra*** at 886. Additionally, it is waived on the basis that Appellant offers no pertinent authority,[5] discussion thereof, or citation to the record in support of this argument. (***See*** Appellant's Brief, at 16-18); ***see also*** Pa.R.A.P. 2119(a)-(c). ***See*** Pa.R.A.P. 2101; ***Irby***, ***supra*** at 464 ("[A]rguments which are not sufficiently developed are waived."). Moreover, the issue would lack merit.

As part of his sentence, the court ordered that Appellant could "have no contact with [his] wife or any of [his] children during the term of [the] sentence." (N.T., 1/05/11, at 20). The court imposed this condition on Appellant because, based on the record, it found that he "poses a grave threat to his children." (Trial Ct. Op., 10/09/12, at unnumbered page 5).

It is beyond peradventure that "a person placed on probation does not enjoy the full panoply of constitutional rights otherwise enjoyed by those who [have] not run afoul of the law." ***Hartman***, ***supra*** at 321 (citation omitted). Based on our independent review of the record, and the reasons set forth by the trial court, we discern no abuse of discretion in the court's decision prohibiting Appellant from contact with his minor children during the term of his sentence as a way of protecting the members of Appellant's

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[5] In fact, Appellant's counsel concedes that she was unable to find any pertinent authority on this issue. (***See*** Appellant's Brief, at 18).

family. Therefore, Appellant's issue, even if not waived, would not merit relief. ***See Glass***, ***supra*** at 727.

Judgment of sentence affirmed.