

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
NELSON JAMES SIMMONS,		No. 1410 EDA 2012
Appellant		

Appeal from the Judgment of Sentence of February 2, 2009,
in the Court of Common Pleas of Lehigh County,
Criminal Division at No. CP-39-CR-0001338-2008

BEFORE: OLSON, WECHT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

Filed: March 20, 2013

This is a *nunc pro tunc* appeal from a judgment of sentence. We affirm.

The relevant background underlying this matter can be summarized in the following manner. A jury convicted Appellant of, *inter alia*, robbery and kidnapping. On February 2, 2009, the trial court sentenced Appellant to twenty-nine to eighty years in prison. Appellant filed a post-sentence motion, which the trial court denied. Appellant appealed to this Court. This Court dismissed the appeal. Appellant eventually filed a petition pursuant to the Post Conviction Relief Act. The court granted the petition, allowing Appellant to file a direct appeal *nunc pro tunc*. Appellant timely filed a notice of appeal. The court then directed Appellant to comply with Pa.R.A.P.

*Retired Senior Judge assigned to the Superior Court.

1925(b). Appellant subsequently filed a statement pursuant to Pa.R.A.P. 1925(b)

On appeal, Appellant asks us to consider the following questions.

1. Did the Trial Court violate the fundamental norms of the sentencing process when it harshly and excessively sentenced the Appellant to twenty-nine (29) to eighty (80) years in a state correctional institution, and then denied the Appellant's Motion for Reconsideration?
2. Did the Trial Court violate the fundamental norms of the sentencing process when it improperly relied on the prior record score of the Defendant, which was already considered in the prior record score, and then sentenced the Appellant to twenty-nine (29) to eighty (80) years in a state correctional institution, and then denied the Appellant's Motion for Reconsideration?

Appellant's Brief at 4 (proposed answers omitted). Both of these issues challenge discretionary aspects of Appellant's sentence.

Challenges to the discretionary aspects of sentencing do not entitle an appellant to appellate review as of right. ***Commonwealth v. Sierra***, 752 A.2d 910, 912 (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. 1410 [now Rule 720]; (3) whether appellant's brief has a fatal defect; 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).

Commonwealth v. Martin, 416 Pa.Super. 507, 611 A.2d 731, 735 (1992) (most internal citations omitted). Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or raised in a motion to

modify the sentence imposed at that hearing. **Commonwealth v. Mann**, 820 A.2d 788, 794 (Pa. Super. 2003), *appeal denied*, 574 Pa. 759, 831 A.2d 599 (2003).

Additionally, 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); **Commonwealth v. Tuladziecki**, 513 Pa. 508, 522 A.2d 17 (1987); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal 'furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to exceptional cases.'" **Commonwealth v. Williams**, 386 Pa. Super. 322, 562 A.2d 1385, 1387 (1989) (*en banc*) (emphasis in original).

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 (quoting **Commonwealth v. Brown**, 741 A.2d 726, 736 (Pa. Super. 1999) (*en banc*), *appeal denied*, 567 Pa. 755, 790 A.2d 1013 (2001)).

Commonwealth v. Hyland, 875 A.2d 1175, 1183 (Pa. Super. 2005).

In terms of whether Appellant preserved his issues for appellate review, he did not object to his sentence at the sentencing hearing. He did timely file a post-sentence motion wherein he requested that the court reconsider his sentence. In that motion, Appellant downplayed his role in the crimes for which he was convicted, characterizing himself as "a minor player." Post Sentence Motions, 02/10/09, at ¶3. Appellant highlighted that

he cooperated with police and that his co-defendant, who Appellant maintained planned and carried out the criminal activity, only received fifteen to forty years in prison. Ultimately, Appellant offered the following bald assertion in seeking reconsideration of his sentence: "Under the circumstances, the sentence is harsh and excessive and therefore unjust." *Id.* at ¶7. We conclude that the only issue that Appellant preserved in his post-sentence motion is whether his sentence is excessive when compared to his co-defendant's sentence and given his cooperation with police.

As to the issue Appellant preserved, we first note that, while his Pa.R.A.P. 1925(b) statement claims that the trial court erred by denying his post-sentence motion, the statement does not present an issue wherein Appellant specifically claims that his sentence is excessive. For this reason, Appellant, at least arguably, abandoned the only issue that he preserved for appellate review.

To the extent that Appellant's Pa.R.A.P. 1925(b) statement and the "Statement of Questions Involved" portion of his brief can be construed as presenting his preserved challenge to the discretionary aspects of his sentence, we observe that Appellant did timely file a notice of appeal and that his brief does contain a statement pursuant to Pa.R.A.P. 2119(f). Thus, at this point, we need to determine whether Appellant presents his preserved challenge in that statement.

Appellant's Pa.R.A.P. 2119(f) statement makes no mention of his cooperation with police. In claiming that his sentence is excessive, Appellant does reference the alleged disparity between his sentence and his co-

defendant's sentence. This Court has held that a substantial question exists where the appellant complains that his sentence is excessive by averring **an unexplained** disparity between his sentence and that of his co-defendant. *Commonwealth v. Mastromarino*, 2 A.3d 581, 589 (Pa. Super. 2010). Appellant does not aver that the trial court **failed to explain** the disparity between his sentence and that of his co-defendant. Moreover, Appellant fails to cite any case law that suggests that a substantial question exists when an appellant simply claims his sentence is excessive when compared to a co-defendant's sentence. Given this lack of citation and Appellant's failure to aver that the trial court failed to explain the alleged sentence disparity, we conclude that Appellant has not raised a substantial question worthy of appellate review.

Judgment of sentence affirmed.

Judge Olson concurs in the result.