NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. NELSON L. TORRES, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1414 MDA 2012

Appeal from the Judgment of Sentence February 15, 2012
In the Court of Common Pleas of Lebanon County
Criminal Division at No(s): CP-38-CR-0001063-2011

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., and OLSON, J.

MEMORANDUM BY STEVENS, P.J. **FILED MAY 03, 2013**

This is an appeal from the judgment of sentence entered in the Court of Common Pleas of Lebanon County following Appellant's conviction by a jury on one count of robbery, 18 Pa.C.S.A. § 3701(a)(1)(iv). Appellant contends (1) the jury's verdict is against the weight of the evidence, and (2) the trial court abused its discretion in sentencing Appellant. We affirm.

The relevant facts and procedural history are as follows: At approximately 9:00 p.m. on May 3, 2011, as Adam Kreiser was leaving the Silver Dollar Bar and Grill, Appellant attacked him and took approximately $450.00 from his pockets. Trial Court Opinion filed 7/3/12 at 3. After Appellant was arrested, he proceeded to a jury trial on January 13, 2012, at the conclusion of which the jury convicted him of robbery.

On February 15, 2012, Appellant proceeded to a sentencing hearing, at the conclusion of which the trial court sentenced Appellant to three years to ten years in prison, plus ordered him to pay costs and restitution. Appellant, who was provided with his post-sentence and appellate rights at the time of sentencing, filed a timely post-sentence motion on Monday, February 27, 2012. Therein, Appellant alleged the trial court erred in considering solely Appellant's prior record in sentencing him in the aggravated range, and the evidence was insufficient to sustain his conviction.[1]

By order and opinion filed on July 3, 2012, the trial court denied Appellant's post-sentence motion, and this timely counseled appeal followed on August 2, 2012. By order entered on August 6, 2012, the trial court directed Appellant to file a statement pursuant to Pa.R.A.P. 1925(b).[2] On August 14, 2012, Appellant filed a counseled Pa.R.A.P. 1925(b) statement contending the trial court erred in considering solely Appellant's prior record in sentencing him in the aggravated range and the evidence was insufficient to sustain his conviction. On August 16, 2012, the trial court filed a brief

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[1] On June 11, 2012, Appellant filed a memorandum in support of his post-sentence motions in which he continued to argue the trial court abused its discretion in sentencing him and the evidence was insufficient to sustain his conviction.

[2] The trial court's order complies with the requirements of Pa.R.A.P. 1925(b)(3), and the certified docket entries reveal the order was served upon Appellant's counsel on August 6, 2012.

Pa.R.A.P. 1925(a) opinion indicating it had adequately addressed Appellant's issues in its July 3, 2012 opinion.

Appellant's first contention is he should be granted a new trial since the jury's verdict was against the weight of the evidence. We find this issue to be waived.

Pennsylvania Rule of Criminal Procedure 607 provides, in pertinent part, that a claim that the verdict was against the weight of the evidence "shall be raised with the trial judge in a motion for a new trial: (1) orally, on the record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion." Pa.R.Crim.P. 607(A). "The purpose of this rule is to make it clear that a challenge to the weight of the evidence must be raised with the trial judge or it will be waived." ***Commonwealth v. McCall***, 911 A.2d 992, 997 (Pa.Super. 2006).

Instantly, Appellant filed a timely post-sentence motion; however, he did not present therein any claim regarding the weight of the evidence.[3] Additionally, the record reflects Appellant did not advance any oral or written motion for a new trial, based on the weight of the evidence, prior to

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[3] As indicated *supra*, in his written post-sentence motion, Appellant presented a challenge to the sufficiency of the evidence. However, it is well-settled that a challenge to the sufficiency of the evidence is distinct from a challenge to the weight of the evidence. ***Commonwealth v. Santiago***, 980 A.2d 659 (Pa.Super. 2009).

sentencing. We, therefore, conclude Appellant has waived his challenge to the weight of the evidence on this basis.

Additionally, we find Appellant's weight of the evidence claim to be waived under Pa.R.A.P. 1925(b). Pa.R.A.P. 1925(b)(4)(vii) specifically provides that "[i]ssues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived." In the case *sub judice*, despite being warned in the trial court's order that any issue not presented in the Rule 1925(b) statement would be deemed waived, Appellant did not include his weight of the evidence claim therein. Additionally, we note that, while Pa.R.A.P. 1925(b)(4)(v) provides that "[e]ach error identified in the Statement will be deemed to include every subsidiary issue contained therein which was raised in the trial court[,]" it is clear that the weight of the evidence claim presented on appeal by Appellant is not a subsidiary issue of either the discretionary aspects of sentencing claim or sufficiency of the evidence claim, which he presented in his Rule 1925(b) statement. Therefore, we find Appellant's weight of the evidence claim to be waived on this basis as well. ***See Commonwealth v. Garland***, 2013 WL 772678 (Pa.Super. filed 3/1/13) (claim not raised in court-ordered Pa.R.A.P. 1925(b) statement shall be deemed waived); ***Majorsky v. Douglas***, 58 A.3d 1250 (Pa.Super. 2012) (same).

Appellant's final contention is the trial court abused its discretion in imposing Appellant's sentence. Specifically, Appellant contends the trial

court erred in relying solely on Appellant's prior record in imposing a sentence in the aggravated range since such a factor is already taken into account by the Sentencing Guidelines.

Initially, we agree with Appellant that his issue presents a challenge to the discretionary aspects of his sentence. ***See Commonwealth v. Goggins***, 748 A.2d 721 (Pa.Super. 2000) (*en banc*) (claim trial court may not double count factors already taken into account by the Sentencing Guidelines challenges discretionary aspects of sentencing). "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." ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa.Super 2004).

> To reach 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, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, 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).

Commonwealth v. Cook, 941 A.2d 7, 11 (Pa.Super. 2007) (citation omitted).

In the instant case, Appellant filed a timely notice of appeal, preserved his claims in his post-sentence motion,[4] and included a Rule 2119(f) statement in his brief. Additionally, we conclude Appellant's claim presents a substantial question. ***See Goggins***, ***supra*** (indicating trial court may not double count factors already taken into account by the Sentencing Guidelines). Accordingly, we will now address the merits of the sentencing issue raised on appeal, pursuant to the following standard:

> [T]he proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. [A]n abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. In more expansive terms, our Court recently offered: An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

Commonwealth v. Provenzano, 50 A.3d 148, 154 (Pa.Super. 2012) (quotation omitted).

Here, at the sentencing hearing, Appellant's counsel informed the trial court that "[Appellant] is 51 years of age, is single with four children, has a ninth grade education. He is currently unemployed." N.T. 2/15/12 at 2. Appellant told the trial court that, during his last incarceration, he "was

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[4] Appellant also presented the issue in his court-ordered Pa.R.A.P. 1925(b) statement.

doing good;" however, when he left prison, he met a woman and "let [his] dumbness get in [his] way." N.T. 2/15/12 at 2. The Commonwealth informed the trial court of the following:

> [Appellant] has a significant history, a prior record score of 5. He has been constantly in and out of jail, past history of problems with drinking and ending up in jail, disorderly conduct, forgery, receiving stolen property, robbery, [and] burglary.
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> [Appellant] has a history of taking things that don't belong to him, without caring about the affect that has on others. And I think with the culmination of all of that, and this case, he has only been out, like you said, a year or so.
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> He gets out, he goes to a bar, he sees an individual there who has cash, he decides he wants to take it, and he beats the guy up, a 61 year old man, bleeding from, you know, elbows, above his eye, behind his ear. He was pinned to the ground, punched the individual, you know, suffered significant injuries or significant blood loss. [Appellant] has clearly shown a past history of violence and not caring about the affects that he has on others.
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> We are asking for, you know, a sentence on the high end of the range. He clearly is not learning from his actions, and so the only thing that we can do is protect society from him by keeping him away.

N.T. 2/15/12 at 3-4.

The trial court, noting it was "stunned" by Appellant's lengthy criminal history, indicated Appellant's first conviction occurred 32 years ago with a harassment summary offense; however, throughout the years, Appellant continued to commit crimes, which escalated in violence. N.T. 2/15/12 at 4-6. The trial court reiterated the facts of Appellant's current offense, noting the victim was a "nice guy" who was not bothering anyone when Appellant "chases this guy down, sneaks up from behind, sucker punches him, [and] pummels the poor guy to take some money." N.T. 2/15/12 at 7. The trial

court noted the case "cried out for the maximum amount of the aggravated range," Appellant "cannot control [his] emotions," he is "almost like the playground bully," and he refuses to take responsibility by blaming his problems on others. N.T. 2/15/12 at 7-9. The trial court specifically stated it has "a duty under the system of justice to protect the citizens from [Appellant]." N.T. 2/15/12 at 8. The trial court also indicated a sentence in the aggravated range was necessary to rehabilitate Appellant since he has not "learned his lesson." N.T. 2/15/12 at 9.

Additionally, in denying Appellant's post-sentence motion, the trial court stated the following reasons for imposing a sentence in the aggravated range:

> [The court] took into consideration the nature and circumstances of the offense and the history of [Appellant] during this time. Furthermore, we considered [Appellant's] Presentence Investigation and the guidelines.
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> Upon review of [Appellant's] Presentence Investigation, the standard range is 24-30 months, and the aggravated range is 30-36 months.
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> We stated on the record our reasons for imposing an aggravated sentence….We acknowledge that we discussed [Appellant's] prior record at sentencing; however, we did not use or intend to exclusively use his prior convictions to justify the imposition of the aggravated sentence. Rather, based on the facts of this case, the assaultive behavior, and the severity of the robbery, th[e] [court] found an aggravated range was necessary as it is eviden[t] that [Appellant] is a danger to society.

Trial Court Opinion filed 7/3/12 at 6-8.

Upon review, we find meritless Appellant's contention the trial court relied solely on his prior record in imposing a sentence in the aggravated range. Rather, the record reveals the trial court considered "all of the requisite factors, including the nature and circumstances of the offense, the recommended guideline ranges, protection of the public, the gravity of the offense, and the rehabilitative needs of [Appellant], when fashioning Appellant's sentence." ***Commonwealth v. Sheller***, 961 A.2d 187, 191 (Pa.Super. 2008). Further, the trial court had the benefit of a pre-sentence investigation report at the time of sentencing and had an opportunity to consider and observe Appellant's history and characteristics. ***See id.*** Finally, even if the trial court relied on a factor, which is subsumed into the guideline recommendation, there is no abuse of discretion when the trial court has significant other support for the imposition of its sentence in the aggravated range, as it clearly did in this case. ***See id.***

For all of the foregoing reasons, we affirm Appellant's judgment of sentence.

Affirmed.

Judgment Entered.

Mary A. Haughey

Deputy Prothonotary

Date: 5/3/2013