

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
SHELTON LEE HOLT,		
Appellant		No. 1466 MDA 2012

Appeal from the Judgment of Sentence entered June 27, 2012,
in the Court of Common Pleas of Lackawanna County,
Criminal Division, at No(s): CP-35-CR-0000303-2012

BEFORE: DONOHUE, ALLEN, and OTT, JJ.

MEMORANDUM BY ALLEN, J.:

Filed: March 15, 2013

Shelton Lee Holt (“Appellant”) appeals from the judgment of sentence imposed after he pled guilty to robbery.¹ We affirm.

The charges against Appellant stemmed from an incident that occurred on November 13, 2011, when Appellant and several other individuals participated in a home invasion at 520 Taylor Avenue in Scranton, Pennsylvania. Affidavit of Probable Cause, 11/15/11, at 1-3. During the home invasion, two of the perpetrators, identified as “Hayden” and “Principe” knocked on the door of 520 Taylor Avenue, and were invited inside by the residents, with whom they were acquainted. *Id.* Some time thereafter, Hayden and Principe asked to use the upstairs bathroom. While

¹ 18 Pa.C.S.A. § 3701(a)(1)(v).

Hayden and Principe were upstairs, three other perpetrators with concealed faces forced their way into the residence, where one of the perpetrators pointed a gun at the victims, another wielded a knife, and the third demanded money and valuables from the victims. The three perpetrators then fled the residence with cash and cell phones stolen from the victims. After a verbal confrontation with the victims who suspected their involvement in the robbery, Hayden and Principe left the residence. *Id.* Following a police investigation, Principe confessed that Appellant, along with Hayden, himself and two others, were residents of a dormitory at Lackawanna College, and that they had committed the robbery after obtaining a handgun. *Id.*

Appellant was subsequently arrested and charged with three counts of robbery, one count of burglary, one count of criminal trespass, one count of theft by unlawful taking, one count of receiving stolen property, one count of conspiracy to commit robbery, one count of simple assault, and one count of recklessly endangering another person. On April 6, 2012, Appellant pled guilty to one count of robbery. The remaining counts were *not prossed*.

The trial court conducted a sentencing hearing on June 27, 2012, at the conclusion of which the trial court sentenced Appellant to a term of imprisonment of eighteen to sixty months. On July 9, 2012, Appellant filed a "Petition for Reduction and Reconsideration of Sentence" which the trial court denied on July 10, 2012. Appellant filed a notice of appeal on August

9, 2012. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issue for our review:

Whether the trial court abused its discretion and imposed a manifestly unreasonable sentence, which was outside of the sentencing guidelines and based upon factors previously considered by the legislature, upon an individual with a prior record score of zero?

Appellant's Brief at 4.

Appellant challenges the discretionary aspects of his sentence. When an appellant challenges a discretionary aspect of sentencing, we must conduct a four-part analysis before we reach the merits of the appellant's claim. *Commonwealth v. Martin*, 611 A.2d 731, 735 (Pa. Super. 1992). In this analysis, we must determine: (1) whether the present appeal is timely; (2) whether the issue raised on appeal was properly preserved; (3) whether the appellant has filed a statement pursuant to Pa.R.A.P. 2119(f); and (4) whether the appellant has raised a substantial question that his sentence is not appropriate under the Sentencing Code. *Id.*

In the present case, the appeal is timely and Appellant preserved his issue in a post-sentence motion. Further, Appellant has filed a statement pursuant to Pa.R.A.P. 2119(f). See Appellant's Brief at 9. We therefore must determine whether Appellant has raised a substantial question for our review.

Appellant argues that the trial court imposed a sentence outside of the aggravated range of the sentencing guidelines without an adequate basis. Appellant's Brief at 9-15. Such a claim raises a substantial question for our review. *See Commonwealth v. Sheller*, 961 A.2d 187 (Pa. Super. 2008 (a claim that the sentencing court exceeded the recommended range in the Sentencing Guidelines without an adequate basis raises a substantial question for this Court to review)). Additionally, Appellant claims that the trial court sentenced outside the guideline range based upon factors already considered in the sentencing guidelines. *Id.* This claim also raises a substantial question. *See Commonwealth v. Fullin*, 892 A.2d 843 (Pa. Super. 2006) (claim the trial court improperly based an aggravated range sentence on a factor that constituted an element of the offense raised a substantial question). Therefore, we will examine the merits of Appellant's claim.

When examining a challenge to the discretionary aspects of a sentence, we are guided by the following principles:

When imposing a sentence, a court must consider the factors set forth in 42 Pa.C.S.A. § 9721(b). Specifically, the court shall consider the protection of the public, the gravity of the offense as it relates to the impact on the victim and the community, the defendant's rehabilitative needs, and the sentencing guidelines. As to the guidelines, they are advisory, not binding on the court. Nevertheless, if the court sentences a defendant outside those guidelines, the court must provide a contemporaneous written statement setting forth its reasons for the deviation therefrom. 42 Pa.C.S.A. § 9721(b). A court can meet the requirement of a contemporaneous written statement

by placing its reasons for departure on the record during sentencing.

Commonwealth v. Feucht, 955 A.2d 377, 383 (Pa. Super. 2008). We have explained that “the sentencing guidelines are advisory in nature. ... [I]f the sentencing court proffers reasons indicating that its decision to depart from the guidelines is not unreasonable, we must affirm a sentence that falls outside those guidelines.” ***Commonwealth v. Bowen***, 55 A.3d 1254, 1264 (Pa. Super. 2012).

“[W]hether or not there is a departure from the guidelines, a court imposing sentence for a felony or misdemeanor shall make part of the record, and disclose in open court during sentencing, a statement of the reasons for the sentence. 42 Pa.C.S.A. § 9721(b). The court is not required to parrot the words of the Sentencing Code, stating every factor that must be considered under Section 9721(b). However, the record as a whole must reflect due consideration by the court of the statutory considerations.” ***Feucht***, 955 A.2d at 383 (Pa. Super. 2008). ***See also*** 42 Pa.C.S.A. §9781(d) (when we review the record, we must have regard for: (1) the nature and circumstances of the offense and the history and characteristics of the defendant[;] (2) [t]he opportunity of the sentencing court to observe the defendant, including any presentence investigation[;] (3) [t]he findings upon which the sentence was based[;] (4) [t]he guidelines promulgated by the [sentencing] commission.); §9781(c).

In the present case, after hearing statements from Appellant, his parents, and Appellant's counsel, the trial court provided the following reasons on the record for its imposition of sentence:

I have to point out that I consider this to be just about as serious a crime as anyone can commit without actually taking a life.

This was essentially a home invasion, something that you and your friends planned. You got together, you talked about it, realized that a gun was necessary; went to another dorm room to get a gun, coordinate it by having somebody go to the front door, get inside, and let you know by a telephone call who's there and whether or not it can be pulled off. And then you and two other buddies come to the back door with a knife and a gun.

First of all, we have what would be a burglary, entering property of another in order to commit a crime therein.

The violation of a home is sacred, and everyone has a right to feel safe in their home.

Secondly, going in and threaten[ing] somebody with physical harm is a separate and distinct crime of itself.

You're standing here charged only with robbery today, and you're worried about the impact on you. When you talk about the victims, I was glad to hear you finally get around to someone other than yourself, but there's also a very serious effect on our community.

When a community receives word that there is a home invasion going on, suddenly you have everybody in the community who starts fearing if they are safe in their own home.

And that is the kind of emotion that you and your friends injected into our community, and everyone does have a right to feel safe.

Your parents obviously care very much and showed great restraint and tough love in saying let him sit there, we could bail him out, but maybe he should be there. But you know, everything from the premeditation to the nature of the crime, a

serious crime that cannot be minimized, and I didn't see a real motive here.

It appears that you guys were high and using some pot and you wanted more pot and you figured you were going to get some.

That's the best I can figure after reviewing four files, all of which are going to be dealt with today; you and your other two friends including Mr. Principe who did go to the police, who did explain and come clean and led to the resolution of the case.

Your attorney referred to the fact that perhaps you cooperated with the investigation; maybe after you were caught, but you were not the first one to come clean and explain what was going on.

And I want you to know that I've taken into consideration all of these matters, and after considering the entire contents of the pre-sentence file, your own rehabilitative needs, but also the nature and gravity of the offense, my obligation to, not only fashion a fair sentence that is fair to you, but one which shows proper respect for those who reside here in our community, I've decided to impose the following sentence [of 18 to 60 months of imprisonment].

* * *

I would note that this sentence is above the aggravated range of the sentencing guidelines, and I've done so because I find that this was a fairly premeditated robbery, not motivated by any drug leads or mental or emotional stress.

I see minimal, if any remorse, other than the fact that you were caught.

I perceive the crime as being motivated by greed; the sentence is necessary to incapacitate you and deter others who might similarly consider a similar type of conduct on their part; and finally, to show respect for those who reside here in the community who have a right to feel safe in their own home and not have to worry if they're going to wake up and find somebody in their house.

N.T., 6/27/12, at 8-13.

Based on the foregoing, we conclude that the trial court did not abuse its discretion. In making its sentencing determination, the trial court was cognizant of Appellant's history and background, the nature of his offense, the impact of the crime on the victims and on society in general, the need for protection of the public, as well as Appellant's remorsefulness. Moreover, the trial court had the benefit of the pre-sentence investigation report, and specifically referenced that report at the sentencing hearing. ***See Commonwealth v. Marts***, 889 A.2d 608, 615 (Pa. Super. 2005) (where the sentencing court possessed and considered a presentence report, the presumption arises that the sentencing court was aware of and weighed all relevant information contained therein along with any mitigating sentencing factors).

Appellant asserts the trial court abused its discretion by relying on the fact that the crime was premeditated to support an upward departure from the sentencing guidelines. Appellant argues that premeditation is an element of the crime of robbery and therefore could not be relied upon to support upward deviation. Additionally, Appellant asserts that the trial court failed to distinguish how Appellant's offense was different from a "typical"

robbery to warrant a sentence above the guideline range.² Accordingly, Appellant asserts that the reasons relied on by the trial court for its sentence were inadequate. *Id.* ***See also Commonwealth v. Gause***, 659 A.2d 1014, 1016-1017 (Pa. Super. 1995) (“unless the particular facts of the case in question are distinguishable from the typical case of that same offense, a sentence in the standard range would be called for”). We disagree.

As noted by the trial court in its Pa.R.A.P. 1925(a) opinion, it provided “numerous reasons” for its determination that Appellant’s crime was atypical, warranting a sentence outside of the guidelines. Trial Court opinion, 10/2/12, at 5. The trial court considered, among other factors, the fact that the robbery was not motivated by a drug dependency, or mental or emotional illness, that Appellant displayed “minimal if any remorse other than being caught[;] that the [trial] court perceived the crime as being motivated by greed[;] and that the sentence was necessary to incapacitate [Appellant] to deter others who might consider committing a similar crime, and to show respect for those who reside in th[e] community who have a right to feel safe in their homes.” *Id.*

The trial court additionally noted that it considered the crime particularly “egregious” in light of the planning and forethought needed to execute it, as demonstrated by the arrangement to have Mr. Principe and

² The sentencing guidelines recommended a minimum sentence of Restorative Sanctions (RS) to twelve months.

Mr. Hayden enter the residence first to prepare for the robbery, in combination with the efforts made to obtain a gun, and the subsequent use of deadly weapons during the commission of the crime. *Id.* The trial court offered adequate reasons for its deviation from the guidelines, and properly evaluated the individual circumstances of the case in making its sentencing determination.

Appellant claims that premeditation is an element of the crime of robbery and therefore the trial court could not rely on that factor in making its sentencing determination. We disagree. Appellant was convicted of robbery pursuant to 18 Pa.C.S.A. § 3701(a)(1)(v), which provides that a person is guilty of robbery if “in the course of committing a theft he ... inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury.” There is no requirement that the robbery be premeditated to sustain a finding of guilt pursuant to § 3701(a)(1)(v). Thus, the trial court did not err in considering Appellant’s extensive preparation and planning of the robbery when sentencing Appellant. ***See Commonwealth v. Walls***, 926 A.2d 957, 966 (Pa. 2007) (trial court’s consideration of a factor that was not an element of the crime could justify an above-guideline sentence). ***See also Commonwealth v. Simpson***, 829 A.2d 334 (Pa. Super. 2003) (trial courts are permitted to use factors already included in the guidelines where they are used to supplement other extraneous sentencing information).

Given the foregoing, we conclude that the trial court articulated adequate reasons on the record to support its sentence beyond the guideline range. We find no abuse of the trial court's sentencing discretion and therefore we affirm the judgment of sentence.

Judgment of sentence affirmed.