NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. WANDA F. MILLER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1473 WDA 2012

Appeal from the Judgment of Sentence July 19, 2004
In the Court of Common Pleas of Warren County
Criminal Division at No.: CP-62-CR-0000629-2003

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

MEMORANDUM BY PLATT, J. Filed: March 12, 2013

Appellant, Wanda F. Miller, appeals from the amended judgment of sentence imposed on July 19, 2004, following her guilty plea to two counts of driving under the influence (DUI), one count of driving while under suspension, and one count of turning movements and required signals. We affirm.

The trial court set forth the facts of the case as follows:

> The Appellant was charged with numerous counts all relating to driving under the influence and other traffic code violations. She entered a plea of guilty to four of those counts and the remaining counts were *nolle prossed*. The [trial c]ourt entered its sentence on July 19, 2004 and the Appellant filed a Motion for Reconsideration of Sentence. Said Motion was denied and the Appellant filed a Motion for Writ of *Habeas Corpus*, which was also denied. The Appellant then filed her Notice of Appeal. Subsequently, the Appellant filed a Motion for Restitution

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* Retired Senior Judge assigned to the Superior Court.

> Hearing to address the issue of restitution that was ordered as part of her sentence. After informal argument, the [trial c]ourt decided that restitution was inappropriate in this case and amended Appellant's sentence to eliminate the restitution requirement. The remaining part of Appellant's sentence was unaffected.

(Trial Court Opinion, 9/24/04, at 1).

After consideration of a pre-sentence investigation report, the court sentenced Appellant to an aggregate term of not less than thirty days nor more than two years less one day's incarceration in county jail and an additional two years' suspension of her operator's license, plus costs, fines, and community service. Appellant timely appealed the amended sentence on July 21, 2004, and the trial court ordered her to file a statement pursuant to Rule 1925(b), which she timely filed on July 27, 2004. The trial court entered a Rule 1925(a) opinion on September 24, 2004. Thereafter, "[f]or unexplained reasons, defense counsel was not sent a request for docketing statement or notice to file briefs until the current year, after defense counsel had inquired into the progress on the case. Counsel has provided verification to [this Court] that he has timely complied with all that was ordered by the court." (Appellant's Brief, at 3).

Appellant raises two questions for our review:

> 1. Was the judgment of sentence illegal as her sentence was above the standard range of the offense due to factors that were not admitted by the Appellant nor found by a jury?
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> 2. Did [the trial court] abuse [its] discretion in sentencing the Appellant in the aggravated range, given that the sole ground is the Appellant's alleged failure to adequately comply with the probation department in preparing her presentence report, when this was the Appellant's first offense and she had taken considerable steps towards alcohol rehabilitation prior to sentencing?

(***Id.*** at 4).

In her first issue, Appellant purports to challenge the legality of her sentence, arguing that "[she] was given an aggravated sentence due to facts that were not found by a jury nor admitted by her." (***Id.*** at 5). Appellant asserts that she was given an aggravated sentence in violation of ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Appellant's Brief, at 5 (quoting ***Apprendi***, ***supra*** at 490)). We disagree.

"Issues relating to the legality of a sentence are questions of law to which our standard of review is *de novo* and our scope of review is plenary." ***Commonwealth v. Bowen***, 55 A.3d 1254, 1265 (Pa. Super. 2012). In reviewing a sentencing court's decision to sentence in the aggravated range, our standard of review 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.
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> A sentencing court may consider any legal factor in determining that a sentence in the aggravated range should be imposed. In addition, the sentencing judge's statement of reasons on the record must reflect this consideration, and the sentencing judge's decision regarding the aggravation of a sentence will not be disturbed absent a manifest abuse of discretion.

Commonwealth v. Bowen, 975 A.2d 1120, 1122 (Pa. Super. 2009) (citations and quotation marks omitted).

Furthermore, it is well-settled that ***Apprendi***, ***supra***, which involves determinate sentencing schemes, "does not implicate the Pennsylvania scheme, where there is no promise of a specific sentence, and a judge has discretion to sentence in the aggravated range so long as he or she provides reasons for the sentence." ***Commonwealth v. Mitchell***, 883 A.2d 1096, 1106 (Pa. Super. 2005), *appeal denied*, 897 A.2d 454 (Pa. 2006) (citation omitted). Appellant's claim that her aggravated sentence is illegal under ***Apprendi*** lacks merit. ***See Bowen***, ***supra*** at 1265.

Second, Appellant challenges the discretionary aspects of her sentence. Specifically, she asserts that the trial court relied on improper factors and failed to consider her efforts to rehabilitate herself. (Appellant's Brief, at 6-7). We disagree.

> Appellant challenges the discretionary aspects of sentencing for which there is no automatic right to appeal. This appeal is, therefore, more appropriately considered a petition for allowance of appeal. Two requirements must be met before a challenge to the judgment of sentence will be heard on the merits. First, the appellant must set forth in his [or her] brief a concise statement of matters relied upon for allowance of appeal with respect to the discretionary aspects of his [or her] sentence. Pa.R.A.P. 2119(f). Second, he or she must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. 42 Pa.C.S.A. § 9781(b)[.]
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> The determination of whether a particular case raises a substantial question is to be evaluated on a case-by-case basis. Generally, however, in order to establish that there is a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code or

> contrary to the fundamental norms underlying the sentencing process.

Commonwealth v. Yeomans, 24 A.3d 1044, 1049 (Pa. Super. 2011) (case citation omitted).

In the present case, Appellant has failed to include in her brief a concise statement pursuant to Pa.R.A.P. 2119(f). (***See*** Appellant's Brief, at 1-8). However, because the Commonwealth has not objected to its omission, we may overlook Appellant's error and reach the merits of her sentencing claim. ***See Yeomans***, ***supra*** at 1049. Therefore, we proceed to determine whether Appellant has presented a substantial question that the sentence appealed from is not appropriate under the Sentencing Code or violates fundamental norms underlying the sentencing process.

First, Appellant objects to the trial court's reasons for sentencing her in the aggravated range. This Court has previously determined that a failure to state adequate reasons for sentencing in the aggravated range raises a substantial question. ***See Commonwealth v. Wellor***, 731 A.2d 152, 155 (Pa. Super. 1999). Thus, we will address the merits of this argument.

At sentencing, the trial court determined that Appellant had "a pathologic drinking problem affecting [her] mental health and [she was] in need of corrective measures." (N.T. Sentencing, 7/19/04, at 7). The court stated that:

> based on all the [c]ourt has reviewed here [it] is going to sentence [Appellant] in the aggravated range because of the fact that [her] failure to cooperate with the probation department just in obtaining the information, and they made several attempts to try and reach [her], indicates that . . . they're going to have a rough time with [her] on probation, so the [trial c]ourt was going to give [her] a longer jail term because of [her] lack of cooperation.

(***Id.*** at 8-9). The trial court also adopted the pre-sentence investigation report, which indicated that Appellant had a previous DUI conviction, into the record. (***See*** Amended Sentence, 7/19/04, at 1-2).

Based on the aforementioned, we conclude that the trial court properly weighed all of the relevant factors and provided adequate reasons on the record for sentencing Appellant in the aggravated range. As such, we find no merit in Appellant's claim and no reason to conclude that the trial court abused its discretion. Appellant's first argument is without merit.

Second, Appellant "points out that she had made extensive efforts in alcohol rehabilitation prior to sentencing[.]" (Appellant's Brief, at 7). However, it is well-settled that "a claim that the court failed to consider certain mitigating factors does not present a substantial question[.]" ***Commonwealth v. Corley***, 31 A.3d 293, 297 (Pa. Super. 2011) (citation omitted). Therefore, her second argument does not present a substantial question for our review.[1]

Judgment of sentence affirmed.

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[1] Moreover, the sentencing court had the benefit of a presentence investigation report. (***See*** Amended Sentence, 7/19/04, at 1-2). Therefore its consideration of any mitigating factors is presumed. ***See Commonwealth v. Tirado***, 870 A.2d 362, 368 (Pa. Super. 2005). Appellant's assertion that the court failed to consider her efforts at rehabilitation would be without merit.