J-S19034-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
STEFAN COOPER,	:	
	:	
Appellant	:	No. 1475 WDA 2012

Appeal from the Judgment of Sentence August 23, 2012 in the Court of Common Pleas of Fayette County, Criminal Division, at No: CP-26-CR-0000651-2012.

BEFORE: SHOGAN, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: FILED: June 5, 2013

Stefan Cooper (Appellant) appeals from the judgment of sentence entered August 23, 2012, after a jury found him guilty of one count each of aggravated harassment by prisoner and terroristic threats.[1]

The trial court summarized the relevant facts as follows:

> It is undisputed that [Appellant] was a confined prisoner at the time of this incident. The victim, Corrections Officer Ronald Schultz [hereinafter "Schultz"], testified that [Appellant] stated that he was "going to spray piss and shit on you or whoever comes around." As Mr. Schultz was walking toward [Appellant's] cell, he saw [Appellant's] hands come out of the cell, holding a bottle. As he passed [Appellant's] cell, [Appellant] "sprayed" him.
>
> Upon laboratory testing of the recovered bottles and Mr. Schultz' uniform shirt, forensic scientist Jennifer Badger discovered urine and fecal matter in and on said exhibits.

Statement in Lieu of Opinion, 11/28/2012 at 2 (unnumbered pages).

[1] 18 Pa.C.S. §§ 2703.1 and 2706(a)(1).

* Retired Senior Judge assigned to the Superior Court.

A two day jury trial was held, and Appellant was found guilty of the aforementioned crimes on August 9, 2012. Appellant was sentenced to an aggregate term of 18 to 48 months' imprisonment on August 23, 2012. On August 28, 2012, Appellant filed a post-sentence motion requesting that the trial court modify his sentence. Appellant's motion was denied on September 4, 2012, and Appellant filed a timely notice of appeal. The trial court ordered a statement pursuant to Pa.R.A.P. 1925(b) on September 25, 2012, and Appellant complied. The trial court then filed a "Statement in Lieu of Opinion" on November 28, 2012.

Appellant presents the following issues for our review:

> Issue No. 1: Did the Commonwealth not establish the crime of harassment by prisoner beyond a reasonable doub[t] since the Commonwealth failed to produce sufficient evidence that the Appellant did the act of throwing urine and feces on the corrections officer?
>
> Issue No. 2: Did the [trial] court err in denying the motion for reconsideration of sentence due to its harsh and excessive nature?

Appellant's Brief at 7 (capitalization omitted).

We first address Appellant's claim that the evidence presented at trial was insufficient to convict him of aggravated harassment by prisoner.

> [O]ur standard of review of sufficiency claims requires that we evaluate the record in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Nevertheless, the Commonwealth need not establish guilt to a

> mathematical certainty. Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.
>
> The Commonwealth may sustain its burden by means of wholly circumstantial evidence. Accordingly, [t]he fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence. Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a reasonable doubt, the appellant's convictions will be upheld.

Commonwealth v. Stays, 40 A.3d 160, 167 (Pa. Super. 2012) (internal quotations and citations omitted).

Aggravated harassment by prisoner is defined as follows:

> A person who is confined in or committed to any local or county detention facility, jail or prison or any State penal or correctional institution or other State penal or correctional facility located in this Commonwealth commits a felony of the third degree if he, while so confined or committed or while undergoing transportation to or from such an institution or facility in or to which he was confined or committed, intentionally or knowingly causes or attempts to cause another to come into contact with blood, seminal fluid, saliva, urine or feces by throwing, tossing, spitting or expelling such fluid or material.

18 Pa.C.S. § 2703.1.

Instantly, Appellant argues that the testimony of Schultz was insufficient to establish that Appellant was the one who threw urine and feces on him. Appellant asserts that "at no time did [Schultz] state that he saw Appellant do anything" with the bottle of urine and feces and that

"[o]ther inmates were in the same area and could have done any act because again no one testified to seeing the actual act." Appellant's Brief at 11. The trial court explains that "[i]t seems clear . . . that the Commonwealth produced sufficient evidence showing that [Appellant] intentionally threw feces and urine on . . . Schultz." Trial Court Opinion, 11/28/2012 at 2. We agree.

Contrary to Appellant's characterization of the evidence, Schultz twice stated that he actually saw Appellant "spray" him with the material later determined to be urine and fecal matter. N.T., 8/8/2012, at 78, 80. Even if he had not, Appellant was seen in possession of the bottles later found to contain the urine and feces both before and after Schultz was "sprayed." ***Id.*** at 21, 29-30, 40-44, 55-56, 67-68, 76-77; N.T., 8/9/2012, at 12-14. Thus, strong circumstantial evidence was presented at trial to indicate that Appellant was the guilty party. No relief is warranted.

In his second issue, Appellant argues that the trial court erred by denying his post-sentence motion requesting that the trial court reconsider his sentence. Appellant's Brief at 12. Specifically, Appellant argues that "[i]f the state parole board continues to have inmates serve at least one-half of their maximum sentence" then Appellant's actual minimum sentence will be 24 months' imprisonment, "falling within the aggravated range of the Sentencing Guidelines." ***Id.*** Appellant asserts that "[t]he [trial c]ourt gave

no reason for the maximum tail [of his sentence] and it [is] excessive and harsh." ***Id.***

As Appellant challenges the discretionary aspects of his sentence, we address Appellant's question mindful of the following.

> 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. 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. The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. In order to establish a substantial question, the appellant must show actions by the trial court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.

Commonwealth v. Bowen, 55 A.3d 1254, 1262-1263 (Pa. Super. 2012) (quoting ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa. Super. 2004)) (emphasis added).[2]

> If an appellant convinces us that a claim presents a substantial question, then we will permit the appeal and will proceed to evaluate the merits of the sentencing claim. When we do so, our standard of review is clear: Sentencing is vested in the sound discretion of the court and will not be disturbed absent an abuse of that discretion. Moreover, an abuse of discretion is

[2] Challenges to the discretionary aspects of a sentence are waived if not raised at the sentencing proceedings or in a post-sentence motion. ***Commonwealth v. Gibbs***, 981 A.2d 274, 282-83 (Pa. Super. 2009). As noted above, Appellant addressed the discretionary aspects of his sentence in a post-sentence motion. He is therefore not foreclosed from challenging the discretionary aspects of his sentence on appeal.

> not merely an error in judgment. Instead, it involves bias, partiality, prejudice, ill-will, or manifest unreasonableness.

Commonwealth v. Kalichak, 943 A.2d 285, 290 (Pa. Super. 2008) (citations omitted).

In the present case, Appellant has failed to include in his a brief a concise statement of the reasons relied upon for allowance of appeal. "However, because the Commonwealth has not objected to its omission, we may overlook Appellant's omission and reach the merits of his sentencing claim." ***Commonwealth v. Yeomans***, 24 A.3d 1044, 1049 (Pa. Super. 2011).

In ***Yeomans***, this Court addressed a claim similar to Appellant's as follows:

> [Yeomans] argues that the trial court abused its discretion in imposing a statutory maximum sentence of fifteen years, even though the minimum sentence was in the mitigated range of the sentencing guidelines. Relying on the dissenting opinion in ***Commonwealth v. Lee***, 876 A.2d 408 (Pa. Super. 2005), [Yeomans] argues that he has raised a substantial question because the now well-known policies of the Pennsylvania Board of Probation and Parole ("PBPP") will require him to serve eighty-five percent of his maximum sentence. We disagree.
>
> Appellant's challenge to the trial court's imposition of the statutory maximum sentence does not present a substantial question for our review. Appellant's sentence falls squarely within the standard range of the sentencing guidelines for all of his convictions. "This is true because the sentencing guidelines provide for minimum and not maximum sentences." ***Commonwealth v. Boyer***, 856 A.2d 149, 153 (Pa. Super. 2004). In ***Commonwealth v. Kimbrough***, 872 A.2d 1244, 1263 (Pa. Super. 2005) (citations omitted), this Court explained that "[w]hen the sentence is within the range prescribed by statute, a challenge to the maximum sentence imposed does not

> set forth a substantial question as to the appropriateness of the sentence under the guidelines." In rejecting a similar claim raised in ***Lee, supra***, this Court stated that evidence of the policies of the PBPP are irrelevant to the issue of sentencing. ***Lee***, 876 A.2d at 414. Thus, [Yeomans'] sentencing claim entitles him to no relief.

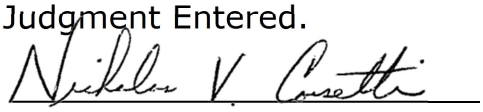
24 A.3d at 1049-1050 (footnotes omitted).

Similarly, we conclude that Appellant has failed to raise a substantial question. Appellant's minimum sentence of 18 months' imprisonment falls within the standard range of the sentencing guidelines, and it is of no moment that the policies of the PBPP may require him to serve a longer period. To the extent that Appellant claims that his maximum sentence is excessive, this bald, unsupported, assertion does not entitle him to relief. ***See Commonwealth v. Fisher***, 47 A.3d 155, 159 (Pa. Super. 2012). Appellant points to nothing that shows this Court that his sentence is inconsistent with the sentencing code or the norms underlying the sentencing process. Accordingly, we deny Appellant permission to appeal the discretionary aspects of his sentence, and affirm the judgment of sentence.[3]

[3] Even if we were to conclude that Appellant has raised a substantial question, we would not grant him relief. At Appellant's sentencing hearing, the trial court discussed the relevant sentencing guidelines and asked Appellant's counsel if he had any corrections or additions to the presentence investigation. N.T., 8/23/2012, at 2-3. The trial court then discussed Appellant's prior criminal record and concluded that Appellant "has problems with impulse control and anger management and, obviously, has not taken a very constructive approach to the consequences of his own behavior." ***Id.*** at 3-4. The trial court then announced its intention to sentence Appellant in the standard range. ***Id.*** at 5. Thus, even reaching the merits of Appellant's sentencing claim, we would conclude that the trial court adequately

Permission for allowance of appeal denied, and judgment of sentence affirmed.

Judgment Entered.



Deputy Prothonotary

Date: June 5, 2013

explained the sentence that it imposed, and acted well within its discretion in sentencing Appellant to a standard range sentence.