

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
SIMON E. GIGEE,	:	
	:	
Appellant	:	No. 1479 MDA 2012

Appeal from the Judgment of Sentence Entered July 16, 2012,
In the Court of Common Pleas of Tioga County,
Criminal Division, at No. CP-59-CR-0000362-2011.

BEFORE: PANELLA, SHOGAN and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.:

Filed: March 14, 2013

Appellant, Simon E. Gige, appeals from the judgment of sentence entered following his conviction of theft by unlawful taking. We vacate the judgment of sentence and remand for resentencing.

The trial court set forth the history of this case as follows:

Simon E. Gige, the above named defendant, through counsel has filed an appeal to the sentencing order dated July 1[6], 2012. Mr. Gige, along with co-defendant Jason L. Meise, pleaded guilty to one count each of Theft by Unlawful Taking, a felony of the third degree. Mr. Meise, Tioga County Criminal Action 394 CR 2011, has likewise filed an appeal on the identical issue.

Mr. Gige and Mr. Meise were charged with stealing six spools and four pallets of copper wire from the Wellsboro Electric Company totaling 4,800 pounds valued at \$43,104.50. The two men were ultimately identified, arrested and charged with the crimes of Burglary (F1), Receiving Stolen Property (F1), Theft by Unlawful Taking (F3), Conspiracy to Commit Burglary (F1), and Criminal Trespass (F2).

*Retired Senior Judge assigned to the Superior Court.

At the time of sentencing, the District Attorney, George Wheeler, Esquire notified the court that the victim in this case, Wellsboro Electric, submitted a claim with their insurance company for loss of the wire in the amount of \$42,204.50. Mr. Wheeler further stated that Wellsboro Electric had agreed to accept \$17,[641].00 in settlement of the claim with the insurance company[.]

Trial Court Opinion, 9/17/12, at 1.

On July 16, 2012, Appellant presented a request to the trial court seeking to adjust, downward, the offense gravity score in light of the updated restitution request. The trial court used the originally determined offense gravity score of six (6) in setting Appellant's sentence. The trial court sentenced Appellant to a term of incarceration of thirty-three to eighty-four months. If the court had used the lower value of \$17,641.00 in determining the offense gravity score, the result would have been an offense gravity score of five (5). The trial court also set restitution at \$42,704.50 instead of the \$17,641.00 amount requested by the electric company.¹ On July 23, 2012, Appellant filed a motion to modify sentence, in which he sought resentencing with the lower offense gravity score and a reduced amount of restitution. On August 1, 2012, the trial court denied Appellant's motion to modify sentence. On August 14, 2012, Appellant filed this timely appeal.

¹ It appears that this higher amount of restitution is equivalent to the loss of the wire, plus a \$500.00 deductible, which the electric company had on its claim to its insurer.

Appellant presents the following issues for our review:

1. DID THE TRIAL COURT ERR IN USING AN OFFENSE GRAVITY SCORE OF SIX (6) AT SENTENCING WHEN THE VICTIM ADJUSTED THEIR RESTITUTION CLAIM DOWNWARD FROM \$42,704.50 TO \$17,641.00 BEFORE SENTENCING?
2. DID THE TRIAL COURT ERR IN SETTING RESTITUTION AT \$42,704.50 WHEN THE VICTIM ADJUSTED THEIR RESTITUTION CLAIM DOWNWARD FROM \$42,704.50 TO \$17,641.00 BEFORE SENTENCING?

Appellant's Brief at 2.

Initially, we note that Appellant's issues each challenge the discretionary aspects of his sentence. Our standard of review is one of abuse of discretion. 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. *Commonwealth v. Shugars*, 895 A.2d 1270, 1275 (Pa. Super. 2006).

Where an appellant challenges the discretionary aspects of a sentence there is no automatic right to appeal, and an appellant's appeal should be considered to be a petition for allowance of appeal. *Commonwealth v. W.H.M.*, 932 A.2d 155, 162 (Pa. Super. 2007). As we observed in *Commonwealth v. Moury*, 992 A.2d 162 (Pa. Super. 2010):

[a]n appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:

[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. [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).

Id. at 170 (citing **Commonwealth v. Evans**, 901 A.2d 528 (Pa. Super. 2006)). Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or in a motion to modify the sentence imposed. **Id.** (citing **Commonwealth v. Mann**, 820 A.2d 788 (Pa. Super. 2003)).

Whether a particular issue constitutes a substantial question about the appropriateness of sentence is a question to be evaluated on a case-by-case basis. **Commonwealth v. Kenner**, 784 A.2d 808, 811 (Pa. Super. 2001), *appeal denied*, 568 Pa. 695, 796 A.2d 979 (2002). As to what constitutes a substantial question, this Court does not accept bald assertions of sentencing errors. **Commonwealth v. Malovich**, 903 A.2d 1247, 1252 (Pa. Super. 2006). An appellant must articulate the reasons the sentencing court's actions violated the sentencing code. **Id.**

Herein, the first three requirements of the four-part test are met, those being that Appellant brought an appropriate appeal, raised the challenges in his post-sentence motion and included in his appellate brief the necessary separate concise statement of the reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f). Therefore, we will next

determine whether Appellant raises substantial questions requiring us to review the discretionary aspects of the sentence imposed by the trial court.

First, Appellant argues that the trial court incorrectly calculated his offense gravity score prior to sentencing. We have held that such a challenge presents a substantial question for our review. **See *Commonwealth v. Archer***, 722 A.2d 203, 210-211 (Pa. Super. 1998) (*en banc*) (holding that claim that sentencing court used incorrect offense gravity score raises a substantial question). Accordingly, because Appellant has raised a substantial question, we will consider this issue on appeal.

We reiterate that 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. ***Commonwealth v. Fullin***, 892 A.2d 843, 847 (Pa. Super. 2006). In this context, an abuse of discretion is not shown merely by an error in judgment. ***Id.*** 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. ***Id.***

The Pennsylvania Sentencing Guidelines assign every crime an offense gravity score. 204 Pa.Code § 303.3. Theft offenses are categorized based upon the value of the property involved in the offense. **See**

204 Pa.Code § 303.15. Theft by unlawful taking, a crime under 42 Pa.C.S.A. § 3921, receives an offense gravity score of "6" when the amount taken is \$25,000.00 to \$50,000.00 and an offense gravity score of "5" when the amount taken is \$2,000.00 to \$25,000.00. *Id.* The amount involved in a theft is defined as "the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime." 18 Pa.C.S.A. § 3903(c)(1).

Our review of the record reflects that Appellant pled guilty to Count Three of the Criminal Information entered against him at CR No. 362/11 in the County of Tioga. Specifically, the Information, as to Count Three, provides as follows:

COUNT THREE: unlawfully took or exercised unlawful control over movable property of another with intent to deprive them thereof; to wit: defendant took or exercised unlawful control over movable property belonging to Wellsboro Electric Company, with intent to deprive them thereof, said property being 4,800 pounds of copper wire valued at approximately \$43,104.50; . . .

Criminal Information, filed 9/23/11, at 1 (Docket entry No. 5). The Criminal Information further indicates that the crime at Count Three is a Felony-3 pursuant to 18 Pa.C.S.A. § 3921(a). *Id.* at 2.

At the time of sentencing the trial court stated, with regard to Count Three:

The offense gravity score is a six, graded as a felony of the third degree. And the guideline ranges -- in the mitigated range is

fifteen months. The standard range is twenty-one to twenty-seven months. The aggravated range is thirty-three months, up to the maximum of eighty-four months.

N.T., 7/16/12, at 4. Thereafter, the trial court sentenced Appellant to serve a term of incarceration of thirty-three to eighty-four months. *Id.* at 9.

However, our review of the certified record on appeal further reflects that Wellsboro Electric Company sent a letter to the Tioga County District Attorney seeking a lesser amount of restitution. Specifically, the complete text of the letter from Wellsboro Electric Company to the District Attorney of Tioga County provides as follows:

Wellsboro Electric is requesting restitution in the Criminal Case Number of 362 CR 2011 and 394 CR 2011 in the amount of \$17,641.00.

Wellsboro Electric was paid \$17,141.00 from Federated Rural Electric Insurance Exchange, Wellsboro has a \$500.00 deductible [sic] on this claim.

Contact Info for Federated Rural Electric Insurance Exchange is PO Box 15147, Lenexa, KS 66285, Contact is Patti Kuhn at 1-800-356-8360.

Any further questions can be directed to Robert S. McCarthy at Wellsboro Electric Company, 33 Austin St., Wellsboro, PA. 16901. Phone 570-439-1915 or email bobbym@ctenterprises.org.

Defendant's Motion to Modify Sentence, filed 7/23/12, at Ex. A (Docket Entry No. 23).

While the letter from Wellsboro Electric Company is silent as to the actual value of the copper wire stolen by Appellant in this matter, we

nevertheless are compelled to conclude that there exists a possible inconsistency in the record with regard to the value of the copper wire stolen. If the value of the copper wire is, indeed, less than indicated in the Criminal Information, as reflected in the letter from the electric company, a lower offense gravity score is appropriate for the crime. Thus, we are constrained to vacate the judgment of sentence and remand for a determination by the trial court as to the value of the copper wire stolen, and the appropriate offense gravity score. The trial court should then resentence Appellant with an accurate offense gravity score.

In his second issue on appeal, Appellant contends that the record does not support the trial court's order of restitution. Essentially, Appellant claims that, in calculating the amount of restitution to the electric company, the trial court abused its discretion in imposing an amount of restitution greater than that requested by the victim.

Again, we note that this issue implicates the discretionary aspects of Appellant's sentence. ***Commonwealth v. Walker***, 666 A.2d 301, 307 (Pa. Super. 1995), *appeal denied*, 545 Pa. 652, 680 A.2d 1161 (1996) (stating "challenges alleging that a sentence of restitution is excessive under the circumstances [are] challenges to the discretionary aspects of sentencing."). As we previously stated, it is well settled that there is no absolute right to appeal the discretionary aspects of a sentence. ***Commonwealth v. Hartle***,

894 A.2d 800, 805 (Pa. Super. 2006). Rather, allowance of appeal will be permitted only when the appellate court determines that there is a substantial question that the sentence is not appropriate under the Sentencing Code. *Id.* The determination of what constitutes a substantial question is made on a case-by-case basis. *Id.* A substantial question exists where an appellant sets forth a plausible argument that the sentence violates a particular provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing process. *Id.*

In Appellant's 2119(f) statement, it is alleged that the trial court miscalculated the amount of restitution due to the electric company. Basically, Appellant argues that the amount of restitution exceeds the losses suffered by the victim.

The right to impose restitution is statutorily grounded in two provisions, 42 Pa.C.S.A. § 9721(c) and 18 Pa.C.S.A. § 1106. The Sentencing Code, 42 Pa.C.S.A. § 9721(c), provides that "the court shall order the defendant to compensate the victim of his criminal conduct for the damage or injury that he sustained." 42 Pa.C.S.A. § 9721(c). The ordering of restitution is further defined by 18 Pa.C.S.A. § 1106. Section 1106(c) requires that, in determining the amount and method of restitution, the sentencing court: "[s]hall consider the extent of injury suffered by the victim

. . . and such other matters as it deems appropriate.” 18 Pa.C.S.A. § 1106(c)(2)(i).

We have held a claim that the record did not support the sentence of restitution raises a substantial question. *Walker*, 666 A.2d at 310 (stating “a substantial question arises when appellant can show ‘actions by the sentencing court inconsistent with the sentencing code or contrary to the fundamental norms underlying the sentencing process’”) (quoting *Commonwealth v. McLaughlin*, 574 A.2d 610, 617-618 (Pa. Super. 1990), *appeal denied*, 527 Pa. 616, 590 A.2d 756 (1991), *cert. denied*, 502 U.S. 916 (1991)). As a result, we will also address the restitution issue before us on appeal.

As we previously stated in this memorandum, Appellant pled guilty to theft by unlawful taking under Count Three of the Criminal Information, indicating a value of \$43,104.50 for the copper wire stolen from the electric company. However, prior to sentencing, the District Attorney received a letter from the electric company requesting restitution in the amount of \$17,641.00. Ultimately, the trial court sentenced Appellant to pay an amount of restitution of \$42,704.50. N.T., 7/16/12, at 10.

While we are constrained to agree with Appellant’s claim that the trial court failed to properly investigate the amount of restitution due to the victim, acceptance of this position does not eliminate Appellant’s obligation

to pay restitution. Accordingly, we also vacate the judgment of sentence pertaining to the award of restitution and remand the matter to the trial court for a more thorough determination of the restitution amount.

Judgment of sentence vacated. Case remanded for resentencing consistent with this memorandum. Jurisdiction relinquished.