

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
FRANCIS KIRCHNER,	:	No. 158 EDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, December 20, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0010181-2009

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND MUSMANNO, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MAY 13, 2013**

Francis Kirchner appeals from the judgment of sentence of December 20, 2011, following an open guilty plea to one count each of voluntary manslaughter and criminal conspiracy. We affirm.

The trial court, the Honorable Shelley Robins New, has summarized the underlying facts of this matter as follows:

The criminal incident began in McFadden’s, a bar located inside the [Philadelphia Phillies’] ballpark. A skirmish occurred inside the bar and the combatants were ejected. It quickly escalated into a brawl between a group of inebriated young men celebrating a bachelor party who came by limo and [a] group of men who attended the game in a bus organized by a neighborhood tavern. The decedent, David Sale was a member of the bachelor party and the three defendants were from the other group. The evidence indicated that all of the parties had been drinking. Fights occurred and continued as the parties made their way to their respective bus and

limo which coincidentally [sic] were in the same parking lot. The fatal confrontation occurred inside that parking lot. The decedent was badly beaten. He was struck by both [co-defendants] [James] Groves and [Charles] Bowers. Bowers delivered many of the more punishing blows, which left Mr. Sale helpless and prone on the ground. As the fight appeared to be over, Appellant came and viciously kicked the defenseless victim in the head. This unnecessary and heinous kick was the eventual cause of death.

Trial court opinion, 7/12/12 at 2.

On October 18, 2011, following a mistrial, all three defendants entered open guilty pleas to voluntary manslaughter and criminal conspiracy. On December 20, 2011, appellant was sentenced to 5½ to 11 years for voluntary manslaughter and 3½ to 7 years for criminal conspiracy, run consecutively for an aggregate sentence of 9 to 18 years' imprisonment.¹ Post-sentence motions were filed and denied, and this timely appeal followed. Appellant has complied with Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion.

Appellant has raised the following issues for this court's review:

- A. Whether The Trial Court committed an error of law when the court failed to use the Basic Sentencing Matrix and instead used the DWE/Used Matrix because it incorrectly determined that [appellant] used a deadly weapon, his foot, to commit the voluntary manslaughter?

¹ On the same date, the trial court sentenced Groves to 2 to 4 years' imprisonment, and Bowers to 5 to 10 years' imprisonment.

- B. Whether The Trial Court abused its discretion by incorrectly applying the Sentencing Guidelines to disproportionately punish [appellant] in relation to his co-defendants[?] Furthermore, [appellant] was given a much longer sentence than his co-defendants even though they all pleaded guilty to the crime of Conspiracy and [] all conspired to commit the same crime[.]

Appellant's brief at 5.

"A challenge to the discretionary aspects of a sentence requires the claimant to set forth in his brief a separate, concise statement of the reasons relied upon for the allowance of appeal as to that challenge." ***Commonwealth v. Griffin***, 804 A.2d 1, 7 (Pa.Super. 2002), ***appeal denied***, 582 Pa. 671, 868 A.2d 1198 (2005), ***cert. denied***, 545 U.S. 1148 (2005), citing ***Commonwealth v. Eby***, 784 A.2d 204, 206 n.2 (Pa.Super. 2001), in turn citing Pa.R.A.P. 2119(f) and ***Commonwealth v. Tuladziecki***, 513 Pa. 508, 522 A.2d 17 (1987). Appellant has complied with this requirement. (Appellant's brief at 8.)

This Court may reach the merits of an appeal challenging the discretionary aspects of a sentence only if it appears that a substantial question exists as to whether the sentence imposed is not appropriate under the Sentencing Code. "A substantial question will be found where the defendant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the code or is contrary to the fundamental norms which underlie the sentencing process. A claim that the sentencing court imposed an unreasonable sentence by sentencing outside the guideline ranges presents a 'substantial question' for our review."

Griffin, supra, quoting **Eby, supra**.

First, appellant claims that the trial court erred by failing to use the basic sentencing matrix and instead using the deadly weapon enhancement (“DWE”)/Used sentencing matrix.² According to appellant, the trial court found that the DWE applied because appellant used a deadly weapon, his foot, to kick the decedent in the head. (Appellant’s brief at 8.) We find that appellant’s allegation the sentencing court erroneously applied the DWE to appellant’s sentence raises a substantial question for our review. **See Commonwealth v. Rhoades**, 8 A.3d 912, 916 (Pa.Super. 2010), **appeal denied**, 611 Pa. 651, 25 A.3d 328 (2011), **cert. denied**, 132 S.Ct. 1746, 182 L.Ed.2d 536, 80 USLW 3526 (2012) (“we have found on several occasions that the application of the deadly weapon enhancement presents a substantial question”) (citations omitted); **Commonwealth v. Diamond**,

² To determine whether a deadly weapon enhancement should apply, the Sentencing Code provides as follows:

When the Court determines that the offender used a deadly weapon during the commission of the current conviction offense, the Court shall use the DWE/Used Matrix (§ 303.18). An offender has used a deadly weapon if any of the following were employed by the offender in a way that threatened or injured another individual; (i) any firearm, (as defined in 42 Pa.C.S. § 9712) whether loaded or unloaded, or (ii) any dangerous weapon (as defined in 18 P.S. § 913) or (iii) any device, implement, or Instrumentality capable of producing death or serious bodily injury.

204 Pa.Code § 303.10(a)(2).

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945 A.2d 252, 258 (Pa.Super. 2008), **appeal denied**, 598 Pa. 755, 955 A.2d 356 (2008) (Commonwealth presented a substantial question for review where it argued that the sentencing court erred by failing to consider the mandatory deadly weapon enhancement in determining the defendant's guideline sentence), citing **Commonwealth v. Magnum**, 654 A.2d 1146, 1149 (Pa.Super. 1995).

The matter of sentencing is vested within the sound discretion of the trial court; we only reverse the court's determination upon an abuse of discretion. To demonstrate that the trial court has abused its discretion, 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. Moreover, 42 Pa.C.S.A. § 9721(b) provides that the trial court must disclose, on the record, its reasons for imposing the sentence.

Commonwealth v. Hanson, 856 A.2d 1254, 1257 (Pa.Super. 2004) (citations and internal quotation marks omitted). "[T]he sentencing judge must state of record the factual basis and specific reasons which compelled him or her to deviate from the guideline ranges. When evaluating a claim of this type, it is necessary to remember that the sentencing guidelines are advisory only." **Griffin, supra** at 8, citing **Eby, supra**.

While we are compelled to agree with appellant that his foot would not constitute a "deadly weapon," the record indicates that the trial court did not apply the DWE to appellant's sentence. The trial court clearly indicated its understanding of the applicable guideline ranges and that its sentence was

outside the guidelines. (Trial court opinion, 7/12/12 at 3-4; notes of testimony, 12/20/11 at 222-223, 257-258.) In fact, if the trial court had used the DWE/Used matrix, appellant's sentence would have fallen within the standard range of the sentencing guidelines. (*Id.* at 4 n.3.) Apparently, the confusion stems from the fact that the trial court referenced the DWE/Used matrix in evaluating appellant's conduct: "... the Court examined what an appropriate guidelines sentence **would have been** had a deadly weapon been used. We believed that appellant's criminal actions in utilizing a boot to the nearly unconscious victim's head were similar to the criminal actions of a defendant who committed 'provocation and passion' Voluntary Manslaughter using a weapon such as a gun or knife." (*Id.* at 4-5 (footnote omitted) (emphasis in original)). Therefore, appellant's argument misses the mark. The trial court did not rely on the DWE/Used sentencing matrix.

Second, appellant argues that the trial court failed to explain its reasons for sentencing him to a greater term of imprisonment than his co-defendants, when all three defendants entered identical pleas. (Appellant's brief at 8.) According to appellant, the trial court imposed a disparate sentence without reason or explanation. (*Id.*) We determine that appellant's argument his aggregate sentence is excessive when compared to his co-defendants' sentences does raise a substantial question for our review. ***Commonwealth v. Mastromarino***, 2 A.3d 581, 589 (Pa.Super.

2010), **appeal denied**, 609 Pa. 685, 14 A.3d 825 (2011), citing **Commonwealth v. Cleveland**, 703 A.2d 1046 (Pa.Super. 1997) (holding substantial question raised where the appellant averred an unexplained disparity between his sentence and that of his co-defendant) (additional citation omitted). Nevertheless, the claim is plainly unmeritorious for the following reasons.

“The law is well-settled that co-defendants are not required to receive identical sentences. Generally, a sentencing court must indicate the reasons for differences in sentences between co-defendants.” **Id.**, citing **Commonwealth v. Krysiak**, 535 A.2d 165, 167 (Pa.Super. 1987). “This is not to say, however, that the court must specifically refer to the sentence of a co-defendant. Rather, it requires that when there is a disparity between co-defendants’ sentences, a sentencing court must give reasons particular to each defendant explaining why they received their individual sentences.” **Id.**, quoting **Cleveland**, 703 A.2d at 1048. **Cf. Commonwealth v. Szczesniewski**, 591 A.2d 1055, 1057 n.2 (Pa.Super. 1991), **appeal denied**, 530 Pa. 654, 608 A.2d 29 (1992) (where co-defendants appear before different judges for sentencing, the court is not required to explain an alleged disparity in sentencing) (citations omitted).

Here, the trial court provided ample reasons for appellant’s sentence and fully explained the disparity in sentencing. Groves was the least culpable defendant; and Bowers’ actions, while heinous, were less so than

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appellant's. (Trial court opinion, 7/12/12 at 3.) The trial court determined that a guidelines sentence was inappropriate for appellant, who delivered the fatal blow to the unconscious victim's head. (***Id.*** at 4-5, citing notes of testimony, sentencing, 12/20/11 at 256-258.) We conclude that Judge Robins New sufficiently explained the reasons for appellant's sentence, and in particular, the reasons justifying the disparity between his and his co-defendants' sentences. Therefore, the claim is without merit.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Gambett", written over a horizontal line.

Prothonotary

Date: 5/13/2013