

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
CLYDE ALEXANDER LONT,		
Appellant		No. 1584 EDA 2011

Appeal from the Judgment of Sentence entered April 25, 2011
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0003174-2009.

BEFORE: PANELLA, OLSON and FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J.:

Filed: January 11, 2013

Appellant, Clyde Lont, appeals from the judgment of sentence entered April 25, 2011, as made final by the denial of his post-sentence motion, sentencing him to 20 to 40 years' incarceration for convictions of murder of the third-degree,¹ and conspiracy to commit first-degree murder.² We affirm.

The trial court set forth the applicable factual and procedural background of this matter as follows:

On the evening of April 20, 2007, Bethlehem Police responded to a residence at 1933 Hillcrest Road in the City of Bethlehem, Lehigh County, Pennsylvania. Officers discovered the victim, David Rivera, with multiple gunshot wounds to his torso. Mr. Rivera died as a result of his wounds. Witnesses indicated a

¹ 18 Pa.C.S.A. § 2502(c).

² 18 Pa.C.S.A. § 903; 18 Pa.C.S.A. § 2502(a).

*Former Justice assigned to the Superior Court.

vehicle, which was later identified as the [Appellant's] vehicle, was seen arriving at the residence around the time Mr. Rivera was last seen alive. Another individual, later identified as Matthew Hendricks, was also seen arriving in the area of the residence in that same vehicle. Subsequent evidence linked both Hendricks and the [Appellant] to the car. Several witnesses advised that the [Appellant] admitted he was involved in killing Mr. Rivera. One witness, Janelle Gordon, indicated she was contacted by the [Appellant] and subsequently transported Mr. Hendricks to Easton where he met with the [Appellant]. Additionally, Gordon observed the [Appellant] with a gun and saw him dispose of the gun.

Additional evidence and witness testimony showed that the [Appellant] was voluntarily intoxicated on PCP at the time of the shooting. Other evidence showed that some planning occurred in this case, including the gathering of accomplices and phone calls placed to the victim by Mr. Hendricks. Based on witnesses' statements, the motive in this case appeared to be a concern by the [Appellant] that Mr. Rivera was after him.

Following this incident, the [Appellant] was charged in this case. On March 9, 2011, pursuant to a negotiated plea agreement, the [Appellant] pleaded guilty to [m]urder of the [t]hird [d]egree and [c]riminal [c]onspiracy to [commit f]irst[-d]egree [m]urder. As part of the agreement, the minimum sentence would not exceed 16 years, but the maximum sentence could be up to 40 years. Furthermore, the Commonwealth agreed that both sentences would run concurrently. At the time of his guilty plea, the [Appellant] had a prior record score of 3, and the charges, both graded as felonies of the first[-]degree, carried an offense gravity score (OGS) of 14.

At the guilty plea hearing, [the trial court] concluded a detailed colloquy with the [Appellant] on the record. [The trial court] advised the [Appellant] of the maximum penalties for each offense, and asked him if he understood; the [Appellant] said, "Yes." [The trial court] asked the [Appellant] if he had any questions regarding the plea agreement or the maximum penalties; he stated, "No." [The trial court] asked the [Appellant] if he understood that [the court] could reject the plea, and if [the court] did, [the trial court] would allow him to withdraw his plea and go to trial; he stated, "Yes." [The trial court] asked the [Appellant] if he was ever treated for a mental illness, disability, or problem[s], or if he was ever diagnosed with a mental illness, disability, or problem[s]; he stated, "No." [The trial court] asked the [Appellant] if he suffered from any physical

or mental problems that prevented him from fully understanding everything that [was] going on; he said, "No."

The [Appellant] also completed a written guilty plea colloquy, and indicated he went over each question with his attorney, understood each question, and answered each question truthfully. The [Appellant] acknowledged he completed the form by writing his answers to each question, initialing each page, and signing the form voluntarily.

The attorney for the Commonwealth then read into the record a summary of the facts of the case as summarized above. Afterwards, the [Appellant] indicated he understood the facts alleged, and he admitted doing the things alleged by the Commonwealth. [The trial court] reviewed the elements of the crimes charged with the [Appellant], and asked the [Appellant] if he understood the elements. The [Appellant] advised he understood the elements of each offense and discussed them with his attorney. [The trial court] asked the [Appellant] if he understood what he was doing by pleading guilty and if he was pleading guilty voluntarily; he said, "Yes." [The trial court] found the plea to be voluntarily and understandingly tendered, and [the trial court] accepted the [Appellant's] plea conditioned upon receipt and review of a presentence investigation report (PSI).

The PSI was prepared, and [the trial court] reviewed the report prior to the sentencing hearing on April 15, 2011. Additionally, [the trial court] received and reviewed "Materials in Aid of Sentencing," prepared and submitted by the [Appellant's] counsel, and a number of letters written by the friends and family [of] David Rivera. The Commonwealth then presented the testimony of Pedro Fonseca, Mr. Rivera's uncle; Steven Perez, Mr. Rivera's nephew; and Lilliam Moraza, Mr. Rivera's mother. The witnesses presented lengthy victim impact testimony, and expressed their disagreement with the guilty plea. The parties made oral argument. After reviewing all the evidence and hearing from the parties, [the trial court] rejected the plea as to the binding minimum of 16 years. The [Appellant's] counsel then moved to withdraw the guilty plea and to have [the trial court] recuse itself. After further discussion, the parties agreed to allow the [Appellant] more time to consider his options, and a second sentencing hearing was scheduled.

On April 25, 2011, the [Appellant] was before [the trial court] again for sentencing. At the time, the [Appellant] indicated he was willing to plead guilty with no agreement as to a minimum sentence. Additionally, the [Appellant] indicated he was no longer asking that [the trial court recuse itself]. [The trial court] then advised the [Appellant] that it was accepting all aspects of the negotiated plea except for the binding 16 year minimum, and asked if he understood that; he stated, "Yes." [The trial court] asked the [Appellant] if he understood he could be sentenced up to a minimum of 20 years and a maximum of 40 years; the [Appellant] said, "Yes." Thereafter, [the trial court] sentenced the [Appellant] on each count to a term of imprisonment of 20 to 40 years, to be served concurrently with each other.

[The trial court] indicated on the record [its] reasons for imposing such a sentence, which included (1) the criminal conduct of the [Appellant] caused harm to not only David Rivera, but also his family; (2) the nature and circumstances of the [Appellant's] criminal conduct showed a disregard for the safety of the community; (3) the [Appellant] has a previous record of criminal activity; (4) the [Appellant] is in need of correctional rehabilitation, which can be provided most effectively by commitment to a state correctional institution; (5) a lesser sentence would depreciate the seriousness of the crimes involved; and (6) the sentences were in accordance with the plea bargain, albeit the portion limiting the minimum sentence to 16 years.

On May 4, 2011, the [Appellant] filed a Post-Sentence Motion for Reconsideration of Sentence and Motion to Modify Sentence. Following a hearing on May 26, 2011, [the trial court] denied the [Appellant's] motion. The instant appeal followed.

Trial Court Opinion, 8/11/2011, at 1-5 (footnote omitted).³

Appellant presents the following issues for appeal:

³ The requirements of Pennsylvania Rule of Appellate Procedure 1925 have been satisfied in this matter.

Did the trial court abuse its discretion and contravene the fundamental norms which underlie the sentencing process when it imposed the statutory maximum sentence following a guilty plea when all parties and the PSI recommended a lower sentence?

Did the trial court abuse its discretion and contravene the fundamental norms which underlie the sentencing process when it mechanically imposed the statutory maximum sentence following a guilty plea and ignored all evidence tending to suggest a lesser sentence?

Appellant's Brief at 4.

Appellant's issues challenge the discretionary aspects of his sentence.⁴

Our standard of review for such challenges is well-settled:

[D]iscretionary aspects of a sentence are not reviewable as a matter of right. Our standard of review when an appellant challenges the discretionary aspects of his or her sentence is very narrow; the Court will reverse only where appellant has demonstrated a manifest abuse of discretion by the sentencing judge. Before a challenge to the sentence will be heard on the merits, an appellant, in order to invoke the Court's jurisdiction, must set forth in his brief a separate and concise statement of reasons relied upon in support of his appeal.

[Pennsylvania Rule of Appellate Procedure] 2119(f) states:

An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall 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. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

⁴ We note that despite entry of a guilty plea, Appellant did not waive a challenge to the discretionary aspects of his sentence because he was sentenced at a second hearing without agreement as to the minimum punishment.

We examine an appellant's Rule 2119(f) statement to determine whether a substantial question exists. Our inquiry must focus on the *reasons* for which the appeal is sought, in contrast to the facts underlying the appeal, which are necessary only to decide the appeal on the merits.

Commonwealth v. Gould, 912 A.2d 869, 872 (Pa. Super. 2006) (citations omitted) (emphasis in original). "A substantial question exists where the brief sets forth a colorable argument that the sentence violates a particular provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing scheme." *Id.* at 873, quoting ***Commonwealth v. Kimbrough***, 872 A.2d 1244, 1263 (Pa. Super. 2005).

In the present case, Appellant's brief contains a concise statement that, in substantial part, is in technical compliance with the above requirement. Appellant's Brief at 8-10.⁵ As to whether Appellant has raised

⁵ We note that, contrary to requirements set forth in precedent from our Court, Appellant's Rule 2119(f) statement fails to specify where his sentence falls in relation to the sentencing guidelines and what particular provision of the sentencing code has been violated. ***See Commonwealth v. Goggins***, 748 A.2d 721, 727 (Pa. Super. 2000) (requiring inclusion of such detail within an appellant's Rule 2119(f) statement). Under these circumstances, however, we do not hold Appellant's omissions to be fatal. Appellant's brief does tell us that his sentence was outside of the standard range. Appellant's Brief at pp. 5 & 9. Additionally, we know that the trial court imposed the statutory maximum sentence. Therefore, logic leads us to conclude that Appellant's sentence fell within the aggravated range of the guidelines. ***See e.g. Commonwealth v. Flowers***, 950 A.2d 330, 332 (Pa. Super. 2008) (overlooking omission from Rule 2119(f) statement of where appellant's sentence falls within the Sentencing Guidelines where the particular length of the sentence was irrelevant to the substantial question presented). Because omissions within Appellant's Rule 2119(f) statement do not
(Footnote Continued Next Page)

a substantial question, Appellant alleges that his sentence is contrary to the fundamental norms of sentencing because the trial court imposed “a sentence significantly greater than the one sought and recommended by the investigating officers, the prosecuting attorneys, the [PSI] reporter[,] and...counsel for Appellant.” *Id.* at 9. Furthermore, Appellant alleges that the trial court fashioned “a sentence that ignores individualized considerations in favor of merely mathematical application of the sentencing law.” *Id.* at 9-10. According to Appellant, the trial court issued him the maximum sentence while ignoring certain mitigating factors such as his acceptance of a plea, his expressed remorse, and his apology to the victim’s family. *Id.* at 10. We hold that, under the circumstances, Appellant has presented a substantial question for review. *See e.g. Commonwealth v. Hyland*, 875 A.2d 1175, 1183 (Pa. Super. 2005) (holding that substantial question is raised where an appellant alleges the sentencing court erred by imposing an aggravated range sentence without consideration of mitigating circumstances); *Commonwealth v. Parlante*, 823 A.2d 927, 929-930 (Pa. Super. 2003) (holding that allegations that the court imposed a disproportionate sentence and did not consider proper sentencing factors raised a substantial question). Therefore, we consider the merits of Appellant’s appeal of the discretionary aspects of his sentence.

(Footnote Continued) _____

materially impede appellate review, we hold Appellant’s Rule 2119(f) statement to be technically compliant.

Our standard of review is as follows:

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. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Cunningham, 805 A.2d 566, 575 (Pa. Super. 2002) (citations omitted).

We address both of Appellant's issues together. Specifically, Appellant argues that the trial court abused its discretion when it sentenced Appellant to the statutory maximum sentence for third-degree murder, in disregard of certain mitigating factors. Appellant's Brief at 11. Such mitigating factors, Appellant argues, include his entry of a guilty plea, the PSI report's recommendation of a lesser sentence, the Commonwealth's suggestion of a lesser sentence, Appellant's remorse, and Appellant's apology to the victim's family. ***Id.*** at 12-14. Additionally, Appellant argues that his sentence was excessive, especially considering the fact that his co-conspirator did not enter a guilty plea, but was nevertheless given the same sentence. ***Id.*** at 13. Appellant asks our Court to vacate his judgment of sentence and remand for resentencing. ***Id.*** at 15.

The record, however, belies Appellant's claims. Indeed, review of the notes of testimony from Appellant's sentencing hearing evidences that, in fashioning Appellant's sentence, the trial court thoroughly considered

mitigating factors, including, but not limited to, Appellant's entry of a plea, his expression of remorse, the PSI report, and the materials submitted by Appellant's attorney in aid of sentencing. N.T., 4/25/2011, at 14, 27, 32-34. Furthermore, while the trial court acknowledged that the PSI report and the original plea agreement suggested a lesser minimum sentence, the trial court thoroughly explained that, in its discretion, a sentence of 20 to 40 years was appropriate under the circumstances. *Id.* at 32-34. Appellant has not established an abuse of discretion in the trial court's determination. ***See Commonwealth v. Griffin***, 804 A.2d 1, 8 (Pa. Super. 2002) (where a fully informed trial court makes a discretionary sentencing decision, that discretion should not be disturbed.)

Additionally, we cannot agree with Appellant's claim that he should have received a lesser sentence because he admitted guilt, did not put the Commonwealth through the expense of a jury trial, and expressed remorse. Appellant's Brief at 14. Appellant's claims in this regard appear to argue that he should have received a lesser sentence than his co-defendant who did not plead guilty, but was issued the same sentence. *Id.* Pennsylvania law, however, does not follow the principle of comparison sentencing. Rather, because each co-defendant in a crime may pose a different threat to the community and may have different rehabilitative needs, the law does not require that co-defendants be identically sentenced. ***See Commonwealth v. Mastromarino***, 2 A.3d 581, 589 (Pa. Super. 2010) ("The law is well-

settled that co-defendants are not required to receive identical sentences.”) Rather, in cases involving co-defendants, Pennsylvania law requires that a trial court give reasons specific to each defendant explaining why they received their individual sentences. ***Commonwealth v. Cleveland***, 703 A.2d 1046, 1048 (Pa. Super. 1997).

In this matter, the transcript of the sentencing hearing makes clear that the trial court thoroughly considered and articulated the sentencing needs and goals specific to Appellant. N.T., 4/25/2011, at 32-34. Based upon those considerations, the trial court issued the sentence that it believed most appropriate under the circumstances. Trial Court Opinion, 8/11/2011, at 5. Indeed, in comparison to his co-defendant, Appellant overlooks his more significant role as the shooter, planner, aggressor and disposer of the weapon. Therefore, that Appellant’s sentence happens to be the same sentence as that issued to his co-defendant, who did not plead guilty, does not establish an abuse of discretion by the trial court.

Judgment of sentence affirmed.