

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KERMIT SPONHEIMER,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1630 EDA 2012

Appeal from the Judgment of Sentence May 14, 2012
In the Court of Common Pleas of Carbon County
Criminal Division at No.: 361 CR 2011

BEFORE: MUSMANNO, J., WECHT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.

Filed: February 19, 2013

Appellant, Kermit Sponheimer, appeals from the judgment of sentence imposed following his negotiated guilty plea to criminal attempt to commit the crime of contraband, prohibiting the possession of a controlled substance by an inmate.¹ Specifically, he challenges the imposition of a consecutive sentence. We affirm.

While an inmate in the Carbon County Correctional Facility, Appellant attempted to have his son supply him with Suboxone, a Schedule III narcotic. On March 5, 2012, he pleaded guilty to attempt to commit a

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. § 901(a); 18 Pa.C.S.A. § 5123(a.2).

violation of 18 Pa.C.S.A. § 5123(a.2) (possession of controlled substance contraband by inmate prohibited). **See** 18 Pa.C.S.A. § 901(a) (attempt).

On May 14, 2012, the court, after review of a pre-sentence investigation report, sentenced Appellant to the negotiated term of not less than twenty-four months nor more than sixty months' incarceration in a state correctional facility. (**See** N.T. Sentencing, 5/14/12, at 3). The court imposed the sentence consecutively to an unrelated sentence Appellant was already serving. (**See id.** at 4). Except for Appellant's inquiry about the nature of the consecutive sentence, (**see id.** at 6), neither Appellant nor his counsel had any questions or comments about sentencing. (**See id.** at 2-3, 12).

Appellant filed a post-sentence motion for reconsideration of sentence, requesting that the sentences be run concurrently, which the court denied. (**See** Post Sentence Motion for Reconsideration of Sentence, 5/24/12; Order, 5/31/12). This timely appeal followed.²

Appellant raises one question for our review:

Did the sentence imposed in this case of 24 to 60 months to run consecutive to CR-721-2010 create an injustice that was not contemplated by the sentencing court?

(Appellant's Brief, at 4).

² Appellant also filed a timely statement of errors pursuant to Pennsylvania Rule of Appellate Procedure 1925, on June 27, 2012. **See** Pa.R.A.P. 1925(b). The trial court filed its Rule 1925(a) opinion on July 24, 2012. **See** Pa.R.A.P. 1925(a).

Appellant's question challenges the discretionary aspects of his sentence.

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. When challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question as to the inappropriateness of the sentence. 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. That is, the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process. 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. Ahmad, 961 A.2d 884, 886-87 (Pa. Super. 2008) (case citations, internal quotation marks and footnotes omitted) (emphases in original).

Here, Appellant has provided a Rule 2119(f) statement. (**See** Appellant's Brief, at 7). Preliminarily, we observe that a claim of excessive sentence, premised on the trial court's imposition of consecutive sentences, generally does not raise a substantial question for our review. **See** *Commonwealth v. Pass*, 914 A.2d 442, 446 (Pa. Super. 2006) (setting forth long-standing precedent that challenge to exercise of discretion by trial

court in imposing sentence either consecutively or concurrently fails to raise substantial question).

Perhaps in recognition of this well-settled principle of law, Appellant does **not** raise the consecutive sentence claim in the Rule 2119(f) statement, even though it is the only question raised on appeal. (**See** Appellant's Brief, at 4, 7). Accordingly, we deem that claim abandoned. **See Ahmad, supra** at 886 (appellant must set forth in brief concise statement **of the reasons relied upon** for allowance of appeal with respect to discretionary aspects of sentence).

Rather, the only specific grounds for appeal which Appellant asserts in his Rule 2119(f) statement are that the sentencing court failed to offer specific reasons for the sentence, and that the judge did not take into consideration his rehabilitative needs. (**See** Appellant's Brief, at 7). However, Appellant did not raise either of these claims with the trial court. (**See** Post Sentence Motion for Reconsideration of Sentence, 5/24/12; **see also** Concise Statement, 6/27/12) (raising sole issue of consecutive sentence). Accordingly, both issues are waived. **See** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); **see also Ahmad, supra** at 886 ("Issues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. Absent such efforts, an objection to a discretionary

aspect of a sentence is waived.”) (citations and internal quotation marks omitted). Appellant fails to present a substantial question.³

Judgment of sentence affirmed.

³ Moreover, even if we assumed that the points suggested raised a substantial question, neither issue would merit relief. The court imposed the agreed-upon sentence, which did not deviate from the Sentencing Guidelines. (**See** N.T. Sentencing, 5/14/12, at 4). The court explained its reasons for the sentence at length. (**See id.** at 4-6; **see also** 42 Pa.C.S.A. § 9721). Further, a claim that the sentencing court failed to consider or accord proper weight to a specific sentencing factor, such as rehabilitative needs, does not raise a substantial question. **See Commonwealth v. Berry**, 785 A.2d 994, 997 (Pa. Super. 2001).