NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. HANNY NOUN Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1719 EDA 2012

Appeal from the Judgment of Sentence May 18, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0510511-2004

BEFORE: BOWES, J., GANTMAN, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, J.: Filed: March 18, 2013

Appellant, Hanny Noun, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following revocation of his probation. We affirm.

The relevant facts and procedural history of this appeal are as follows.

> On the evening of February 7, 2004, the victim was on the porch at the home of his cousins, Intanon and Saone Chay. The victim and Saone Chay had previously provided statements to the police about an incident wherein [A]ppellant was arrested. On February 7, 2004, [A]ppellant and his cohort, Ricky Lan ("Lan"), approached and stated to the victim, "Yo man why do you snitch on me? You know I got time for that. You want me to get locked up so I can't see my family? You know I can blow your house up right now with my C4." Intanon Chay stated, "You can't do shit." Appellant replied, "I can do it right now." After a few more threats, [A]ppellant and Lan then pulled out guns and started shooting.

> Intanon Chay stayed on the porch while the victim and Saone Chay ran into the house; they recall hearing 12 gunshots. The police were called; upon arrival, the officers found bullet holes in the vehicle parked in the front of the house and in a pillar on the porch. The police drove the complainants around the area looking for the gunmen. Lan was arrested a few minutes later in a pool hall near the scene. A warrant for [A]ppellant's arrest was obtained as he was not located. Appellant was arrested on March 19, 2004.
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> While awaiting trial for this case, [A]ppellant sent a letter to his cousin Intanon Chay. The letter stated, "Tell [the victim] I said everything is good with me with him, but what about him with me. Feel me. … Feel like he ain't trying to drop that shit." The letter continued:
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> > But me and you, like you said, we good. I just want to get discharged from the adult system…. When I come home…I got you. When I get out of the adult system you say you going to get it dropped. And if it do come out like you said, that's good looking.
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> Following a jury trial, [A]ppellant was convicted of criminal conspiracy, intimidation of a witness, and retaliation against a witness. On February 2, 2006, the [court] sentenced him to one and one-half to three years' imprisonment to be followed by four years' probation for retaliation against a witness with concurrent terms of seven years' probation for criminal conspiracy and intimidation of a witness.

Commonwealth v. Noun, No. 441 EDA 2006, unpublished memorandum at 1-3 (Pa.Super. filed August 6, 2007) (affirming judgment of sentence) (internal footnote and citations to the record omitted).

Appellant subsequently violated the terms of probation by committing new firearms offenses. On July 16, 2010, the court revoked probation, deferred re-sentencing, and ordered a pre-sentence investigation ("PSI")

report. The court conducted Appellant's re-sentencing hearing on August 20, 2010. At the conclusion of the hearing, the court re-sentenced Appellant to two and one-half (2½) to five (5) years' imprisonment for witness intimidation, a consecutive term of two and one-half (2½) to five (5) years' imprisonment for witness retaliation, and a consecutive term of seven (7) years' probation for conspiracy. Thus, the court imposed an aggregate sentence of five (5) to ten (10) years' imprisonment, followed by seven (7) years' probation.

On February 25, 2011, Appellant timely filed a *pro se* petition pursuant to the Post Conviction Relief Act ("PCRA") at 42 Pa.C.S.A. §§ 9541-9546. The court appointed counsel, who filed an amended petition on November 2, 2011. In it, Appellant claimed the court had imposed an illegal sentence:

> The sentence imposed by the trial court at the VOP hearing on witness retaliation of 2½ to 5 years in prison was illegal because at sentencing after trial the trial court imposed a sentence of 1½ to 3 years in prison which would make the total maximum sentence imposed of 8 years in prison which would be above the maximum sentence for a felony of the third degree which is 7 years in prison.

(Amended PCRA Petition, filed 11/2/11, at 2). On February 7, 2012, the Commonwealth filed an answer, requesting the court to re-sentence Appellant on all charges.

On May 18, 2012, the court conducted a hearing on the matter. At that time, the court granted PCRA relief and vacated the sentence imposed on August 20, 2010. Immediately thereafter, the court conducted a new

sentencing proceeding. After hearing from counsel and Appellant, the court re-sentenced Appellant to two (2) to four (4) years' imprisonment for witness retaliation, a consecutive term of three (3) to six (6) years' imprisonment for witness intimidation, and a consecutive term of seven (7) years' probation for conspiracy. Thus, the court imposed an identical aggregate sentence of five (5) to ten (10) years' imprisonment, followed by seven (7) years' probation.

Appellant timely filed a post-sentence motion on May 23, 2012. In it, Appellant argued that the court imposed an unreasonable sentence, because the court failed to consider Appellant's age at the time of the offenses, his family history, and rehabilitative needs. On June 14, 2012, Appellant timely filed a notice of appeal.[1] The court did not order Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

Appellant raises one issue for our review:

IS APPELLANT ENTITLED TO A NEW SENTENCE HEARING?

(Appellant's Brief at 2).

Appellant contends the sentencing court did not adequately consider the fact that he committed the underlying offenses as a juvenile. Appellant

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[1] In their appellate briefs, the parties indicate the court entered an order denying the post-sentence motion. The certified record, however, does not include an order denying relief. Regardless of whether the court formally entered an order, the filing of the post-sentence motion did not toll the appeal period. ***See*** Pa.R.Crim.P. 708(D).

asserts that juveniles are less culpable than adults who commit the same offenses, because juveniles lack maturity and have an "underdeveloped" sense of responsibility. Additionally, Appellant complains the court erroneously imposed a consecutive term of probation, which keeps Appellant under state supervision for a total of seventeen (17) years. Appellant argues the court did not consider the factors set forth in 42 Pa.C.S.A. § 9721(b), including the protection of the public, the gravity of the offenses as it relates to the impact on the life of the victim and on the community, and Appellant's rehabilitative needs. Appellant concludes the court abused its discretion by imposing a manifestly excessive sentence. Appellant's claim challenges the discretionary aspects of his sentence. ***See Commonwealth v. Lutes***, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing).

When reviewing the outcome of a revocation hearing, this Court is limited to determining the validity of the proceeding and the legality of the judgment of sentence imposed. ***Commonwealth v. Heilman***, 876 A.2d 1021 (Pa.Super. 2005). Notwithstanding the stated scope of review suggesting only the legality of a sentence is reviewable, an appellant may also challenge the discretionary aspects of a sentence imposed following revocation. ***Commonwealth v. Sierra***, 752 A.2d 910 (Pa.Super. 2000). ***See also Commonwealth v. Cappellini***, 690 A.2d 1220 (Pa.Super. 1997) (addressing discretionary aspects of sentence imposed following revocation

of probation).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Sierra, supra*** at 912. Prior to reaching the merits of a discretionary sentencing issue:

> [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).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to **exceptional** cases." ***Commonwealth v. Williams***, 562 A.2d

1385, 1387 (Pa.Super. 1989) (*en banc*) (emphasis in original) (internal quotation marks omitted).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830 A.2d 1013 (Pa.Super. 2003). A substantial question exists "only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Sierra, supra*** at 912-13. A claim that a sentence is manifestly excessive might raise a substantial question if the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence imposed violates a specific provision of the Sentencing Code or the norms underlying the sentencing process. ***Mouzon, supra*** at 435, 812 A.2d at 627. Nevertheless, "[a]n allegation that a sentencing court 'failed to consider' or 'did not adequately consider' certain factors does not raise a substantial question that the sentence was inappropriate." ***Commonwealth v. Cruz-Centeno***, 668 A.2d 536, 545 (Pa.Super. 1995), *appeal denied*, 544 Pa. 653, 676 A.2d 1195 (1996) (quoting ***Commonwealth v. Urrutia***, 653 A.2d 706, 710 (Pa.Super. 1995), *appeal denied*, 541 Pa. 625, 661 A.2d 873 (1995)). ***See also Commonwealth v. Kane***, 10 A.3d 327 (Pa.Super. 2010), *appeal denied*, 612 Pa. 689, 29 A.3d 796 (2011) (stating claim that

sentencing court failed to consider factors set forth in Section 9721(b) does not raise substantial question).

Instantly, Appellant's claim that the court failed to consider his age and rehabilitative needs does not raise a substantial question. ***See Cruz-Centeno, supra***. The court had the benefit of a PSI report. Therefore, we can presume it considered the relevant sentencing factors. ***See Commonwealth v. Tirado***, 870 A.2d 362 (Pa.Super. 2005) (stating where sentencing court had benefit of PSI, law assumes court was aware of and weighed relevant information regarding defendant's character and mitigating factors). To the extent Appellant also complains about the court's decision to impose a consecutive term of probation, we reiterate that a defendant is not entitled to have all sentences run concurrently. ***See Commonwealth v. Prisk***, 13 A.3d 526 (Pa.Super. 2011). Thus, Appellant is not entitled to relief as to the discretionary aspects of sentencing. Accordingly, we affirm.

Judgment of sentence affirmed.