

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

SILAS HARTAGE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 174 EDA 2012

Appeal from the Judgment of Sentence September 26, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0505091-2006

BEFORE: STEVENS, P.J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY STEVENS, P.J.

FILED MAY 03, 2013

Appellant Silas Hartage appeals from the judgment of sentence entered by the Court of Common Pleas of Philadelphia County after this Court vacated the trial court's original sentence as illegal. Upon remand for resentencing, the trial court imposed an aggregate sentence of twenty to forty years imprisonment. Appellant now appeals the sufficiency of the evidence supporting his attempted murder conviction and claims the trial court abused its discretion in imposing the new sentence. We affirm.

Appellant was charged and convicted of attempted murder,¹ aggravated assault,² arson,³ and causing a catastrophe⁴ in relation to the

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. § 901(a).

January 12, 2006 events in which Appellant poured lighter fluid on his girlfriend and set her on fire. This Court summarized the factual background and procedural history of this case when deciding Appellant's original appeal:

In January of 2006, Appellant was living with his longtime girlfriend, Carol Ann Cook, at her home in Philadelphia. According to Ms. Cook's testimony, the relationship became "rocky" and she asked Appellant to move out on January 10th. The next day, Appellant held Ms. Cook inside her home, unplugged the telephones, and followed her around the house. That same day, January 11th, Appellant poured lighter fluid on his body but did not light it.

On January 10th and 11th, Ms. Cook's daughter, Jennifer Cook-Perry, attempted to call her mother at home, but the calls went straight to voicemail. On January 12th, Ms. Cook-Perry, concerned for her mother's well-being, called George Hamilton, a neighbor and friend of her mother, and asked him to check on Ms. Cook. Mr. Hamilton went over to Ms. Cook's house at around 9 a.m. on January 12th, and when he knocked on the door, Appellant answered. Mr. Hamilton testified that Appellant told him that Ms. Cook was upstairs sleeping. Mr. Hamilton asked Appellant to tell Ms. Cook that her daughters were trying to reach her and that she should call them.

Later that morning, Ms. Cook and Appellant were in the kitchen when Appellant grabbed Ms. Cook, held her against his body, and proceeded to pour lighter fluid over them both. Ms. Cook testified that Appellant then lit her arm with a lighter and when she began to scream Appellant told her, "too late, it's too late." While holding Ms. Cook so she could not escape, Appellant poured lighter fluid around the kitchen and attempted to light the room on fire. Appellant continued to hold Ms. Cook as she burned and tried to get away from him, and at one point Appellant punched her and knocked her to the ground. Appellant finally let Ms. Cook go, but the smoke was so thick that she could not see and was unable to find her way out of the house.

(Footnote Continued) _____

² 18 Pa.C.S.A. § 2702(a).

³ 18 Pa.C.S.A. § 3301(a)(1).

⁴ 18 Pa.C.S.A. § 3302(a).

Both Ms. Cook and Appellant were pulled, unconscious, from the burning house by the Philadelphia Fire Department. Ms. Cook was taken to Temple University Hospital where she was intubated and heavily sedated. Dr. Hensell, Ms. Cook's doctor, testified that Ms. Cook had second and third degree burns on her face, shoulder, back, and arms. Ms. Cook remained sedated and on a ventilator for nineteen days, spent fifty-four days in the burn center, and an additional twenty-one days in the hospital's rehabilitation center. Ms. Cook underwent skin grafts and a tracheotomy so that she could breathe on her own, [and] she suffers from permanent injuries including scars, lung problems, and voice damage.

Lt. John Dougherty, from the Philadelphia Fire Marshal's Office, investigated the cause of the fire. At trial, Lt. [Dougherty] testified that he had determined the fire was incendiary, meaning a "fire set with malicious intent." Forensic testing revealed a petroleum product on pants, socks, the carpet and various other article taken from the scene. A glass jar containing a clear fluid was also recovered from the scene.

At trial, Appellant testified in his own defense, often contradicting himself and making nonsensical statements. Most notably, Appellant testified on direct that he was not at the house on January 11th, yet when cross-examined by the Commonwealth, Appellant insinuated that he was there. When reminded by the prosecutor that he had previously testified that he was not at the house, Appellant stated, "[t]hat's right, I wasn't there." Appellant also made confusing statements about how the fire started, at one point he claimed he had no idea, yet stated that he believed the fire started "in the kitchen when we was upstairs." More than once, the court informed Appellant that he could not "ramble on" and must answer the questions posed by his attorney.

On October 12, 2006, Appellant was found guilty of all charges and sentenced to four consecutive terms of ten to twenty years, a total of forty to eighty years' incarceration. Appellant filed no post-sentence motions nor did he file an appeal. Appellant filed a timely *pro se* petition under the Post-Conviction Relief Act ("PCRA"), pursuant to 42 Pa.C.S. §§ 9541-9546. Counsel was subsequently appointed and an amended PCRA was filed. Appellant's direct appeal rights were reinstated *nunc pro tunc* on December 15, 2008, and that same day, Appellant filed a timely notice of appeal.

Commonwealth v. Hartage, 34 EDA 2009, unpublished memorandum at 1-5 (Pa. Super. filed November 30, 2010) (citations omitted).

On appeal, a panel of this Court affirmed Appellant's sentence in part, vacated it in part, and remanded for resentencing. This Court found there was insufficient evidence to support Appellant's conviction for causing a catastrophe. Appellant did not challenge the sufficiency of the evidence supporting his attempted murder, aggravated assault, and arson convictions. This Court also found the trial court imposed an illegal sentence when it failed to merge Appellant's attempted murder and aggravated assault convictions for sentencing purposes.

Upon remand, the trial court held a resentencing hearing in which it imposed a ten to twenty year sentence for Appellant's attempted murder conviction and a ten to twenty year sentence for Appellant's arson conviction. As the sentences were set to run consecutively, Appellant received an aggregate sentence of twenty to forty years imprisonment. Appellant filed a timely post-sentence motion, which the trial court subsequently denied. This timely appeal followed.

Appellant first claims there was insufficient evidence to support his conviction for attempted murder. We note this is the first time Appellant raised this claim. Previously, on his direct appeal *nunc pro tunc*, Appellant did not challenge his attempted murder conviction but limited his appeal to challenge certain evidentiary issues, the sufficiency of the evidence

supporting his conviction for causing a catastrophe, and the improper merger of his attempted murder and aggravated assault convictions. Although this Court vacated Appellant's conviction for causing a catastrophe and found two of his convictions should have merged for sentencing, this Court upheld Appellant's convictions for attempted murder, aggravated assault, and arson. The purpose of this Court's limited remand was for the trial court to resentence Appellant in light of these rulings, not to give Appellant another chance to raise additional unrelated issues. As Appellant's challenge to the sufficiency of his attempted murder conviction is not within the scope of our Court's limited remand, we decline to review this new claim.

Appellant also claims the trial court abused its discretion in allegedly basing his sentence solely on retribution and ignoring relevant factors such as the protection of the public, the gravity of the offense, the impact on the life of the victim and the community, and Appellant's rehabilitative needs. Appellant contends that "one can only assume that the reason for [the trial court's] sentence was only retribution." Appellant's Brief, at 11. Appellant also claims for the first time that his sentence was unreasonable because the trial court imposed two consecutive sentences.

As sentencing is a matter vested in the sound discretion of the sentencing court, our standard of review is as follows:

the proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not 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. An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion.

Commonwealth v. Perry, 612 Pa. 557, 564-65, 32 A.3d 232, 236 (2011) (citations omitted).

Before we reach the merits of Appellant's claim, we note "[c]riminal defendants do not have the automatic right to challenge the discretionary aspects of their sentence." ***Commonwealth v. Robinson***, 931 A.2d 15, 19 (Pa. Super. 2007) (citations omitted). An appellant challenging the discretionary aspects of his sentence must petition this Court for permission to appeal by satisfying the following four-part test:

(1) the appellant preserved the issue either by raising it at the time of sentencing or in a post-sentence motion; (2) the appellant filed a timely notice of appeal; (3) the appellant set forth a concise statement of reasons relied upon for the allowance of his appeal pursuant to Pa.R.A.P. 2119(f); and (4) the appellant raises a substantial question for our review.

Commonwealth v. Stein, 39 A.3d 365, 370 (Pa. Super. 2012) (citing ***Commonwealth v. Dunphy***, 20 A.3d 1215, 1220 (Pa. Super. 2011)). Appellant's concise statement under Rule 2119(f) must raise a "substantial question as to whether the trial judge, in imposing sentence, violated a specific provision of the Sentencing Code or contravened a 'fundamental norm' of the sentencing process." ***Commonwealth v. Kelly***, 33 A.3d 638, 640 (Pa. Super. 2011) (quoting ***Commonwealth v. Flowers***, 950 A.2d 330, 331 (Pa. Super. 2008)).

In his post-sentence motion, Appellant claimed the trial court abused its discretion in solely focusing on the gravity of the offense without considering any of the other relevant sentencing factors listed in 42 Pa.C.S.A. 9721(b). Appellant filed a timely appeal and again raised this claim in a concise statement under Rule 2119(f) in his appellate brief. This Court has held that “[a]n averment that the court sentenced based solely on the seriousness of the offense and failed to consider all relevant factors raises a substantial question.” **Commonwealth v. Bricker**, 41 A.3d 872, 875 (Pa. Super. 2012). Thus, we may review the merits of this claim.

Section 9721 of the Sentencing Code provides trial courts with guidance in crafting an appropriate sentence for each defendant. “The sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.” 42 Pa.C.S.A. § 9721(b).

Section 9781(c) specifically defines three instances in which the appellate courts should vacate a sentence and remand: (1) the sentencing court applied the guidelines erroneously; (2) the sentence falls within the guidelines, but is “clearly unreasonable” based on the circumstances of the case; and (3) the sentence falls outside of the guidelines and is “unreasonable.” 42 Pa.C.S. § 9781(c). Under 42 Pa.C.S. § 9781(d), the appellate courts must review the record and consider the nature and circumstances of the offense, the sentencing court's observations of the defendant, the findings that formed the basis of the sentence, and the sentencing guidelines. The ... weighing of factors under 42 Pa.C.S. § 9721(b) [is] exclusively for the sentencing court, and an appellate court could not substitute its own weighing of those factors. The primary

consideration, therefore, is whether the court imposed an individualized sentence, and whether the sentence was nonetheless unreasonable for sentences falling outside the guidelines, or clearly unreasonable for sentences falling within the guidelines, pursuant to 42 Pa.C.S. § 9781(c).

Commonwealth v. Bricker, 41 A.3d 872, 875-76 (Pa. Super. 2012) (quoting **Commonwealth v. Bowen**, 55 A.3d 1254, 1263 (Pa. Super. 2012)). “The sentencing court is given broad discretion in determining whether a sentence is manifestly excessive because the sentencing judge is in the “best position to measure factors such as the nature of the crime, the defendant's character and the defendant's display of remorse, defiance, or indifference.” **Commonwealth v. Riggs**, ---A.3d---, 2012 PA Super 187, at *5 (Pa. Super. Sept. 6, 2012) (citations omitted).

In this case, Appellant claims his sentence is unreasonable as the trial court allegedly sentenced him outside the guideline range without considering appropriate sentencing factors. We note that the record does not contain any information as to the calculated guideline ranges for each of Appellant’s sentences. The trial court supplied this Court with a limited reconstructed record as the certified record apparently has been lost. Appellant baldly claims that his sentences were outside the sentencing guidelines without providing any information as to the applicable guideline ranges.

However, even if we assume that both of Appellant’s sentences were beyond the guideline ranges, we find the trial court’s sentences of ten to

twenty years' imprisonment on each count were not unreasonable. At sentencing, the trial court set forth its reasoning which showed it considered all relevant sentencing factors. Despite the gravity of Appellant's offense, the trial court did note that Appellant had behaved well in prison. The trial court gave Appellant a chance to make a statement in which Appellant asked the court for mercy but claimed the fire was accidental. Appellant dodged the trial court's repeated attempts to ask him how the fire started. When the trial court indicated the Fire Department found the fire was started with malicious intent, Appellant claimed one of the investigating detectives had fabricated this report as she had a bias against Appellant. The trial court found Appellant not credible as his account was full of contradictory statements. The trial court emphasized that Appellant will not take responsibility for his actions and shows no remorse for his crimes.

In addition, the trial court also expressed concern for Appellant's victim, a woman who had shown mercy to Appellant in providing for his every need and allowing him to stay in her home when he had nowhere to live. From this incident, the victim sustained horrible injuries that required seventy-five days of hospitalization in which she received skin grafts and a tracheotomy to allow her to breathe. As a result of Appellant's actions, the victim still suffers permanent injuries, including scarring, lung damage, and voice problems. Moreover, the trial court confirms that it had the benefit of the sentencing guidelines, a presentence report, and a mental health report

when it imposed Appellant's sentence. Accordingly, we find no merit in Appellant's claim that the trial court did not consider the relevant sentencing factors in imposing his sentence.

As noted above, Appellant also claimed his sentence was unreasonable as his two individual sentences were set to run consecutively. However, Appellant did not raise this claim in his post-sentence motion before the trial court. "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." ***Commonwealth v. Lamonda***, 52 A.3d 365, 371 (Pa. Super. 2012) (citation omitted). As a result, we find Appellant has waived his challenge to the consecutive nature of his sentences.

For the foregoing reasons, we affirm Appellant's judgment of sentence.

Judgment of sentence affirmed

Judgment Entered.

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

Prothonotary

Date: 5/3/2013

