

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

KEVIN JOHNSON

Appellant

No. 1790 MDA 2012

Appeal from the Judgment of Sentence of July 20, 2012
In the Court of Common Pleas of Berks County
Criminal Division at No.: CP-06-CR-0004370-2011

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

MEMORANDUM BY WECHT, J.:

FILED DECEMBER 03, 2013

Kevin Johnson ("Appellant") appeals from the judgment of sentence entered on July 20, 2012. We affirm.

The trial court set forth the pertinent facts of the case as follows:

[O]n August 18, 2011, Appellant met [c]riminal [i]nvestigator Jose Martinez at a prearranged location in the City of Reading, Berks County, Pennsylvania. Martinez and a confidential informant drove to the appointed location and waited in Martinez's vehicle for Appellant to arrive. Meanwhile, additional officers were stationed nearby to conduct surveillance and provide backup security if necessary. A digital video camera was also hidden inside Martinez's vehicle.

Approximately ten minutes after the meeting was arranged, Appellant arrived and approached the vehicle, which he entered through the rear passenger side door. On direct examination by counsel for the [C]ommonwealth, Martinez described the

* Retired Senior Judge assigned to the Superior Court.

following exchange that took place after [A]ppellant entered the car:

A: I told him to give me three.

Q: What [does] that mean when you're on the street buying drugs?

A: Three baggies of crack cocaine.

Q: And what was his response?

A: That he only had 20's.

Q: And did you say anything back?

A: I handed him the \$30 that I had. He took the \$30, and he handed me two clear pink plastic baggies with suspected crack cocaine inside.

Martinez's description of events was further corroborated by photographic evidence taken from the hidden camera. At the conclusion of the exchange, Martinez submitted the white, rocklike substance found inside the baggies for laboratory analysis, and it was determined that the substance was in fact 0.36 grams of cocaine. Appellant was arrested on September 20, 2011.

Trial Court Opinion ("T.C.O."), 1/14/2013, at 2-3.

After a jury trial, Appellant was found guilty of possession of a controlled substance,¹ possession with intent to deliver a controlled substance ("PWID"),² and delivery of a controlled substance.³ On July 20, 2012, Appellant was sentenced to ten to twenty years' incarceration on the above charges.

¹ 35 P.S. § 780-113(a)(16).

² 35 P.S. § 780-113(a)(30).

³ 35 P.S. § 780-113(a)(30).

On July 25, 2012, Appellant requested an extension of time to file post-sentence motions. On July 27, 2012, the trial court granted Appellant's request, and ordered that post-sentence motions be filed within thirty days after all transcripts had been filed, which occurred on August 27, 2012. On September 10, 2012, Appellant filed a timely post-sentence motion raising a challenge to the discretionary aspects of his sentence and the weight of the evidence, which the trial court denied on September 13, 2012.

On October 9, 2012, Appellant filed a notice of appeal. On October 10, 2012, the trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied. On January 14, 2013, the trial court filed its Rule 1925(a) opinion.

Appellant presents three issues for our consideration:

1. Whether Appellant's appeal, filed within [thirty] days of the [trial court's] denial of [his] Post-Sentence Motion should be quashed as untimely.
2. Whether the sentencing court abused its discretion by sentencing appellant to an aggregate sentence of 10-20 year[s], where such a sentence was manifestly excessive and clearly unreasonable, where such a sentence was disproportionately beyond the standard range, where the sentence was contrary to the fundamental norms underlying the sentencing process, in that the protection of the public, the gravity of the offense as it relates to the impact of the life of the victim and the community, and Appellant's individual rehabilitative needs and mitigating circumstances were not considered.
3. Whether the guilty verdicts for delivery of a controlled substance, possession with the intent to deliver a controlled

substance, and possession of a controlled substance [were] contrary to the weight of the evidence presented at trial.

Brief for Appellant at 4.

Appellant's first argument responds to this Court's order dated November 20, 2012, directing Appellant to address the timeliness of this appeal. We must determine whether Appellant's notice of appeal was timely filed; this affects our jurisdiction to reach the merits of this case. ***Commonwealth v. Miller***, 715 A.2d 1203, 1205 (Pa. Super. 1998); ***see Commonwealth v. Dreves***, 839 A.2d 1122, 1126 n.4 (Pa. Super. 2003) (*en banc*) (stating that we may raise the question of jurisdiction *sua sponte*).

Rule 720 of the Pennsylvania Rules of Criminal Procedure, in relevant part, provides that:

1. [A] written post-sentence motion shall be filed no later than 10 days after imposition of sentence.
2. If the defendant files a timely post-sentence motion, the notice of appeal shall be filed:
 - a. within 30 days of the entry of the order deciding the motion;

Pa.R.Crim.P. 720(A).

Appellant was granted an extension to file any post-sentence motions until thirty days after all transcripts in the case had been filed. The certified record reveals that the trial transcripts were filed on August 27, 2012. Thus, Appellant's September 10, 2012 post-sentence motion was timely filed. ***See Dreves***, 839 A.2d at 1129 (stating that when a trial court grants a request to file a post-sentence motion *nunc pro tunc*, the motion must be treated as

though it were filed within the ten day period following the imposition of sentence). On September 13, 2012, the trial court denied Appellant's post-sentence motion. On October 9, 2012, Appellant filed a notice of appeal. Accordingly, Appellant's notice of appeal was timely filed within thirty days of the denial of his post sentence motion, as is required by Pa.R.Crim.P. 720(A).

In his second issue, Appellant challenges the discretionary aspects of his sentence. As such, his challenge must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute. ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa. Super. 2004). To obtain review of the discretionary aspects of a sentence, an appellant must meet two requirements. First, the appellant's brief must include a concise statement of reasons relied upon for allowance of appeal. **See** Pa.R.A.P. 2119(f). Second, the appellant must demonstrate that there exists a substantial question that the sentence imposed is inappropriate under the Sentencing Code. **See** 204 Pa.Code §§ 303.1-303.19. A substantial question requires a demonstration that "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." ***Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa. Super. 2005). Whether a substantial question has been raised is determined on a case-by-case basis. ***Commonwealth v. Titus***, 816 A.2d 251, 255 (Pa. Super. 2008). However, a bald assertion that a sentence is excessive does not, by itself,

raise a substantial question justifying this Court's review of the merits of the underlying claim. ***Id.***

In his brief, Appellant has set forth a separate concise statement of the reasons for allowance of appeal, as required by Pa.R.A.P. 2119(f). **See** Brief for Appellant at 15. Appellant claims that the court imposed a sentence in excess of the guideline sentence without sufficiently articulating, on the record, justifiable reasons for doing so.⁴ Brief for Appellant at 16. This raises a substantial question for our review. **See *Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa. Super. 1999) (*en banc*) (holding that a substantial question is raised where petitioner asserts that the sentencing court failed to state sufficiently its reasons for imposing sentence in excess of the sentencing guidelines). Thus, we will review the merits of Appellant's claims.

In reviewing sentencing decisions, we apply an abuse of discretion standard:

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. In this context, an abuse of discretion is not shown merely by an error in judgment.

⁴ Based upon Appellant's prior record score (five) and the offense gravity score for PWID (six), the sentence recommended under the guidelines is between 33 and 63 months. 204 Pa.Code § 303.16. The aggravated and mitigated ranges may expand or contract this range by six months. ***Id.*** Therefore, Appellant is correct that his sentence of ten to twenty years imprisonment exceeded the aggravated range of the guideline sentence.

Rather, 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.

Commonwealth v. Zurburg, 937 A.2d 1131, 1135 (Pa. Super. 2007).

In pertinent part, the Sentencing Code requires that the sentencing court must:

follow the general principle that 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. The court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing In every case where the court imposes a sentence outside the sentencing guidelines . . . the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines. Failure to comply shall be grounds for vacating the sentence and resentencing the defendant.

42 Pa.C.S. § 9721(b). The sentencing court is not required to parrot the words of the Sentencing Code, or to recite every factor that must be considered under subsection 9721(b). ***Commonwealth v. Cappellini***, 690 A.2d 1220, 1228 (Pa. Super. 1997). However, the record as a whole must reflect due consideration of the prescribed factors. ***Commonwealth v. Malovich***, 903 A.2d 1247, 1251 (Pa. Super. 2006).

In addition to our analysis of the sentencing court's compliance with Section 9721(b), we must also consider the following factors:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant.

(2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.

(3) The findings upon which the sentence was based.

(4) The guidelines promulgated by the commission.

See 42 Pa.C.S. § 9781(d).

The record in this case reveals that the trial court considered all of the relevant sentencing factors. The sentencing court considered the circumstances of the crime, and noted its finding that the offense occurred within 1,000 feet of a school zone. Notes of Testimony (“N.T.”), 8/09/2012, at 31-32. The court also plainly considered the sentencing guidelines. **Id.** at 23. In evaluating Appellant’s background and character, the sentencing court also had the benefit of a presentence investigation report. **Id.** at 31; **see Commonwealth v. Devers**, 546 A.2d 12, 18 (Pa. 1988) (“Where presentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors”). Specifically, the court considered Appellant’s four prior drug-related felony convictions as well as a robbery conviction in 1991, and a firearms conviction in 1999, for which Appellant was incarcerated. **Id.** at 33.

Moreover, the trial court heard testimony from Appellant’s family and from Appellant himself, who exercised his right of allocution. **Id.** at 24-31. The sentencing court then explicitly balanced the concerns expressed by Appellant’s family with Appellant’s likelihood of rehabilitation, and the

seriousness of his offenses. **Id.** at 33. In considering Appellant's rehabilitative needs, the court noted that, "there have been many efforts to rehabilitate [Appellant], all of which have ended in failure." **Id.** Finally, the sentencing court expressed concerns regarding the safety of the community in light of Appellant's persistent history of recidivism. **Id.**

We find nothing unreasonable in the court's departure from the sentencing guidelines. There is no evidence of bias, prejudice, partiality, ill will, manifest unreasonableness, or legal error. The court duly considered the sentencing factors under subsection 9721(b), the sentencing guidelines, and the mitigating evidence presented by Appellant and contained within the presentence investigation report. **See Malovich, supra.** Consequently, we find no abuse of discretion and we will not disturb the sentence.

Appellant's final issue is a challenge to the weight of the evidence.⁵

Our standard of review is well settled:

As an appellate court, we cannot substitute our judgment for that of the finder of fact. Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. A verdict is said to be contrary to the evidence such that it shocks one's sense of justice when "the figure of Justice totters on her

⁵ Challenges to the weight of the evidence must be raised with the trial court in a motion for a new trial either orally or by written motion before sentencing or in a post-sentence motion. **See** Pa.R.Crim.P. 607(A). The record in this case reflects that Appellant challenged the weight of the evidence in his post-sentence motion pursuant to Rule 607. Consequently, Appellant properly has preserved the issue on appeal.

pedestal,” or when “the jury’s verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience.” **Commonwealth v. Davidson**, 860 A.2d 575, 581 (Pa. Super. 2004) (citations omitted), *appeal granted on other grounds*, 871 A.2d 185 (Pa. 2005).

Furthermore, where the trial court has ruled on the weight claim below, an appellate court’s role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim. **Commonwealth v. Champney**, 832 A.2d 403, 408 (Pa. 2003).

Commonwealth v. Cruz, 919 A.2d 279, 281–282 (Pa. Super. 2007) (citations modified; some citations omitted).

Appellant points to several alleged inconsistencies in the testimony and evidence presented by the Commonwealth at trial. Specifically, Appellant submits that the video camera time stamps do not correspond with the times recorded in Officer Rowe’s report. Brief for Appellant at 29. Appellant also emphasizes that the video camera never captured or recorded any contraband being passed to Officer Martinez. **Id.** Similarly, Appellant notes that, at the time of his arrest, he was not found to be in possession of the prerecorded currency or any other indicia of drug activity. **Id.** at 31. Finally, Appellant argues that there was no corroborating testimony to establish his guilt, because the Commonwealth refused to present its confidential informant as a witness at trial. **Id.** at 28.

Nothing in Appellant’s argument or in our careful review of the evidence suggests that the jury’s verdict should shock one’s sense of justice,

or that the trial court abused its discretion in ruling that Appellant had failed to establish the sort of injustice that would require a new trial. The Commonwealth presented testimony from criminal investigators Michael Rowe, Darren Smith, and Jose Martinez. At trial in open court, both Detective Smith and Officer Martinez identified Appellant as the individual that they observed actually engaged in the narcotics transaction. Additionally, the Commonwealth introduced photographs depicting Appellant inside a vehicle with Officer Martinez, and surveillance photos showing Appellant outside the same vehicle. In rendering a guilty verdict, the jury indicated that it found the Commonwealth's evidence to be credible despite the discrepancies and inconsistencies that Appellant presented to them. The jury is free to believe all, part, or none of the evidence presented at trial and ultimately determines the credibility of the witnesses. ***See Davidson, supra.***

Based upon our standard of review, we find no abuse of discretion in the trial court's order denying Appellant's weight of the evidence claim.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above the printed name.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/3/2013