NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. CHRIS COOL CLARKE Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1810 MDA 2012

Appeal from the Judgment of Sentence August 28, 2012
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0000787-2012
CP-35-CR-0002849-2011

BEFORE: SHOGAN, J., MUNDY, J., and COLVILLE, J.*

MEMORANDUM BY MUNDY, J.: **FILED MAY 07, 2013**

Appellant, Chris Cool Clarke, appeals from the August 28, 2012 aggregate judgment of sentence of 26 months plus two days to 66 months' imprisonment, plus four years' probation, imposed after he pled guilty to one count each of possession with intent to deliver a controlled substance (PWID), endangering the welfare of children, and DUI, high rate of alcohol.[1] Additionally, the trial court found Appellant eligible for a Recidivism Risk Reduction Incentive (RRRI) sentence. ***See*** 61 Pa.C.S.A. § 4505. After careful review, we affirm.

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* Retired Senior Judge assigned to the Superior Court.

[1] 35 P.S. § 780-113(a)(30), 18 Pa.C.S.A. § 4304(a)(1) and 75 Pa.C.S.A. § 3802(b), respectively.

The relevant factual and procedural history of this case, as gleaned from the certified record, follows. On November 18, 2011, Scranton Police executed a search warrant at 2013 Margaret Avenue, Scranton, Pennsylvania. Appellant was at home with an infant as well as three toddlers. Upon executing the search, the police recovered two large plastic bags of crack cocaine from a third-floor bedroom. Additionally, the police discovered 14 grams of marijuana along with a glass pipe. The police also found small bags and packaging materials and U.S. currency.

In a separate incident, on June 26, 2011, Pennsylvania State Trooper Peter J. Matyjevich was travelling northbound on State Route 307 in Scranton, Pennsylvania when he noticed a gray vehicle travelling southbound on Route 307, which was driving on the double yellow line. After turning around and pulling the vehicle over, Trooper Matyjevich asked the driver to produce his driver's license, at which time, the vehicle jerked forward, traveled up onto the sidewalk, nearly striking a wall as the driver had not put the vehicle in park. The driver identified himself as Appellant and stated to Trooper Matyjevich that he did not possess a valid driver's license. Trooper Matyjevich detected an odor of alcohol and asked Appellant to step out of his vehicle. Trooper Matyjevich had Appellant perform two field sobriety tests. Appellant was taken into custody on suspicion of DUI and transported to Moses Taylor Hospital, where a blood sample from

Appellant's right arm was drawn. Testing revealed Appellant's blood alcohol level to be 0.146%.

As a result of the events on November 18, 2011, the Commonwealth charged Appellant with one count each of PWID, intentional possession of a controlled substance, possession of marijuana, criminal use of a communication facility, two counts of possession of drug paraphernalia and four counts of endangering the welfare of children at docket number CP-35-CR-2849-2011.[2] Based on the events on June 26, 2011, the Commonwealth subsequently also charged Appellant with one count each of DUI general impairment, DUI high rate of alcohol, careless driving, reckless driving, driving without a license, and disregarding a traffic lane at docket number CP-35-CR-787-2012.[3]

On May 7, 2012, Appellant pled guilty to one count each of PWID and endangering the welfare of children in connection with the charges at docket number CP-35-CR-2849-2011. On July 3, 2012, Appellant pled guilty to one count of DUI – high rate of alcohol in connection with the charges at docket number CP-35-CR-787-2012. On August 28, 2012, the trial court sentenced

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[2] 35 P.S. §§ 780-113(a)(30), 780-113(a)(16), 780-113(a)(31), 18 Pa.C.S.A. § 7512(a), 35 P.S. § 780-113(a)(32) and 18 Pa.C.S.A. § 4304(a)(1), respectively.

[3] 75 Pa.C.S.A. §§ 3802(a)(1), 3802(b), 3714(a), 3736(a), 1501(a) and 3309(1), respectively.

Appellant at both docket numbers, and imposed an aggregate sentence of 26 months plus two days to 66 months' imprisonment, plus four years' probation.[4] As noted above, the trial court also noted that Appellant was eligible for a RRRI sentence.[5] N.T., 8/28/12, at 8; ***see also*** 61 Pa.C.S.A. § 4505. Appellant filed a motion for reconsideration of sentence on September 7, 2012, which the trial court denied on September 11, 2012. On October 11, 2012, Appellant filed a timely notice of appeal.[6]

On appeal, Appellant raises one issue for our review.

> Whether the [t]rial [c]ourt abused its discretion by sentencing [Appellant] in the aggravated range of the sentencing guidelines on the charge of

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[4] The trial court sentenced Appellant to 14 to 36 months' imprisonment plus one year probation for PWID, one to two years' imprisonment plus three years' probation for endangering the welfare of children, and two days to six months' imprisonment for DUI, with all sentences to run consecutively. The remaining charges at both docket numbers were *nolle prossed*.

[5] The RRRI statute allows a defendant to be eligible to receive a reduced sentence equal to three-fourths of the minimum sentence if said minimum sentence is three years or less. 61 Pa.C.S.A. § 4505(c)(2). If the minimum sentence is greater than three years, the RRRI-eligible defendant is eligible to receive a reduced sentence of five-sixths of the minimum sentence. ***Id.***

[6] The trial court did not order Appellant to file a concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Nor did the trial court file a Rule 1925(a) opinion. However, this Court has previously held that "the lack of a Rule 1925(a) opinion is not always fatal to our review, because we can look to the record to ascertain the reasons for the [trial court's decision]." ***Commonwealth v. Hood***, 872 A.2d 175, 178 (Pa. Super. 2005). Because we can adequately determine the trial court's reasoning from the sentencing transcript, and given our analysis that follows, we decline to remand this case for a Rule 1925(a) opinion. ***See id.***

> [e]ndangering the [w]elfare of [c]hildren and in running such sentence consecutively to the section on the charge of [PWID]?

Appellant's Brief at 7.

Our standard of review in assessing whether a trial court has erred in fashioning a sentence is well settled.

> [T]he proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. [A]n 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, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

Commonwealth v. Provenzano, 50 A.3d 148, 154 (Pa. Super. 2012) (citation omitted).

We observe that Appellant does not challenge the legality of his sentence, but rather his issue raised on appeal goes to the discretionary aspects of his sentence. Appeals regarding the discretionary aspects of sentencing are not reviewable as a matter of right. ***Commonwealth v. Mastromarino***, 2 A.3d 581, 585 (Pa. Super. 2010) (citation omitted), *appeal denied*, 14 A.3d 825 (Pa. 2011). In order for this Court to review the discretionary aspects of his sentence, Appellant must comply with the following.

> [W]e must … determine: (1) whether the appeal is timely; (2) whether Appellant preserved his issue; (3) whether Appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the sentencing code.

Commonwealth v. Carrillo-Diaz, --- A.3d ---, 2013 WL 1442318, *2 (Pa. Super. 2013).

In this case we note that Appellant has filed a timely notice of appeal, he has preserved his issues below through his motion for reconsideration of sentence, and Appellant has included a Rule 2119(f) statement in his brief.[7] We also agree with Appellant that he has raised substantial questions for our review. ***See Commonwealth v. Felmlee***, 828 A.2d 1105, 1107 (Pa. Super. 2003) (*en banc*) (stating that a "claim that the [trial] court erred by imposing an aggravated range sentence without consideration of mitigating circumstances raises a substantial question[]") (citation omitted); ***Commonwealth v. Trimble***, 615 A.2d 48, 54 (Pa. Super. 1992) (concluding, "[the] appellant ha[d] set forth a substantial question in stating that the trial court focused solely on the seriousness of the offense[]")

[7] The Commonwealth argues that Appellant presented different issues in his motion for reconsideration of sentence than those that he argues in his brief. ***See*** Commonwealth's Brief at 3-4. However, after careful review of the certified record, we agree with Appellant that his two arguments are fairly encompassed within his motion below. We further observe the Commonwealth concedes that Appellant has complied with the three other factors of the test. ***Id.***

(citations omitted). We therefore proceed to review the merits of Appellant's claims.

Appellant first argues that the trial court failed to consider various mitigating factors in fashioning its sentence. Appellant's Brief at 14-15. Specifically, that Appellant had a prior record score of zero, and that his only prior offense was use of a motor vehicle without permission and other related summary offenses. ***Id.*** at 14. Appellant also argues the trial court did not take into account the circumstances surrounding his upbringing, that he is the father of five children, his employment history, as well as his drug and alcohol addiction. ***Id.*** at 14-15.

As the Commonwealth points out, there was a pre-sentence investigative report (PSI) prepared in this case. ***See*** N.T., 8/28/12, at 2. It is axiomatic that where "the sentencing court had the benefit of a [PSI], we can assume the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." ***Commonwealth v. Rhodes***, 8 A.3d 912, 919 (Pa. Super. 2010) (internal quotation marks and citation omitted); ***see also Commonwealth v. Ventura***, 975 A.2d 1128, 1135 (Pa. Super. 2009) (stating, "where the trial court is informed by a [PSI], it is presumed that the court is aware of all appropriate sentencing factors and considerations, and that where the court has been so informed, its discretion should not be disturbed[]") (citation omitted), *appeal denied*, 987 A.2d 161 (Pa. 2009). In

addition to the PSI, defense counsel pointed out all of the above-mentioned mitigating factors to the judge at the sentencing hearing.

> I think in this case we're faced with a young man who just let the pressures of life and his addiction issues get the better of him. He has a prior record score of zero. His prior criminal record consists of one misdemeanor and a few summaries. He does also have a pretty decent work history. He was doing well. He was working with his dad for approximately eight years and employed in various other endeavors.
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> He came to Scranton in 2010. He is the father of five children. He had a little bit of a difficult childhood. He was bounced around a little bit to foster families. He had some problems with his parents. He doesn't have any physical or mental health issues, but he does have addiction issues dating back to the age of 10 when had began [sic] using alcohol, began abusing marijuana at the age of 12. I think at this point he has a significant marijuana problem. By the age of 18 he was smoking, by his own admission, about ten blunts a day.

N.T., 8/28/12, at 3-4. As the record demonstrates, the trial court was fully aware of all of the mitigating circumstances, if not by the PSI, by Appellant's own argument at sentencing. Based on the above considerations, we agree with the Commonwealth that Appellant's first claim lacks merit. As this Court has previously noted with regard to sentencing, "[i]t would be foolish, indeed, to take the position that if a court is in possession of the facts, it will fail to apply them to the case at hand." ***Commonwealth v. Macias***, 968 A.2d 773, 778 (Pa. Super. 2009), *quoting* ***Commonwealth v. Devers***, 546 A.2d 12, 18 (Pa. 1988).

Appellant relies on this Court's decision in ***Commonwealth v. Hyland***, 875 A.2d 1175 (Pa. Super. 2005), *appeal denied*, 890 A.2d 1057 (Pa. 2005), in which this Court remanded for re-sentencing because "[t]he [trial] court virtually ignored Appellant's lack of any prior criminal record, his age, and his personal characteristics, and his life situation." ***Id.*** at 1185. However, we find ***Hyland*** to be distinguishable as there is no indication that the trial court had the benefit of a PSI in ***Hyland***. Nor is there any indication that the Appellant provided the trial court all of the mitigating factors it wanted the trial court to consider, as was done in this case. As stated above, in the instant matter there was a PSI and Appellant gave a list of mitigating factors on the record that he wanted the trial court to consider. Given our established precedent, we cannot accept Appellant's argument that the trial court "ignored the plethora of mitigating circumstances that were present[]" in light of the PSI and Appellant's arguments below. Rather, as the Commonwealth points out, the trial court "chose to sentence Appellant in the aggravated range for more compelling reasons." Commonwealth's Brief at 5. Therefore, we conclude Appellant is not entitled to relief on his first issue.

Next, Appellant avers that he is entitled to be re-sentenced on the count of endangering the welfare of children "because the [trial] court improperly took into account the seriousness of the offense in aggravating [his] sentence." Appellant's Brief at 15. Appellant further argues that the

trial court engaged in "double-dipping" of sorts because the seriousness of the crime is already contemplated in the offense gravity score and the sentencing guidelines. ***Id.***

> A sentencing court may consider any legal factor in determining that a sentence in the aggravated range should be imposed. In addition, the sentencing judge's statement of reasons on the record must reflect this consideration, and the sentencing judge's decision regarding the aggravation of a sentence will not be disturbed absent a manifest abuse of discretion.

Commonwealth v. Bowen, 975 A.2d 1120, 1122 (Pa. Super. 2009) (internal quotation marks and citations omitted).

In this case, the trial court informed Appellant that it was sentencing him in the aggravated range for endangering the welfare of children.

> In regard to the endangering the welfare of children, the Court is going to sentence you in the aggravated factor [sic], the number of children that were involved and the circumstances surrounding it and the indifference to the children at 12 to 24 [months] plus three years special probation.

N.T., 8/28/12, at 7. As noted above, the trial court did not take into account "the seriousness of the offense" in the abstract, but rather enumerated three separate factors in its decision to sentence Appellant in the aggravated range. Because the trial court is otherwise allowed to take these factors into consideration, we agree with the Commonwealth that Appellant is not

entitled to relief on this issue.[8] ***See Commonwealth v. Fullin***, 892 A.2d 843, 850 (Pa. Super. 2006) (concluding sentencing in the aggravated range for endangering the welfare of children was proper when trial court stated, "[t]his sentence is in the aggravated range of the guidelines because of the **extreme indifference for the consequences of the defendant's actions** and because of the extreme nature of the harm to the victim") (emphasis added).

Based on the foregoing, we conclude that the trial court did not abuse its discretion in sentencing Appellant in this case. ***See Provenzano***, ***supra***. Accordingly, the August 28, 2012 judgment of sentence is affirmed.

Judgment of sentence affirmed.

Judgment Entered.

Deputy Prothonotary

Date: 5/7/2013

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[8] Appellant cites to our Supreme Court's decision in ***Commonwealth v. Walls***, 926 A.2d 957 (Pa. 2007), and this Court's opinion in ***Commonwealth v. Robinson***, 874 A.2d 1200 (Pa. Super. 2005), for the proposition that "it is inappropriate for a court to use the seriousness of an offense as a reason for going into the aggravating range …." Appellant's Brief at 15. However, we find both ***Robinson*** and ***Walls*** distinguishable, as those cases did not deal with sentences in the aggravated range of the guidelines, but rather instances in which the trial court's sentence deviated beyond the guidelines entirely. ***See Walls***, ***supra*** at 959-960; ***Robinson***, ***supra*** at 1212-1213.