NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CARL WAYNE MORRISON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1815 MDA 2012

Appeal from the Judgment of Sentence entered August 30, 2012,
in the Court of Common Pleas of Perry County,
Criminal Division, at No(s): CP-50-CR-0000025-2012

BEFORE: PANELLA, ALLEN, and COLVILLE,* JJ.

MEMORANDUM BY ALLEN, J.: **FILED JUNE 04, 2013**

Carl Wayne Morrison ("Appellant") appeals from the judgment of sentence imposed after he entered a *nolo contendere* plea to one count of persons not to possess firearms, and three counts of recklessly endangering another person.[1] For the following reasons, we affirm.

The pertinent facts and procedural history may be summarized as follows: On January 1, 2012, Trooper Shane Varner of the Pennsylvania State Police responded to a report of domestic violence at 29 Morrison Hideaway in Perry County. Affidavit of Probable Cause, 1/2/12, at 1. Upon arrival, Trooper Varner interviewed Blaine and Elizabeth Morrison, who

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[1] 18 Pa.C.S.A. §§ 6105(a)(1) and 2705.

*Retired Senior Judge assigned to the Superior Court.

informed Trooper Varner that Appellant, who was intoxicated, had threatened to kill them, and that Appellant had retrieved a rifle and a shotgun from the garage and struck Blaine Morrison in the chin and ribs with the guns. *Id*. Blaine Morrison was able to disarm Appellant. *Id*. However, Appellant left the residence and returned with a handgun, which he repeatedly shoved into Elizabeth Morrison's temple before firing it into a wood pile. *Id*. Appellant then put the handgun in his mouth and pulled the trigger, but the gun did not discharge, whereupon Appellant retrieved the rifle that Blaine Morrison had taken from him, and fired a shot through the floor before leaving the residence with the weapons. *Id*.

Appellant was subsequently arrested and charged with persons not to possess a firearm, carrying a firearm without a license, terroristic threats, simple assault, recklessly endangering another person, disorderly conduct, harassment, and public drunkenness. On August 13, 2012, pursuant to a plea agreement, Appellant entered an open *nolo contendere* plea to one count of persons not to possess firearms, and three counts of recklessly endangering another person.

The trial court conducted a sentencing hearing on August 30, 2012. At the sentencing hearing, Appellant made an oral motion to withdraw his plea. N.T., 8/30/12, at 14. The trial court denied the motion, and sentenced Appellant to a term of imprisonment of 5 to 10 years for persons not to possess a firearm, and consecutive sentences of to 1 to 2 years of

imprisonment on each count of recklessly endangering another person, consecutive to the sentence for persons not to possess a firearm. Appellant's aggregate sentence was 8 to 16 years of imprisonment. The trial court awarded Appellant credit for time served from January 12, 2012.

Appellant filed a timely post-sentence motion asserting that the trial court failed to award him appropriate credit for time served. Additionally in his post-sentence motion, Appellant sought reconsideration of the sentence imposed or, alternatively, permission to withdraw his plea. By order entered on September 13, 2012, the trial court granted in part and denied in part Appellant's post-sentence motion. Specifically, the trial court granted Appellant's request to be awarded credit for time served from January 2, 2012, and denied Appellant's request for reconsideration of his sentence, and his request to withdraw his plea. Appellant filed a timely notice of appeal. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues for our review:

I. DID THE TRIAL COURT ERR IN NOT PERMITTING APPELLANT TO WITHDRAW HIS NOLO CONTENDERE PLEA?

II. DID THE TRIAL COURT ERR IN NOT IMPOSING CONCURRENT SENTENCES?

Appellant's Brief at 8.

Appellant argues that the trial court erred in denying his oral pre-sentence request to withdraw his plea and his post-sentence motion to withdraw his plea.

With regard to motions to withdraw a plea, our Courts have explained:

> A significant distinction exists between a pre-sentence request to withdraw a guilty plea and a post-sentence request to do so.
>
> The standard for allowing withdrawal of a guilty plea prior to sentenc[ing] [is as follows]:
>
> Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea. …
>
> Because the plea involves the simultaneous waiver of so many constitutional rights, a request to withdraw prior to sentencing is liberally allowed.
>
> When considering a petition to withdraw a guilty plea submitted to a trial court after sentencing, however, it is well-established that a showing of prejudice on the order of manifest injustice is required before withdrawal is properly justified. Post-sentencing attempts to withdraw a guilty plea must sustain this more substantial burden because of the recognition that a plea withdrawal can be used as a sentence-testing device. If a plea of guilty could be retracted with ease after sentencing, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe.

Commonwealth v. Muntz, 630 A.2d 51, 53 (Pa. Super. 1993) (citations and internal quotations omitted).

Here, Appellant made an oral motion to withdraw at the August 30, 2012 sentencing hearing, and additionally filed a written post-sentence

motion to withdraw on September 7, 2012. We first address Appellant's oral motion to withdraw at the August 30, 2012 sentencing hearing. On that date, prior to sentencing, the trial court heard statements from Appellant's counsel, who informed the trial court that Appellant's criminal behavior was fueled by alcohol use, and that Appellant sought admission to an alcohol rehabilitation program called Teen Challenge.[2] N.T., 8/30/12, at 3. The trial court then heard testimony from Appellant who admitted guilt, although he disputed the account of the events leading to his arrest. *Id*. at 10. Additionally, Appellant stated "I fully intend to complete the Teen Challenge program once I have finished serving my time. In fact, I wish that you would put that right into my sentencing order." *Id*.

The trial court then began to dictate its sentence, whereupon Appellant interjected. Specifically, the following exchange occurred:

> Trial Court: … I don't care whether you were drinking or not drinking. You knew you weren't supposed to have guns and your actions are totally inexcusable.
>
> So I am not going to order you to Teen Challenge [drug and alcohol rehabilitation program] at this point because I don't have anything in here that says they

[2] Although the program is called Teen Challenge, the record shows that Appellant was born on September 29, 1964, and was 48 years old at the time of sentencing.

	would take you, just that they would review. And I am sentencing you as follows: Commonwealth versus Carl Wayne Morrison, CR-25 of 2012 –
Appellant's Counsel:	Your Honor, [Appellant] just whispered to me he wanted a jury trial. He wants to withdraw his pleas. I don't know if the Court is inclined to do that or not.
Trial Court:	[directing the Commonwealth to respond to Appellant's motion to withdraw].
Assistant District Attorney:	Your Honor, the Commonwealth's position is that it is not grounds to withdraw a plea just because you don't like the sentence you are probably going to get.
Trial Court:	Well, and he didn't tell me he is not guilty. He admitted he knew he shouldn't have had a firearm. He also … disputes some of those claims, but I am not going to allow him to withdraw his guilty plea. He can take that up on appeal.

N.T., 8/30/12, at 13-14. The trial court then rendered its sentence.

At the time Appellant orally indicated his desire to withdraw his plea, the trial court had already begun to impose its sentence, denying Appellant's request to participate in the Teen Challenge program. The trial court expressly stated on the record that, as part of its sentencing: "I am not going to order you to Teen Challenge," when Appellant, dissatisfied with this

sentencing determination, interjected his desire to withdraw his plea before the trial court could complete its sentencing order. N.T., 8/30/12, at 14.

"It is axiomatic that a disappointed expectation regarding a sentence does not constitute grounds for withdrawing a … plea." ***Commonwealth v. Owens***, 467 A.2d 1159, 1163 (Pa. Super. 1983). "[D]issatisfaction with a sentence is not alone a basis for plea withdrawal. A defendant cannot engage in sentence-testing and then seek plea withdrawal merely because the defendant is unhappy with the penalty." ***Commonwealth v. Diehl***, 61 A.3d 265, 271-272 (Pa. Super. 2013) (citations omitted).

We further conclude that the trial court did not err in denying Appellant's oral post-sentence motion to withdraw his plea at the sentencing hearing, or Appellant's written post-sentence motion to withdraw his plea. To succeed on a post-sentence motion to withdraw "[a] defendant must demonstrate that manifest injustice would result if the court were to deny his post-sentence motion to withdraw a guilty plea. Manifest injustice may be established if the plea was not tendered knowingly, intelligently, and voluntarily." The record reflects that at the guilty plea hearing, the trial court conducted a thorough guilty plea colloquy, at the conclusion of which it was assured that Appellant's plea was knowing, intelligent, and voluntary. Appellant stated that he understood the elements of the offenses with which he was charged, and the maximum sentences to which he could be subjected. N.T., 7/13/12, at 4-5. The trial court then asked Appellant why he was entering his *nolo contendere* plea, to which Appellant responded,

"Well, I had the guns, and I know I wasn't supposed to have them." *Id*. at 6-7. The trial court asked Appellant whose decision it was to enter the plea and Appellant responded, "mine." *Id*. Given the foregoing, we find no abuse of discretion in the trial court's determination that Appellant entered a valid plea, and its denial of Appellant's motions to withdraw his plea.

Appellant argues that the trial court erred in denying his oral motion to withdraw his plea without asking Appellant his reasons for seeking withdrawal, and precluding Appellant from demonstrating whether a grant of his motion was warranted at that time. However, Appellant's assertion that he was precluded from expressing legitimate grounds for withdrawal is belied by his written post-sentence motion to withdraw. In his written post-sentence motion, when given the opportunity to enunciate his reasons for withdrawal, Appellant provided no reasons other than his dissatisfaction with his sentence. *See* Post-Sentence Motion, 9/7/12, at 1. As the trial court noted in its Pa.R.A.P. 1925(a) opinion: "[A]t no time in his Post-Sentencing Motion does Appellant request he be permitted to withdraw his plea due to some prejudice on the order of manifest injustice as would be required. He merely requests permission to withdraw the plea if the [trial court] is not willing to resentence him." Trial Court Opinion, 12/4/12, at 9. We reiterate that "dissatisfaction with a sentence is not alone a basis for plea withdrawal." ***Diehl***, 61 A.3d at 271-272. For the foregoing reasons, we find

no abuse of discretion in the trial court's denial of Appellant's post-sentence motions to withdraw.[3]

In his second issue, Appellant argues that the trial court erred in imposing consecutive rather than concurrent sentences. Appellant's Brief at 13-15. This issue constitutes a challenge to the discretionary aspects of Appellant's sentence. When an appellant challenges a discretionary aspect of sentencing, we must conduct a four-part analysis before we reach the merits of the appellant's claim. ***Commonwealth v. Martin***, 611 A.2d 731, 735 (Pa. Super. 1992). In this analysis, we must determine: (1) whether the present appeal is timely; (2) whether the issue raised on appeal was properly preserved; (3) whether the appellant has filed a statement pursuant to Pa.R.A.P. 2119(f); and (4) whether the appellant has raised a substantial question that his sentence is not appropriate under the Sentencing Code. ***Id.***

Although Appellant filed a timely appeal and preserved his issue in a post-sentence motion, Appellant has failed to include a Pa.R.A.P 2119(f) statement in his brief. The Commonwealth has objected. *See*

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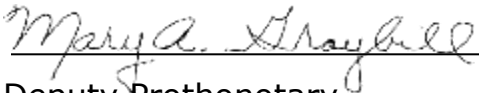
[3] We note that even on appeal, Appellant makes no claim that his plea was not tendered knowingly, intelligently, and voluntarily, to establish the manifest injustice required for a post-sentence motion to withdraw. Nor does Appellant provide a "fair and just" reason for withdrawal, as required under the less-stringent standard for pre-sentence motions to withdraw. Appellant's Brief at 11-13. ***See Muntz, supra***;

Commonwealth Brief at 5-6. This Court has held that "[i]f a defendant fails to include an issue in his Pa.R.A.P 2119(f) statement, and the Commonwealth objects, then the issue is waived and this Court may not review the claim." ***Commonwealth v. Karns***, 50 A.3d 158, 166 (Pa. Super. 2012). Because Appellant failed to include a Pa.R.A.P. 2119(f) statement in his brief, and the Commonwealth has objected, we may not review Appellant's second issue challenging the discretionary aspects of his sentence. ***But see Commonwealth v. Johnson***, 961 A.2d 877, 880 (Pa. Super. 2008) ("A challenge to the imposition of consecutive rather than concurrent sentences does not present a substantial question regarding the discretionary aspects of sentence.").

Judgment of sentence affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 6/4/2013