COMMONWEALTH OF PENNSYLVANIA, Appellee v. JAMES BROOKS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1830 EDA 2010

Appeal from the Judgment of Sentence March 19, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No. 10604437911
CP-51-CR-0800971-2006

BEFORE: FORD ELLIOTT, P.J.E., BENDER AND BOWES, JJ.

MEMORANDUM BY BENDER, J.: Filed: January 7, 2013

Appellant, James Brooks, appeals from the judgment of sentence of ten to twenty years' imprisonment, imposed after he was convicted of various offenses including aggravated assault, simple assault, and recklessly endangering another person (REAP). Appellant challenges discretionary aspects of his sentence. After careful review, we affirm.

At Appellant's non-jury trial, the evidence revealed the following facts.[1] On March 7, 2006, at approximately 10:30 a.m., Philadelphia Police Officer Lloyd Keller was on routine patrol when he received a report of a person with a gun driving a silver Ford pickup truck. The officer proceeded to the location indicated in the report and observed the truck, which was driven by a man later identified as Appellant. The officer activated his lights

[1] Our statement of the facts is summarized from the trial court's February 18, 2011 opinion. Trial Court Opinion (T.C.O.), 2/18/11, at 5-9.

and siren in an attempt to stop Appellant's vehicle. While Appellant initially pulled over, he then sped off. Officer Keller pursued Appellant, resulting in a high speed chase through West Philadelphia and onto Interstate 76 (I-76). During this pursuit, Appellant sped through stop signs, veered in and out of traffic, and hit several cars. The officer stated that Appellant's vehicle was driving at speeds of about 100 miles per hour.

Ultimately, Appellant's truck collided with a car driven by Thomas Carroll. Mr. Carroll's vehicle, in which Connie Nelson was a passenger, rolled over multiple times before coming to rest on its wheels. Mr. Carroll was seriously injured in the accident, sustaining cuts to his face, a burn from the airbag deploying, and an injury to his lower back from which he still suffered pain at the time of Appellant's trial. Ms. Nelson was also badly hurt in the collision. Namely, glass entered her eyes and she sustained injuries to her back. Ms. Nelson also experienced subsequent emotional repercussions and anxiety due to the accident.

After Appellant's truck collided with Mr. Carroll's car, Appellant fled the scene on foot. During this flight, Appellant scaled several barrier walls and dropped to the ground from heights of up to 30 feet. Two Philadelphia police officers were injured when they pursued Appellant over these impediments. For instance, one officer sustained a fractured spine, a broken left hand, and two bruised heels. The other officer sprained both ankles and chipped a bone in his foot. Appellant ultimately escaped apprehension that day, but

was subsequently arrested on April 28, 2006. At the time of his arrest, Appellant was found in possession of crack cocaine and marijuana.

Appellant waived his right to a jury trial and, following a trial before the court, he was found guilty of two counts of aggravated assault for the injuries inflicted on Mr. Carroll and Ms. Nelson, and two counts of simple assault relating to the injuries inflicted on the police officers. Appellant was also convicted of REAP, fleeing or attempting to allude a police officer, violations of the motor vehicle code, and possessing a controlled substance. On March 19, 2010, he was sentenced to an aggregate term of 10 to 20 years' incarceration. He filed a timely post-sentence motion challenging the weight of the evidence to sustain his convictions, as well as discretionary aspects of his sentence. The court denied that motion on June 24, 2010.

Appellant then filed a timely *pro se* notice of appeal on July 1, 2010. While Althia O. Bennett, Esquire, was appointed to represent Appellant on appeal, Appellant nevertheless filed a *pro se* concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Attorney Bennett did not file an amended statement. On February 18, 2011, the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a). Therein, the court noted that "[t]he record does not indicate what happened to appointed defense counsel or why defendant is proceeding *pro se*." T.C.O. at 3. Nevertheless, the court discussed the merits of each of the issues raised by Appellant in his *pro se* Rule 1925(b) statement. For her part, Attorney Bennett filed an appellate brief on Appellant's behalf. However, therein, she only argued one

of the four issues Appellant presented in his *pro se* Rule 1925(b) statement, thus waiving his remaining claims.

On October 26, 2011, this Court issued a Memorandum decision concluding that the trial court erred in accepting Appellant's *pro se* Rule 1925(b) statement when he was represented by counsel. ***Commonwealth v. Brooks***, 37 A.3d 1244 (Pa. Super. 2011) (unpublished memorandum). We reasoned that in doing so, the court impermissibly allowed hybrid representation, which has been expressly precluded by our Supreme Court. ***See Commonwealth v. Jette***, 23 A.2d 1032, 1038-1040 (Pa. 2011) (reiterating "that there is no constitutional right to hybrid representation either at trial or on appeal," and declaring that an examination of Pennsylvania Supreme Court "jurisprudence reveals the consistent expression precluding hybrid representation"). Accordingly, we remanded the case for the trial court to ascertain whether Appellant wished to proceed *pro se* on appeal and, if so, for the court to conduct the proper colloquy pursuant to ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998). If, on the other hand, the court determined that Appellant sought the representation of counsel, the court was to direct Attorney Bennett to file a Rule 1925(b) statement on Appellant's behalf, and then issue a new Rule 1925(a) opinion addressing the claims Attorney Bennett raised therein.

Several months passed without this Court receiving any indication that the trial court had acted in accordance with our October 26, 2011 decision. Therefore, on February 15, 2012, we issued an order again directing the trial

court to either conduct a ***Grazier*** hearing if Appellant desired to proceed *pro se* on appeal, or to direct Attorney Bennett to file an amended Rule 1925(b) statement on his behalf. We stated that the trial court had thirty days to act in accordance with this order.

Once again, no hearing was held within the requisite thirty-day time period. Over the course of the next several months, our Prothonotary's Office contacted the trial court on several occasions attempting to ascertain the status of Appellant's case, and was repeatedly told that the court would promptly take action to comply with our February 15, 2012 order. However, no such action was taken until five months later when, on July 20, 2012, the trial court issued notice of a hearing.

Unfortunately, that did not end the trial court's perfunctory handling of this case. Instead of holding the scheduled hearing, a "No Opinion Letter" was issued by the Philadelphia Clerk of Courts on August 9, 2012, indicating that the judge presiding in this case was no longer sitting on the bench in Philadelphia. Through further communications with the trial court, our Prothonotary's Office discovered that Appellant's case had been reassigned to another trial judge. On August 14, 2012, the newly assigned judge issued an order permitting Attorney Bennett to withdraw and appointing J. Matthew Wolfe, Esquire, to represent Appellant on appeal. However, the court did not direct Attorney Wolfe to file a new Rule 1925(b) statement on Appellant's behalf. Consequently, on September 5, 2012, this Court was compelled to issue a third order. Therein, we directed Attorney Wolfe to file

a Rule 1925(b) statement, and indicated that the trial court had thirty days from the date that statement was filed within which to issue an opinion. Both Attorney Wolfe and the trial court adhered to our order.[2]

Now that we are finally able to review this appeal, we will examine the following two issues Appellant raises herein:

> 1. Did the Lower Court err in admitting testimony relating to an incident at prison that occurred after [] Appellant's arrest?
>
> 2. Did the Lower Court abuse its discretion in the sentence it imposed?

Appellant's Brief at 10.

Both of Appellant's issues are challenges to the discretionary aspects of his sentence. Accordingly, the following standard of review applies:

> A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute. When challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question as to the inappropriateness of the sentence. Two requirements must be met before we will review this challenge on its merits. First, an appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. That is, [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. We examine an appellant's Pa.R.A.P. 2119(f) statement to

[2] Due to the procedural mayhem caused by the court's improvident handling of this case, over *two years* have passed since Appellant's timely *pro se* notice of appeal was filed. We chastise the trial court for its inattention and disregard for the orders of this Court.

> determine whether a substantial question exists. Our inquiry must focus on the *reasons* for which the appeal is sought, in contrast to the *facts* underlying the appeal, which are necessary only to decide the appeal on the merits.

Commonwealth v. Ahmad, 961 A.2d 884, 886-87 (Pa. Super. 2008) (citations, quotation marks and footnote omitted).

Presently, Appellant contends that his sentence was an abuse of discretion because (1) the court improperly considered evidence that Appellant was involved in an altercation while incarcerated in the instant case, and (2) the court's sentence was excessive in that the court imposed his sentences to run consecutively, and failed to state sufficient reasons on the record for imposing an aggravated range sentence. We conclude that these claims raise substantial questions for our review. ***See Commonwealth v. Booze***, 953 A.2d 1263, 1278 (Pa. Super. 2008) (allegation that court failed to state adequate reasons on the record for imposing aggravated range sentence raises a substantial question for our review); ***Commonwealth v. P.L.S.***, 894 A.2d 120, 127 (Pa. Super. 2006) (claim that court relied on impermissible factors, such as uncharged conduct, in imposing sentence raises substantial question).

Additionally, in reviewing Appellant's sentencing issues, we are mindful that "[s]entencing 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." ***Commonwealth v. Vega***, 850 A.2d 1277, 1281 (Pa. Super. 2004) (citation omitted). "Moreover, the sentencing court has broad discretion in choosing the range of permissible confinements

which best suits a particular defendant and the circumstances surrounding his crime." ***Id.*** (citations and internal quotation marks omitted).

In his first assertion of error, Appellant complains that the sentencing court improperly considered testimony by Correctional Officer Brian Winder regarding Appellant's involvement in an altercation while he was incarcerated and awaiting sentencing. Specifically, Officer Winder testified that Appellant sprayed him in the face with pepper spray, and then repeatedly hit him with the can of pepper spray and his fists while saying, "kill the cops." N.T. Sentencing Hearing, 3/19/10, at 33. Appellant's attorney objected to this testimony on the basis that Appellant had not been convicted of any offenses stemming from that altercation; rather, he had merely been charged with crimes arising therefrom.[3] ***Id.*** at 30.

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[3] On appeal, Appellant argues that this evidence was not relevant and was unduly prejudicial. However,

> "[a] party complaining, on appeal, of the admission of evidence in the court below will be confined to the specific objection there made." ***Commonwealth v. Cousar****,* 593 Pa. 204, 231, 928 A.2d 1025, 1041 (2007), *cert. denied,* 553 U.S. 1035, 128 S.Ct. 2429, 171 L.Ed.2d 235 (2008). If counsel states the grounds for an objection, then all other unspecified grounds are waived and cannot be raised for the first time on appeal. ***Commonwealth v. Arroyo****,* 555 Pa. 125, 142, 723 A.2d 162, 170 (1999); ***Commonwealth v. Stoltzfus****,* 462 Pa. 43, 60, 337 A.2d 873, 881 (1975) (stating: "It has long been the rule in this jurisdiction that if the ground upon which an objection is based is specifically stated, all other reasons for its exclusion are waived, and may not be raised post-trial"); ***Commonwealth v. Duffy****,* 832 A.2d 1132, 1136 (Pa.Super.2003), *appeal denied,* 577 Pa. 694, 845 A.2d 816 (2004) (stating party must make timely and *specific* objection to preserve issue for appellate review).

We conclude that the court's consideration of Officer Winder's testimony was not improper. This Court has stated that "a proceeding held to determine sentence is not a trial, and the court is not bound by the restrictive rules of evidence properly applicable to trials." ***Commonwealth v. Medley***, 725 A.2d 1225, 1229 (Pa. Super. 1999) (citations omitted). "Rather, the court may receive any relevant information for the purposes of determining the proper penalty." ***Id.*** (citations omitted); ***see also Commonwealth v. DuPont***, 730 A.2d 970, 986 (Pa. Super. 1999) ("in sentencing, a court is not limited only to consideration of information which would be admissible evidence at trial"). Such information may include evidence of prior arrests or criminal conduct, even where a conviction did not arise from that behavior. ***See P.L.S.***, 894 A.2d at 130 ("the fact that a defendant is guilty of prior criminal conduct for which he escaped prosecution has long been an acceptable sentencing consideration"); ***Commonwealth v. Fries***, 523 A.2d 1134, 1136 (Pa. Super. 1987) (citing ***Commonwealth v. Johnson***, 481 A.2d 1212, 1214 (Pa. Super. 1984) ("it is not improper for a court to consider a defendant's prior arrests which did not result in conviction, as long as the court recognizes the defendant has not been convicted of the charges").

Commonwealth v. Bedford, 50 A.3d 707, 713-14 (Pa. Super. 2012). Thus, we are limited to examining the specific assertion presented when Appellant objected, *i.e.* whether Officer Winder's testimony was properly considered by the court even though Appellant had not been convicted of any offenses arising from the prison altercation.

Here, the record confirms that the court was aware that Appellant had not yet been tried or convicted of the conduct alleged by Officer Winder. N.T. Sentencing Hearing at 30-40. The court acknowledged that the officer's testimony concerned only "allegations" regarding Appellant's behavior while in custody. ***Id.*** at 34, 40. Therefore, we conclude that the court did not abuse its discretion in considering Officer Winder's testimony in fashioning the appropriate sentence for Appellant.

Next, Appellant asserts that the trial court improperly imposed an aggravated range sentence for one of his counts of aggravated assault without giving sufficient reasons on the record. We disagree. First, the court specified its rationale for Appellant's sentence on the record. Namely, the court indicated that it considered everything presented by both parties at the sentencing proceeding. This included arguments by counsel for both the Commonwealth and Appellant, victim impact statements, and the testimony of Officer Winder and Appellant's father. The court also had the benefit of a presentence report. N.T. Sentencing Hearing at 3. Before imposing its sentence, the court stated that "this was … close to the most maniacal behavior that I have witnessed in 30 years sitting up on this bench." ***Id.*** at 44. We conclude, based on these combined facts, that Appellant was sufficiently informed of the court's reasons for imposing the sentence it did.

Moreover, Appellant's aggregate term of incarceration was not excessive or an abuse of the court's discretion. Pursuant to section 9781(d), in reviewing Appellant's sentence, this Court must consider:

> (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
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> (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
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> (3) The findings upon which the sentence was based.
>
> (4) The guidelines promulgated by the commission.

42 Pa.C.S. § 9781(d).

Here, it is clear that the nature and circumstances of Appellant's crimes warranted the sentence the court imposed. Appellant led police on a high-speed chase at 10:30 a.m. on a weekday through a heavily trafficked area of Philadelphia. His conduct endangered the lives of many people and significantly injured four individuals, two pedestrians and two police officers. Appellant's behavior evidenced his total disregard for the safety of others, and nothing in the record of his sentencing hearing indicates that he expressed any remorse for his actions.[4] Furthermore, Appellant has a rather significant criminal history. Notably, as pointed out by Appellant's own counsel at the sentencing hearing, Appellant was serving a sentence of house arrest for an unrelated crime when he committed the instant offenses. N.T. Sentencing Hearing at 7. Additionally, the allegations of Appellant's violent misconduct while incarcerated support a conclusion that he is not attempting to rehabilitate himself.

[4] Appellant declined to address the court at his sentencing proceeding. N.T. Sentencing Hearing at 9.

Finally, the trial court had the opportunity to observe Appellant during trial and at the sentencing hearing, and had the benefit of a presentence report. The trial court also had a thorough understanding of the applicable sentencing guideline ranges. ***See*** T.C.O., 2/18/11, at 2. At the close of the sentencing hearing, the court "adopted the Commonwealth's recitation of [the] history" of Appellant's case, and deemed Appellant's conduct as "maniacal." Accordingly, after analyzing the above-stated factors of section 9781(d), we do not find the court's sentence to be unreasonable.

Judgment of sentence affirmed.