NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. HAROLD NELSON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1849 WDA 2011

Appeal from the Judgment of Sentence July 18, 2011,
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s):
CP-02-CR-0016512-2010
CP-02-CR-0012675-2010

BEFORE: BENDER, ALLEN, and MUSMANNO, JJ.

MEMORANDUM BY BENDER, J.: Filed: February 19, 2013

Harold Nelson (Appellant) appeals from the judgment of sentence of an aggregate term of 7 to 14 years' imprisonment imposed following his guilty plea to two counts of robbery—serious bodily injury, and one count each of carrying firearm without a license, possession with intent to deliver, and possession that arose from two separate incidents. Appellant challenges the discretionary aspects of his sentence. We affirm.

The facts pertinent to this appeal are that Appellant was charged with one count of robbery—serious bodily injury, involving the victim Benjamin Fry at No. 12675-2010. At No. 16512-2010, Appellant was charged with one count of robbery—serious bodily injury, carrying firearm without a license, possession with intent to deliver, and possession concerning an

incident involving the victim Dana Rock. On July 18, 2011, Appellant entered an open guilty plea to all charges. Appellant declined a presentence report and he was sentenced that same day to a mandatory 5 to 10 year term for the robbery count at No. 12675-2010 followed by a 2-year probationary term. Appellant was also sentenced to a concurrent mandatory 5 to 10 year term for the robbery count at No. 16512-2010. Appellant was further sentenced to a consecutive term of 2 to 4 years for the firearm offense, with no further penalties imposed.

Appellant filed a post-sentence motion, raising a challenge to the discretionary aspects of his sentence. The motion was denied by the trial court. Thereafter, the instant appeal was filed and Appellant filed a timely statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

Now, on appeal, Appellant raises the following issue for our review:

> DID THE TRIAL COURT ERR IN DENYING APPELLANT'S POST SENTENCING MOTIONS SINCE IT IMPOSED A MANIFESTLY EXCESSIVE AGGREGATE SENTENCE OF 7-14 YEARS IMPRISONMENT (BY RUNNING THE 2-4 YEAR VUFA SENTENCE AT 16512-2010 CONSECUTIVELY TO THE TWO CONCURRENT AND MANDATORY 5-10 YEAR SENTENCES AT 12675-2010 AND 16512-2010) SINCE APPELLANT ONLY HAD A PRIOR RECORD SCORE OF ONE (HIS ONLY PRIOR CONVICTION WAS AS A JUVENILE), HE WAS ONLY 18 YEARS OLD AND HOMELESS WHEN HE COMMITTED THESE CRIMES, HE HAD NO PARENTAL SUPERVISION OR CARE AT THE TIME OF THE INSTANT CRIMES, HE HAD A LIFELONG HISTORY WITH THE CHILD WELFARE SYSTEM, NEITHER OF THE INSTANT VICTIMS WAS PHYSICALLY HARMED, APPELLANT EXPRESSED GENUINE REMORSE FOR HIS ACTIONS AND HE WAS ATTEMPTING TO IMPROVE HIS LIFE (BY OBTAINING A GED DEGREE) AND BECOME A PRODUCTIVE MEMBER OF SOCIETY; MOREOVER, THE TRIAL COURT DID NOT CONSIDER 42 PA.C.S. § 9721 (b), SINCE IT DID NOT CONSIDER

> THE AFOREMENTIONED MITIGATING FACTORS AND THE REHABILITATIVE NEEDS OF APPELLANT?

Appellant's brief at 3. Essentially, Appellant is challenging his sentence on the basis that it is manifestly excessive due to the imposition of the consecutive prison term of 2 to 4 years for the firearms offense, which he asserts should have run concurrently with the two concurrent mandatory 5 to 10 year sentences. He also asserts that the court did not consider the mitigating factors listed in his question for our review and that the trial court did not consider the factors set forth at 42 Pa.C.S. § 9721(b), namely, that the court did not consider Appellant's rehabilitative needs. This is a challenge to the discretionary aspects of sentencing.

> Where an appellant challenges the discretionary aspects of a sentence, there is no automatic right to appeal and an appellant's appeal should be considered a petition for allowance of appeal. Before a challenge to a judgment of sentence will be heard on the merits, an appellant first must set forth in his or her brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of his or her sentence. ***Commonwealth v. Miller****,* 835 A.2d 377, 380 (Pa. Super. 2003) (citations omitted). … In addition to including a Rule 2119(f) statement, "an appellant must show that there is a substantial question as to whether the imposed sentence was inappropriate under the Sentencing Code." ***Miller****,* 835 A.2d at 380 (citing 42 Pa.C.S.A. § 9781(b)).

Commonwealth v. Crork, 966 A.2d 585, 590 (Pa. Super. 2009), *appeal denied*, 981 A.2d 217 (Pa. 2009).

Appellant's counsel has included what he terms a concise statement of the reasons relied upon for allowance of appeal in Appellant's brief as

required by Pa.R.A.P. 2119(f).[1] It appears that Appellant is claiming that his sentence is manifestly excessive because of the imposition of a consecutive sentence, that it does not take into consideration mitigating factors, and that the court did not address Appellant's rehabilitative needs.

With regard to the determination as to whether Appellant has raised a substantial question by claiming excessiveness due to consecutive sentences, we turn to ***Commonwealth v. Gonzales-Dejusus***, 994 A.2d 595 (Pa. Super. 2010), a recent case that discusses this issue at length.

> Generally speaking, the court's exercise of discretion in imposing consecutive as opposed to concurrent sentences is not viewed as raising a substantial question that would allow the granting of allowance of appeal. ***Commonwealth v. Marts***, 889 A.2d 608 (Pa. Super. 2005). However, the case of ***Commonwealth v. Dodge ("Dodge I")***, 859 A.2d 771 (Pa. Super. 2004), *vacated and remanded on other grounds*, 594 Pa. 345, 935 A.2d 1290 (2007), finds an aggregate sentence manifestly excessive and that a substantial question was presented where there were numerous standard range sentences ordered to be served consecutively. ***Dodge I*** offered this holding despite the existence of prior cases finding that an assertion of error grounded upon the imposition of consecutive versus concurrent sentences did not raise a substantial question. Discussing the matter, ***Marts*** indicates:
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> > To the extent that he complains that his sentence[s] on two of the four robberies were imposed consecutively rather than concurrently, Appellant fails to raise a substantial question. Long standing

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[1] The "concise" statement is far from concise; rather, it is a verbatim recitation of what is included in the argument section of the brief. Counsel's employment of such a method is a disservice to counsel's client and is not helpful to this Court in our attempt to properly review the sentencing issue raised.

> precedent of this Court recognizes that 42 Pa.C.S.A. section 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. ***Commonwealth v. Graham***, 541 Pa. 173, 184, 661 A.2d 1367, 1373 (1995). … Any challenge to the exercise of this discretion ordinarily does not raise a substantial question. ***Commonwealth v. Johnson***, 873 A.2d 704, 709 n.2 (Pa. Super. 2005); ***see also Commonwealth v. Hoag***, 665 A.2d 1212, 1214 (Pa. Super. 1995) (explaining that a defendant is not entitled to a 'volume discount' for his or her crimes).
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> The recent decision of a panel of this Court in ***Commonwealth v. Dodge***, 859 A.2d 771 (Pa. Super. 2004), does not alter our conclusion. In fact, the panel in ***Dodge*** noted the limitations of its holding. ***See id.*** at 782 n.13 (explaining that its decision 'is not to be read a [sic] rule that a challenge to the consecutive nature of a standard range sentence always raises a substantial question or constitutes an abuse of discretion. We all are cognizant that sentencing can encompass a wide variation of factual scenarios. Thus, we make clear again that these issues must be examined and determined on a case-by-case basis.'). In ***Dodge***, the court imposed consecutive, standard range sentences on all thirty-seven counts of theft-related offenses for an aggregate sentence of 58 1/2 to 124 years of imprisonment.

Marts, 889 A.2d at 612-613. Thus, in our view, the key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case.[6]

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[6]Appellant contends that the mere fact that judges are imbued with discretion in ordering sentences to be served consecutively or concurrently does not render such decisions unreviewable. (Appellant's brief at 5-6.) We note that ***Dodge I*** was decided prior to the supreme court's decision in ***Commonwealth v. Walls***, 592 Pa. 557, 926 A.2d 957 (2007). Of course, in ***Walls***, our supreme court reiterated that the ability of this court to

> vacate a sentence is predicated upon a sentence being outside of the guidelines. Given ***Walls***, it would appear reasonable to consider whether the ***Dodge*** approach to reviewing and vacating aggregate sentences that may have been viewed as manifestly excessive, although comprised of standard range sentences, had continuing viability. However, ***Dodge*** was remanded back to this court for reconsideration in light of ***Walls***. Upon reconsideration, the original panel still found the sentence unreasonable and vacated the sentence previously imposed. ***Commonwealth v. Dodge ("Dodge II")***, 957 A.2d 1198 (Pa. Super. 2008). Thus, as of this date, we view the "excessive aggregate sentence" argument as cognizable upon appellate review.

Id. at 598-99. ***See also Commonwealth v. Moury***, 992 A.2d 162, 171-72 (Pa. Super. 2010) (stating "imposition of consecutive, rather than concurrent, sentences may raise a substantial question in only the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment").

Consequently, we too, as always, must review whether Appellant's argument regarding his allegedly excessive sentence raises a substantial question. Under the circumstances here, we do not resolve this claim in Appellant's favor. Rather, we conclude that Appellant's consecutive sentences are not unreasonably excessive as they relate to his criminal conduct that involved robbing two different individuals at two separate times at gunpoint, and threatening Ms. Rock by stating that it was a good day for her to die. This type of behavior clearly put the victims in fear for their lives. Moreover, it is apparent that Appellant's mandatory sentences could have been run consecutively, which would have resulted in at a minimum a

10 to 20 year sentence. ***See also Commonwealth v. Cruz-Centeno***, 668 A.2d 536 (Pa. Super. 1995) (stating combination of a prior record score and a standard range sentence, absent more, cannot be considered excessive or unreasonable). Accordingly, we conclude that the consecutive sentence imposed in this matter is not excessively harsh under the circumstances here. The aggregate sentence imposed was not inappropriate or contrary to a fundamental norm underlying the sentencing code. We, therefore, conclude that Appellant has not raised a substantial question.

Appellant next alleges that the court did not consider the mitigating circumstances that his attorney presented to the court prior to sentencing. These mitigating circumstances include his age, his lack of adult supervision, his lack of adult convictions, his remorse, and his educational aspirations to get his GED. However, "this Court has held on numerous occasions that a claim of inadequate consideration of mitigating factors does not raise a substantial question for our review." ***Commonwealth v. Bullock***, 868 A.2d 516, 529 (Pa. Super. 2005) (citing ***Commonwealth v. Wellor***, 731 A.2d 152 (Pa. Super. 1999)). Thus, again we conclude that Appellant has not raised a substantial question.

However, Appellant's claim that the court failed to consider his rehabilitative needs as directed in 42 Pa.C.S. § 9721(b) does raise a substantial question. ***See Commonwealth v. Fullin***, 892 A.2d 843, 847 (Pa. Super. 2006) (stating that allegation that court failed to consider the section 9721(b) factors raises a substantial question). Specifically, section

9721(b) provides that when imposing a sentence, "the court shall 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."

Although we recognize that Appellant chose to forgo a presentence report, his counsel presented an overview of Appellant's situation, including that he was 18 at the time of the crimes, that the instant conviction was his first as an adult, that he had a prior record score of 1 arising from a juvenile matter, that he was remorseful, and that he was taking classes at the county jail to obtain his GED. Appellant also addressed the court and the victims, stating that he was sorry and had not meant to harm anyone. N.T. Sentencing, 7/18/11, at 9-10. Thereafter, the court indicated that it had taken into consideration the section 9721(b) factors, specifically, identifying the rehabilitative needs of Appellant. ***Id.*** at 11. Accordingly, we conclude that although this last allegation concerning Appellant's rehabilitation needs raises a substantial question, the court indicated its consideration and, therefore, no relief is due.

Judgment of sentence affirmed.