

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

BRANDON OBRYAN BOWERS

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 185 WDA 2013

Appeal from the PCRA Order January 11, 2013
In the Court of Common Pleas of Mercer County
Criminal Division at No(s): CP-43-CR-0000069-2011

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and OTT, J.

MEMORANDUM BY OTT, J.: FILED: December 24, 2013

Brandon Obryan Bowers appeals from the order entered on January 11, 2013, in the Mercer County Court of Common Pleas, denying his first petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. On August 8, 2011, Bowers pled guilty to robbery.¹ On appeal, Bowers asserts the following: (1) the court erred when it imposed Bowers' sentence, which was manifestly excessive and failed to meet his rehabilitative needs; and (2) the court erred in applying the deadly weapon enhancement to his sentence. Bowers' Brief at 4. After a thorough review of the record, the parties' briefs, and applicable law, we affirm.

¹ 18 Pa.C.S. § 3701(a)(1)(ii).

The facts and procedural history are as follows. Bowers' conviction stems from the armed robbery of a pizza delivery man on December 18, 2010, in Pine Township, Mercer County. He was arrested and charged with robbery, theft by unlawful taking, and recklessly endangering another person. On August 8, 2011, Bowers pled guilty to robbery, a first-degree felony, with the use of an airsoft pistol. The Commonwealth indicated at the time of the plea that it would be pursuing the mandatory minimum sentence for the use of a firearm under 42 Pa.C.S. § 9712.

On October 7, 2011, the court sentenced Bowers to a term of five and one-half to 15 years' incarceration. The court also applied the deadly weapon enhancement to his sentence.² Bowers filed a post-sentence motion, which was denied on October 20, 2011. He did not file a direct appeal but did file a *pro se* PCRA petition on September 6, 2012, raising the following two issues: (1) trial counsel was ineffective for failing to file a direct appeal from the judgment of sentence; and (2) trial counsel was ineffective for failing to negotiate a proper deal with the Commonwealth. Counsel was appointed and no amendments to the petition were filed.

² The offense gravity score was ten and Bowers' prior record score was two. There was a mandatory minimum sentence imposed pursuant to 42 Pa.C.S. § 9712(a) based on the fact Bowers visibly possessed a firearm replica, an air pistol, during the commission of the crime. Bowers' sentence was in the standard range of the deadly weapon enhancement sentencing guidelines.

A PCRA evidentiary hearing was held on January 11, 2013. At the time of hearing, Bowers also raised the following issues: (1) his sentence was excessive on the grounds the minimum sentence was greater than the mandatory minimum sentence and counsel was ineffective for not appealing on that basis; and (2) the mandatory minimum sentence should not apply because the alleged weapon was an airsoft pistol. The PCRA court treated these issues as an amendment to his PCRA petition, even though counsel did not file an amendment. The court denied Bowers' petition at the conclusion of the hearing. This appeal followed.³

We begin with our well-settled standard of review:

We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. **Commonwealth v. Burkett**, 2010 PA Super 182, 5 A.3d 1260, 1267 (Pa. Super. 2010). This review is limited to the findings of the PCRA court and the evidence of record. **Id.** We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. **Id.** This Court may affirm a PCRA court's decision on any grounds if the record supports it. **Id.** Further, we grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. **Commonwealth v. Carter**, 2011 PA Super 113, 21 A.3d 680, 682 (Pa. Super. 2011). However, we afford no such deference to its legal conclusions. **Commonwealth v. Paddy**, 609 Pa. 272, 15 A.3d 431, 442 (Pa. 2011); **Commonwealth v. Reaves**, 592 Pa. 134, 923 A.2d 1119, 1124 (Pa. 2007). Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review

³ On January 30, 2013, the PCRA court ordered Bowers to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Bowers filed a concise statement on February 27, 2013. The PCRA court issued an opinion pursuant to Pa.R.A.P. 1925(a) on March 11, 2013.

plenary. ***Commonwealth v. Colavita***, 606 Pa. 1, 993 A.2d 874, 886 (Pa. 2010).

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa. Super. 2012), *appeal denied*, 54 A.3d 347 (Pa. 2012).

Based on the nature of Bowers' sentencing claims⁴, we will address them together. In Bowers' first argument, he claims the court erred in imposing a sentence that was manifestly excessive and failed to consider his rehabilitative needs. In Bowers' second argument, he asserts the court erred in applying the deadly weapon enhancement to his sentence because the record is not clear as to what type of gun was used and where it was pointed at the victim.

Contrary to Bowers' argument, these issues are not legality of sentence claims but discretionary aspects of sentencing challenges. ***See Commonwealth v. Bishop***, 831 A.2d 656, 660 (Pa. Super. 2003) ("a claim that the sentence imposed by the trial court was manifestly excessive is a challenge to the discretionary aspects of the sentence."); ***Commonwealth v. Downing***, 990 A.2d 788, 793 (Pa. Super. 2010) (a claim that a trial court failed to consider the defendant's rehabilitative needs and the protection of society is a challenge to the discretionary aspects of sentencing); ***Commonwealth v. Brougher***, 978 A.2d 373, 375 (Pa. Super. 2009) (a

⁴ It appears that Bowers has abandoned the ineffective assistance of counsel claims that he raised in his PCRA Petition and at the PCRA hearing.

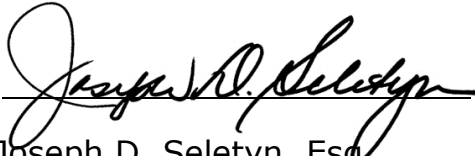
claim that the court improperly applied a deadly weapon enhancement relates to the discretionary aspects of a sentence).

Moreover, challenges to the discretionary aspects of sentencing are not cognizable under the PCRA. **See** 42 Pa.C.S. § 9543(a)(2)(vii); **Commonwealth v. Fowler**, 930 A.2d 586, 593 (Pa. Super. 2007); **Commonwealth v. Young**, 922 A.2d 913, 916 (Pa. Super. 2007). As such, we are precluded from reviewing Bowers' discretionary aspects of sentencing claims in this appeal.⁵ Therefore, both arguments fail and the PCRA court did not err in denying Bowers' petition.

Order affirmed.

⁵ We note the PCRA court addressed Bowers' first claim under the umbrella of an ineffective assistance of counsel claim. Discretionary aspects of sentencing claims couched within claim of ineffective assistance of counsel claim are cognizable under PCRA. **See Commonwealth v. Jones**, 942 A.2d 903, 906 (Pa. Super. 2008). However, a review of Bowers' appellate brief reveals that he did not couch his discretionary aspects claim within an ineffectiveness claim. Bowers' Brief at 8-9. Therefore, we need not address it further. Moreover, the PCRA court addressed his second argument as a sufficiency claim rather than a sentencing issue, finding that an airsoft pistol is a deadly weapon for purposes of the deadly weapon enhancement provision. Nevertheless, we may affirm the court on other grounds. **See Commonwealth v. Burns**, 988 A.2d 684, 690 n. 6 (Pa. Super. 2009) (this Court "may affirm the lower court on any basis, even one not considered or presented in the court below.").

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/24/2013