

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
CHRISTOPHER CASH,	:	
	:	
Appellant	:	No. 1850 WDA 2010

Appeal from the Judgment of Sentence Entered July 13, 2010,
In the Court of Common Pleas of Allegheny County,
Criminal Division, at No. CP-02-CR-0002745-2009.

BEFORE: SHOGAN, OTT and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.:

Filed: February 7, 2013

Appellant, Christopher Cash, appeals from the judgment of sentence entered on July 13, 2010. We affirm.

The trial court stated the factual history as follows:

On December 31, 2008, Detective Gregory Woodhall (Woodhall) was patrolling Second Avenue in the Hazelwood section of Pittsburgh, Allegheny County, when he heard several shots fired. (T.T. 27)⁷. After announcing that shots were fired on radio, Woodhall drove onto Glouster Street where he observed Christopher Cash (Cash) fire a round into the air with a pistol. (T.T. 28, 59, 67). Woodhall testified that he was approximately 75 feet away from Cash when he observed this and that lighting conditions and visibility were good. (T.T. 29).

⁷ "T.T." refers to the Trial Transcript of March 24, 2010.

Woodhall pulled his marked police car alongside Cash, who turned and made eye contact with Woodhall. (T.T. 29-30, 47). Cash raised his pistol and pointed it at Woodhall. (T.T. 29, 31 47). In response, Woodhall slammed on his brakes and veered

*Retired Senior Judge assigned to the Superior Court.

to the right, causing his marked police car to strike a tree stump. (T.T. 29-31, 51).

Cash fled and Woodhall immediately exited his vehicle and pursued Cash while calling for backup over the radio. (T.T. 31-32, 52). He pursued Cash approximately four blocks and never lost visual contact of him. (T.T. 32-33, 36). Cash then attempted to enter a residence, located at 5021 Chaplain Street, but could not get the door open. (T.T. 36-37, 62). Woodhall then drew his service weapon and ordered Cash to the ground, but Cash did not comply. (T.T. 36-37). However, Officer Aaron Fetty arrived as backup and performed a leg sweep on Cash that brought him to the ground. (T.T. 37, 63).

Cash resisted arrest by spreading his arms and kicking around to avoid being handcuffed by Officer Fetty. (T.T. 38, 63). Cash made gratuitous statements that included: (1) "I never had a gun"; (2) "That wasn't me"; and, (3) "You don't see me with a gun"; even though neither Woodhall nor Officer Fetty mentioned anything concerning a firearm. (T.T. 37-38, 63). After he was handcuffed Cash continued to resist being put into the police vehicle by kicking with his legs, and he had to be physically placed into the vehicle by two officers. (T.T. 69-70).

While other officers transported and processed Cash, Woodhall returned to his vehicle and retraced the route of the pursuit. (T.T. 39). He found four .40 S&W shell casings approximately 40 or 50 feet away from his wrecked vehicle. (T.T. 41). He also found the firearm that Cash had been carrying, a .40 caliber Taurus handgun, approximately 10 feet away from the vehicle. (TT. 39-40, 42).

During transport to jail, Cash was belligerent and began slamming himself into the sides of the police vehicle. (T.T. 72-73). He eventually vomited and passed out for a short period due to his intoxication. (T.T. 73). Once the vehicle arrived at the sally port of the jail, Cash woke up and continued to act belligerent. (T.T. 73). He began threatening both officers, saying, "Bail ain't nothing, you know that, right? Take the cuffs off and try that shit. I'm gonna get you all at y'all homes while y'all sleep." (T.T. 74). He further said "You're laughing now, but you'll be crying later. Laugh now, cry later, mother fucker. God bless you. You'll need blessed, you'll see." (T.T. 75).

Trial Court Opinion, 6/28/12, at 4-6.

The trial court stated the procedural history as follows:

Appellant, Christopher Cash, was charged by Criminal Information (CC200902745) with one count each of: Possession Of Firearm Prohibited¹, Aggravated Assault², Firearms Not To Be Carried Without License³, Terroristic Threats With Intent to Terrorize Another⁴, Recklessly Endangering Another Person⁵, and Resisting Arrest Or Other Law Enforcement⁶.

¹ 18 Pa. C.S. § 6105(a)(1).

² 18 Pa. C.S. § 2702(a)(6).

³ 18 Pa. C.S. § 6106(a)(1).

⁴ 18 Pa. C.S. § 2706(a)(1).

⁵ 18 Pa. C.S. § 2705.

⁶ 18 Pa. C.S. § 5104.

Appellant proceeded to a jury trial on March 24, 2010. At the close of the Commonwealth's case, Appellant moved for a Judgment of Acquittal as to count 3, Firearm Not To Be Carried Without License, which was granted. The jury found Appellant guilty of Possession of Firearm Prohibited, Aggravated Assault, Terroristic Threats, Recklessly Endangering Another Person, and Resisting Arrest.

Appellant was sentenced on July 13, 2010 to an aggregate term of four to eight years incarceration. Appellant filed a post-sentence [motion] in the nature of a motion to reconsider sentence on July 16, 2010, which was denied by operation of law on November 16, 2010.

Trial Court Opinion, 6/28/12, at 2-3. This appeal followed.

Appellant raises the following issues on appeal:

- I. The trial court erred when it denied Defendant's Motion for Judgment of Acquittal where evidence of record failed to prove beyond a reasonable doubt that Defendant was the individual who committed the offenses of Violation of the

Uniform Firearms Act, Aggravated Assault and Recklessly Endangering Another Person.

- II. The trial court erred when it denied Defendant's Motion to Reconsider Sentence where the trial court abused its discretion when it sentenced Defendant to an aggravated range sentence and to consecutive sentences without adequately stating its reasons on the record and without due consideration of the sentencing factors set forth at 42 Pa.C.S.A. §9721.

Appellant's Brief at 4.

Appellant first argues that the evidence is insufficient to support his convictions of violation of the Uniform Firearms Act,¹ aggravated assault,² and recklessly endangering another person (REAP).³ He specifically contends that the Commonwealth failed to establish that he was the

¹ Appellant failed to raise a challenge to the sufficiency of the evidence as to his violation of the Uniform Firearms Act conviction in his concise statement but raises it in his brief on appeal. This issue is waived. **See Commonwealth v. Bullock**, 948 A.2d 818, 823 (Pa. Super. 2008), *appeal denied*, 600 Pa. 773, 968 A.2d 1280 (2009) (any issues not raised in a Pa.R.A.P. 1925(b) statement shall be deemed waived) (citing **Commonwealth v. Lord**, 553 Pa. 415, 419, 719 A.2d 306, 308 (1998)). **See also Commonwealth v. Oliver**, 946 A.2d 1111, 1115 (Pa. Super. 2008), *appeal denied*, 599 Pa. 690, 960 A.2d 838 (2008) (**Lord** "requires a finding of waiver whenever an appellant fails to raise an issue in a court-ordered Pa.R.A.P. 1925(b) statement").

² Section 2702(a)(3) of the Crimes Code provides that a person is guilty of aggravated assault "if he ... (3) attempts to cause or intentionally or knowingly causes bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c), in the performance of duty."

³ Section 2705 of the Crimes Code provides that a person is guilty of REAP and commits a misdemeanor of the second degree "if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury."

perpetrator of the shooting and argues that the physical evidence is insufficient to link him to the scene. Appellant's Brief at 9-12. Appellant claims that Detective Woodhall's identification of him was unreliable due to inadequate lighting and the too brief view of Appellant.

When reviewing a challenge to the sufficiency of the evidence, our standard of review is as follows:

The standard we apply . . . is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [trier] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part, or none of the evidence.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa. Super. 2011) (citation omitted).

The trial court addressed this issue as follows:

It is clear that the fact finder in this case believed the testimonies of Officers Woodhall and Fetty, as well as their fellow officers. Concerning the offenses of aggravated assault and recklessly endangering another person, Woodhall testified that: (1) he witnessed Appellant point the firearm at him; (2) visibility

and lighting were good; and (3) that he slammed on his [brakes] and wrecked his car because the firearm was pointed at him. (T.T. 29-31, 47, 51). Further, Woodhall identified Appellant at trial and stated that he had no doubt that Appellant was the same person who pointed the firearm at him. (T.T. 31, 57). See *Commonwealth v. Repko*, 817 A.2d 549 (Pa. Super. 2003) (evidence sufficient to support aggravated assault conviction where defendant aimed an unloaded shotgun at a uniformed officer who had gotten out of a marked police vehicle). See also *Commonwealth v. Hopkins*, 747 A.2d 910, 916 (Pa. Super. 2000) (brandishing a loaded firearm during the commission of a crime provides a sufficient basis on which a fact finder may conclude that a defendant proceeded with conscious disregard for the safety of others, and that he had the present ability to inflict great bodily harm or death)(citations omitted).

Trial Court Opinion, 6/28/12, at 8-9.

Review of the record supports the determination of the trial court. On December 31, 2008, Detective Gregory Woodhall was on patrol on Second Avenue in the Hazelwood neighborhood in the City of Pittsburgh when he heard two shots fired. N.T., 3/24/10, at 27-28, 40. He immediately radioed this information, then made a left on Tecumseh and a right on Glouster and observed a male walking away from him. The detective testified that prior to seeing this man, he had turned off his headlights so that he would not "spook" anyone. From his original distance of 75 to 80 feet away, he saw that the man was carrying an object in his right hand and as he got closer, he watched the man raise his hand into the air and fire a shot. He stated that the area was not only well lit, but he had also observed the muzzle flash. *Id.* at 27-29, 45.

Suspecting that this man was the individual who had fired the previous shots, Detective Woodhall turned on his headlights when he got within 50 feet of him and saw that he was carrying a gun. He testified that when he was almost beside the individual, the man turned directly toward him, made eye contact, and pointed the gun at him. He further testified that he had a clear and unimpeded view of the individual with the gun. Seeing the gun leveled at him, the detective hit the brakes and ducked in his seat, causing his vehicle to veer toward the man and then slide into a tree stump alongside the road. The detective then saw this man, subsequently identified as Appellant, begin running down the street. N.T., 3/24/10, at 29-31, 35. Detective Woodhall immediately jumped out of his vehicle and began chasing Appellant, while radioing this information to other officers. At the start of the pursuit, the detective estimated that Appellant was 80 feet ahead of him but he was quickly able to close the gap. *Id.* at 30-32. He followed as Appellant made a right on Tecumseh, a left onto Lytle, a right onto Path and, ultimately, a right onto Chaplain Way. *Id.* at 32-33. As Appellant turned on Tecumseh, the detective stated that he was only 10 feet from him. Detective Woodhall remained 10 feet from him as Appellant continued to run on Lytle and Path, but as Appellant turned onto Chaplain, he was only 10 to 12 steps behind. *Id.* at 35-36. He stated that he never lost sight of Appellant during the entirety of the chase. *Id.* at 36.

Once Appellant was in custody, the detective retraced the flight path and discovered a gun, with an emptied clip, about 10 feet from his wrecked vehicle. N.T., 3/24/10, at 38-39. He also found four shell casings 40 to 50 feet from the gun; one was discovered at the spot he saw Appellant fire the weapon and the remaining three were found in the same line on Gloster. Subsequent examination by the Crime Lab revealed that the four spent .40 caliber Smith & Wesson casings matched and that they had been fired from the recovered .40 caliber Taurus handgun. *Id.* at 41-43. Detective Woodhall indicated that he did not request that the gun be fingerprinted since he actually saw Appellant holding and firing the gun. *Id.* at 45-46, 50. When asked at trial if he had any doubt Appellant was the individual who had pointed the gun at him, the detective replied that he had no doubt. *Id.* at 57.

Detective Woodhall's testimony was clearly sufficient to establish that: (1) Appellant had been firing shots into the air; and (2) that he was the one who pointed a firearm at Detective Woodhall. Such evidence supports Appellant's aggravated assault, and REAP convictions. Appellant's first claim fails.

Appellant next asserts that the trial court erred in sentencing him in the aggravated range and to consecutive sentences without providing

sufficient reasons. Appellant's Brief at 4, 12. This is a challenge to the discretionary aspects of Appellant's sentence.

It is well settled that there is no absolute right to appeal the discretionary aspects of a sentence. *Commonwealth v. Hartle*, 894 A.2d 800, 805 (Pa. Super. 2006). Rather, allowance of appeal will be permitted only when the appellate court determines that there is a substantial question that the sentence is not appropriate under the Sentencing Code. *Id.* The determination of what constitutes a substantial question is made on a case-by-case basis. *Id.* A substantial question exists where an appellant sets forth a plausible argument that the sentence violates a particular provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing process. *Id.*

Additionally, when an appellant seeks to challenge the discretionary aspects of his sentence, he:

must provide a separate statement, pursuant to Rule of Appellate Procedure 2119(f), specifying where the sentence falls in relation to the Sentencing Guidelines and what particular provision of the Sentencing Code has been violated. Similarly, the Rule 2119(f) statement must specify what fundamental norm the sentence violates and the manner in which it violates that norm. An appellant's failure to comply with Rule 2119(f) may be waived if the Commonwealth does not object to the defect.

Commonwealth v. Pollard, 832 A.2d 517, 525 (Pa. Super. 2003) (citations omitted).

In *Commonwealth v. Tuladziecki*, our Supreme Court explicitly held that Rule 2119(f) was not simply promulgated as an aid to the appellate courts: instead, the rule was created to advance and protect “important concerns of substance.” *Commonwealth v. Tuladziecki*, 522 A.2d 17, 19 (Pa. 1987). Where the party opposing the discretionary challenge to the trial court’s sentencing decision has objected to a procedural violation under Rule 2119(f), the *Tuladziecki* Court reasoned:

Our insistence on separate presentation of these [discretionary sentencing] issues **is more than mere formalism**; important concerns of **substance** guide this decision. In addition to preserving the respective rights of both parties according to the jurisdictional scheme provided by the legislature, it furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court’s evaluation of the multitude of factors impinging on the sentencing decision to exceptional cases.

Tuladziecki, 522 A.2d at 19-20 (emphasis added).

Here, Appellant has failed to include a Rule 2119(f)⁴ statement in his brief. The Commonwealth has objected to the omission. Commonwealth

⁴ Pa.R.A.P. 2119(f) states:

An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall 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. The statement **shall** immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

Pa.R.A.P. 2119(f) (emphasis added).

Brief at 1, 15. Accordingly, the sentencing issue is waived on appeal.⁵

Tuladziecki; Commonwealth v. Farmer, 758 A.2d 173 (Pa. Super. 2000).

Judgment of sentence affirmed.

⁵ Moreover, we further note that a challenge to the imposition of a consecutive sentence does not present a substantial question. **See *Commonwealth v. Pass***, 914 A.2d 442, 446 (Pa. Super. 2006) (stating that a challenge to the imposition of consecutive versus concurrent sentences fails to raise a substantial question). Thus, Appellant's assertion concerning error in imposition of consecutive sentences fails to present a substantial question and no right of appeal exists to address Appellant's issue.