

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT O
Appellee	:	PENNSYLVANIA
	:	
	:	
v.	:	
	:	
ROBERT C. MARTIN,	:	
Appellant	:	No. 1856 WDA 2011

Appeal from the Judgment of Sentence September 2, 2011
 In the Court of Common Pleas of Potter County
 Criminal Division No(s): CP-53-CR-0000237-2010
 CP-53-CR-0000238-2010

BEFORE: GANTMAN, WECHT, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

Filed: March 20, 2013

Appellant, Robert C. Martin, appeals from the judgment of sentence entered in the Potter County Court of Common Pleas, alleging that the sentencing court improperly imposed the mandatory sentencing enhancement for violent offenses with firearms and abused its discretion in failing to consider mitigating factors.¹ This case returns to us following remand for the trial court to file a Pa.R.A.P. 1925(a) opinion. We affirm.²

* Former Justice specially assigned to the Superior Court.

¹ Appellant purported to appeal from the orders dated August 30, 2011 and September 26, 2011, denying his post-sentence motion. “[W]hen timely post-sentence motions are filed, an appeal properly lies from the judgment of sentence made final by the denial of post-sentence motions.” *Commonwealth v. Kuykendall*, 2 A.3d 559, 560 n.1 (Pa. Super. 2010).

Appellant pleaded guilty to endangering welfare of children,³ corruption of minors,⁴ harassment,⁵ persons not to possess, use, manufacture, control, sell or transfer firearms,⁶ conspiracy,⁷ possession of firearm with altered manufacturer's number,⁸ manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance,⁹ use of, or possession with intent to use, drug paraphernalia,¹⁰ makes, repairs, sells, or otherwise deals in, uses, or possesses any offensive weapon,¹¹ and use or possession of electric or electronic incapacitation device.¹²

² The Commonwealth did not file a brief in the case *sub judice*.

³ 18 Pa.C.S. § 4304(a).

⁴ 18 Pa.C.S. § 6301(a)(1).

⁵ 18 Pa.C.S. § 2709(a)(1).

⁶ 18 Pa.C.S. § 6105(a)(1).

⁷ 18 Pa.C.S. § 903(c).

⁸ 18 Pa.C.S. § 6110.2(a).

⁹ 35 Pa.C.S. § 780-113(a)(30).

¹⁰ 35 Pa.C.S. § 780-113(a)(32).

¹¹ 18 Pa.C.S. § 908(a).

¹² 18 Pa.C.S. 908.1(c).

The facts that are pertinent to the issues raised by Appellant on appeal were stated by the Commonwealth at the guilty plea hearing.

On September 15th of 2010 state police obtained a search warrant for [Appellant's] residence At that time they ran a criminal history check that [Appellant] had a prior conviction in Chester County for delivery or with (sic) possession to (sic) intent to deliver a controlled substance, which is a felony. As a result of that prior conviction he was prohibited from possessing, using, manufacturing, controlling, or selling firearms. During the search, . . . several items were found on the premises, including multiple items of drug paraphernalia to store or conceal or ingest marijuana, multiple firearms, a zip gun, a 22-caliber pistol with an altered serial number, a stun gun, and approximately 6 switch blade knives, and various ammunition (sic) and small amount of Oxycodone, a Schedule II controlled substance. From various statements obtained from the investigation as confirmed by the quantity, packaging and items of marijuana seeds it was concluded that [Appellant] possessed this marijuana with intent to deliver same and also . . . the Oxycodone. [Appellant] was also in possession or control of firearms on the premises that were found in the same building as the marijuana. . . . Additionally, [Appellant] did possess with intent to deliver two controlled substances . . . contrary to Title 35 section 780-113[(a)(30)] and specifically . . . firearms were found on the premises near marijuana.

N.T. Guilty Plea Hr'g, 8/30/11, at 15-17. Following the Commonwealth's statement, the court asked Appellant if it was accurate and if he committed the acts alleged. Appellant responded "Yes." *Id.* at 17.

Appellant was sentenced to 80 to 168 months' incarceration. Amended Order, 9/26/11, at 2. Appellant filed post-sentence motions which were denied. This timely appeal followed. Appellant filed a court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

Appellant raises the following issues for our review:

Did the lower court improperly sentence [Appellant] under the mandatory sentencing enhancement for violent offenses with firearms which was unsupported factually?

Did the lower court improperly sentence [Appellant] without considering mitigating factors?

Appellant's Brief at 5.

First, Appellant argues: "There must be a factual basis to utilize the mandatory minimum sentencing enhancement. Here the record does not support the position that [Appellant] ever used guns in any drug trafficking. There is no evidence that [he] ever used violence or threats of violence in furtherance of drug trafficking." *Id.* at 9.¹³ We find no relief is due.

¹³ Appellant's argument on this issue consists of two pages. Appellant's Brief at 8-9. Although Appellant cites *Commonwealth v. Zortman*, 993 A.2d 869 (Pa. 2010), he does not discuss it. We note that citation is for the Pennsylvania Supreme Court's grant of allowance of appeal on the issue of "[w]hether an inoperable handgun is a firearm pursuant to 42 Pa.C.S. § 9712(e) for sentence enhancement purposes." *Id.* Subsequently, our Supreme Court issued an opinion holding that the inoperable handgun was a "firearm" under section 9712.1. *Commonwealth v. Zortman*, 23 A.3d 519 (Pa. 2011), *cert. denied*, 132 S.Ct. 1634 (2012). Pa.R.A.P. 2119(b) provides that "[c]itations of authorities must set forth the principle for which they are cited." Pa.R.A.P. 2119(b). Pa.R.A.P. 2119(a) provides: "The argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent." Pa.R.A.P. 2119(a). "We have repeatedly held that failure to develop an argument with citation to, and analysis of, relevant authority waives the issue on review." *Commonwealth v. Plante*, 914 A.2d 916, 924 (Pa. Super. 2006) (citation omitted). However, challenges to a trial court's application of a mandatory sentencing provision implicates the legality of the sentence. *Commonwealth v. Lewis*, 885 A.2d 51, 55 (Pa. Super. 2005). "[A]

Our standard of review of a challenge to the application of a mandatory minimum sentence “is *de novo* and our scope of review is plenary.” *Commonwealth v. Person*, 39 A.3d 302, 305 (Pa. Super. 2012) (citation omitted).

The pertinent statute provides:

(a) Mandatory sentence.—Any person who is convicted of a violation of section 13(a)(30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act,^[14] when at the time of the offense the person or the person's accomplice is in physical possession or control of a firearm, whether visible, concealed about the person or the person's accomplice or within the actor's or accomplice's reach or in close proximity to the controlled substance, shall likewise be sentenced to a minimum sentence of at least five years of total confinement.

42 Pa.C.S. § 9712.1(a). Furthermore, “[t]here shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) or to place such offender on probation or to suspend sentence.” 42 Pa.C.S. § 9712.1(d). *See Commonwealth v. Wisor*, 928 A.2d 270, 273 (Pa. Super. 2007) (sentencing court has no discretion to impose less than mandatory minimum sentence).

challenge to the application of a mandatory minimum sentence is a non-waivable challenge to the legality of the sentence.” *Commonwealth v. Person*, 39 A.3d 302, 305 (Pa. Super. 2012) (citation omitted). Therefore, we address this issue. *See id.*

¹⁴ 35 Pa.C.S. § 780-113(a)(30).

In *Commonwealth v. Zortman*, 985 A.2d 238 (Pa. Super. 2009), *aff'd*, 23 A.3d 519 (Pa. 2011), *cert. denied*, 132 S.Ct. 1634 (2012),¹⁵ this Court held it was reversible error not to apply the mandatory minimum sentence where a gun in the bedroom was in close proximity to drugs in the kitchen. *Id.* at 244. Similarly, in *Commonwealth v. Sanes*, 955 A.2d 369 (Pa. Super. 2008), the sentencing enhancement was applied where the gun in the closet was in close proximity to the drugs on the dresser. *Id.* at 376.

In the instant matter, the trial court opined:

In the instant case, firearms were found on the same property as large amounts of marijuana, oxycodone and morphine pills. Pennsylvania Courts have held firearms to be in close proximity to drugs for purposes of applying mandatory minimum sentence guidelines under Section 9712.1 where the firearms were on the same piece of property as the controlled substance. *See Commonwealth v. Hawkins*, 45 A.3d 1123 (Pa. Super. 2012)[, *appeal denied*, 132 S.Ct. 1634 (Pa. 2012)] (Firearm recovered from common basement area of defendant's apartment was "in close proximity" to drugs for purposes of applying mandatory minimum sentencing guidelines). Because [Appellant] pled guilty to manufacture, delivery, possession of a controlled substance under Section 13(a)(30) of the Controlled Substance, Drug, Device and Cosmetic Act, . . . the mandatory minimum sentence clearly applied

Trial Ct. Op., 2/12/13, at 4 (unpaginated). We agree. The "firearms were found on the premises near marijuana" when the state police executed the search warrant of Appellant's residence, mandating the application of the

¹⁵ This is the Superior Court decision in the case cited by Appellant.

sentencing enhancement. *See* 42 Pa.C.S. § 9712.1(a).; *Zortman, supra*; *Sanes, supra*.¹⁶

Lastly, Appellant claims the trial court improperly sentenced him because it did not consider mitigating factors. This is a challenge to the discretionary aspect of his sentence.

Initially we note that “[t]he entry of a guilty plea constitutes a waiver of all defenses and defects except claims of lack of jurisdiction, invalid guilty plea, and illegal sentence.” However, “Appellant’s guilty plea does not bar his discretionary challenge because there was no agreement as to the sentence Appellant would receive.”

¹⁶ We note that our Pennsylvania Supreme Court has granted the petition for allowance of appeal in *Commonwealth v. Hanson*, 29 A.3d 366 (Pa. 2011), on the following issues in relation to the statute:

1. Whether, as a matter of statutory construction, the Superior Court properly construed 42 Pa.C.S. § 9712.1(a), and specifically:

(a) What is the meaning of the term “control of a firearm,” as used in Section 9712.1(a)?

(b) Whether, under Section 9712.1(a), the Commonwealth demonstrates that a defendant was “in physical possession or control of a firearm” by merely proving that the firearm was “visible, concealed about the person ... or within the actor's ... reach or in close proximity to the controlled substance?”

(c) What is the meaning of the term “in close proximity,” as used in Section 9712.1(a)?

Id. at 366-67. “The general rule followed in Pennsylvania is that we apply the law in effect at the time of the appellate decision. . . .” *Passarello v. Grumbine*, 29 A.3d 1158, 1164 (Pa. Super. 2011), *appeal granted*, 44 A.3d 654 (Pa. 2012).

Commonwealth v. Kennedy, 868 A.2d 582, 593 (Pa. Super. 2005).

Instantly, there was no agreement as to Appellant's sentence, therefore we address this issue.

An appeal from the discretionary aspects of sentencing is not guaranteed as a matter of right. *Commonwealth v. Mastromarino*, 2 A.3d 581, 585 (Pa. Super. 2010).

To reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code[.]

A substantial question will be found where an appellant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the Sentencing Code or is contrary to the fundamental norms which underlie the sentencing process. At a minimum, the Rule 2119(f)^[17] statement must articulate what particular provision of the code is violated, what fundamental norms the sentence violates, and the manner in which it violates that norm.

Id. at 585-86 (some citations omitted).

¹⁷ We note that Appellant did not comply with Pa.R.A.P. 2119(f); however, the Commonwealth did not object to this deficiency. "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).

“An argument that the sentencing court failed to adequately consider mitigating factors in favor of a lesser sentence does not present a substantial question appropriate for our review.” ***Commonwealth v. Ratushny***, 17 A.3d 1269, 1273 (Pa. Super. 2011); ***accord Commonwealth v. Lewis***, 911 A.2d 558, 567 (Pa. Super. 2006) (“[a] claim that a sentencing court failed to consider certain mitigating factors does not raise a substantial question”). Appellant has failed to present a substantial question for our review. ***See Ratushny, supra; Lewis, supra.*** Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

VS.

ROBERT MARTIN,

: NO. 237 & 238 OF 2010

: NO. 1856 WDA 2011

Defendant

: CRIMINAL DIVISION

PROBATION & PAROLE DEPARTMENT
POTTER COUNTY
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OPINION IN SUPPORT OF ORDER

The Defendant, in his Concise Statement of Matters Complained of on Appeal, has alleged the Court failed to properly consider the following at the time of sentencing:

1. Due to his arrest, the Defendant lost his family – paramour and three children.
2. The Defendant suffered from mental illness that he was being treated for by two psychiatrists for a number of years.
3. The Defendant did not have a history of violence.
4. The Defendant had no disciplinary issues while housed at the Potter County Jail.
5. The Defendant has a strong support system evidenced from letters of support provided by a pastor, family and friends.
6. Although 42 Pa. C.S. § 9712.1 mandates minimum sentences for certain drug offenses committed with firearms, the Defendant did not use any firearms in any drug trafficking.
7. The Defendant accepted responsibility by pleading guilty and admitting his guilt.
8. Defendant's prior criminal history was in the early 1990's.
9. Defendant's actions were that of a survivalist and were not threatening toward anyone.

10. The Defendant suffers from chronic liver disease.

ANALYSIS

Under 42 Pa. C.S. § 9721(b), the Court must “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[s] and on the community, and the rehabilitative needs of the Defendant.” Id. “The Court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing...” Id. “In every case in which the Court imposes a sentence for a felony or misdemeanor, modifies a sentence, resentences an offender following revocation of probation, county intermediate punishment or State intermediate punishment or resentences following remand, the Court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence impose.” Id. “The Court is not required to parrot the words of the Sentencing Code, stating every factor that must be considered under Section 9721(b). However, the record as a whole must reflect due consideration by the Court of the statutory considerations.” Commonwealth v. Coulverson, 34 A.3d 135, 145 (Pa.Super. 2011), quoting Commonwealth v. Feucht, 955 A.2d 377, 383 (Pa.Super. 2008).

On August 30th, 2011, the Court sentenced the Defendant to an aggregate sentence of not less than 114 months nor more than 228 months to be served at a state correctional facility. At the time of sentencing, this Court stated the following as part of the record:

I have had an opportunity to review the presentence memorandum provided to me by the Defense including several letters from family and friends of Mr. Martin most of them very positive for him in the sense that he seems to be a gentleman who has had a difficult time in life and perhaps some of the issues that brought him into court today is a result of some of that history he has gone through. I've also had a chance to

*review the records from medical facilities in which he was involved with, the effect upon his children, his family. So I have considered all of that in reaching a sentence I think is fair to Mr. Martin and also to the Commonwealth and society. Certainly, Mr. Martin, and I think the records indicate you've taken responsibility for a lot of what has occurred here in this case and I appreciate that. "You have a couple of daughters I know that are being raised elsewhere. They have been victims of some of your activity, sir. I'm hoping in some time that they'll be able to heal, that perhaps some point in your life you'll be able to rekindle your relationship with them. Having said all that I will sentence within the guidelines, standard guidelines. Mr. Martin, if I added up all the maximum penalties you could be facing it could be decades in jail. I'm not intending to do that to you, but I'm going to issue and Order here that I think again will be fair and balanced."*¹

Thus, in addressing the Defendant's allegations 1 through 5, as well as allegations 7 through 10, the Court did consider at the time of sentencing the Defendant's family, the Defendant's mental and health records, the favorable letters of support authored by the Defendant's pastor, family and friends as well as the fact that the Defendant took at least some responsibility for his actions. The Court, however, also took into account the Defendant's children were victims in this case, and also took into account the impact of the Defendant's crimes on the community and the rehabilitative needs of the Defendant which is mandated by Section 9721(b). In weighing these factors, the Court appropriately sentenced the Defendant, in its discretion, within the guidelines provided by the Pennsylvania Commission on Sentencing.

The Defendant further argues that the mandatory minimum sentence under 42 Pa.C.S. § 9712.1 should not have applied in this particular case. This argument is without merit. Section 9712.1(a) holds that:

Any person who is convicted of a violation of section 13(a)(30) of ... The Controlled Substance, Drug, Device and Cosmetic Act, when at the time of the offense the person ... is in physical possession or control of a firearm, whether visible, concealed about the person ... or within the actor's ... reach or in close proximity of the controlled substance, shall ... be sentenced to a minimum sentence of at least five years of total confinement. *Id.*, (emphasis added).

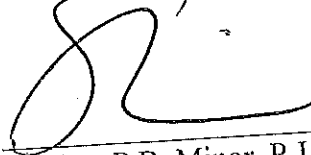
¹ Transcript of the Sentencing Hearing, p. 12-13, August 30, 2012, (emphasis added).

In the instant case, firearms were found on the same property as large amounts of marijuana, oxycodone and morphine pills. Pennsylvania Courts have held firearms to be in close proximity to drugs for purposes of applying mandatory minimum sentence guidelines under Section 9712.1 where the firearms were on the same piece of property as the controlled substance. See Commonwealth v. Hawkins, 45 A.3d 1123 (Pa.Super. 2012) (Firearm recovered from common basement area of defendant's apartment was "in close proximity" to drugs for purposes of applying mandatory minimum sentencing guidelines.) Because the Defendant pled guilty to manufacture, delivery, possession of a controlled substance under Section 13(a)(30) of the Controlled Substance, Drug, Device and Cosmetic Act, at Count 30 under Docket Number 238 of 2010, the mandatory minimum sentence clearly applied to this Court.

For the above-stated reasons, the Defendant's sentence was thoroughly considered by the Court prior to sentencing and was appropriate given the circumstances of the case.

February 12, 2013

BY THE COURT



Stephen P.B. Minor, P.J.,
55th Judicial District

cc: Andy Watson, Esq.
Jay Carr, Esq.