NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ANTHONY EDWARD OLIVER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1865 EDA 2012

Appeal from the Judgment of Sentence May 25, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0009949-2011

BEFORE: DONOHUE, J., MUNDY, J., and OLSON, J.

MEMORANDUM BY MUNDY, J.: **FILED JUNE 05, 2013**

Appellant, Anthony Edward Oliver, appeals from the May 25, 2012 judgment of sentence of three and one-half to seven years' imprisonment, to run consecutively to a sentence he was serving in an unrelated matter. The instant sentence was imposed after Appellant was found guilty of receiving stolen property.[1] After careful review, we affirm the judgment of sentence.[2]

The trial court summarized the relevant facts of this case as follows.

> Between the dates of October 15, 2010 and December 2, 2010, [Appellant] was President of the non-profit organization, PA Cure, a position he held as a volunteer. The Secretary of PA Cure, Mr. Angus Love, testified that as President, [Appellant] had the ability to withdraw money from the organization's

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[1] 18 Pa.C.S.A. § 3925.

[2] The Commonwealth has elected not to file a brief in this matter.

> bank account on behalf of the organization, with the approval of the Board of Directors and in conjunction with the signature of the organization's Treasurer, Mr. Pappas. [Appellant] and Mr. Pappas were the authorized signatories through the organization's bank, Commerce Bank[,] which was eventually purchased by TD Bank. After viewing the Commonwealth's Exhibits C-I through C-22, a series of checks, Mr. Love testified that the checks were from the PA Cure account, signed only by Anthony Oliver, the majority of which were made payable to Anthony Oliver. Mr. Love also testified that PA Cure did not give permission to [Appellant] to write the checks or withdraw the funds. Copies of these checks were entered into evidence and the sum of these checks totaled well over $2,000.
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> Mr. Dan Gold, the owner of a retail guitar store in Narberth, Pennsylvania, testified that on December 2, 2010, [Appellant] came into his store and purchased a guitar. [Appellant] paid for the guitar using a check which was introduced by the Commonwealth and was again from the PA Cure account and signed by [Appellant].
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> On June 23, 2011, at approximately 1:20 p.m., [Appellant] gave a statement to University of Pennsylvania Detective Paul Sawicki. His ***Miranda***[3] rights were explained to him and he initialed and signed each answer given to the Miranda questions. After more than an hour of questioning, [Appellant] was given food and a drink which took approximately ten to fifteen minutes to consume. During this time he was not left alone and when he finished his meal the questioning resumed. When the questioning by Detective Sawicki resumed, [Appellant] was questioned about the instant case for the first time. [Appellant's] statement was introduced and accepted into evidence by the Commonwealth as exhibit C-1.

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[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> [Appellant]'s statement contained the following questions and answers:
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> Question: "Between 10/15/2010 and 11/4/2010 did you removed [sic] about $4,700 from this nonprofit group without permission?" Answer: "Yes."
>
> Question: "Did you go into TD Bank at 15th and JFK Boulevard on 10/15/2012 and change the signature card on the business account of PA Cure f[ro]m 2 authorized signatures to just one, that being your signature?" Answer: "Yes."
>
> Question: "You are aware that what you were doing was committing crimes of theft and fraud is that correct?" Answer: "Yes."
>
> Question: "What did you do with the money you obtained fraudulently?" Answer: "Use it to get medication."
>
> At the end of the interview, [Appellant], upon viewing photos of another individual involved in a separate incident, did request to speak to his attorney, at which time the interview was terminated.

Trial Court Opinion, 9/25/12, at 1-3 (citations to notes of testimony omitted; emphasis added).

On September 13, 2011, Appellant was charged with theft by deception[4] and receiving stolen property in connection with this incident. On October 25, 2011, Appellant filed an omnibus pre-trial motion to suppress his statement to police, and a hearing was held on May 7, 2012. Following the hearing, the trial court denied Appellant's suppression motion on May

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[4] 18 Pa.C.S.A. § 3922.

11, 2012. Thereafter, Appellant waived his right to a trial by jury and proceeded to a bench trial that same day. As noted, Appellant was found guilty of one count of receiving stolen property. On May 25, 2012, the trial court sentenced Appellant to three and one-half to seven years' imprisonment, to run consecutively to the sentence he was serving in an unrelated matter. On June 4, 2012, Appellant filed a timely post-sentence motion for reconsideration of his sentence. Following a hearing, the trial court denied Appellant's post-sentence motion on June 6, 2012. This timely appeal followed.[5]

On appeal, Appellant raises the following issues for our review.

> 1. Did not the trial court err in denying [A]ppellant's motion to suppress his statement, where the police initially warned [A]ppellant they were questioning him about an unrelated case and then failed to properly re-Mirandize [A]ppellant before questioning him about the instant case?
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> 2. Did not the trial court err as a matter of law and abuse its discretion when it imposed a manifestly and unreasonable sentence of 3½ to 7 years[']' incarceration, the maximum sentence authorized by law, and one which was outside the aggravated range of the Sentencing Guidelines?

Appellant's Brief at 3.

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[5] Appellant and the trial court have complied with Pa.R.A.P. 1925.

We begin by addressing Appellant's claim that the trial court erred in denying his motion to suppress his inculpatory statements to police on the basis that he did not receive appropriate ***Miranda*** warnings prior to being questioned about the instant matter. ***Id.*** at 12.

Our standard of review of the denial of a suppression motion is well settled.

> Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. Where … the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to our plenary review.

Commonwealth v. Jones, 988 A.2d 649, 654 (Pa. 2010) (citations and quotations omitted), *cert. denied*, ***Jones v. Pennsylvania***, 131 S.Ct. 110 (2010).

Herein, the record reveals that prior to questioning Appellant on June 23, 2011, Detective Paul Sawicki of the University of Pennsylvania Police

Department provided Appellant with his ***Miranda*** rights at approximately 1:20 pm. N.T., 5/7/12, at 6-7. Appellant initialed and signed each page of the ***Miranda*** Waiver Form at this time. ***Id.*** Following the ***Miranda*** warnings, Detective Sawicki questioned Appellant on an unrelated case. ***Id.*** at 8. At approximately 2:40 p.m., Appellant was given an opportunity to drink and eat for 10 to 15 minutes, and Detective Sawicki remained in the room. ***Id.*** at 8-9. Thereafter, at approximately 2:55 p.m., Detective Sawicki began questioning Appellant with regard to the instant case. ***Id.*** at 10, 16. The record reflects that Detective Sawicki did not restate the ***Miranda*** warnings to Appellant at this time, but did inform him that he was about to change topics and question Appellant on warrants from the Southwest and Central Detective divisions. ***Id.*** at 18-19. During the course of this interview, Appellant acknowledged taking $4,700 from PA Cure without permission. ***See*** Investigation Interview Record, 6/23/11; Commonwealth's Exhibit C-1.

Appellant contends that his inculpatory statements to police should have been suppressed because Detective Sawicki failed to re-issue him his ***Miranda*** warnings prior to questioning him about the instant theft. Appellant's Brief at 13. Appellant maintains that,

> [w]hile [he] may have voluntary [sic] waived his rights as to the questioning about the thefts of computers from the campus lab, he most certainly did not make a knowing and intelligent waiver of his rights as they pertain to the questioning of the completely unrelated theft from PA CURE.

Id. at 14. In support of this contention, Appellant relies, *inter alia*, on our Supreme Court's holdings in ***Commonwealth v. Dixon***, 379 A.2d 553 (Pa. 1977), and ***Commonwealth v. Richman***, 320 A.2d 351 (Pa. 1974). ***Id.*** at 14-15. For reasons that follow, we conclude that Appellant's argument is devoid of merit.

Dixon involved an appellant who had been found guilty of criminal mischief, ordered to pay restitution, and informed that she would be arrested if she failed to comply. Four months later, the body of the appellant's young son was found in a wooded area, and police suspected the appellant of having been involved. Several weeks after the body was recovered, police went to the appellant's home and asked to speak with her, and she went voluntarily with them to the barracks. Police asked the appellant if she knew why she was being questioned, and she responded that she did. An officer gave her ***Miranda*** warnings, and she signed a waiver. She was then shown a photograph of her son and an officer asked her where the boy was. The appellant became upset and made incriminating statements. She was arrested and subsequently filed a suppression motion, which the trial court denied. ***Dixon***, ***supra*** at 554-555.

Following her conviction, our Supreme Court reversed and remanded for a new trial, explaining that a knowing and intelligent waiver of ***Miranda*** rights required that the accused be aware of the subject matter of the interrogation. ***Id.*** at 556. Because, under the circumstances, the appellant

could reasonably have understood the questioning would relate to her criminal mischief conviction, the ***Dixon*** Court could not conclude that she "'knowingly and intelligently' relinquished the exercise of her constitutional rights." ***Id.*** at 557.

Richman, in turn, is the case upon which the ***Dixon*** Court relied, and involved an appellant's waiver of the right to counsel at the time of a lineup, which was conducted after a warrantless arrest and before the appellant was informed of the charge against him. ***Richman***, ***supra*** at 352. The ***Richman*** Court there held that, just as with waiver of ***Miranda*** rights, an accused must be apprised of the nature of the crime under investigation before a waiver of counsel at a lineup will be considered valid. ***Id.*** at 355.

In the case at bar, Appellant likens his situation to that in ***Dixon*** and ***Richman***, contending that Detective Sawicki was required to "re-***Mirandize***" him prior to questioning him about the instant theft. We disagree. The fact that Appellant was initially questioned about an unrelated theft is not determinative. Rather, we must "view the totality of the circumstances in each case to determine whether repeated warnings are necessary where the initial warnings have become stale or remote." ***Commonwealth v. Scott***, 752 A.2d 871, 875 (Pa. 2000) (citation omitted), *cert. denied*, ***Scott v. Pennsylvania***, 121 S.Ct. 1419 (2001). The following factors are helpful in evaluating whether new ***Miranda*** warnings are necessary.

> [T]he length of time between the warnings and the challenged interrogation, whether the interrogation was conducted at the same place where the warnings were given, whether the officer who gave the warnings also conducted the questioning, and whether the statements obtained are materially different from other statements that may have been made at the time of the warnings.

Commonwealth v. Cohen, 53 A.3d 882, 888 (Pa. Super. 2012), *citing* ***Scott***, ***supra***.

Here, our review of the record reveals that Appellant knowingly and voluntarily waived his ***Miranda*** rights, and thus, suppression was not warranted. As noted, a mere one hour and thirty-five minutes passed between Detective Sawicki's issuance of ***Miranda*** warnings to Appellant and his questioning regarding the instant case. N.T., 5/7/12, at 6, 16. Moreover, the record reflects the entirety of Appellant's statement took place in the same room, and that Detective Sawicki never left said room, even during the 15-minute interlude while Appellant was given the opportunity to eat. ***Id.*** at 9, 18. The record further reflects that prior to questioning Appellant on the instant matter, Detective Sawicki informed Appellant that he wanted to question him on warrants from the Southwest and Central Detective divisions. ***Id.*** at 18-19. Additionally, the sum of Appellant's inculpatory statement involved a series of questioning regarding various thefts. ***Id.*** at 12-13, 19. Lastly, we agree with the trial court that it is clear "[Appellant] fully understood his rights delineated by ***Miranda***[,]" as evidenced by the fact that toward the conclusion of the interview, Appellant

exercised his constitutional right to counsel after viewing photos of another individual involved in a separate incident. ***See*** Trial Court Opinion, 9/25/12, at 5 (emphasis added); ***see also*** N.T., 5/7/12, at 20. Accordingly, we conclude there existed a "clear continuity of interrogation" in this instance, and re-issuance of ***Miranda*** warnings were not necessary. ***See Cohen***, ***supra*** (citation and internal quotation marks omitted). Therefore, Appellant's first claim of error must fail.

We now turn to Appellant's claim that the trial court erred in imposing a sentence that was both "manifestly excessive and unreasonable" and "outside the aggravated range of the Sentencing Guidelines." Appellant's Brief at 20. Generally, our standard of review in assessing whether a trial court has erred in fashioning a sentence is well settled.

> Sentencing 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. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Holiday, 954 A.2d 6, 9 (Pa. Super. 2008), *appeal denied,* 972 A.2d 520 (Pa. 2009).

> In fashioning a sentence, a judge is obligated to 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 [Appellant]. A court is required to consider the particular circumstances of the offense and the character of the [Appellant]. In particular, the court should refer to the [Appellant]'s prior criminal record, his age, personal characteristics and his potential for rehabilitation.

Commonwealth v. Hyland, 875 A.2d 1175, 1184 (Pa. Super. 2005) (citations and quotation marks omitted), *appeal denied*, 890 A.2d 1057 (Pa. 2005).

Where an appellant challenges the discretionary aspects of his sentence, as is the case here, there is no automatic right to appeal and an appellant's appeal should be considered a petition for allowance of appeal. ***Commonwealth v. W.H.M., Jr.***, 932 A.2d 155, 163 (Pa. Super. 2007). We will grant an appeal challenging the discretion of the sentencing court only where the appellant has advanced a colorable argument that the sentence is inconsistent with the Sentencing Code or is contrary to the fundamental norms that underlie the sentencing process. ***Hyland***, ***supra*** at 1183. In other words, an appellant must seek permission from this Court to appeal and must establish that a substantial question exists that the sentence was not appropriate under the Sentencing Code. ***Commonwealth v. Mouzon***, 812 A.2d 617, 627-628 (Pa. 2002); 42 Pa.C.S.A. § 9781(b).

Prior to reaching the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine the following.

> (1) [W]hether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the

> issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** 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, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Prisk, 13 A.3d 526, 532 (Pa. Super. 2011).

Applying the four-factor test to the present matter, we conclude Appellant has complied with the first three requirements. Specifically, our review reveals that Appellant filed a timely notice of appeal on July 3, 2012, properly preserved his sentencing claim in his October 25, 2011 motion for reconsideration of his sentence, and has included a Rule 2119(f) statement in his brief. ***See*** Appellant's Brief at 9-10. Accordingly, we proceed to consider whether Appellant has presented a substantial question for our review. "A substantial question will be found where the defendant 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." ***Commonwealth v. Booze***, 953 A.2d 1263, 1278 (Pa. Super. 2008) (citation omitted), *appeal denied*, 13 A.3d 474 (Pa. 2010); ***see also*** 42 Pa.C.S.A. § 9781(b).

In the instant matter, Appellant argues that in fashioning his "manifestly excessive and unreasonable" sentence, the trial court "dwelled almost exclusively on [his] prior criminal history to the exclusion of almost any other sentencing factor[,]" and "failed to provide adequate and sufficient

reasons for [its] departure [from the Sentencing Guidelines]." Appellant's Brief at 21-22.

Upon review, we conclude that Appellant's claims present a substantial question for our review. ***See Commonwealth v. Lawrence***, 960 A.2d 473, 478 (Pa. Super. 2008) (stating "a claim that the sentencing court imposed an unreasonable sentence by sentencing outside the guidelines presents a substantial question[]") (citation omitted), *appeal denied*, 980 A.2d 606 (Pa. 2009).

It is well settled that this Court is required to vacate a sentence and remand for resentencing with instructions if the sentencing court imposed a sentence that is outside of the sentencing guidelines and the sentence is unreasonable. 42 Pa.C.S.A. § 9781(c)(3). In reviewing the record, we consider the following.

> (1) the nature of the 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 pre-sentence 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.A. § 9781(d).

A sentencing court may deviate from the guidelines, if necessary, to fashion a sentence that takes into account the protection of the public, the

rehabilitative needs of the defendant, and the gravity of the particular offense as it relates to the impact on the life of the victim and the community. ***Commonwealth v. Kenner***, 784 A.2d 808, 811 (Pa. Super. 2001), *appeal denied*, 796 A.2d 979 (Pa. 2002). However, the Sentencing Code requires that where a court imposes a sentence outside the guidelines, it "shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines." ***Lawrence***, ***supra*** at 479, *quoting* 42 Pa.C.S.A. § 9721(b).

Herein, our review of the record reveals that the trial court considered numerous factors in fashioning Appellant's sentence outside the aggravated range of the Sentencing Guidelines, including his prior record score, extensive criminal history, and his refusal to accept responsibility for his actions. As the trial court explained in its opinion,

> [t]he prior record score of [Appellant], as reflected by the sentencing guidelines provided by the Department of Probation and Parole, puts him at the RFEL level (repeat felony offender) with a prior record score of eleven. [Appellant's] record spans more than twenty years and includes more than fifteen convictions, many of which are for burglary, criminal trespass and theft. The guidelines for a Defendant with a RFEL prior record score and an offense gravity score of five for a felony of the third degree theft receiving stolen property conviction are twenty-four to thirty six months plus or minus three. Therefore, a sentence of three and one half to seven years places this sentence three months above the suggested sentencing guidelines….
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> …

> When given an opportunity to address the [t]rial [c]ourt before sentencing, [Appellant] reiterated the position [that he] was innocent of the charges [and] did not steal from the organization. He also stated that he was not given a fair opportunity to present [his] side of the story. At no time did [Appellant] take responsibility for his action or express remorse or regret for his crime.

Trial Court Opinion, 9/25/12, at 8-9 (citations and internal quotation marks omitted).

Additionally, the record reveals the trial court was made aware of numerous mitigating circumstances in this case, including Appellant's age, stable background, and extensive education and intelligence. N.T., 5/25/12, at 8-13. Our review of the May 25, 2012 sentencing hearing transcript further reveals the trial court stated adequate reasons on the record for the sentence imposed. Specifically, the trial court indicated that it considered the mental health evaluation, the facts underlying this offense, Appellant's lack of remorse, and his own testimony at the hearing. ***Id.*** at 18-19. The trial court further surmised that Appellant is not a good candidate for rehabilitation based on his criminal history, and that "[he] shouldn't be on the streets because [he is] stealing from people for no reason." ***Id.*** at 19.

Lastly, the trial court indicated that the pre-sentence investigation (PSI) and mental health evaluation played a role in its denial of Appellant's post-sentence motion for reconsideration of his sentence. Specifically, the trial court stated as follows.

> The PSI and Mental Health Evaluation reflected a myriad of inconsistencies provided by [Appellant] in regards to his upbringing, his residences and his education where he described receiving his Ph.D. in Corpus Christie, Texas and from Oxford University. In addition, the PSI concluded with the statement that [Appellant] has lived his adult life, on many occasions at the expense of others.

Trial Court Opinion, 9/25/12, at 9.

Proper appellate review dictates this Court not disturb a trial court's sentence absent a finding the court failed to weigh the sentencing considerations in a meaningful fashion. When reviewing sentencing matters, "[w]e must accord the sentencing court great weight as it is in the best position to view the defendant's character, displays of remorse, defiance or indifference, and the overall effect and nature of the crime." ***Commonwealth v. Miller***, 965 A.2d 276, 277 (Pa. Super. 2009) (citation omitted), *appeal denied*, 981 A.2d 218 (Pa. 2009), *cert. denied*, ***Miller v. Pennsylvania***, 130 S.Ct. 1068 (U.S. 2010). In the instant matter, we discern no abuse of the trial court's discretion. Accordingly, Appellant's claim must fail.

For all the foregoing reasons, we conclude that Appellant's claims on appeal merit no relief. Therefore, we affirm the trial court's May 25, 2012 judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 6/5/2013