NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. MIKOS MILLER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1889 EDA 2011

Appeal from the Judgment of Sentence March 6, 2006
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-CR-0002208-2005

BEFORE: BOWES, GANTMAN, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.: Filed: March 8, 2013

This appeal from the judgment of sentence imposed on March 6, 2006 followed the denial of a post-sentence motion filed *nunc pro tunc* by Mikos Miller. The present appeal is Appellant's third attempt to have this Court review the discretionary aspects of the sentence imposed herein. We affirm.

We briefly described the criminal episode. At approximately 1:00 a.m. on June 6, 2005, Appellant, HyQawnn Wallace, Alex Kulp, and Terrill Gibbs invaded a residence located on 624 Elm Street, Bethlehem, that was occupied by nine people. The four cohorts were each armed with a shotgun and also were in possession of one handgun. They bound their victims and terrorized them with the weapons, robbed eight people, placed a gun to the head of a thirteen-year-old boy who was mentally challenged, beat Neyland

DeSouza with a weapon, ransacked the home, and stole numerous items. During the criminal episode, one of the occupants of the house escaped and contacted police, who arrived while the four perpetrators were still at the scene and in the process of placing Mr. DeSouza in the trunk of a car. Appellant admitted to police that he was caught red-handed and acknowledged that he would be doing prison time for his actions.

On February 9, 2006, a jury convicted Appellant of eight counts of robbery, nine counts of simple assault, and one count each of aggravated assault, burglary, conspiracy to commit robbery, conspiracy to commit burglary, and conspiracy to commit simple assault. The Commonwealth issued notice of intent to seek the mandatory minimum sentence applicable to the crimes due to the fact that they were committed while Appellant was in visible possession of a firearm. At the March 6, 2006 sentencing proceeding, the court had the benefit of a newly-compiled presentence report, to which Appellant had no corrections. N.T. Sentencing, 3/6/06, at 2. Appellant had a criminal history and self-identified as a member of the Bloods gang. ***Id***. at 7.

After consideration of the presentence report, facts of the crime, arguments of counsel, Appellant's failure to display remorse, and all the factors outlined in the Sentencing Code, the court imposed its sentence. Appellant received concurrent sentences of five to ten years imprisonment as to each of the eight robbery convictions. That five-to-ten-year sentence

was imposed consecutively to an identical term for burglary. For the aggravated assault of Mr. DeSouza, conspiracy to commit burglary, and conspiracy to commit robbery, Appellant also received five to ten year terms of incarceration, which were all consecutive to one another and the other two sentences already imposed.[1] Finally, the court gave a consecutive sentence of six to twelve months imprisonment as to one count of simple assault. No penalty was imposed on the remaining eight counts of simple assault and one count of conspiracy. The total term of incarceration amounted to twenty-five and one-half to fifty-one years.

Appellant's post-sentencing rights were explained, but he did not file a post-sentence motion. Instead, he proceeded to file a direct appeal and challenged the discretionary aspects of his sentence. He failed to comply with the dictates of Pa.R.A.P. 2119(f) by placing in his brief a separate statement of reasons relied upon for the appeal of the discretionary aspects of the sentence imposed. Since the Commonwealth objected to the lack of the statement, we were prohibited from addressing the sole contention

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[1] On pages nine through eleven of his brief, Appellant appears to suggest that he should not have been sentenced on both the substantive crimes of burglary and robbery and on the conspiracies to commit those crimes. However, our Supreme Court has observed, "It has long been the law of this Commonwealth that the crime of criminal conspiracy does not merge with the completed offense which was the object of the conspiracy." ***Commonwealth v. Miller***, 364 A.2d 886, 886-87 (Pa. 1976).

raised in that appeal and affirmed. ***Commonwealth v. Miller***, 915 A.2d 146 (Pa.Super. 2006) (unpublished memorandum).

Appellant immediately filed a PCRA petition and contended that counsel was ineffective for failing to properly present Appellant's allegation as to the soundness of his sentence. The PCRA court, after conducting a hearing, concluded that counsel was not ineffective because all sentencing challenges were meritless. That PCRA petition was denied by June 28, 2007. Within one year of our decision in Appellant's direct appeal, Appellant filed a second PCRA petition seeking reinstatement of his appellate rights *nunc pro tunc*. The PCRA court granted him relief on October 5, 2007.

In the ensuing appeal *nunc pro tunc*, Appellant's allegations again pertained to the discretionary aspects of his sentence. We concluded that these averments were not preserved since Appellant did not file a post-sentence motion. ***Commonwealth v. Miller***, 963 A.2d 569 (Pa.super. 2008) (unpublished memorandum). The Supreme Court denied review on January 16, 2009. ***Commonwealth v. Miller***, 964 A.2d 2 (Pa. 2009).

On April 24, 2010, Appellant filed a timely *pro se* PCRA petition from his *nunc pro tunc* direct appeal. ***See Commonwealth v. Fowler***, 930 A.2d 586, 591 (Pa.Super. 2007) (quoting ***Commonwealth v. O'Bidos***, 849 A.2d 243, 252 n. 3 (Pa.Super. 2004)) ("It is now well-established that a PCRA petition brought after an appeal *nunc pro tunc* is considered an appellant's first PCRA petition, and the one-year time clock will not begin to run until

this appeal *nunc pro tunc* renders his judgment of sentence final."). Counsel was appointed and amended that petition by requesting the right to file a post-sentence motion *nunc pro tunc*. That relief was granted by the court, and the Commonwealth does not challenge that ruling. Appellant filed his post-sentence motion, which was dismissed by an order entered on March 4, 2011. Appellant filed the present appeal to this Court on March 25, 2011 from dismissal of his post-sentence motion. Appellant raises these allegations:

> Whether the sentencing Court erred in imposing an excessive sentence for failure to comply with sentencing norms, for improper double counting of seriousness of offense, already included [in] an offense gravity score, for imposing an excessive aggregate sentence, and for imposing an excessive aggregate sentence, demonstrating prejudice and ill will for Defendant proceeding to trial?

Appellant's brief at 4.

All of Appellant's contentions relate to the discretionary aspects of his sentence.

> Challenges to the discretionary aspects of sentencing do not guarantee an appeal as of right. ***Commonwealth v. Sierra**,* 752 A.2d 910, 912 (Pa.Super. 2000). An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:
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> We conduct a four-part analysis to determine: (1) whether 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 -533 (Pa.Super. 2011) (quoting ***Commonwealth v. Evans****,* 901 A.2d 528, 533 (Pa.Super. 2006).

In this case, the notice of appeal was timely filed from denial of a post-sentence motion, and Appellant preserved his sentencing challenge in that motion. Additionally, Appellant included in his brief a separate statement of the reasons for allowance of appeal from the discretionary aspects of his sentence, as required by Pa.R.A.P. 2119(f). Appellant's brief at 5. We proceeded to consider whether the statement raises a substantial question.

Appellant complains that the sentences on the conspiracy charges were in the aggravated range of the sentencing guidelines and were imposed "without any proper justification, either verbal or on the written record." ***Id***. The guidelines mandate that when "the court imposes an aggravated or mitigated sentence, it shall state the reasons on the record[.]" 204 Pa.Code. § 303.13(c). Hence, we have recognized that an allegation that court neglected to justify a sentence that is outside the standard guideline range raises a substantial question. ***Commonwealth v. Garcia-Rivera***, 983 A.2d 777 (Pa.Super. 2009).

Appellant also avers that the court sentenced him more severely by relying upon two improper sentencing factors: 1) his silence at sentencing, which Appellant contends was improperly characterized as displaying a lack of remorse; and 2) that he proceeded to trial rather than accept a tendered guilty plea arrangement. A finding that a defendant failed to display

remorse cannot be premised solely upon his exercise of his Fifth Amendment right to remain silent and refusal to acknowledge guilt at sentencing. ***Commonwealth v. Bowen***, 975 A.2d 1120, 1121 (Pa.Super. 2009). Also, a defendant cannot be penalized at sentencing based on his decision to exercise of his constitutional right to a jury trial. ***Commonwealth v. Bethea***, 379 A.2d 102, 104 (Pa. 1977). Since consideration of impermissible sentencing factors raises a substantial question, ***Commonwealth v. Downing***, 990 A.2d 788 (Pa.Super. 2010), these averments also are sufficient to permit allowance of appeal from the discretionary aspects of the sentence imposed.

In his Pa.R.A.P. 2119(f) statement, Appellant also suggests that the consecutive nature of the sentences imposed herein raises a substantial question. This type of allegation can raise a substantial question under narrow circumstances. Resolution of whether imposition of consecutive sentences raises a substantial question involves a detailed examination of the case law, nature of the sentence imposed, and facts of the crimes at issue. Thus, we will more fully delineated *infra* whether Appellant's position in this respect warrants review.

As Appellant's statement has raised the existence of substantial question as to the appropriateness of his sentence in two respects, we will review the merits of his positions on appeal. Our standard of review in this context is limited:

> 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. Glass, 50 A.3d 720, 727 (Pa.Super. 2012) (quoting ***Commonwealth v. Shugars***, 895 A.2d 1270, 1275 (Pa.Super. 2006)).

On the merits, Appellant first complains about the fact that five of his sentences were imposed consecutively. We have struggled recently with the issue of whether a challenge to the consecutive nature of a sentence even raises a substantial question in the first instance. ***See Prisk***, ***supra***. Appellant invokes ***Commonwealth v. Dodge***, 859 A.2d 771 (Pa.Super. 2004), *reversed*, 935 A.2d 1290 (Pa. 2007), and he argues that as in "***Dodge***, the consecutive sentences here are also inappropriate." Appellant's brief at 9.

In ***Dodge***, the defendant was given consecutive sentences on each crime that he committed. The offenses were all non-violent property crimes, and the resulting aggregate sentence was 58½ to 124 years incarceration. In ***Dodge***, this Court concluded that the overall sentence was so manifestly excessive as to be an abuse of discretion in light of the fact that the defendant, at a minimum, would be jailed until he was ninety-four years old for property crimes. We therefore reversed and remanded for resentencing. In so doing, we relied upon two Superior Court decisions that were

subsequently reversed, ***Commonwealth v. Walls***, 846 A.2d 152 (Pa.Super. 2004), *reversed*, 926 A.2d 957 (Pa. 2007), and ***Commonwealth v. Carabello***, 848 A.2d 1018 (Pa.Super. 2004), *reversed*, 933 A.2d 650 (Pa. 2007).

Dodge was thereafter reversed and remanded for reconsideration. ***Commonwealth v. Dodge***, 935 A.2d 1290 (Pa. 2007). Upon remand, we altered our analysis but came to the same conclusion and again reversed the sentence. Our reason for vacating the significant term of imprisonment imposed in the ***Dodge*** case is instructive herein:

> [T]he court did not acknowledge that its sentence essentially guarantees life imprisonment for Appellant. Likewise, the court did not acknowledge that the life sentence is comprised largely of consecutive sentences for receiving stolen costume jewelry. We acknowledge that many of the stolen items, though of little monetary value, were of significant sentimental value to the victims. The sentimental value of these items is an appropriate consideration in imposing a sentence. Nonetheless, we conclude that, based on the record before us, the trial court abused its discretion in imposing a life sentence for non-violent offenses with limited financial impact.

Commonwealth v. Dodge, 957 A.2d 1198, 1202 (Pa.Super. 2008). Thus, our ruling was premised upon two findings: 1) the sentence was tantamount to life imprisonment for the defendant therein; and 2) the life sentence was imposed for non-violent property crimes that had limited impact on the victims.

In light of the facts of the crimes at issue herein, Appellant's attempt to analogize this case to that of ***Dodge*** cannot be sustained. First, the

sentence in ***Dodge*** was more than double the sentence imposed in the present case. Appellant received a minimum sentence of twenty-five and one-half years. The sentencing court indicated that Appellant was a young man and that its aggregate sentence meant that Appellant would spend the majority, not entirety, of his adult life in prison. In addition, the sentencing court herein, unlike the ***Dodge*** sentencing court, did not impose consecutive sentences on each of Appellant's offenses. Rather, it imposed concurrent sentences on the eight robbery offenses at issue and imposed no sentence at all on eight simple assaults and one conspiracy conviction. Thus, unlike ***Dodge***, the present sentence is neither tantamount to life imprisonment nor close to the maximum sentence faced by Appellant.

Next, Appellant did not commit non-violent property crimes with little impact on his victims. Appellant and his cohorts were armed with five weapons and committed a nighttime invasion of a residence containing nine people. They terrorized nine victims, robbed eight of them, pistol whipped one man, held the gun to the head of a child, and were engaged in an attempted kidnapping when police arrived at the crime scene.

As we have recently noted, "[T]he key to resolving the preliminary substantial question inquiry [regarding a challenge to the imposition of consecutive sentences] 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." ***Commonwealth v. Gonzalez-Dejusus***, 994 A.2d 595, 598-99 (Pa.Super.

2010) (footnote omitted); ***accord Prisk***, ***supra***; ***Commonwealth v. Mastromarino***, 2 A.3d 581 (Pa.Super. 2010). In light of the above-discussion, we conclude that the sentence does not, on its face, appear to be excessive give that the sentence did not approach a term of life imprisonment, the term of incarceration fell far short of the maximum permissible sentence, and the vicious nature of the criminal conduct Appellant and his co-conspirators directed at numerous victims. The decision to sentence consecutively on five of twenty-two crimes committed during a criminal episode that involved significant violence against numerous victims does not facially seem to be unwarranted. Hence, we decline to find the existence of a substantial question in this respect, and, concomitantly, must reject Appellant's challenge to the consecutive nature of his sentence.[2]

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[2] In this portion of his brief, Appellant also baldly asserts that he committed only one conspiracy and could not have been sentenced consecutively on the two conspiracy counts. Appellant's brief at 10. As our Supreme Court clearly delineated over ten years ago, this type of allegation is properly characterized as a challenge to the sufficiency of the evidence supporting a guilty verdict on more than one conspiracy offense rather than one relating to the legality of the sentence imposed. ***Commonwealth v. Andrews***, 768 A.2d 309 (Pa. 2001); ***see also Commonwealth v. Wade***, 33 A.3d 108 (Pa.Super. 2011); ***Commonwealth v. Marinez***, 777 A.2d 1121 (Pa.Super. 2001). However, Appellant fails to refer to any cases discussing the sufficiency of the evidence to support that there was more than one conspiracy involved in this criminal episode. ***See Andrews***, ***supra*** (discussing test to be employed in determining whether the Commonwealth produced sufficient evidence to support jury's determination that there was more than one criminal conspiracy and affirming more than one conspiracy conviction). Appellant similarly neglects to delve, to any extent, into the proof presented by the Commonwealth as to existence of separate conspiracies. Thus, this position is undeveloped and will not be considered.
(Footnote Continued Next Page)

Appellant next claims that he was sentenced more severely because he lacked remorse and that the trial court improperly based its finding that he was not contrite solely upon his silence at sentencing. In ***Commonwealth v. Bowen***, ***supra*** at 1121, we held that "a court may not consider a defendant's silence at sentencing as indicative of his failure to take responsibility for the crimes of which he was convicted" and that "silence at sentencing may not be the sole factor in determining a defendant's lack of remorse." However, in that decision, we also specifically acknowledged that a lack of remorse is a valid sentencing factor and that it can be utilized in the sentencing process so long as the court premises its finding as to a lack of remorse on something other than the defendant's exercise of his Fifth Amendment right to remain silent.

In the present case, we first note that Appellant was not silent at sentencing. After the district attorney asked the court to impose mandatory minimum, consecutive sentences on all of Appellant's convictions, Appellant expressed anger since the district attorney had offered Appellant a plea arrangement whereby he would have received a fifteen to thirty year term of imprisonment. Second, when it extrapolated on the reasons for its sentence, the sentencing court never mentioned Appellant's silence, and it

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Commonwealth v. Spotz, 18 A.3d 244 (Pa. 2011) (single sentence, undeveloped assertion is unreviewable).

simply was not utilized as a basis for its finding that Appellant did not exhibit remorse for his conduct.

At the start of its discourse on the rationale for its sentencing decision, the court indicated that it considered all of the pertinent sentencing factors, the presentence report, and counsels' arguments. It noted that Appellant was a young man with a prior record score that demonstrated a "course of conduct in which little respect has been shown for the law." N.T. Sentencing, 3/6/06, at 9. The court had presided over trial and, thus, possessed intimate knowledge of the facts of the crime, which it characterized as horrific. The court supported this classification by addressing Appellant directly, as follows. "You and your compatriots bound [the victims] with tape. You brought in a sawed-off shotgun and a pistol. You threatened them with it. You robbed them. You assaulted them – some of them. You victimized an individual who should have been recognized by you not simply as a minor but someone who had some mental difficulties." ***Id***. The sentencing court also expressed concern over the fact that Mr. DeSouza was in the process of being placed in the trunk of a car when police arrived. It noted that, absent this interruption, "something even worse may have occurred." ***Id***. at 10.

Then, the court informed Appellant, "You have demonstrated no remorse whatsoever." ***Id***. at 10. It explained that "not a word of remorse has been uttered by you even here today. What you tell us is, 'Oh, I didn't get the deal I could have gotten.' That's the remorse you showed." ***Id***.

Hence, the record fails to sustain any finding that trial court violated Appellant's Fifth Amendment right to remain silent by suggesting that he lacked remorse due to his failure to admit guilt, and this argument fails.

Appellant next complains that the sentencing court failed to take into account various mitigating factors, including his "age, limited educational and intellectual capacity, and his troubled youth." Appellant's brief at 11. However, this assertion cannot be accepted since the court specifically stated that it reviewed and relied upon the presentence report when it imposed its sentence. As we noted in ***Commonwealth v. Macias***, 968 A.2d 773, 778 (Pa.Super. 2009) (quoting ***Commonwealth v. Devers***, 546 A.2d 12, 18 (Pa. 1988)):

> Where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. In order to dispel any lingering doubt as to our intention of engaging in an effort of legal purification, we state clearly that sentencers are under no compulsion to employ checklists or any extended or systematic definitions of their punishment procedure. Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed. This is particularly true, we repeat, in those circumstances where it can be demonstrated that the judge had any degree of awareness of the sentencing considerations, and there we will presume also that the weighing process took place in a meaningful fashion. It would be foolish, indeed, to take the position that if a court is in possession of the facts, it will fail to apply them to the case at hand.

Appellant next avers that the court imposed a harsher sentence because he rejected the guilty plea offered by the Commonwealth and

exercised his right to a jury trial. Appellant's brief at 11-12. As noted, this type of action is forbidden under ***Commonwealth v. Bethea***, ***supra***. However, the record dispels any conclusion that this punitive measure occurred. As noted, Appellant did express frustration that the district attorney was asking for a lengthy sentence when it previously agreed to permit Appellant to plead guilty in return for a sentence of fifteen to thirty years. Appellant also specifically averred, "And it seems like he is trying to punish me for taking it to trial. Is that wrong in the courts?" N.T. Sentencing, 3/6/09, at 8.

The district attorney then quickly acknowledged that Appellant should not "be penalized for going to trial," ***id***., and the sentencing court agreed by stating, "I don't hold it against you for going to trial[.]" ***Id***. at 10. Then, as detailed *supra*, the sentencing court delineated a cogent and extensive rationale for the sentence imposed. All of the factors that it considered were legitimate and supported by the record, and none involved the fact that Appellant exercised his right to a jury trial. Thus, we cannot agree that a more severe punishment was imposed in this case because Appellant proceeded to trial rather than plead guilty. ***Commonwealth v. Smith***, 673 A.2d 893, 896 (Pa. 1996) ("The application of our decision in ***Bethea*** is limited to the narrow category of cases in which a trial court impermissibly penalizes a defendant for exercising constitutional rights.")

Finally, we must reject Appellant's position that he was sentenced on the conspiracy convictions in the aggrevated range of the sentencing guidelines without adequate justification. Appellant's brief at 5 ("The consecutive sentences for the conspiracy charges were excessive in the aggravated range without any proper justification [.]"); ***see also*** Appellant's brief at 10. The Commonwealth notified Appellant prior to sentencing that it would be seeking the mandatory minimum sentence of five years imprisonment applicable for these crimes based on the fact that they were committed when Appellant possessed a gun.[3] The sentencing court noted that it imposed five-to-ten-year terms of imprisonment as to conspiracy to commit robbery and conspiracy to commit burglary and indicated that they were mandatory minimum sentences that "were imposed because of the use and possession of a firearm during the commission of the crimes." Trial

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[3] Specifically, 42 Pa.C.S. § 9712(a) calls for a mandatory minimum sentence of at least "five years of total confinement" for a person convicted of a crime of violence as defined in 42 Pa.C.S. 9714(g) when the person "visibly possessed a firearm . . . that placed the victim in reasonable fear of death or serious bodily injury, during the commission of the offense[.]" A crime of violence as outlined in § 9714(g), includes, *inter alia*,: 1) "burglary of a structure adapted for overnight accommodation in which at the time of the offense any person is present"; 2) "robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii), or (iii)"; and 3) "criminal conspiracy . . . to commit . . . any of the offenses listed above[.]". In this case, Appellant burglarized a residence that was occupied by nine people. He also was charged and convicted of robbery under 18 Pa.C.S. § 3701(a)(1)(ii) ("A person is guilty of robbery if, in the course of committing a theft, he . . . threatens another with or intentionally puts him in fear of immediate serious bodily injury[.]"). Finally, he was convicted of conspiracy to commit both of those crimes.

Court opinion, 9/27/12, at 1. Hence, the sentencing guidelines were not implicated for those sentences. Appellant received a standard range sentence of six to twelve months in the simple assault. Hence, we reject Appellant's final challenge to the sentence imposed.

Judgment of sentence affirmed.