

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

LARRY F. DUGAN

Appellant

No. 1988 WDA 2012

Appeal from the PCRA Order of November 13, 2012  
In the Court of Common Pleas of Lawrence County  
Criminal Division at No.: CP-37-CR-0000609-2010

BEFORE: FORD ELLIOTT, P.J.E., WECHT, J., and STRASSBURGER, J.\*

MEMORANDUM BY WECHT, J.

FILED: February 3, 2014

Larry F. Dugan challenges the PCRA court's order dismissing his petition pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541, *et seq.* We affirm.

The trial court set forth the following brief procedural history of the case:

On March 3, 2011, [Dugan] pleaded guilty to the charges of Attempted Unlawful Contact with a Minor pursuant to 18 Pa.C.S.A. § 6318(a)(1), Unlawful Contact with a Minor – Obscene or Explicit Sexual Material pursuant to 18 Pa.C.S.A. § 6318(a)(4), and two (2) counts of Criminal Use of a Communication Facility pursuant to 18 Pa.C.S.A. § 7512(a). This Court imposed a concurrent sentence upon [Dugan] of four (4) to eight (8) years['] imprisonment by Order of Court dated March 3, 2011. In calculating this sentence, this Court

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\* Retired Senior Judge assigned to the Superior Court.

considered, *inter ali* [sic], [Dugan's] 1974 burglary conviction in the State of Ohio.

PCRA Court Opinion ("P.C.O."), 11/13/2012, at 1-2.

Dugan did not file a direct appeal. On February 17, 2012, Dugan filed a timely *pro se* petition for relief pursuant to the PCRA. In a lengthy memorandum attached to his petition, Dugan argued that his sentence was illegal because incorporating into his prior record score a conviction that preceded the enactment of Pennsylvania's sentencing guidelines violated the *ex post facto* clause of the United States and Pennsylvania Constitutions. The PCRA court appointed counsel, and a PCRA hearing was held on October 25, 2012. By order entered on November 13, 2012, the PCRA court denied Dugan's petition. Dugan filed a timely notice of appeal of the PCRA court's order on November 28, 2012.

On January 8, 2013, the PCRA court directed Dugan to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Dugan's Rule 1925 statement does not appear in the certified record and is not appended to his brief. However, it appears that the PCRA court received one, as evinced by its February 28, 2013 opinion pursuant to Rule 1925(a). Therein, the court characterized the issues raised by Dugan as follows:

(1) [the trial court] erred in denying his [PCRA petition] because his prior counsel was ineffective for failing to object to the [trial court's] consideration of a prior conviction during his sentencing; (2) [the trial court] erred in denying his [PCRA petition] because prior counsel failed to explain the charges against him or his prior record score; (3) [the trial court] erred in denying his [PCRA petition] because prior counsel was ineffective for failing to file a motion to modify his sentence; and (4) [the trial court]

erred in denying his [PCRA petition] because his sentence violates the Eighth Amendment to the United States Constitutional prohibition against cruel and unusual punishment.

P.C.O., 2/28/2013, at 1. The PCRA court addressed and rejected these issues (and no others) in its Rule 1925(a) opinion.

Before this Court, Dugan raises the following issues:

- 1) Whether trial counsel was ineffective at sentencing in failing to present mitigating circumstances related to [Dugan's] life history and background[?]
- 2) Whether the sentencing court was manifestly unreasonable in not exercising its discretion to depart from the guidelines in sentencing [Dugan?]

Brief for Dugan at xiv (numbering added; formatting modified). For two reasons, we must find that neither of Dugan's issues as stated or argued before this Court was preserved in the court below. Consequently, we must deem them waived, and we must affirm the trial court's order.

As noted, in the memorandum attached to Dugan's *pro se* PCRA petition, Dugan pursued only the *ex post facto* argument. Counsel was appointed, but did not file an amended petition. Instead, on October 25, 2012, counsel appeared on Dugan's behalf at the PCRA hearing, which Dugan attended and participated in by video. During that hearing, counsel for Dugan argued only the *ex post facto* issue. Nothing was said about the absence of mitigating circumstances. Similarly, no challenge was raised or discussed regarding the trial court's exercise of discretion in declining to depart downward from the sentencing guidelines. Following the

presentations of counsel for Dugan and for the Commonwealth, Dugan was asked whether he had anything to add. He indicated that he did not. Notes of Testimony, 10/25/2012, at 12-13. Notably, Dugan does not now challenge the effectiveness of PCRA counsel for failing to file an amended petition or for failing to raise any issue not raised in Dugan's *pro se* PCRA petition.

Pennsylvania Rule of Appellate Procedure 302(a) provides that “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” To that end, “[f]ailure to raise an issue before the PCRA court results in waiver.” ***Commonwealth v. Paddy***, 15 A.3d 431, 446 (Pa. 2011) (citing ***Commonwealth v. Natividad***, 938 A.2d 310, 322, 336 (Pa. 2007)). Because none of the issues Dugan seeks to argue before this Court was presented in the first instance to the PCRA court, they are waived for purposes of appeal.

Even if this were not the case, however, the issues would be waived for another reason: As best we can discern in the absence from the certified record of Dugan's Rule 1925(b) statement,<sup>1</sup> he did not raise the issues

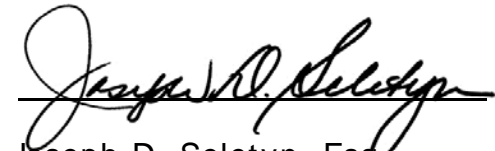
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<sup>1</sup> We long have held that “responsibility rests upon the appellant to ensure that the record certified on appeal is complete in the sense that it contains all of the materials necessary for the reviewing court to perform its duty.” ***Commonwealth v. Bongiorno***, 905 A.2d 998, 1000 (Pa. Super. 2006). Moreover, Pa.R.A.P. 2111(a)(11) requires an appellant to attach a copy of his or her Rule 1925(b) statement, if any, to his or her brief. Dugan has failed to do so in this case.

presented to us in that statement, depriving the PCRA court of the opportunity to consider those challenges to its order in the first instance. In service of the same principles set forth above, this, too, results in waiver of the issues presented to this Court. **See** Pa.R.A.P. 1925(b)(4)(vii) (“Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.”); ***Commonwealth v. Lord***, 719 A.2d 306 (Pa. 1998).

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 2/3/2014