

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

AUSTIN JAMES STRAWSER

Appellant

No. 1023 MDA 2013

Appeal from the Judgment of Sentence dated May 2, 2013
In the Court of Common Pleas of the 41st Judicial District of Pennsylvania,
Perry County Branch
Criminal Division at No: CP-50-CR-0000507-2012

BEFORE: MUNDY, OLSON, and STABILE, JJ.

MEMORANDUM BY STABILE, J.:

FILED MAY 15, 2014

Appellant Austin James Strawser appeals from a judgment of sentence, which the Court of Common Pleas of the 41st Judicial District of Pennsylvania, Perry County Branch (trial court), imposed following his guilty plea to indecent assault.¹ Upon review, we affirm.

The only issue Appellant advances on appeal is whether the trial court abused its discretion in resentencing him to a lengthier prison term.²

¹ 18 Pa.C.S. § 3126(a)(7).

² As the trial court found:

Less than one hour after Appellant's sentencing, [the trial court] was informed that Appellant caused a significant disruption while talking to a county probation officer. Shortly thereafter, at the direction of [the trial court], a second hearing was convened. [At the hearing,] Appellant was present, as was his counsel, the District Attorney, and Probation Officer Lisa Finkenbinder.

(Footnote Continued Next Page)

Specifically, Appellant argues that the trial court abused its discretion when it resentenced him to six to twenty-three months' imprisonment, within three hours of sentencing him to forty-eight hours' to thirty days' imprisonment.

Preliminarily, we observe that "[t]he right to appeal a discretionary aspect of sentence is not absolute." **Commonwealth v. Martin**, 727 A.2d 1136, 1143 (Pa. Super. 1999). Rather, where an appellant challenges the discretionary aspects of a sentence, an appellant's appeal should be considered as a petition for allowance of appeal. **Commonwealth v. W.H.M.**, 932 A.2d 155, 162 (Pa. Super. 2007). As we stated in **Commonwealth v. Moury**, 992 A.2d 162 (Pa. Super. 2010):

An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:

[W]e 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).

Id. at 170 (citing **Commonwealth v. Evans**, 901 A.2d 528 (Pa. Super. 2006)). Objections to the discretionary aspects of a sentence are waived if they are not raised at the sentencing hearing or in a motion to modify the

(Footnote Continued) _____

Trial Court Opinion, 8/26/13, at 1.

sentence imposed. *Id.* (citing ***Commonwealth v. Mann***, 820 A.2d 788 (Pa. Super. 2003)).

Here, in objecting to Appellant's challenge, the Commonwealth points out that Appellant is unable to meet the four-part test because his brief does not contain a section implicating the discretionary aspects of his sentence as required under Pa.R.A.P. 2119(f).³ Appellee's Brief at 12. We agree and thus, we consider his challenge to the discretionary aspect of his sentence waived.⁴ ***See Commonwealth v. Foster***, 960 A.2d 160, 163 (Pa. Super. 2008) (noting even if properly preserved, a challenge to the discretionary

³ Rule 2119(f) provides:

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.

(Emphasis added.)

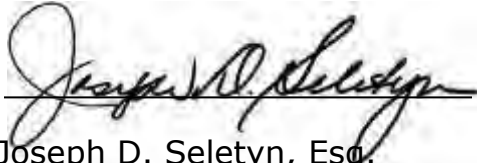
⁴ Appellant appears to argue in his brief that the trial court lacked authority to reconvene the hearing for purposes of modifying his sentence. We, however, decline to address this argument, because Appellant failed to develop it in his brief. Specifically, Appellant failed to cite to any legal authority for the proposition that a trial court may not modify its sentencing order *sua sponte* after providing notice to the parties. Nonetheless, we observe that under Section 5505 of the Judicial Code, Act of July 9, 1976, P.L. 586, ***as amended***, 42 Pa.C.S. § 5505, a trial court "upon *notice* to the parties may modify or rescind any order within 30 days after its entry . . . if no appeal from such order has been taken or allowed." ***See also Commonwealth v. Postell***, 693 A.2d 612, 616 n.6 (Pa. Super. 1997), ***appeal denied***, 706 A.2d 1212 (Pa. 1998). Here, the record reveals that Appellant, his counsel, the district attorney and the complaining probation officer were present during the resentencing hearing, which occurred about three hours after the trial court imposed the initial sentence on Appellant.

aspect of sentence is waived if an appellant does not include a Pa.R.A.P. 2119(f) statement in his brief and the opposing party objects to the statement's absence), **aff'd**, 17 A.3d 332 (Pa. 2011).

Judgment of sentence affirmed.

Judge Mundy concurs in the result.

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: 5/15/2014