NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. WINFIELD THOMPSON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1033 EDA 2013

Appeal from the Judgment of Sentence January 18, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0010168-2011

BEFORE: GANTMAN, P.J., JENKINS, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, P.J.: **FILED JULY 16, 2014**

Appellant, Winfield Thompson,[1] appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his *nolo contendere* plea to involuntary deviate sexual intercourse by forcible compulsion, unlawful contact with a minor, burglary, possessing an instrument of crime ("PIC"), and two (2) counts of rape by forcible compulsion.[2] We affirm.

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[1] The certified record indicates alternative names for Appellant, including "Winfield White," "Whitfield Thompson," and "Winston Thompson."

[2] 18 Pa.C.S.A. §§, 3123(a)(1), 6318(a)(1), 3502(a), 907(a), and 3121(a)(1), respectively. Prior to sentencing, the Commonwealth withdrew the PIC charge as beyond the relevant statute of limitations.

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*Former Justice specially assigned to the Superior Court.

In its opinion, the trial court fully and correctly sets forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them.

Appellant raises the following issue for our review:

> WAS THE TRIAL COURT'S AGGREGATE SENTENCE OF FIFTY TO ONE HUNDRED YEARS' INCARCERATION A MANIFESTLY EXCESSIVE SENTENCE UNDER THE CIRCUMSTANCES?

(Appellant's Brief at 2).

Appellant argues his aggregate sentence of fifty (50) to one hundred (100) years' imprisonment is manifestly excessive. Appellant claims the sentencing court based its sentence on only the seriousness of his crimes, and failed to consider any mitigating factors, such as Appellant's expressed remorse for his crimes. Appellant also contends the court failed to consider his rehabilitative needs, and to place adequate reasons on the record for imposing sentences in the aggravated range. Appellant concludes the sentencing court abused its discretion, and this Court should vacate and remand for resentencing. Appellant challenges the discretionary aspects of his sentence. ***See Commonwealth v. Dunphy***, 20 A.3d 1215 (Pa.Super. 2011) (stating claim that sentencing court failed to offer adequate reasons to support sentence challenges discretionary aspects of sentencing); ***Commonwealth v. Lutes***, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing); ***Commonwealth v. Cruz-Centeno***, 668 A.2d 536 (Pa.Super.

1995) (explaining claim that court did not consider mitigating factors challenges discretionary aspects of sentencing).

Prior to reaching the merits of a discretionary sentencing issue:

> [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).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating a substantial question as to the appropriateness of the sentence under the Sentencing Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). The concise statement must indicate "where the sentence falls in relation to the sentencing guidelines and what particular provision of the code it violates." ***Commonwealth v. Kiesel***, 854 A.2d 530, 532 (Pa.Super. 2004) (quoting ***Commonwealth v. Goggins***, 748 A.2d 721, 727 (Pa.Super. 2000), *appeal denied,* 563 Pa. 672, 759 A.2d 920 (2000)). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal 'furthers the purpose evident in the Sentencing Code

as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to exceptional cases.'" ***Commonwealth v. Williams***, 562 A.2d 1385, 1387 (Pa.Super. 1989) (*en banc*).

> [O]nly where the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process, will such a statement be deemed adequate to raise a substantial question so as to permit a grant of allowance of appeal of the discretionary aspects of the sentence. ***See*** [***Commonwealth v. Koehler***, 558 Pa. 334, 370, 737 A.2d 225, 244 (1999)] (party must articulate why sentence raises doubts that sentence was improper under the Sentencing Code).

Mouzon, supra at 435, 812 A.2d at 627.

A claim that a sentence is manifestly excessive might raise a substantial question if the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence imposed violates a specific provision of the Sentencing Code or the norms underlying the sentencing process. ***Mouzon, supra*** at 435, 812 A.2d at 627. Generally, "[a]n allegation that a sentencing court failed to consider or did not adequately consider certain factors does not raise a substantial question that the sentence was inappropriate." ***Cruz-Centeno, supra*** at 545 (internal quotation marks omitted). Nevertheless, "[a]n allegation that a judge 'failed to offer specific reasons for [a] sentence does raise a substantial question.'" ***Dunphy, supra*** at 1222 (quoting ***Commonwealth v. Reynolds***, 835 A.2d

720, 734 (Pa.Super. 2003)).

Preliminarily, we note Appellant failed to raise at sentencing or in his post-sentence motion his claims concerning the sentencing court's failure to consider mitigating factors and Appellant's rehabilitative needs, and to place adequate reasons for Appellant's sentence on the record. Therefore, these arguments are waived. ***See Commonwealth v. Mann***, 820 A.2d 788 (Pa.Super. 2003) (stating issues that challenge discretionary aspects of sentencing are generally waived if they are not raised during sentencing proceedings or in post-sentence motion).

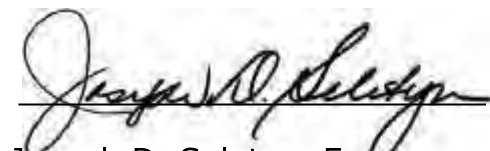
Instantly, Appellant's post-sentence motion and Rule 2119(f) statement preserved his claim alleging a manifestly excessive sentence. After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable James Murray Lynn, we conclude Appellant's issue merits no relief. The trial court opinion comprehensively discusses and properly disposes of the question presented. (***See*** Trial Court Opinion, filed December 27, 2013, at 6-9) (finding: all sentences court imposed were within statutory maximum; court fully set forth factors it had considered prior to imposing sentence, including pre-sentence investigative report, facts of case, Appellant's *nolo contendere* plea, mental health, drug use, family history, extensive criminal record, prior record score, sentencing guidelines, and that Appellant was sexually violent predator; Appellant committed especially heinous crime, for which he failed

to take full responsibility because he pled *nolo contendere* and blamed his actions on peer pressure and drug use; Appellant posed significant danger to community; court did not abuse its discretion). The record supports the trial court's decision; therefore, we see no reason to disturb it. Accordingly, we affirm on the basis of the trial court's opinion.

Judgment of sentence affirmed.

*JUSTICE FITZGERALD CONCURS IN THE RESULT.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

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IN THE COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PHILADELPHIA
TRIAL DIVISION -CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	**COURT OF COMMON PLEAS PHILADELPHIA COUNTY**
	:	**No. CP-51-CR-0010168-2011**
v.	:	
	:	**SUPERIOR COURT NO. 1033 EDA 2013**
WINFIELD THOMPSON, Appellant	:	

CP-51-CR-0010168-2011 Comm. v. Thompson, Winfield
Opinion

Lynn, J.

OPINION

This is an appeal from a judgment of sentence following a no contest plea before this Court on July 20, 2012 after which the Appellant was found guilty of 2 counts of Rape, Involuntary Deviate Sexual Intercourse, Unlawful Contact with a Minor, Burglary and Possession of an Instrument of Crime. Sentencing was deferred for the preparation of a presentence report, mental health evaluation and a Megan's Law evaluation. A sentencing hearing took place on January 18, 2013 at which time this Court found the Appellant to be a sexually violent predator. Prior to sentencing the Commonwealth nolle prossed the charge of Possession of an Instrument of Crime, as it was beyond the statute of limitations. This Court then sentenced the Appellant to the statutory maximum of 10 to 20 years on each of the remaining charges to run consecutively for a total aggregate sentence of 50-100 years incarceration. Appellant filed a timely post-sentence motion to reconsider his sentence on January 28, 2012 which this Court denied on March 13, 2013. Appellant filed a timely notice of appeal.

The sole issue raised on appeal alleges that this Court's sentence was a manifestly excessive sentence given that the Appellant pled guilty, expressed remorse, that the offenses were committed as a result of drug use, that the Court failed to consider Appellant's rehabilitative needs and that the sentence imposed constituted, in effect, a life sentence.

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. Commonwealth v. McNabb, 819 A.2d 54 (Pa. Super. 2003). There is no absolute right to appeal the discretionary aspects of a sentence. Commonwealth v. Mastromarino, 2 A.3d 581 (Pa. Super. 2010). Rather, allowance of an appeal raising such a claim will be granted only when the appellate court determines that there is a substantial question that the sentence is not appropriate under the Sentencing Code. Commonwealth v. Glass, 50 A.3d 720 (Pa. Super. 2012). The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. Commonwealth v. Howard, 64 A.3d 690 (Pa. Super. 2013). Bald allegations of excessiveness are insufficient to demonstrate a substantial question. Commonwealth v. Dunphy, 20 A.3d 1215 (Pa. Super. 2011). A substantial question exists only when an appellant advances a colorable argument that the sentencing judge's actions either: (1) violated a specific provision of the Sentencing Code or; (2) were contrary to the fundamental norms which underlie the sentencing process. Commonwealth v. Griffin, 65 A.3d 932 (Pa. Super. 2013).

Generally, Pennsylvania law affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time. Any challenge to the exercise of this discretion ordinarily does not raise a substantial question. Commonwealth v. Harvard, 64 A.3d 690 (Pa. Super. 2013).

An appellant is not automatically entitled to a volume discount for his crimes by having all of his sentences run concurrently. Commonwealth v. Austin, 66 A.3d 798 (Pa. Super. 2013). The imposition of consecutive sentences may raise a substantial question in only the most extreme circumstances. The key to determining whether a substantial question has been raised is whether the decision to sentence consecutively raises the aggregate sentence to what, on its face, appears to be an excessive level in light of the criminal conduct at issue in a particular case. Commonwealth v. Prisk, 13 A.3d 526 (Pa. Super. 2011).

The undisputed horrific facts of the instant case are as follows: On October 15, 2001, at approximately 5:00 A.M. the Appellant entered into the residence located at 805 North 11th Street in Philadelphia. (N.T. 7-20-2012, p. 28). Asleep inside the home were the complainants, "D.D." and her 14 year old daughter "A.L."[1] A.L. woke up to find the Appellant near her third floor bedroom. (N.T. 7-20-2012, p. 30). The Appellant walked over to her bed and asked her if she had any jewelry or money, to which A.L. stated, "No." (N.T. 7-20-2012, p. 30). When the Appellant continued to ask A.L. for jewelry or money, she told him that she had some money in her mom's room. (N.T. 7-20-2012, p. 30). The Appellant took A.L. into her mother's room while telling her that if anyone was in the room, he would kill them both. (N.T. 7-20-2012, p. 30). D.D. awoke to find her daughter sitting on the side of her bed with the Appellant standing over them. (N.T. 7-20-2012, p. 28). The Appellant punched D.D. in the face and demanded money. (N.T. 7-20-2012, p. 29). When D.D. told the Appellant that she did not have any money, he made 14 year old A.L. lay down on the bed next to her. (N.T. 7-20-2012, p. 29). The Appellant took D.D. from the bed, pulled her scarf over her face and forced her to walk over to her dresser. (N.T. 7-20-2012, p. 28). The Appellant began looking for money in her jewelry box

[1] The initials of the complainant mother and her minor child are being used in lieu of their full names in order to protect their identity.

after which, he threw her back onto the bed next to her daughter. (N.T. 7-20-2012, p. 28). The Appellant then placed a bed cover over the faces of D.D. and A.L., telling them not to move. (N.T. 7-20-2012, p. 31). The Appellant walked in and out of the bedroom and started to punch both mother and daughter causing D.D. to suffer a small lump above her right eye and a cut on her finger. (N.T. 7-20-2012, p. 29). Following these assaults, the Appellant climbed on top of 14 year old A.L. and began to engage in intercourse. (N.T. 7-20-2012, p. 31). D.D. screamed begging the Appellant not to rape her daughter. (N.T. 7-20-2012, p. 31). The Appellant then got on top of D.D. and raped her vaginally. (N.T. 7-20-2012, p. 29, 31). The Appellant had a knife in his hand and threatened to slit D.D.'s throat if she moved. (N.T. 7-20-2012, p. 29, 31). The Appellant also forced D.D. to perform oral sex. (N.T. 7-20-2012, p. 29). All of these acts were done while D.D.'s 14 year old daughter was forced to lie next to her defenseless mother. (N.T. 7-20-2012, p. 29-30). Both complainants were treated at Episcopal Hospital, at which time a rape kit was done on D.D. (N.T. 7-20-2012, p. 31). Following these horrendous actions, Appellant remained free to commit other crimes on the streets of Philadelphia for almost nine years until August 2010 when he was finally identified as the perpetrator through DNA evidence. (N.T. 7-20-2012, p. 32). The Appellant did not contest the rape of the child, A.L., or the Mother, D.D. before his Court. At the plea hearing, on July 20, 2012, in Courtroom 808 of the Criminal Justice Center, the following exchange occurred between the Court and the Appellant:

THE COURT: All right. So I'll ask you, you heard all the evidence the Commonwealth has, this young lady and her mother –

THE DEFENDANT: Yes, Your Honor.

THE COURT: --say that you raped them.

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you're not contesting either of those two things?

THE DEFENDANT: No, Your Honor.

THE COURT: And that you had a knife?

THE DEFENDANT: Yes, Your Honor.

(N.T. 7-20-2012, p. 36)

Assuming, *arguendo,* that Appellant has presented a substantial question, thus permitting review, the Court's sentence did not constitute an abuse of discretion and thus should not be disturbed. The proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion. Commonwealth v. Fisher, 47 A.3d 155 (Pa. Super. 2012). An abuse of discretion is more than a mere error in judgment. A sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable; or the result of partiality, prejudice, bias or ill-will. Commonwealth v. Perry, 32 A.3d 232 (Pa. 2011). The rationale behind such broad discretion is based upon the recognition that the trial court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it. Commonwealth v. Riggs, 63 A.3d 780 (Pa. Super 2012).

The trial court must follow the general principle that the sentence imposed should take into consideration the protection of the public, the gravity of the offense as it relates to the life of the victim and on the community and the rehabilitative needs of the defendant 42 Pa. C.S.A. 9721(b).

Upon review, an Appellate Court must consider:

(1) The nature and circumstance of the offense and the history and characteristics of the defendant.

(2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.

(3) The findings upon which the sentence was based.

(4) The guidelines promulgated by the commission.

42 Pa. C.S.A. § 9781(d)

In the instant case all sentences imposed by this Court were within the statutory maximum for all of the criminal offenses for which he was found guilty. The fact that the maximum sentences for each offense was imposed cannot, on that ground alone, be considered illegal or inordinate. Moreover, this Court had the benefit of a pre-sentence report which was considered fully before imposing sentence. Where pre-sentence reports exist, there is a presumption that the sentencing judge was both aware of and appropriately weighed all relevant information regarding a defendant's character and any mitigation circumstances. Commonwealth v. Ventura, 975 A2d 1128 (Pa. Super. 2009). A sentencing judge can satisfy the requirement of placing on the record the reasons for imposing sentence by indicating that he has been informed by a presentence report. Commonwealth v. Burns, 765 A.2d 1144 (Pa. Super. 2000). Prior to sentencing this Court explicitly stated that it had reviewed and considered the presentence report.

This Court also considered the Appellant's extensive criminal record. The presentence report revealed that the Appellant had nine (9) arrests and four (4) adjudications as a juvenile involving one (1) count of Robbery and three (3) counts of Burglary. As an adult, the Appellant had a record of twenty-three (23) arrests and seventeen (17) convictions. Specifically, the Appellant had twelve (12) convictions for Burglary. Seven (7) of these Burglary convictions arose during the nine year time period after he perpetrated the sexual assaults in the instant case.

Additionally, the Appellant incurred sixty (60) infractions while in state prison including *setting his cell on fire and threatening to stab a prison employee* (emphasis added). (N.T. 1-18-2013, p. 17). This Court considered the sentencing guidelines for each offense. At sentencing it was agreed that the Appellant's prior record score was a RFEL. The offense gravity score for each Rape, and Involuntary Deviate Sexual Intercourse was 12 making the standard range for these offenses 96-114 months plus or minus 12 months or 108-126 months. Consequently, the sentences imposed fell within the aggravated range for each of these offenses. The offense gravity score for Burglary was a 9, making the standard range 72-84 months plus or minus 12 months. The offense gravity score for Unlawful Contact with a Minor was an 8, making the standard range 40-52 months plus or minus 12 months.[2] At the time of the sentencing hearing, this Court provided more than adequate reasons for sentencing the Appellant in the aggravated range for Rape and Involuntary Deviate Sexual Intercourse. These same reasons also provided a sufficient basis for departure from the guidelines on the convictions for Burglary and Unlawful Contact with a Minor.

Appellant asserts that this Court failed to consider mitigating factors in imposing its sentence. As stated before this Court considered a litany of factors before arriving upon a sentence. The Sentencing Code merely requires that the Court consider all factors not to weigh them equally. It must be noted that the Appellant was clearly informed at the time of his plea of the maximum sentences which he could receive. Furthermore, this Court properly afforded the Appellant his right of allocution. Thus, this Court was able to observe the Appellant's demeanor and make a credibility determination prior to sentencing.

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[2] Based upon the time of the commission of the offense, Unlawful Contact with a Minor was assigned an omnibus score of only 8. Since the 6th Edition of the Sentencing Guidelines were enacted in June 3, 2005, Unlawful Contact with a Minor has been assigned an offense gravity score equal to the underlying offense. Thus, under the current guidelines this offense would have been a 12.

Appellant's counsel attempted to argue during the sentencing hearing that his client was standing before this Court with the ultimate acceptance of responsibility which he referred to as an open guilty plea. This Court was quick to correct the record recognizing that the Appellant had instead entered an open *no contest* plea. (N.T. 1-18-2013, p. 7). Moreover, after hearing from the Appellant, this Court did not find his testimony to be credible. After entering the no contest plea, the Appellant attempted to blame his actions on peer pressure which caused him to smoke, "some wet dust." This Court accepted the argument of the assistant district attorney to the effect that the Appellant after being linked by DNA evidence to the criminal offenses was merely accepting the reality of his situation.

After hearing from the Appellant, along with arguments from counsel, this Court fully set forth the factors that it had considered before imposing sentence. (N.T. 1-18-13, p.22-23) Specifically, this Court considered the arguments of counsel, the facts of the case, the plea of no contest, the presentence investigation, the mental health issues, the Appellant's drug use, and his family history. Additionally, this Court considered the fact that the Appellant was determined to be a sexually violent predator, the sentencing guidelines, the prior record score including the Appellant's background and the prior offenses that he had committed. Before imposing sentence this Court noted that, short of committing a homicide, this was without question one of the worst cases it had encountered. (N.T. 1-18-2013, p.23-25). The Court stated as follows:

> I conclude that this is without any question one of the worst things I've ever heard in my years which is in the law business 43 years, I think. And I was a defense attorney. I did murder cases, and I was a prosecutor. I did many kinds of cases including criminal. I prosecuted crimes in this very room as a young District Attorney. I've heard a lot of things in my time, but this is one of the worst I've ever heard. I would qualify one of them because I think taking a life of a human being is probably the worst thing you could ever do in your life, killing some one. So, that exceeds this without saying. But beyond that, this is the worst I've ever seen. I mean, taking a child 14 years of age and going into her bedroom and demanding money for drugs and some how she got you into the other bedroom because she knew her mother was there, looking for protection like any 14 year

> old would do. It's a horrible situation. I know you have a child, you have two children. One was killed in a car accident and one you don't see anymore because you're in jail mostly, I would imagine. But I can tell you that if you have a child that you are with, you raise and nature[*sic*], there is nothing on earth that's a worse thing than to see that child harmed in any way, shape, or form, and to be compelled to witness it is just – one thing is for it to happen and find out later, but to actually be there and watch your child threatened with a knife then having your child forced to watch you raped and sodomized and then rape the child. I just can't imagine any parent or any child going through that. It is probably one of the worst nightmares any parent has is that their child won't be safe and that they can't protect them. The fact that that mother could not protect her child must have a devastating life long effect on her. Every night she puts her head on her pillow, I am sure that thought crosses her mind that she did not have the ability to overcome you and protect her child. She gave herself up to you hoping that would protect her child but it didn't. You insisted that you would rape the child as well.

(N.T. 1-18-2013, p.23-25)

This Court was faced with an extremely dangerous offender with an extensive criminal record who, it determined, was not genuinely taking responsibility for his actions. The Appellant has spent his entire life, preying upon the citizens of this Commonwealth. His past behavior clearly demonstrated the danger that he posed to every single member of the community. This Court recognizes its responsibility to keep dangerous offenders, such as the defendant, off the streets for as long as the law permits. Consequently, for all of the above stated reasons, the sentence of this Court should be affirmed.

BY THE COURT:

DATE: December 24, 2013

JAMES MURRAY LYNN, J.