NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. GERALD JOSEPH FULLER JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1384 MDA 2013

Appeal from the Judgment of Sentence June 17, 2013
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0000618-2013
CP-35-CR-0000619-2013
CP-35-CR-0000620-2013
CP-35-CR-0000621-2013
CP-35-CR-0000622-2013
CP-35-CR-0001458-2012
CP-35-CR-0001459-2012
CP-35-CR-0001460-2012
CP-35-CR-0001461-2012
CP-35-CR-0001469-2012
CP-35-CR-0001488-2012
CP-35-CR-0002541-2012

BEFORE: FORD ELLIOTT, P.J.E., OLSON and STRASSBURGER,* JJ.

MEMORANDUM BY OLSON, J.: **FILED JULY 03, 2014**

Appellant Gerald Fuller, appeals from the judgment of sentence entered on September 25, 2013, following his guilty plea convictions for six counts of robbery and one count of criminal attempt of robbery[1]. We affirm.

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[1] 18 Pa.C.S.A. §§ 3701 and 901 respectively.

* Retired Senior Judge assigned to the Superior Court.

The trial court aptly summarized the facts and procedural history of this case as follows:

> On January 7, 2013, [Appellant] pled guilty to one count of robbery [in four separate cases,] one count of criminal attempt of robbery in [another case] and two counts of robbery in [a third case]. In exchange, the numerous other charges pending against [Appellant] were *nolle prossed*. The charges in [the aforementioned] cases arose between February 25, 2012 and June 15, 2012 when [Appellant] robbed six stores in Lackawanna County by pretending to have a weapon in his pocket and threatening the stores' clerks.
>
> On May 9, 2013, [Appellant] pled guilty to one count of robbery each in [six additional cases]. In exchange, the numerous other charges pending against [Appellant] were *nolle prossed*, and the Commonwealth agreed not to oppose concurrent sentences. The charges in these cases arose between March 1, 2012 and June 8, 2012 when [Appellant] robbed five stores in Luzerne County and one store in Susquehanna County by pretending to have a weapon in his pocket and threatening the stores' clerks. By agreement between the District Attorneys in Luzerne and Susquehanna Count[ies] and the District Attorney in Lackawanna County, all of the cases were transferred to Lackawanna County so that [the trial] court could dispose of and resolve all of the cases together.
>
> On June 17, 2013, [Appellant] was sentenced. [Appellant's] attorney acknowledged that the court had discretion in deciding whether to impose concurrent sentences and explained why he thought concurrent sentences were appropriate. … The [trial] court imposed a 6 to 12 month sentence on each of the charges to be served consecutively. The [trial] court stated that the aggregate sentence is 6½ to 13 years. The court also ordered a mental health evaluation and ordered restitution. The court noted that the sentences fall within the standard range of the sentencing guidelines.
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> On June 26, 2013 [Appellant] filed a motion for reconsideration of sentence which was denied on June 27, 2013. On July 26, 2013, [Appellant] filed a [n]otice of [a]ppeal, and on August 2, 2013 [the trial] court ordered [Appellant] to file a concise statement of the matters complained of on appeal within 21 days

> pursuant to Pa.R.A.P. 1925(b). On August 23, 2013, [Appellant] served [the trial] court with a [s]tatement of [m]atters [c]omplained of on [a]ppeal. [The trial court subsequently issued an opinion pursuant to Pa.R.A.P. 1925(a) on September 26, 2013.]

Trial Court Opinion, 9/26/2013, at 1-3 (internal citations omitted).

On appeal, Appellant now raises the following two claims:

1. Is [Appellant] entitled to be re-sentenced because the trial court abused its discretion by not following the concurrent sentencing agreement that [Appellant] understood existed between he and the Commonwealth?

2. Is [Appellant] entitled to be re-sentenced as a result of the trial court's failure to take into consideration all the mitigating factors when sentencing [Appellant]?

Appellant's Brief at 3.

Appellant challenges the trial court's discretionary authority to impose a sentence:

> Challenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right. An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:
>
> > 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).
>
> Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or in a motion to modify the sentence imposed.

Commonwealth v. Moury, 992 A.2d 162, 170 (Pa. Super. 2010) (citations and brackets omitted).

Appellant complied with the first requirement above by timely filing a notice of appeal. Additionally, upon review, we note that Appellant preserved the issues he presents on appeal by filing a timely post-sentence motion and, thus, has satisfied the second factor set forth in ***Moury***, above.

Appellant, however, failed to satisfy the third requirement of the aforementioned four-part ***Moury*** test. Rule of Appellate Procedure 2119(f) explicitly requires that Appellant must "set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence." The rule further states, "the statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence." Pa.R.A.P. 2119(f). Here, Appellant has failed to set forth a concise statement pursuant to Rule 2119(f), despite acknowledging in his brief that such a statement was required. ***See*** Appellant's Brief at 9. The Commonwealth objected to the omission of a Rule 2119(f) statement. ***See*** Commonwealth's Brief at 2. Thus, since Appellant failed to include a Rule 2119(f) statement in his brief, and the Commonwealth objected, the Appellant is deemed to have waived his challenge to the discretionary aspects of his sentence. ***See Commonwealth v. Faulk***, 928 A.2d 1061, 1072 (Pa. Super 2007) ("If a Rule 2119(f) statement is not included in the appellant's brief and the

[Commonwealth] objects to the omission, then this Court is precluded from reviewing the merits of the appellant's claim.").

Moreover, even if Appellant did not waive his challenge to the discretionary aspects of his sentence by failing to include a Rule 2119(f) statement, we would be precluded from granting Appellant relief as he has failed to meet the fourth prong of the ***Moury*** test; *i.e.* there is no substantial question for our review. Appellant argues that the trial court erred by imposing consecutive rather than concurrent sentences in contravention of a plea agreement. Initially, we note that a challenge to the imposition of consecutive sentences does not raise a substantial question. ***See Commonwealth v. Dodge***, 77 A.3d 1263, 1269 (Pa. Super 2013) ("[B]ald excessiveness claims premised on imposition of consecutive sentences do not raise a substantial question for review… .")

Appellant, however, alleges that there was an implicit plea agreement, which the trial court violated when it sentenced him to consecutive rather than concurrent terms resulting in an aggregate sentence of 6½ to 13 years. More specifically, Appellant avers that he "is not challenging the imposition of consecutive rather than concurrent sentences as raising a substantial question but rather whether the court[']s refusal to sentence him in accordance with the [C]ommonwealth['s agreement to] concurrent sentence[s] raises a substantial question." Appellant's Brief at 10.

Upon review, the record belies Appellant's argument that there was an implicit agreement for the imposition of concurrent sentences. Appellant negotiated and agreed to plead guilty to six counts of robbery and one count of criminal attempt of robbery, in exchange for "[a]ll remaining charges, including the [first-degree felony] robbery charges, [to] be *nolle prossed*" and "a deadly weapon enhancement possessed/used will not apply at the time of sentencing." Written Guilty Plea Colloquy, 12/13/2012, at Exhibit A. The agreement further states that Appellant was facing a maximum of 10 years of incarceration for each count to which he pled guilty. Appellant's plea agreement did not state that only concurrent prison terms could be imposed.

At the guilty plea hearing, the trial court stated "I'm told that the plea agreement here is that you will enter a plea to six counts of robbery and one count of attempted robbery and that the Commonwealth will drop all remaining charges against you[]" and "the deadly weapon's enhancement whether possessed or used will not apply to your case." N.T., 1/07/2013, at 4. Appellant answered affirmatively. ***Id.*** After Appellant admitted the factual basis for his guilty pleas, the trial court advised Appellant that it could impose consecutive sentences and Appellant agreed that he understood this possibility. ***Id.*** at 9.

Likewise, at sentencing, Appellant recognized that the trial court had discretion to impose concurrent or consecutive sentences. N.T. 6/17/2013,

at 8. At no time did the Commonwealth object to the imposition of concurrent sentences or argue for the imposition of consecutive sentences at both Appellant's guilty plea colloquy and his sentencing hearing. Appellant acknowledged and agreed to the specific penalties and fines the trial court could impose for the crimes he had committed. Thus, Appellant has no factual basis upon which to claim that the trial court abused its discretion in disregarding an implicit agreement to forego consecutive sentences.

Appellant next claims that the trial court failed to consider his "education, work history, character, lack of criminal record, statements made by [Appellant], and the extensive cooperation he provided to law enforcement." Appellant's Brief at 11. "This Court has held on numerous occasions that a claim of inadequate consideration of mitigating factors does not raise a substantial question for our review." ***Commonwealth v. Disalvo***, 70 A.3d 900 (Pa. Super. 2013) (citations omitted). Moreover, "[s]ince the sentencing court had and considered a presentence report, this fact alone was adequate to support the sentence, and due to the court's explicit reliance on that report, we are required to presume that the court properly weighed the mitigating factors present in the case." ***Commonwealth v. Fowler***, 893 A.2d 758, 766 (Pa. Super. 2005), *citing* ***Commonwealth v. Boyer***, 856 A.2d 149 (Pa. Super. 2004).

> In imposing sentence, the trial court is required to consider the particular circumstances of the offense and the character of the defendant. The trial court should refer to the defendant's prior criminal record, age, personal

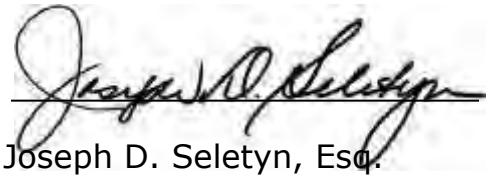
> characteristics, and potential for rehabilitation. However, where the sentencing judge had the benefit of a presentence investigation report, it will be presumed that he or she was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. Additionally, the sentencing court must state its reasons for the sentence on the record. 42 Pa.C.S.A. § 9721(b). The sentencing judge can satisfy the requirement that reasons for imposing sentence be placed on the record by indicating that he or she has been informed by the pre-sentencing report; thus properly considering and weighing all relevant factors.

Fowler, 893 A.2d at 766-767 (some citations omitted). Thus, Appellant's claim that the trial court failed to consider mitigating circumstances in fashioning his sentence does not raise a substantial question to allow our discretionary review.

In sum, Appellant failed to comply with Pa.R.A.P 2119(f) and does not raise a substantial question to implicate our discretionary review of his sentence challenges. Hence, Appellant's sentencing claims are meritless.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/3/2014