NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DARRYL BRYANT, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1401 WDA 2013

Appeal from the Judgment of Sentence Entered July 10, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0006261-2012

BEFORE: BENDER, P.J.E., WECHT, J., and PLATT, J.*

MEMORANDUM BY BENDER, P.J.E.: FILED JUNE 20, 2014

Appellant, Darryl Bryant, appeals from the judgment of sentence of 39 to 78 months' imprisonment. Appellant challenges the discretionary aspects of his sentence. After careful review, we affirm.

Appellant proceeded to a jury trial on April 18, 2013. The facts adduced at trial were as follows:

> [T]he Commonwealth presented the testimony of Janette Reever, an expert witness in dog fighting. … [She] testified that … her investigation … led her to [Appellant], and to the home located at 1209 Bessica Street where [Appellant] lived with his mother. … Upon entering 1209 Bessica Street, Officer Reever proceeded down to the basement where there were four rooms. Upon entering the first room, she discovered five American Pit Bull Terriers housed in crates that were stacked upon each other. Each crate had physical barriers to prevent the dogs from seeing each other. That room also contained an intravenous

* Retired Senior Judge assigned to the Superior Court.

fluid set-up, metal copper clamps with a place to attach a conductor and syringes. She testified that these items were used for dog fighting. There was no food or water in the room.

Upon entering the second room she discovered three more American Pit Bull Terriers in crates with similar physical barriers and two empty crates. She observed that the dogs were heavily scarred and that there was extensive scarring on the front legs, shoulder areas, back muscles and faces of these dogs. The search of the third room revealed a large treadmill adapted for use with dogs, vitamins and supplements, two packets of suture material, and a needle. Used syringes and a prescription bottle with the label scratched off containing white pills were also discovered. Ms. Reever also found triodine, which is an iodine based product used to clean surgical wounds. One small American Pit Bull Terrier in a crate was also discovered in room three. The forth room contained a treadmill with no canine adaptations and a sink. Upon spraying "Blue Star" which is luminal used to detect blood, she discovered large quantities of blood on the walls, floors, and doors in all of the basement rooms. Before and after pictures of the areas sprayed with "Blue Star" were entered into evidence.

Visible from the Bryant home was an adjacent vacant lot identified as 1602 Montier Street which contained three dogs. Officer Reever obtained and executed [a] second search warrant for 1602 Montier Street. This search revealed three more American Pit Bull Terriers. The dogs were restrained with heavy chains to keep the dogs separate from each other. The dogs had water, food dishes and dog houses on concrete slabs in the vacant lot. These dogs were seized pursuant to the warrant and were examined by Doctor Cirillo. Doctor Cirillo testified that these dogs were "cold and filthy."

Detective Scott Klobchar testified that he and his partner Detective Thomas DeFelice approached [Appellant][,] identified themselves, and placed the Defendant into custody and confiscated [Appellant]'s cellular telephone. This telephone was ultimately analyzed by Officer Vendmilli, who testified that he was able to extract pictures, and videos from the phone as well as the contents of … its external memory. Officer Knapp, a retired Pennsylvania State Trooper and an expert in dog fighting investigations, testified that the videos on the Defendant's cell phone were videos of "schooling" where a young dog and an older dog fight and the younger dog learns how to fight.

Trial Court Opinion (TCO), 12/4/14, at 2 – 6 (citations to the record omitted). Canine blood was detected on plaster chips, floor tiles, and a door taken from Appellant's basement. ***Id.*** at 4. The veterinarian who treated the dogs at the scene, Dr. Cirillo, testified about the condition of the dogs. ***Id.*** Of the fourteen dogs that were seized, only three of them did not have scars.[1] ***Id.*** at 4 – 5. The older dogs were more scarred. ***Id.*** at 4. Examination of the dogs revealed, in addition to scars, some of the dogs were underweight, and some suffered from a panoply of conditions such as elevated body temperature, hair loss, infections, fractures, calluses, ulcerations, and fleas. ***Id.*** A number of the dogs also suffered a trauma-related eye condition, horizontal nystagmus. ***Id.*** at 4 – 6. Dr. Cirillo also testified that none of the dogs had conditions requiring the need for intravenous fluids. ***Id.*** at 4.

At the conclusion of Appellant's trial, the jury found him guilty of two counts of animal fighting and one count of possessing instruments of crime. On July 30, 2013, Appellant was sentenced to an aggregate term of 39 to 78 months' incarceration. He filed a timely notice of appeal, as well as a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

Appellant now presents the following question for our review:

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[1] One of the dogs had scars "which may be from dermatitis." TCO at 5.

> 1. Did the trial court abuse its discretion at sentencing when it relied on impermissible factors in imposing a sentence in the aggravated range of the guidelines?

Appellant's brief at 5 (unnecessary capitalization omitted). In his briefed argument, Appellant claims the sentencing court improperly relied on: (1) unsubstantiated information regarding his probation history; (2) Appellant's poor employment history; (3) letters sent by members of the community; (4) the deterrent effect of Appellant's sentence on would-be offenders; and (5) the nature of the crime.

Turning briefly to Appellant's Rule 1925(b) statement, we note that his Rule 1925(b) statement states as follows:

> This Honorable Court committed an abuse of discretion in sentencing [Appellant] as the sentence was manifestly excessive and clearly unreasonable, and therefore the sentence should be vacated and a new sentencing hearing should be held.

Rule 1925(b) Statement, 9/25/13, at 3 (unnumbered pages) (internal citations omitted). The issue raised in Appellant's brief is different from the issue raised his Rule 1925(b) statement. Appellant did not claim that the sentencing court relied on impermissible factors in his boilerplate Rule 1925(b) statement; rather, he raised a claim of bald excessiveness. It is well-established that "[i]ssues not included in the [Rule 1925(b)] [s]tatement … are waived." Pa.R.A.P 1925(b)(4)(vii). As such, the issue Appellant now raises on appeal is waived.

Even assuming that Appellant had properly preserved his claims, however, he would not be entitled to relief, as these claims are meritless. Initially, we note that there is "no absolute right to appellate review of the

discretionary aspects of a sentence." ***Commonwealth v. Mouzon***, 812 A.2d 617, 621 (Pa. 2002). An appellant must present a "substantial question" to this Court for review by submission of a statement as required by Pa.R.A.P. 2119(f). ***See id.*** Rule 2119(f) states that an appellant must include in his brief "a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of the sentence." Pa.R.A.P. 2119(f).

> [T]he Rule 2119(f) statement must specify where the sentence falls in relation to the sentencing guidelines and what particular provision of the Code is violated (*e.g.*, the sentence is outside the guidelines and the court did not offer any reasons either on the record or in writing, or double-counted factors already considered). Similarly, the Rule 2119(f) statement must specify what fundamental norm the sentence violates and the manner in which it violates that norm (*e.g.*, the sentence is unreasonable or the result of prejudice because it is 500 percent greater than the extreme end of the aggravated range). If the Rule 2119(f) statement meets these requirements, we can decide whether a substantial question exists.

Commonwealth v. Goggins, 748 A.2d 721, 727 (Pa. Super. 2000). "Generally, 'in order to establish a substantial question, [an] appellant must show actions by the sentencing court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.'" ***Commonwealth v. Sims***, 728 A.2d 357, 359 (Pa. Super. 1999) (quoting ***Commonwealth v. Gaddis***, 639 A.2d 462, 469 (Pa. Super. 1994)). Here, Appellant claims that the court "relied on inaccurate, unsubstantiated and impermissible factors" at sentencing. Appellant's brief at 13. A claim that a sentencing court relied on impermissible factors raises a substantial question

for our review. ***Commonwealth v. Roden***, 730 A.2d 995, 997 (Pa.Super. 1999).

As such, we turn to the merits of Appellant's issues. We first address Appellant's claim that the sentencing court relied on unsubstantiated information about his probation history. Our review of the record shows that the court stated, "according to the presentence report [Appellant] failed on past probation and community supervision…. He received probation twice and he didn't do his community service." N.T., 7/12/13, at 58. The court then asked for confirmation of these facts: "Am I correct?" ***Id.*** Appellant's attorney clarified that in one of those cases, "no further penalty was taken." ***Id.*** at 59. Again, seeking to clarify the information in the presentence investigation report, the court asked Appellant's counsel, "that probation report specifically says that he did not fulfill his probation. Do you agree? Granted they closed the case, but he was brought up on probation violations on two occasions." ***Id.*** Appellant's counsel replied, "I agree that he was brought up on two probation violations." ***Id.*** The record reflects that the court did not rely on unsubstantiated information regarding Appellant's probation; instead, the court confirmed the information's accuracy with Appellant's counsel. Accordingly, we would conclude this claim is meritless.

We would also conclude the record does not support Appellant's claim that the sentencing court improperly relied on Appellant's employment history as an aggravating factor. The court explained that its review of the presentence investigative report indicated the absence of an employment

history. N.T., 7/12/13, at 57. The court discussed this fact in conjunction with Appellant's (admittedly unsuccessful) military service, which was introduced as evidence of Appellant's potential for rehabilitation. ***Id.*** The court also heard testimony that Appellant had recently completed a job training program, but took note of the fact that Appellant had not enrolled until after the charges in the instant case were filed. TCO at 8. As such, the court found Appellant's employment history did not amount to a mitigating sentencing factor. To the extent that "the record is otherwise silent on [Appellant's] need for rehabilitation," as he alleges in his brief, we would note that the court acknowledged, "I haven't heard much from witnesses regarding his future." Appellant's brief at 18; N.T., 7/12/13, at 59.[2] The court cannot be faulted for failing to consider evidence that has not been introduced.

With regard to Appellant's claim that the sentencing court improperly considered letters written by members of the community, it is explicit in our Sentencing Code that a court is to consider "the gravity of the offense as it relates to … the impact on the community." 42 Pa.C.S. § 9721(b). ***See also Roden***, 730 A.2d at 998 ("[T]he trial court is permitted to consider the

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[2] Appellant's sister testified at sentencing about his housing and career opportunities, and that he had the support of his family. N.T., 7/12/13, at 12 - 15. On cross-examination, however, this witness admitted that she lived at the same address where Appellant's crimes had been committed, and the criminal activity had gone on in her presence. ***Id.*** at 16.

seriousness of the offense and its impact on the community.") Thus, the court's acknowledgement of the letters is consistent with our Sentencing Code's mandate that the court consider a crime's impact on the community, and would not be an abuse of discretion.

Turning to Appellant's claim that the court improperly considered the impact of Appellant's sentence on would-be offenders, we note that "general deterrence" is a "valid purpose[] of sentencing." ***Commonwealth v. Williams***, 652 A.2d 283, 286 n.1 (Pa. 1994). However, this Court has held that a blanket policy of sentencing defendants to the statutory maximum in an effort to deter crime violates the principle of individualized sentencing. ***Commonwealth v. Mola***, 838 A.2d 791 (Pa. Super. 2003). In doing so, this Court was careful to note that "[w]e do not in any way denigrate [the trial court's] concern for deterrence," and we observed that an individualized sentence would also serve to "deter this defendant and others at least as well from committing similar acts." ***Id.*** at 795. Accordingly, to the extent that the court considered this sentence's effect on possible would-be offenders, such a consideration would not be an abuse of discretion.

Finally, we would not conclude that the sentencing court only considered the nature of the crime. This Court has noted that

> the nature of the criminal act [is] not to be the sole basis for the determination of the length of sentence but that, in addition, inquiry [is] to be made into the character of the convicted individual and into any extenuating or mitigating circumstances, so as to enable the sentencing court to exercise its broad discretion in accordance with the applicable statutory requirements.

Commonwealth v. Franklin, 446 A.2d 1313, 1315 (Pa. Super. 1982). Thus, the nature of the offense is not excluded from a sentencing court's consideration; rather, the court must take in account other factors as well. Given the record before us, we would conclude that the court did so here. The court reviewed Appellant's presentence investigative report. That report indicated that Appellant had not fulfilled the terms of two probationary sentences, he was dishonorably discharged from the armed forces, and he did not have a mitigating history of employment. During a trial recess, Appellant approached a juror, and said he knew the juror's family. N.T., 7/12/13, at 48. In addition, the court heard testimony about the effect of dogfighting in communities, and received statements from members of the community regarding the crime's impact. The sentencing court properly considered this evidence, along with testimony that Appellant had the support of his friends and family, and that Appellant was pursuing job training and employment.

The record also demonstrates that Appellant's crimes were alarmingly violent, as well as extensive in scope. Fourteen dogs were seized from Appellant. A number of the dogs were "scared," "cold and filthy." N.T., 4/18/13, at 146. Of the fourteen dogs, only three showed no evidence of physical injury. Eventually, at least twelve of the dogs had to be euthanized. Large quantities of canine blood were discovered "on the walls, floors and doors in all of the basement rooms." TCO at 3. Having heard this testimony, the sentencing court attempted to place the gravity of Appellant's

offenses in context, comparing it to non-violent offenses, such as "retail theft and various other crimes," that are also graded as felonies of the third degree as an illustration for why Appellant's particular sentence was appropriate. N.T., 7/12/13, at 60. Accordingly, we would conclude that this claim is meritless.

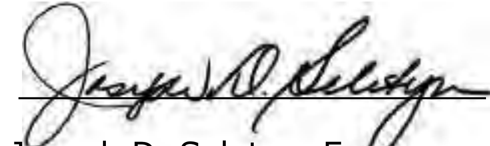
Moreover, the fact that Appellant's aggregate 78 month maximum sentence is the result of consecutive sentences would not render that sentence an abuse of discretion, as defendants are not entitled to "volume discounts" for multiple criminal acts by having all sentences run concurrently. ***Commonwealth v. Hoag***, 665 A.2d 1212, 1214 (Pa. Super. 1995). It is well-established that when "imposing sentence, a trial judge has the discretion to determine whether, given the facts of a particular case, a given sentence should be consecutive to, or concurrent with, other sentences being imposed." ***Commonwealth v. Rickabaugh***, 706 A.2d 826, 847 (Pa. Super. 1997). As noted, *supra*, at sentencing the court received, and considered, extensive information about Appellant and his crimes. As such, we would conclude the court's imposition of consecutive sentences was not an abuse of discretion.

Finally, we note that it is significant that the Commonwealth repeatedly asked the court to sentence Appellant to the statutory maximum term of incarceration. The court made a specific finding on the record that such a sentence would not be appropriate given the circumstances, and that Appellant's sentence should not depart from the sentencing guidelines. We

would conclude that the court did not abuse its discretion in imposing Appellant's sentence, and we would not disturb that sentence had Appellant preserved this issue in his Rule 1925(b) statement.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/20/2014