

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

MARCUS D. BISHOP

Appellant

No. 1538 WDA 2013

Appeal from the Judgment of Sentence October 23, 2012
In the Court of Common Pleas of Crawford County
Criminal Division at No: CP-20-CR-0000610-2011

BEFORE: GANTMAN, P.J. , ALLEN, and STABILE, JJ.

MEMORANDUM BY STABILE, J.:

FILED JUNE 24, 2014

Appellant Marcus D. Bishop appeals from the October 23, 2012 judgment of sentence¹ entered in the Court of Common Pleas of Crawford County (trial court) following his negotiated guilty plea to criminal use of a

¹ Appellant sought to appeal the trial court's August 26, 2013 order, which denied his post-sentence reconsideration motion filed *nunc pro tunc*. It is well-settled that "[i]n a criminal action, appeal properly lies from the judgment of sentence made final by the denial of post-sentence motions." ***Commonwealth v. Shamberger***, 788 A.2d 408, 410 n.2 (Pa. Super. 2001) (*en banc*) (citations omitted), ***appeal denied***, 800 A.2d 932 (Pa. 2002); ***see also Commonwealth v. W.H.M. JR.***, 932 A.2d 155, 158 n.1 (Pa. Super. 2007) (noting that an appeal from an order denying post-sentence motions is procedurally improper because a direct appeal in a criminal proceeding lies from judgment of sentence). This appeal, therefore, properly lies from the judgment of sentence and not from any post-sentence order. Accordingly, we have corrected the caption.

communication facility² and indecent assault.³ Upon review, we adopt the trial court's Rule 1925(a) opinion and affirm the judgment of sentence.

Given the parties' close familiarity with the details of this case and the trial court's thorough recounting of the facts and procedural history, we need not further elaborate upon the background of this case. **See** Trial Court 1925(a) Opinion, 11/7/13, at 1-2.

Following the trial court's denial of Appellant's *nunc pro tunc* motion for reconsideration, Appellant appealed to this Court. On appeal, Appellant raises two issues for our review.⁴ First, Appellant argues that the trial court erred in denying his reconsideration motion by which he challenged the sentence imposed as manifestly excessive.⁵ Second, Appellant argues that

² 18 Pa.C.S. § 7512(a).

³ 18 Pa.C.S. § 3126(a)(8).

⁴ We observe that Appellant failed to develop his arguments or cite to any legal authority in support of them in his brief. **See** Pa.R.A.P. 2119(a), (b). Although we have the authority to deem Appellant's arguments waived on this basis, we reluctantly decline to do so in this instance. **See Commonwealth v. Kearney**, ___ A.3d ___, 2014 WL 1797677 (Pa. Super. May 6, 2014). As a result, we proceed to review the merits of his appeal.

⁵ 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

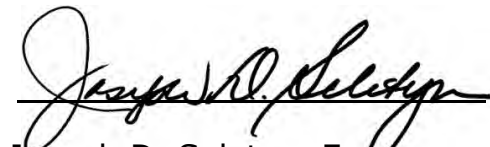
(Footnote Continued Next Page)

the trial court erred in failing to consider him eligible for motivational boot camp, as provided under 61 Pa.C.S. §§ 3901-09.

After careful review of the parties' briefs, the record on appeal, and the relevant case law, we conclude that the trial court's 1925(a) opinion authored by the Honorable Mark D. Stevens, thoroughly and adequately disposes of Appellant's issues on appeal. **See** Trial Court 1925(a) Opinion, 11/7/13, at 2-5. We, therefore, affirm the trial court's judgment of sentence. We direct that a copy of the trial court's November 7, 2013 Rule 1925(a) opinion be attached to any future filings in this case.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/24/2014

(Footnote Continued) _____

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)).

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IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :
Appellee :
 :
vs. :
 :
MARCUS D. BISHOP, :
Appellant/Defendant :

C.R. No. 610-2011

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FILED

Pa. R.A.P. 1925 OPINION

Mark D. Stevens, J.

November 7, 2013

Appellant was charged with Rape, 18 Pa.C.S.A. § 3121(a)(1), Unlawful Contact with Minor, 18 Pa.C.S.A. § 6318(a)(1), Statutory Sexual Assault, 18 Pa.C.S.A. § 3122.1; Criminal Use of Communication Facility, 18 Pa.C.S.A. § 7512(a); Sexual Assault, 18 Pa.C.S.A. § 3124.1; two counts of Indecent Assault, 18 Pa.C.S.A. § 3126(a)(2) and 18 Pa.C.S.A. § 3126(a)(8); and Corruption of Minors, 18 Pa.C.S.A. § 6301(a)(1)(ii). Appellant was on State Parole at the time of the alleged incident, having previously served time in the State Prison system on an aggravated assault charge. On August 30, 2011, Appellant entered a guilty plea before this Court, pleading guilty to Count 4, Criminal Use of Communication Facility, 18 Pa.C.S.A. § 7512(a), and Count 8, Indecent Assault, 18 Pa.C.S.A. § 3126(a)(8).

On October 23, 2012, the undersigned, after reviewing a pre-sentence report prepared by the Crawford County Adult Probation Department and as per the sentencing guidelines, sentenced Appellant to a split sentence of fourteen (14) to 36 months of incarceration, followed by 36 months of probation for the Criminal Use of Communication Facility charge, and six (6) to 24 months of incarceration for the Indecent Assault charge to run concurrent with the Criminal Use of Communication Facility charge. Appellant received 196 days of pre-sentence incarceration credit. No Post-Sentence Motions were filed timely with the Court and no appeal was filed with the Pennsylvania Superior Court.

Appellant filed a Petition for Post-Conviction Collateral Relief on January 24, 2013. New counsel was appointed on January 29, 2013 and an Amended Post-Conviction Relief Act Petition was filed on or about March 7, 2013. The Court scheduled an evidentiary hearing for August 1, 2013. At this time, the Court underwent an extensive colloquy with Appellant where he agreed to withdraw his Amended Post-Conviction Relief Petition in its entirety with prejudice and waive all issues that had been previously raised in exchange for the Court granting him relief to file a Motion for Reconsideration of Sentence *Nunc Pro Tunc*. The Court granted Appellant ten (10) days to file such motion, but in its colloquy explained to Appellant that there were no guarantees that the Court would grant reconsideration, or even if reconsideration was granted, there was no guarantee that any change would be made to the sentence.

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Appellant filed a Motion for Reconsideration of Sentence *Nunc Pro Tunc* on August 12, 2013. By Order dated August 26, 2013, the Court denied said motion. On September 24, 2013, Appellant filed a Notice of Appeal. The Court, by its Order of September 30, 2013, ordered that Appellant file a Concise Statement of Matters Complained of on Appeal in accordance with Pa.R.A.P. § 1925.

On October 17, 2013, Appellant filed a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. § 1925 and sets forth the following matters:

- (1) Appellant believes and therefore avers that the Court abused its discretion when sentencing him;
- (2) Appellant believes and therefore avers that the court erred by not considering him eligible for Motivational Boot Camp, pursuant to 61 Pa.C.S. Chapter 39; and
- (3) Appellant believes and therefore avers that the Court erred in denying his Motion for Reconsideration of Sentence *Nunc Pro Tunc*.

Preliminarily, under Rule 702 of the Pennsylvania Rules of Criminal Procedure, “the sentencing judge may, in the judge’s discretion, order a pre-sentence investigation report in any case” to aid in imposing an individualized sentence. *Commonwealth v. Carillo-Diaz*, 64 A.3d 722, 724 (Pa.Super. 2013). Pennsylvania Courts have held that the responsibility of the sentencing judge “is to be sure he has before him sufficient information to enable him to make a determination of the circumstances of the offense and the character of the defendant.” *Id.* (citations omitted). The judge must, therefore, either order a pre-sentence investigation report, which the Pennsylvania Supreme Court has held sets forth sufficient information on which the judge can rely to render an adequate sentence, or conduct sufficient pre-sentence inquiry such that “at a minimum, the court is apprised of the particular circumstances of the offense, not limited to those of record, as well as the defendant’s personal history and background.” *Id.* (citations omitted). Here, the Court relied on a pre-sentence investigation report that was compiled by the Crawford County Adult Probation Department in imposing a sentence on Appellant, thereby satisfying the Court’s responsibility that it have sufficient information available in order to make an individualized determination of Appellant’s sentence. Appellant never indicated during sentencing that the pre-sentence report relied on by the Court was in any way inaccurate, nor did Appellant object to the sentencing guidelines used as being inappropriate or inaccurate.

Additionally, at the sentencing hearing the Court was also made aware of certain information, which was echoed in the pre-sentence report. Defense counsel indicated to the Court that Appellant was a 24-year-old male who is married with one child and, at the time of the hearing, had one child on the way. He and his wife lived together prior to his incarceration and intended to continue living together, as they were working things out after the incident occurred and his wife had been very supportive of him. Appellant has a tenth grade education, but received his GED while incarcerated on the prior aggravated assault charge. Appellant has always worked and has training in welding, and he claimed that he always pays his bills on time.

In March of 2012, Appellant broke his back and was in a cast for five to six months and was unable to work during that period. Defense counsel indicated to the Court that Appellant had suffered from depression since his prior incarceration, but has taken medication since then. Defense counsel made clear that Appellant wanted to provide for his family, reconcile with his wife, and move on from this incident.

It is well settled that “[w]hen imposing a sentence, a court must consider the factors set forth in 42 Pa.C.S.A. § 9721(b). *Commonwealth v. Feucht*, 955 A.2d 377, 383 (Pa.Super.2008) (citations omitted). Specifically, the court shall consider the protection of the public, the gravity of the offense as it relates to the impact on the victim and the community, the defendant’s rehabilitative needs, and the sentencing guidelines. *Id.*

Moreover, as cited in cases such as *Commonwealth v. Coulverson*, 34 A.3d 135 (Pa.Super. 2011),

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. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Id. at 143, quoting *Commonwealth v. Rodda*, 723 A.2d 212, 214 (Pa.Super.1999) (*en banc*).

In the instant case, Appellant was sentenced to fourteen (14) to 36 months incarceration followed by 36 months of probation based upon his guilty plea to Count 4, Criminal Use of Communication Facility. The standard range as set forth by the guidelines is nine (9) to 16 months based upon an offense gravity score of five (5) and a prior record score of four (4).

Appellant was also sentenced to six (6) to 24 months incarceration for Count 8, Indecent Assault, to run concurrently with the sentence of Count 4. The District Attorney’s office made a recommendation that the sentences run concurrent on the minimum end of the sentence only. The standard range as set forth by the guidelines is six (6) to 12 months of incarceration based upon an offense gravity score of four (4) and a prior record score of four (4).

In his Motion for Reconsideration *Nunc Pro Tunc*, Appellant avers that the Court gave too much weight at the time of sentencing to facts articulated by the Commonwealth as the basis of the Indecent Assault charge by sentencing Appellant at the Criminal Use of a Communication Facility charge towards the upper end of the standard sentencing range. Appellant acknowledges that he sent text messages to the victim that were inappropriate, but maintains that they were far less harmful to the victim than the underlying acts that are the basis of the Indecent Assault. Appellant believes that the Court placed too much weight on the allegations contained in the Affidavit of Probable Cause and sentenced him more harshly because of those allegations on the

Criminal Use of a Communication Facility Charge, rather than the Indecent Assault charge, because it carried a greater sentencing range.

First, and most importantly, the Court notes that the sentences imposed for both charges were within the standard range and no issues were raised by Appellant at the time of the sentencing to suggest that the standard range was inaccurate. The offense gravity score, as well as the Appellant's prior record score, were both accurate in the pre-sentence report as pertaining to the Criminal Use of Communication Facility charge. These scores accurately reflected a nine (9) to 16 month sentencing range, and the Court sentenced Appellant to 14 to 36 months incarceration on this charge, which is well within the standard range. With regards to the Indecent Assault charge, the standard range, based on the offense gravity score and Appellant's prior record score, was six (6) to 12 months, and Appellant was sentenced to six (6) to 24 months, which is also well within the standard range.

Prior to sentencing the Court received a letter from Appellant, including a letter to the victim, expressing his sincere apologies for the incident and the importance of his family and his eagerness to provide for them. The Court heard testimony from Appellant at the sentencing hearing where he expressed the need to provide for his family, and explained that his family would struggle without him in the event he was incarcerated. The Court also heard testimony to the effect that Appellant is a good provider for his family, a good father to his children, and that he was rarely out of work. Although the Court finds that Appellant's belief that family is important is admirable and doesn't doubt such beliefs, clearly there was no thought of the importance of family on the date in question, and the Court, as part of its discretionary analysis, certainly took this factor into consideration while reading Appellant's letters and listening to testimony at the sentencing hearing.

During the sentencing hearing, Appellant asked for a County sentence and hoped to be eligible for some sort of work release program. The Court, as reflected in the record, engaged in an extensive colloquy with Appellant regarding his past legal discrepancies and that fact that he was on State Parole at the time of the incident. The Court noted that Appellant had previously served almost two and a half years in State Prison for an aggravated assault charge. Appellant was out of jail for 23 months and was on State Parole when he committed the offenses charged, which clearly shows that not only did the time spent in State Prison not deter him from committing another crime, but that State Parole hadn't either. The Court thoroughly discussed the fact that because Appellant was on State Parole at the time of the offenses committed his ability to be rehabilitated was obviously a factor that had to be considered, and in doing so, noted that a County sentence would not be appropriate at that time and that a State sentence would give him the supervision and control that Appellant needed.


The Court additionally took into account that the victim in this case was at Appellant's house for the purpose of babysitting his child. The fact that a minor had every intention of coming to Appellant's house solely for the purpose of babysitting his child, and that Appellant, at least in some ways, took advantage of this situation certainly went to the Court's decision in determining Appellant's sentence.

The Court, therefore, holds that the sentence is within the standard range and within the appropriate guidelines. The sentence was made within the Court's sound discretion after taking into consideration all the appropriate factors and circumstances.

In his Motion for Reconsideration of Sentence *Nunc Pro Tunc*, Appellant also alleges that he was eligible for Motivational Boot Camp and that the Court abused its discretion by denying him eligibility to the program. The Court has the discretion to exclude a defendant from eligibility for motivational boot camp if the Court determines that the defendant would be inappropriate for placement in a motivational boot camp. 61 Pa.C.S.A. § 3904(b). Appellant had previously been incarcerated in the State Penal System from 2007 to 2009 for an aggravated assault conviction and remained on State Parole until the time of the instant offense. Additionally, Appellant was incarcerated in the Crawford County Jail from June 10, 2011 to December 22, 2011, when the Pennsylvania Board of Probation and parole released their detainer on him and he was able to post bond. Although Appellant may be deemed eligible pursuant to the definition in the Motivational Boot Camp statute, the Court, having taken these factors into account at the time of sentencing, undertook discretionary measures in deciding to disallow Appellant the opportunity to partake in motivational boot camp as the Court thought that the opportunity for boot camp would not be appropriate for Appellant at that time. Clearly Appellant, as stated above, had not been deterred by either his time in the State Penal System and was certainly not phased by the fact that he had been placed on State Parole because he still committed the offense in question. The Court, therefore, did not abuse its discretion in deciding to exclude Appellant from eligibility for boot camp.

The Court, having reviewed all documents related to this case, as well as the pre-sentence report filed prior to sentencing and the relevant sentencing guidelines, holds that it did not abuse its discretion in sentencing Appellant, in denying Appellant eligibility for Motivational Boot Camp, and thereby denying Appellant's Motion for Reconsideration of Sentence *Nunc Pro Tunc*.

BY THE COURT,


_____ J.

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