**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellee<br><br>v.<br><br>DENNIS NABRIED, JR.<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br>No. 1564 MDA 2013 |

Appeal from the Judgment of Sentence July 29, 2013
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0001702-2011

BEFORE: GANTMAN, P.J., ALLEN, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.: **FILED MAY 06, 2014**

Dennis Nabried, Jr., ("Nabried") appeals from the judgment of sentence entered in the Court of Common Pleas of Lackawanna County, after he pled guilty to one count of unlawful contact with a minor.[1] We affirm.

Nabried's plea, on April 13, 2012, arose out of a series of sexual assaults beginning when victim was between the ages of 10 and 14 years old and Nabried was between 25 and 29 years old. The offenses occurred from about 2004 through November 2008.

On May 11, 2012, Nabried filed a petition to withdraw his guilty plea prior to sentencing, citing his innocence and indicating that he originally entered a guilty plea because he was "afraid of the outcome of the

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[1] 18 Pa.C.S.A. § 6318.

circumstances in the matter." N.T. Motion to Withdraw Guilty Plea Hearing, 6/11/12, at 2. In response, the Commonwealth argued substantial prejudice and that Nabried's desire to withdraw his guilty plea was a dilatory tactic. ***Id.*** at 4. On March 26, 2013, the trial court denied Nabried's petition to withdraw his guilty plea, concluding that Nabried did not make a credible assertion of innocence and thus did not provide a fair and just reason to withdraw his guilty plea prior to sentencing. Order, 3/26/13, at 5.

This matter proceeded to a sexually violent predator ("SVP") hearing on July 29, 2013. During the hearing, a member of the Sexual Offense Assessment Board ("SOAB") testified that, based the Board's review of the case,[2] Nabried met the criteria set forth in the statute to be classified as an SVP. N.T. SVP Hearing, 7/29/13, at 17-18. The trial court found that the Commonwealth met its burden of proving Nabried was an SVP and sentenced him, that same day, to a minimum of 30 to 60 months' incarceration, followed by two years special probation.

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[2] This assessment included a review of the affidavit of probable cause, the criminal complaint, and letters from Nabried to his family. The SOAB never interviewed the victim or Nabried. The SOAB did review the 14 factors identified in the statute for determining whether an individual is a sexually violent predator. N.T. SVP Hearing, 7/29/13, at 8-10. When asked whether Nabried's refusal to participate in the assessment would affect the outcome, the SOAB member further testified that an assessment can be done with thorough research of the available records. ***Id.*** at 9

On August 7, 2013, Nabried filed a petition for reconsideration of sentence, which the court denied on August 13, 2013. This timely appeal followed, in which Nabried presents the following issues for our review.

> 1. Whether the lower court erred in denying [Nabried's] pre-sentence motion to withdraw his guilty plea without holding a hearing as required by Pa.R.Crim.P. 591[.]
>
> 2. Whether the lower court abused its discretion and/or committed an error of law when it determined that [Nabried] was a sexually violent predator where the Commonwealth failed to prove by clear and convincing evidence that he met the criteria for such a classification[.]
>
> 3. Whether the lower court erred when it imposed a sentence in the high end of the standard range when there were no aggravating circumstances[.]

Brief of Appellant, at 5.

In his first issue, Nabried argues that the trial court erred when it denied his pre-sentence motion to withdraw his guilty plea without an on-the-record colloquy pursuant to Pennsylvania Rule of Criminal Procedure 591. Nabried's reliance on Rule 591 is misguided and we find his argument meritless.[3] Moreover, we are mindful this Court's standard of review for

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[3] Rule 591 states: "At any time before the imposition of sentence, the court may, in its discretion, permit, upon motion of the defendant, or direct, *sua sponte*, the withdrawal of a plea of guilty or *nolo contendere* and the substitution of a plea of not guilty." Pa.R.Crim.P. 591. The comment to Rule 591 provides that the court should conduct an on-the-record colloquy to determine whether a fair and just reason to permit the withdrawal of the plea exists; however, this is so only in cases where the defendant *orally* moves to withdraw his/her plea at the sentencing hearing. Pa.R.Crim.P. 591, comment (emphasis added). Here, Nabried filed a *written* motion to withdraw his guilty plea prior to sentencing. Therefore, the proposition set

*(Footnote Continued Next Page)*

challenges to a trial court's decision regarding a motion to withdrawal a guilty plea.

We review a trial court's refusal to allow withdrawal of a guilty plea for an abuse of discretion. ***Commonwealth v. Gordy***, 73 A.3d 620, 624 (Pa. Super. 2013). "An abuse of discretion is not a mere error in judgment but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law. By contrast, a proper exercise of discretion conforms to the law and is based on the facts of record." ***Id.*** (internal citation omitted).

A trial court should grant a pre-sentence request to withdraw a plea of guilty or *nolo contendere* for any "fair and just reason," unless granting the motion would substantially prejudice the Commonwealth. ***Commonwealth v. Carrasquillo***, 78 A.3d 1120, 1125 (Pa. Super. 2013) (*en banc*) (quoting ***Commonwealth v. Forbes***, 299 A.2d 268, 271 (Pa. 1973)). The "mere assertion of innocence" is a fair and just reason to allow withdrawal of a guilty plea. ***Commonwealth v. Katonka***, 33 A.3d 44, 46 (Pa. Super. 2011) (*en banc*). "Although it is apparently an extremely unpopular rule with prosecutors and trial courts, since ***Forbes***, case law has continuously upheld an assertion of innocence as a fair and just reason for seeking the

*(Footnote Continued)* ———————————

forth in the comment to Rule 591, upon which Nabried relies, is inapplicable. Moreover, the trial court heard argument on Nabried's motion to withdraw his guilty plea on June 11, 2012. ***See*** Pa.R.Crim. P. 577(A)(2).

withdrawal of a guilty plea." ***Carrasquillo***, 78 A.3d at 1125 (internal quotation omitted);[4] ***see also Commonwealth v. Randolph***, 718 A.2d 1242, 1244-45 (Pa. 1998) (reminding this Court not to ignore the standard set forth in ***Forbes***). Presentence requests to withdraw guilty pleas are liberally granted, because "courts should show solicitude for a defendant who wishes to undo a waiver of all constitutional rights that surround the right to trial—perhaps the most devastating waiver possible under our Constitution." ***Id.*** (internal quotation omitted).

In this case, Nabried first asserted his innocence in his presentence motion to withdraw guilty plea and again at the hearing on said motion. The trial court, relying on Nabried's familiarity with the criminal justice system and his professed fear of the "outcome of the circumstances in the matter," found Nabried's petition for withdrawal to be pretextual, aimed at delaying sentencing. The trial court erred when it denied Nabried's assertion of innocence as a fair and just reason to allow withdrawal of his guilty plea. ***Katonka***, 33 A.3d at 46. The trial court believed it could deny the request based on the pretextual nature of his plea; however, we have previously rejected such a rationale. "Indeed, any time a defendant moves to withdraw a guilty plea prior to sentencing, he could be accused of engaging

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[4] Our Supreme Court has granted allowance of appeal in Carrasquillo. The case is docketed at No. 7 EAP 2014. ***See Carrasquillo***, ___ A.3d ___, 2014 WL 642944 (Pa. Feb. 14, 2014).

in a dilatory tactic to avoid sentencing." ***Commonwealth v. Unangst***, 71 A.3d 1017, 1021-22 (Pa. Super. 2013); ***see Commonwealth v. Pardo***, 35 A.3d 1222, 1228-29 (Pa. Super. 2011) (discounting argument defendant's motion to withdraw plea should be denied for gaming system). Moreover, the trial court undertook the same type of credibility analysis condemned by this Court when it found that Nabried failed to make a credible assertion of innocence. ***See Carrasquillo*** 78 A.3d at 1127; ***Katonka***, 33 A.3d at 48. Having determined that the trial court erred in denying Nabried's assertion of innocence as a fair and just reason to allow withdrawal of his guilty plea, we now consider whether withdrawal of Nabried's guilty plea will substantially prejudice the Commonwealth. ***See Forbes***, 299 A.2d at 271.

We are guided and, ultimately, bound by the prevailing legal standard set forth in ***Commonwealth v. Carr***, 543 A2d, 1232 (Pa. Super. 1988). In ***Carr***, the Appellant pled *nolo contendere* to a corruption of a minor charge and an involuntary deviate sexual intercourse charge related to the sodomization of his grandson. ***Id.*** at 1233. The Appellant filed a motion to withdraw his plea and the trial court held that Appellant was competent to enter his plea so that the withdrawal lacked "just cause" and that the Commonwealth would be substantially prejudiced by withdrawal of the plea. On appeal, this Court affirmed the trial court's finding of substantial prejudice; specifically, that delays occasioned by continuances resulted in a shift of family sympathies from the victim to Appellant. ***Id.*** at 1234. "Though undoubtedly available in a technical sense, the reluctance of family

members to testify in a way which would cause incarceration of Appellant is evident, and would have significantly impaired prosecution of this case." ***Id.*** Accordingly, the ***Carr*** court held that substantial prejudice was present and mandated a denial of the motion to withdraw the plea.

Likewise, in the present case, the trial court recognized that family sympathies have shifted from the victim to Nabried. Christine Nabried, Nabried's wife and the victim's mother, has maintained a relationship with Nabried throughout the proceedings and plans to remain together with him upon his parole. Additionally, Nabried has written letters to his wife, one of which states:

> Please stop talking to Children and Youth or I won't see the light of day for a very long time. Please keep this in the family. More jail time will only makes things worse. This does not excuse the fact of my wrongdoings. I am the adult and nothing should have ever happened.

Order, 3/26/13, at 7. Moreover,

> Since August 2011, Nabried has had four trial dates spanning a seven-month delay during which family sympathies have clearly shifted. In preparation for trial, the Commonwealth noted the obvious tension between the victim and her mother regarding the impending charges. The Commonwealth further indicated that the victim's mother failed to bring the victim to two meetings at the District Attorney's office and refused any contact with the victim via phone or in person. An attempt to make contact with the victim at her mother's residence was also unsuccessful.

***Id.*** When the District Attorney was finally able to make contact with the victim, she was unaware that Nabried had moved to withdraw his guilty plea. N.T. Motion to Withdraw Guilty Plea Hearing, 6/11/12, at 4. Based on

these facts, the trial court concluded that the Commonwealth had clearly demonstrated the reluctance of the victim's mother to testify in a way that would cause the incarceration of Nabried.

In our evaluation of whether the Commonwealth would be substantially prejudiced by withdrawal of a guilty plea, we keep in mind the following:

> [P]rejudice would require a showing that due to events occurring after the plea was entered, the Commonwealth is placed in a worse position than it would have been had trial taken place as scheduled. This follows from the fact that the consequence of granting the motion is to put the parties back in the pre-trial stage of proceedings. This further follows from the logical proposition that **prejudice cannot be equated with the Commonwealth being made to do something it was already obligated to do prior to the entry of the plea.**
>
> Thus, prejudice is about the Commonwealth's ability to try its case, not about the personal inconvenience to complainants unless that inconvenience somehow impairs the Commonweal's prosecution.

***Carrasquillo***, 78 A.3d at 1129 (citations omitted) (emphasis in original).

Given the clear shift in family sympathies demonstrated by the considerable tension between the victim and her mother and the mother's refusal to speak with the District Attorney, the trial court properly concluded that withdrawal of Nabried's plea would have placed the Commonwealth in a worse position than it would have been had the trial occurred as scheduled. As the record supports this determination, we discern no abuse of discretion. Thus, we find Nabried's first claim meritless. ***See Forbes***, 299 A.2d at 271; ***see also Commonwealth v. Campbell***, 455 A.2d 126, 128 (Pa. Super.

1983) (irrespective of fair just reason, withdrawal denied where prosecution substantially prejudiced).

In his second issue, Nabried argues that the Commonwealth failed to prove, by clear and convincing evidence, that he is an SVP for the purposes of Megan's Law.[5] "Questions of evidentiary sufficiency present questions of law; thus, 'our standard of review is *de novo* and our scope of review is plenary.'" ***Commonwealth v. Bishop***, 936 A.2d 1136, 1141 (Pa. Super. 2007) (citations omitted). In reviewing such a claim, we consider the evidence in the light most favorable to the Commonwealth, which prevailed upon the issue at trial. ***Id.***

An SVP is defined as:

> A person who has been convicted of a sexually violent offense set forth in Section 9795.1 (relating to registration) and who is determined to be a sexually violent predator under 9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses. In order to show that the offender suffers from a mental abnormality or personality disorder, the evidence must show that the defendant suffers from a congenital or acquired condition . . . that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons. Moreover, there must be a showing that the defendant's conduct was predatory. Predatory conduct is defined as an act directed at a stranger or at a person with whom a relationship has been instituted, established, maintained, or promoted, in whole or in part, in order to facilitate or support victimization. Furthermore, in reaching a

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[5] 42 Pa.C.S. §§ 9799.10 – 9799.41.

> determination, we must examine the driving force behind the commission of these acts, as well as looking at the offender's propensity to re-offend, an opinion about which the Commonwealth's expert is required to opine. However, the risk of re-offending is but one factor to be considered when making an assessment; it is not an "independent element."
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> At the SVP hearing, the Commonwealth has the burden of proving by clear and convincing evidence that the person meets the criteria to be designated as an SVP. This burden of proof has been described as an intermediate test, falling below the highest level of proof, beyond a reasonable doubt, but above the preponderance of the evidence standard. Evidence will meet this level of proof if it is so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts at issue.

***Commonwealth v. Stephens***, 74 A.3d 1034, 1038-39 (Pa. Super. 2013) (citations and quotations omitted).

Nabried's SVP hearing occurred on July 29, 2013, before the Honorable Michael Barrasse. At this hearing, the Commonwealth's only witness was Paula Brust, the SOAB member who conducted Nabried's SVP assessment. N.T. SVP Hearing, 7/29/13, at 6. Brust's testimony largely relayed the information and opinion contained in the assessment report, which itself was offered into evidence. Brust indicated Nabried suffers from pedophilia and personality disorder not otherwise specified, and, as a result, his mental disorder makes him likely to engage in predatory sexually violent offenses as defined by statute. As such, Brust opined that Nabried met the SVP criteria.

When viewed in the light most favorable to the Commonwealth, the facts of Nabried's crimes combined with Brust's determination of pedophilia provide clear and convincing evidence that Nabried suffers from a mental

abnormality that makes him likely to engage in predatory, sexually violent offenses. Therefore, the evidence was sufficient for the trial court to designate Nabried an SVP. Accordingly, Nabried's claim has no merit and we cannot offer him relief on this claim.

In his third issue, Nabried challenges the discretionary aspects of his sentence, arguing that his sentence is excessive. "It is well settled that, with regard to the discretionary aspects of sentencing, there is no automatic right to appeal." ***Commonwealth v. Austin***, 66 A.3d 798, 807-08 (Pa. Super. 2013) (citation omitted).

Before we may reach the merits of a challenge to the discretionary aspects of a sentence, we must engage in a four-part analysis to determine: (1) whether the appeal is timely; (2) whether appellant preserved his issue; (3) whether appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence, ***see*** Pa.R.A.P. 2119(f); and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the Sentencing Code. ***Austin***, 66 A.3d at 808.

Here, Nabried filed a timely notice of appeal, and preserved his claim in his post-sentence motion. He also included a proper, separate statement, as required by Rule 2119(f), in his appellate brief. Therefore, we proceed to determine whether Nabried has presented a substantial question that his sentence is not appropriate under the Sentencing Code. ***Id.***

> The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. A substantial question exists only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.

***Commonwealth v. Griffin***, 65 A.3d 932, 935 (Pa. Super. 2013) (citations and quotation marks omitted).

Nabried, in his Rule 2119(f) statement, claims that the sentencing court lacked sufficient reasons to sentence him in the aggravated range and considered improper factors, including the age of the victim and his prior record score, when it imposed sentence. Based on Nabried's assertion that the sentencing court considered improper factors in placing the sentence in the aggravated range, we conclude that he presents a substantial question on appeal. ***See Commonwealth v. Downing,*** 990 A.2d 788, 792 (Pa. Super. 2010); ***see e.g.***, ***Commonwealth v. Mouzon***, 812 A.2d 617, 624 (Pa. 2002) (plurality) (claim of excessive sentence reviewable even if sentence falls within statutory limits and within sentencing guidelines). Thus, we will review the sentence in question.

> 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.

***Commonwealth v. Glass***, 50 A.3d 720, 727 (Pa. Super. 2012),

Nabried asserts that his sentence is unreasonable because the facts cited by the sentencing court were already contemplated by the statutory definition of unlawful contact with a minor, his prior record score, and his classification as an SVP, and should not have been considered when fashioning his sentence. Brief of Appellant, at 21. However, Nabried fails to cite any case law for this proposition, and we find his argument is unavailing.

It is well established that "[a] trial court judge has wide discretion in sentencing and can, on the appropriate record and for the appropriate reasons, consider any legal factor in imposing a sentence in the aggravated range. Absent a manifest abuse of discretion, such sentence will not be disturbed." ***Commonwealth v. Stewart***, 867 A.2d 589, 593 (Pa. Super. 2005) (citation omitted). Moreover, "[t]he sentencing court can go so far as to consider its own SVP determination as a legal factor in imposing sentence in the aggravated range of the sentencing guidelines." ***Commonwealth v. Harris***, 972 A.2d 1196, 1201 (Pa. Super. 2009).

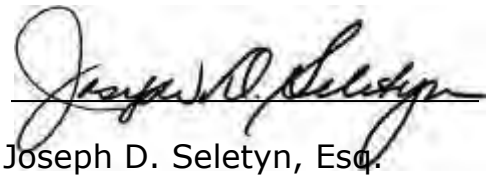
Instantly, Judge Barrasse gave several reasons on the record for sentencing Nabried in the aggravated range, including the age difference between Nabried and the victim and the nature of the contact. N.T. Sentencing, 7/29/13, at 24. Moreover, the court also considered Nabried's pre-sentence investigation report and the SOAB report prior to sentencing. ***Id.*** "Our Supreme Court has determined that where the trial court is informed by a pre-sentence report, it is presumed that the court is aware of

all appropriate sentencing factors and considerations, and that where the court has been so informed, its discretion should not be disturbed." ***Commonwealth v. Ventura***, 975 A.2d 1128, 1135 (Pa. Super. 2009).

Nabried fails to 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. Moreover, we discern no abuse of discretion on the part of the sentencing court. Accordingly, Nabried's challenge to the discretionary aspects of his sentence lacks merit, and we cannot grant him relief on this claim.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/6/2014