

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JOSHUA LEE STEWART

Appellant

No. 1618 WDA 2013

Appeal from the Judgment of Sentence dated August 09, 2013
In the Court of Common Pleas of Mercer County
Criminal Division at No: CP-43-CR-0000101-2012

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

MEMORANDUM BY STABILE, J.:

FILED JULY 11, 2014

Appellant Joshua Lee Stewart appeals from the Court of Common Pleas of Mercer County's (trial court) August 9, 2013 judgment of sentence. We now affirm.

The facts underlying this appeal are undisputed. As the trial court recounted:

A jury found [A]ppellant guilty on May 21, 2013 of armed robbery [18 Pa.C.S. § 3701(a)(1)(ii)], a felony of the first degree, robbery [18 Pa.C.S. § 3701(a)(1)(v)], a felony of the third degree and terroristic threats [18 Pa.C.S. § 2706(a)(1)], a misdemeanor of the first degree. The Commonwealth filed a notice of its intent to seek the mandatory minimum term of incarceration of five years for the armed robbery charge pursuant to [42 Pa.C.S. § 9712] prior to sentencing.

Appellant was sentenced on August 9, 2013 to the statutory maximum term of incarceration of 10 to 20 years on the armed robbery charge, but the other robbery and terroristic threat charges merged, so no sentence was imposed thereon.

Trial Court Opinion, 12/11/13, at 1-2 (footnotes omitted). Following sentencing, Appellant filed a motion to modify the sentence imposed,

arguing it was manifestly excessive in length because it was not specifically tailored to the nature of the offense, the ends of justice and society and his rehabilitative needs. Motion to Modify Sentence, 8/19/13, ¶ 1. Appellant also argued that the sentence exceeded the standard range of the sentencing guidelines and was therefore improper. *Id.* at ¶ 2. On September 4, 2013, following a hearing, the trial court denied Appellant's motion to modify the sentence. Appellant timely appealed to this Court.

Following Appellant's filing of a Pa.R.A.P. 1925(b) statement of errors complained of on appeal, which raised the same issues as Appellant's motion to modify the sentence, the trial court issued a Pa.R.A.P. 1925(a) opinion.¹ In its Rule 1925(a) opinion, the trial court concluded that the sentence imposed was proper because "[A]ppellant clearly demonstrated a fixed lifestyle of criminality that was escalating when he held a gun to a man's head to get a meager \$30.00." Trial Court Opinion, 12/11/13, at 2. In fact, the trial court rendered thirteen findings of fact to support its conclusion:

1. Prior adjudication for theft (M1), false identification to law enforcement (M3) and escape (M2) over a 3 year period as a juvenile.
2. Completed Youth Forestry Camp as a juvenile then placed on probation but failed to engage in any productive lifestyle or make plans for adulthood.
3. Continued to abuse marijuana.

¹ The trial court noted in its opinion that on September 17, 2013, it sentenced Appellant to mandatory life imprisonment after a jury found him guilty of first- and second-degree murder, two counts of robbery and two counts of criminal conspiracy in another case. *See* Trial Court Opinion, 12/11/13, at 1.

4. Committed this armed robbery two days after juvenile probation was terminated.
5. Cold and calculated nature of this crime shows a fixed hardness to use threat of death while holding gun to head of unarmed person to obtain a few dollars.
6. Engaged in dangerous risk taking behaviors.
7. Low likelihood of rehabilitation given extensive involvement in juvenile system including placement.
8. Supported drug habit by selling drugs.
9. Lifestyle as a juvenile up to time of this offense demonstrated high criminogenics.
10. Dropped out of school in 8th grade and was selling marijuana by age 13.
11. 22 misconducts while in the Mercer County Jail during the 579 days prior to sentencing.
12. Spent 7 months in hole in Mercer County Jail.
13. Fails to take responsibility for behavior.

Id. at 3.

On appeal,² Appellant essentially raises a single issue for our review, *i.e.*, whether the trial court abused its discretion in imposing a manifestly excessive and unreasonable sentence.³ Specifically, Appellant argues that

² When reviewing a challenge to the sentencing court's discretion, our standard of review is as follows:

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. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to 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. Bowen, 55 A.3d 1254, 1263 (Pa. Super. 2012) (quoting ***Commonwealth v. Cunningham***, 805 A.2d 566, 575 (Pa. Super. 2002)), ***appeal denied***, 64 A.3d 630 (Pa. 2013).

³ We attempt to address his argument on appeal to the extent we are able to discern it based on the record before us, notwithstanding Appellant's failure (*Footnote Continued Next Page*)

the sentence imposed fell outside of the sentencing guidelines and was unreasonable because it was not tailored to his rehabilitative needs or “the ends of justice and society.” Appellant’s Brief at 8.

It is well-settled that “[t]he right to appeal a discretionary aspect of sentence is not absolute.” **Commonwealth v. Dunphy**, 20 A.3d 1215, 1220 (Pa. Super. 2011). Rather, where an appellant challenges the discretionary aspects of a sentence, an appellant’s appeal should be considered as a petition for allowance of appeal. **Commonwealth v. W.H.M.**, 932 A.2d 155, 162 (Pa. Super. 2007). 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 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)). Whether a particular issue constitutes a substantial question about

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to cite to any legal authority in support of his argument. **See** Pa.R.A.P. 2119; **see also Commonwealth v. Rhodes**, 54 A.3d 908, 915 (Pa. Super. 2012) (failure to discuss pertinent facts or cite legal authority results in waiver).

the appropriateness of sentence is a question to be evaluated on a case-by-case basis. **See Commonwealth v. Kenner**, 784 A.2d 808, 811 (Pa. Super. 2001), **appeal denied**, 796 A.2d 979 (Pa. 2002).

Here, Appellant has satisfied the first three requirements of the four-part **Moury** test. Appellant filed a timely appeal to this Court, preserved the issue on appeal through his motion to modify sentence, and included a Pa.R.A.P. 2119(f) statement in his brief.⁴ Thus, we must determine only if Appellant's sentencing issue raises a substantial question.

We have found that a substantial question exists "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. Phillips**, 946 A.2d 103, 112 (Pa. Super. 2008) (citation omitted), **appeal denied**, 964 A.2d 895 (Pa. 2009). This Court does not accept bald assertions of sentencing errors. **See Commonwealth v. Malovich**, 903 A.2d 1247, 1252 (Pa. Super. 2006). When we examine an appellant's Rule 2119(f) statement to determine whether a substantial question exists, "[o]ur inquiry must focus on the reasons for which the appeal is sought, in contrast to the facts underlying

⁴ Rule 2119(f) provides that "[a]n appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence." Pa.R.A.P. 2119(f).

the appeal, which are necessary only to decide the appeal on the merits.” ***Commonwealth v. Ahmad***, 961 A.2d 884, 886-87 (Pa. Super. 2008) (quoting ***Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa. Super. 2005)). A Rule 2119(f) statement is inadequate when it “contains incantations of statutory provisions and pronouncements of conclusions of law[.]” ***Commonwealth v. Bullock***, 868 A.2d 516, 528 (Pa. Super. 2005) (citation omitted).

Here, Appellant asserts in his Rule 2119(f) statement

that a substantial question exists as to the sentencing judge’s action being inconsistent with the sentencing code and/or being contrary to the fundamental norms which underlie the sentencing process where the sentence [sic] court exceeded even the aggravated range of the guidelines to impose the statutory maximum [sentence] and cited as its reason matters which were considered by the guidelines, cited reasons multiple times, cited reasons of an economic basis, all of which suggest a bias or partiality in imposing a sentence which fails to address any rehabilitative needs and ignores explanation by [Appellant] as to the reasons the [court] cites.

Appellant’s Brief at 7. Based on Appellant’s 2119(f) statement, we conclude that he has raised a substantial question. ***See Commonwealth v. Simmons***, 56 A.3d 1280, 1286 (Pa. Super. 2012) (“A claim that a sentence is manifestly excessive such that it constitutes too severe a punishment raises a substantial question.”); ***see also Commonwealth v. Lawrence***, 960 A.2d 473, 478 (Pa. Super. 2008) (stating that a claim that a sentence was unreasonable because it was outside the sentencing guidelines raises a substantial question). As such, we will address the merits of Appellant’s sentencing claim.

It is settled that the trial court may sentence a defendant outside the range provided by the sentencing guidelines as long as the trial court gives its reasons for doing so on the record. **Commonwealth v. Walls**, 846 A.2d 152, 158 (Pa. Super. 2004), **reversed on other grounds**, 926 A.2d 957 (Pa. 2007).

When reviewing a sentence outside of the guideline range, the essential question is whether the sentence imposed was reasonable. **Commonwealth v. Walls**, [] 926 A.2d 957, 962 ([Pa.] 2007). An appellate court must vacate and remand a case where it finds that "the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable." 42 Pa.C.S.A. § 9781(c)(3). In making a reasonableness determination, a court should consider four factors:

- (1) The nature and circumstances 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). A sentence may be found unreasonable if it fails to properly account for these four statutory factors. A sentence may also be found unreasonable if the "sentence was imposed without express or implicit consideration by the sentencing court of the general standards applicable to sentencing." **Walls**, 926 A.2d at 964. These general standards mandate that a sentencing court impose a sentence "consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S.A. § 9721(b).

Commonwealth v. Sheller, 961 A.2d 187, 190-91 (Pa. Super. 2008), **appeal denied**, 980 A.2d 607 (Pa. 2009).

Simply put,

Where an excessiveness claim is based on a court's sentencing outside the guideline ranges, we look, at a minimum, for an indication on the record that the sentencing court understood the suggested sentencing range. When the court so indicates, it may deviate from the guidelines, if necessary, to fashion a sentence which takes into account the protection of the public,

the rehabilitative needs of the defendant, and the gravity of the particular offenses as it relates to the impact on the life of the victim and the community, so long as the court also states of record the factual basis and specific reasons which compelled him to deviate from the guideline range.

Commonwealth v. Mouzon, 828 A.2d 1126, 1128 (Pa. Super. 2003) (internal citations and quotation marks omitted).

Instantly, we observe it is undisputed that the trial court imposed upon Appellant a statutory maximum sentence of 10 to 20 years' incarceration for armed robbery.⁵ 18 Pa.C.S. § 1103(1). Thus, the essential issue we must resolve is whether the sentence imposed is unreasonable. In that regard, we consider the four Section 9781(d) factors. **See Walls**, 926 A.2d at 963.

First, the trial court had the benefit of a presentence investigation report, which indicates that the trial court was aware of Appellant's character and circumstances, and weighed those considerations in imposing the sentence. **See Moury**, 992 A.2d at 171 ("Where the sentencing court had the benefit of a presentence investigation report ("PSI"), we can assume the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.") (internal quotation omitted).

Second, as the sentencing judge explained, he was familiar with Appellant. Specifically, the judge noted:

⁵ The trial court noted "Appellant had a prior record score of 0 and the armed robbery had an offense gravity score of 10, resulting in a standard range of 40 to 54 months, plus or minus 12 months, under the deadly weapon used matrix." Trial Court Opinion, 12/11/13, at 2.

[T]he undersigned judge held a sentence modification hearing on September 4, 2013 and reiterated the reasons for the deviation from the sentencing guidelines. The undersigned judge was also the judge assigned to [A]ppellant throughout his days in the Juvenile Division of the Court and had available, and took into consideration, the information pertaining to his juvenile record and performance. Moreover, the [trial court] spent considerable time discussing the various information with [Appellant] at his original sentence hearing on August 9, 2013.

Trial Court Opinion, 12/11/13, at 2. Lastly, based on our review of the entire record, we conclude that the trial court satisfied the remaining Section 9781(d) factors. The trial court's findings of fact were supported by record evidence and the trial court was cognizant of the sentencing guidelines. Appellant, in fact, concedes in his brief that "[c]learly, the [trial court] was aware of the guideline ranges." Appellant's Brief at 11. Accordingly, we conclude the trial court did not abuse its discretion in sentencing Appellant to 10 to 20 years' imprisonment, *i.e.*, statutory maximum and that the sentence imposed was not unreasonable.

Next, to the extent Appellant argues that the trial court imposed an unreasonable sentence, because it failed to take into account his rehabilitative needs or the gravity of the offense as it relates to the impact on the life of the victim and on the community, we must reject this argument as lacking merit. As noted above, where, as here, "the sentencing court had the benefit of a [PSI], we can assume the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." **Moury**, 992 A.2d at 171. Our review of the record reveals that the trial

court gave ample consideration to these concerns. The trial court judge remarked at the sentencing hearing:

[A]s I see your juvenile record—none of which counted in the guidelines, and I—so I will take that into consideration since it is not in the guidelines—had you committing and being adjudicated delinquent of a number of offenses: The first one was theft and receiving stolen property in 2008.

. . . .

The view that I have here based upon everything that I am seeing in the PSI, based upon what I heard at the trial, based upon being your juvenile judge and seeing your juvenile record and how you failed to conform basically through that, is that you are a man of criminality; that is the life that you have chosen early on in your childhood. You are not showing any mitigation—and I understand that you are denying it—no mitigation for drug and alcohol abuse is why you did it or some mental health reason, just a cold-hearted armed robbery at a young age, and I—I agree with the Commonwealth.

. . . .

I agree with their view. So even in light of your young age, your criminality seems fixed. So I am going to max you.

N.T. Sentencing, 8/9/13, at 19, 32-33. Thus, contrary to what Appellant asserts, the trial court considered his rehabilitative needs and the gravity of the offense.⁶ According to the trial court, Appellant had a slew of juvenile

⁶ The trial court noted at the September 4, 2013, hearing on the motion to modify the sentence:

I have reviewed the transcript and I thought I was pretty thorough in my discussion of the transcript, the reasons that I gave [Appellant] the maximum statutory sentence that I could give him in this case. Mr. [Robert G.] Kochems had presented the argument on behalf of the Commonwealth, made an extremely strong argument that I concurred with, and perhaps I could detail it a little bit more to make it clearer.

I did find that there was a mitigating circumstance in this case, and that was [Appellant's] age. And the unfortunate part of this whole thing is that he is so young, and finds himself in the midst of all of this trouble. But as I stated at the original sentencing hearing, I was his juvenile court judge as well, as familiar with him at that time, and the—that his juvenile criminal

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record that was set forth in the sentence guidelines—or in the pre-sentence investigation report, rather, did not count on his prior record score. So I properly took those convictions and delinquencies into account, and the programs that were involved with [Appellant] that did not work.

[Appellant] completed probations as a juvenile successfully, but as soon as he was off probation he would reoffend.

But here are the aggravating circumstances that I believe substantiate the sentence that I reluctantly imposed upon [Appellant], because of [his] age: First of all, were the prior adjudications of the misdemeanor one theft, the false identification to law enforcement delinquency finding, a misdemeanor of the third degree; [his] escape, misdemeanor of the second degree delinquency finding which occurred over a three-year period, and [Appellant] basically started out roughly at age 13 or 14 in the juvenile system. One of the later depend—or delinquency findings resulted in [Appellant] being placed at the Youth Forestry Camp, and following [his] completion of that when [he was] returned to the community [he was] on probation, did not have any violations, but [he] also did not engage in any productive lifestyle or make plans towards [his] adulthood.

. . . .

Also, I note that [Appellant] dropped out of school in the eighth grade, started using marijuana, started selling marijuana to support [his] marijuana habit, and by age 14 [he was] into juvenile court. So [he] had an early and significant drug-abuse problem that [he] addressed by selling drugs to other people.

This armed robbery was particularly cold and calculated, as I presided over the jury trial and listened to the victim testify in a very convincing manner, and it showed a—what I view as a fixed hardness by sticking a gun in someone's face for a couple dollars, and the threat of death of somebody to get a little bit of money at a young age shows to me that [Appellant] either [has] no moral beacon whatsoever in [his] life—and I know [he has] denied [his] involvement in this case—but I have to accept the jury's verdict, and accepting it as it is, it does not demonstrate to this [c]ourt a young man who is able to be rehabilitated.

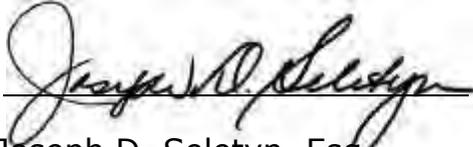
So the rehabilitative prong of any sentence here is very low. [His] risk-taking behavior, as demonstrated by this crime, and [his] long use of marijuana and escaping while [he was] in detention shows that [he is] a very dangerous individual to [himself] and to other people, that there is a low likelihood of [him] being rehabilitated.

N.T. Modification Hearing, 9/4/13, at 6-9.

adjudications, and completed the Youth Forestry Camp, but still failed to reform and rehabilitate himself. Instead, the intensity and nature of his offenses escalated. Having reviewed the record, we conclude that the trial court did not abuse its discretion in sentencing Appellant to the statutory maximum term of 10 to 20 years' imprisonment for armed robbery.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/11/2014