

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

MICHAEL LIPINSKI

Appellant

No. 1746 WDA 2013

Appeal from the Judgment of Sentence of September 19, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No.: CP-02-CR-0000309-2013

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

MEMORANDUM BY WECHT, J.:

FILED July 1, 2014

Michael Lipinski appeals his September 19, 2013 judgment of sentence. We affirm.

The sentencing court¹ summarized the factual and procedural history of this case as follows:

[O]n March 18, 1989, [B.D.] lived on Roup Avenue in the Friendship area of the City of Pittsburgh. After going to bed that evening, she was awakened by a noise and saw the outline of a man. The man threatened to kill her if she screamed, then bound her arms and taped over her eyes. He then put his penis in her mouth and raped her vaginally. At the conclusion of the attack, he asked where she kept her jewelry and took several gold chains and a pair of diamond earrings as well as a camera

* Retired Senior Judge assigned to the Superior Court.

¹ Because both of Lipinski's claims challenge the discretionary aspects of his sentence, we refer to the trial court as the sentencing court.

that was on her desk. Once the man had left her apartment, she went to a neighbor's apartment, who called her friends and 911. [B.D.] was taken to Magee Women's Hospital by the police where she was examined and a rape kit was performed. Because DNA testing was not available in 1989, the rape kit was stored at the Allegheny County Medical Examiner's office, where it remained untouched for over [twenty] years..

In 2012, Detective Aprill-Noelle Campbell of the Sex Assault unit was examining cold cases and came across [B.D.'s] file. Detective Campbell located the rape kit at the Medical Examiner's office and submitted it for DNA testing. The results returned a positive match to [Lipinski] with a statistical certainty of 1:740,000,000,000,000,000,000 (quintillion).

* * *

[Lipinski] was charged with Rape, Involuntary Deviate Sexual Intercourse (IDSI), Burglary, Robbery, Indecent Assault, Unlawful Restraint, Terroristic Threats[,] and False Imprisonment^[2] in relation to the 1989 rape and assault of [B.D.] in her Friendship apartment.^[3] Prior to trial, the Indecent Assault, Unlawful Restraint, Terroristic Threats[,] and False Imprisonment charges were *nolle prossed* by the Commonwealth. At the conclusion of a jury trial held before [the trial court], [Lipinski] was convicted of all remaining charges. [Lipinski] appeared before [the sentencing court] on September 19, 2013 and was sentenced to two (2) terms of imprisonment of ten (10) to twenty (20) years at the Rape and IDSI charges, which [the sentencing court] ran consecutive[ly] both to each

² 18 Pa.C.S. §§ 3121, 3123, 3502(c)(1), 3701(a)(1)(iv), 3126(a)(2), 2902(a), 2701(a)(1), and 2903(a), respectively.

³ Ordinarily, the Commonwealth would have been barred from prosecuting Lipinski for these offenses by the relevant statutes of limitation. 42 Pa.C.S. § 5552. However, Pennsylvania law provides the following exception: "[I]f evidence of a misdemeanor sexual offense set forth in subsection (c)(3) or a felony offense is obtained containing human [DNA] . . . the prosecution of the offense may be commenced within the period of limitations provided for the offense or one year after the identity of the individual is determined, whichever is later." 42 Pa.C.S. § 5552(c.1).

other and to another sentence he was already serving for an unrelated crime.^[4] Timely Post-Sentence Motions were filed and were denied on September 30, 2013.

Sentencing Court Opinion (“S.C.O.”), 1/13/2014, at 1-2 (footnotes omitted).

On October 28, 2013, Lipinski filed a timely notice of appeal. On December 23, 2013, as ordered by the sentencing court, Lipinski filed a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On January 13, 2014, the sentencing court entered an opinion pursuant to Pa.R.A.P. 1925(a).

Lipinski presents two issues for our review:

1. Did the sentencing court abuse its discretion when it fashioned a sentence that only considered the impact on the victim and the seriousness of the crime and failed to consider [Lipinski’s] rehabilitative needs and protection of the public, as required by the sentencing code?
2. Did the sentencing court abuse its discretion when it sentenced [Lipinski] to [the statutory maximum] terms of incarceration at count one to not less than ten[,] no[r] more than twenty years and at count two to not less than ten nor more than twenty years to be served consecutively to count one and consecutively to [Lipinski’s] previous sentence of no less than ninety years nor more than [one hundred eighty] years, creating a sentence that is so manifestly excessive that it constitutes too severe a punishment?

Brief for Lipinski at 4 (capitalization modified).

⁴ Lipinski is currently serving a sentence of ninety to one hundred eighty years in prison for similar, but unrelated, crimes.

Before we reach the merits of Lipinski's claims, we first must determine whether he has properly preserved his issues for our review.

Issues challenging the discretionary aspects of sentence must be raised in a post-sentence motion or by presenting the claim to the [sentencing] court during the sentencing procedures. Absent such efforts, an objection to a discretionary aspect is waived. This failure cannot be cured by submitting the challenge in a Rule 1925(b) statement.

Commonwealth v. McAfee, 849 A.2d 270, 275 (Pa. Super. 2004) (quoting ***Commonwealth v. Watson***, 835 A.2d 786, 791 (Pa. Super. 2003)); **see** ***Commonwealth v. Cartrette***, 83 A.3d 1030, 1042-43 (Pa. Super. 2013) (holding that a claim that the sentencing court did not properly consider statutory sentencing factors was waived when defendant failed to raise it at sentencing or in his post-sentence motion); ***Commonwealth v. Anderson***, 830 A.2d 1013, 1016 (Pa. Super. 2003) (holding that a claim that the sentencing court considered improper factors in imposing sentence was waived when defendant raised it for the first time in Rule 1925(b) statement).

Although the thrust of Lipinski's first issue is that the sentencing court failed to consider all of the relevant statutory factors in imposing sentence,⁵ Lipinski's post-sentence motion alleged only the following errors:

⁵ The statutory factors that a court shall consider before imposing sentence are "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. § 9721(b).

The crimes for which [Lipinski] was convicted consisted of first offenses and [were] committed more than [twenty-five] years ago when he was very young.

As [Lipinski] is already serving not less than [ninety years] [*sic*] no[r] more than [one hundred eighty] years in jail, the sentences issued by the court, jurisdictional maximums served consecutively at two counts and consecutive to previous sentence shows ill will and hostility towards [Lipinski] not justified from the facts of the case and constitute an abuse of discretion.

Post-Sentence Motion, 9/20/2013, at 3. Thus, Lipinski's first listed issue was not raised in his post-sentence motion. Rather, Lipinski raised it for the first time in his Rule 1925(b) statement. Accordingly, that claim is waived due to Lipinski's failure to preserve it. **See *Cartrette***, 83 A.3d at 1042-43; ***Anderson***, 830 A.2d at 1016.

However, Lipinski properly preserved his second listed issue in his post-sentence motion. Thus, the sole issue preserved for our review is whether the sentencing court abused its discretion when it sentenced Lipinski to terms of incarceration without allegedly considering the fact that Lipinski had a "prior record score" of zero at the time that he committed the offense. Brief for Lipinski at 15.

As noted earlier, Lipinski's claim implicates the discretionary aspects of his sentence. Our review is guided by the following well-settled legal principles:

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. Prior to reaching the merits of a discretionary sentencing issue:

[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. § 9781(b).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. Pa.R.A.P. 2119(f). The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the [sentencing] court's evaluation of the multitude of factors impinging on the sentencing decision to exceptional cases.

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. Phillips, 946 A.2d 103, 112 (Pa. Super. 2008) (some citations omitted).

As noted above, Lipinski filed a timely notice of appeal, and he properly preserved his second listed issue in his post-sentence motion. In addition, Lipinski's brief contains the required Rule 2119(f) statement. Therefore, we must determine whether Lipinski has stated a substantial question justifying this Court's review of his sentencing claim. ***See Phillips***, 946 A.2d at 112.

The thrust of Lipinski's argument is that the sentencing court was motivated by bias against him in "g[iving] no consideration to [Lipinski's] prior record score of zero." Brief for Lipinski at 17. This Court has held that "an allegation of bias in sentencing implicates the fundamental norms underlying sentencing and hence . . . raises a substantial question." **Commonwealth v. Corley**, 31 A.3d 293, 297 (Pa. Super. 2011). Therefore, we conclude that Lipinski's second issue raises a substantial question, justifying our review of the merits of his claim.

Our standard of review is well-settled:

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. Shugars, 895 A.2d 1270, 1275 (Pa. Super. 2006).

[An] appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance, or indifference.

Commonwealth v. Mouzon, 828 A.2d 1126, 1128 (Pa. Super. 2003) (citing **Commonwealth v. Ellis**, 700 A.2d 948, 958 (Pa. Super. 1997)).

Lipinski alleges that the sentencing court was motivated by bias when it allegedly "gave no consideration to [Lipinski's] prior record score of zero." Brief for Lipinski at 17. We disagree. This Court has held that appellate

courts will presume that the sentencing judge considered the evidence of mitigating circumstances presented to that judge at the sentencing hearing. **See Commonwealth v. Devers**, 546 A.2d 12, 18-19 (Pa. 1988). Despite a lack of a presentence report,⁶ the record establishes that the sentencing court considered Lipinski's prior record score of zero when imposing his sentence. At the sentencing hearing, the Commonwealth submitted proposed sentencing guideline forms⁷ that reflected Lipinski's prior record score at the time of the offense as zero, because he had no prior convictions at that time. Notes of Testimony ("N.T."), 11/18/2013, at 3. Furthermore, the prosecutor made the following statement:

The Commonwealth has submitted guideline sentencing forms that reflect [Lipinski's] prior record score as it would have been at the time of the offense. That does represent a zero. At the time of this offense[,] he had no prior convictions I submitted those guideline forms as reference if Your Honor wanted to take them into consideration.

Id.

⁶ At the close of trial, Lipinski waived his right to a presentence report.

⁷ The prosecutor, Lipinski, and the sentencing court posited that there were no sentencing guidelines in effect at the time of the offense, because our Supreme Court declared the guidelines to be unconstitutional in **Commonwealth v. Sessoms**, 532 A.2d 775 (Pa. 1987). However, new guidelines were implemented and became effective on January 1, 1986, more than three years before Lipinski committed the instant crime. **See** 204 Pa. Code § 303.1.

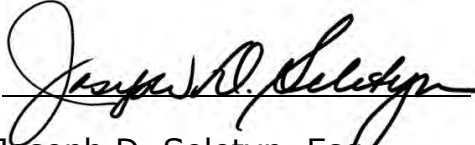
Lipinski's sole basis for his claim of bias is his allegation that the sentencing court did not consider that Lipinski's prior record score was zero at the time of the offense. However, as noted above, the Commonwealth submitted proposed sentencing guidelines at the sentencing hearing that reflected Lipinski's prior record score of zero at the time of the offense. Additionally, the prosecutor explicitly stated at the sentencing hearing that Lipinski's prior record score was zero at the time of the offense. Based upon **Devers**, we presume that the sentencing judge took this information into consideration when imposing Lipinski's sentence. **Devers**, 546 A.2d at 18-19. Because Lipinski's bias claim rests upon his allegation that the sentencing court did not consider his prior record score of zero, and because we conclude that that allegation is meritless, Lipinski's bias claim necessarily fails.

Based upon our review, we conclude that Lipinski's sentence is supported by the record, conforms to the applicable law, and was not motivated by bias. Accordingly, the sentencing court did not abuse its discretion in imposing Lipinski's sentence.

Judgment of sentence affirmed.

Platt, J. concurs in the result.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line drawn through the middle of the text.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/1/2014