NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ANDREW GEORGE MILLER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1811 MDA 2013

Appeal from the Judgment of Sentence May 2, 2013
In the Court of Common Pleas of Perry County
Criminal Division at No(s): CP-50-CR-0000489-2011

BEFORE: FORD ELLIOTT, P.J.E., OLSON, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED JULY 24, 2014**

Andrew George Miller (Appellant) appeals from the judgment of sentence entered May 2, 2013, after he was found guilty of involuntary deviate sexual intercourse (IDSI), aggravated indecent assault, and indecent assault.[1] We vacate and remand for resentencing.

Appellant was charged with the aforementioned offenses after he was accused of molesting his former girlfriend's daughter (the victim). Specifically, the victim claimed that Appellant lived with her and her mother 15 to 17 years earlier, when the victim was 5 to 7 years old. The victim alleged that, during this time, Appellant engaged in a variety of sexual

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 3123(a)(6), 3125(a)(7), and 3126(a)(7), respectively. Subsection 3123(a)(6) was in effect during the time Appellant's crimes were committed, but was deleted in 2002, and the substance of that subsection became the current subsection 3123(b).

misconduct with her on multiple occasions. The victim claimed that Appellant touched her vagina, performed oral sex on her, made her perform oral sex on him, and attempted to penetrate her vagina with his penis.

Appellant was found guilty following a jury trial on October 1, 2012. On May 2, 2013, Appellant received an aggregate sentence of 10 to 20 years' imprisonment followed by two years' probation. Appellant timely filed post-sentence motions challenging, *inter alia*, the discretionary aspects of his sentence. Appellant's motions were denied on September 25, 2013, and he timely filed a notice of appeal. The trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925, and Appellant timely complied. At the same time, Appellant filed a motion for leave to file a supplemental concise statement. In the motion, Appellant's counsel averred that he had been unable to obtain a transcript of Appellant's trial. The trial court granted Appellant's motion, and a supplemental concise statement was filed.[2]

Appellant raises the following issues on appeal.

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[2] We note that Appellant's supplemental concise statement is in violation of our Rules of Appellate Procedure. Appellant's statement spans 13 pages and contains lengthy discussions of Appellant's issues. ***Cf.*** Pa.R.A.P. 1925(b)(4)(iv) ("The Statement should not be redundant or provide lengthy explanations as to any error."). "Despite this apparent impropriety, neither the Commonwealth nor the trial court objected and the issues are clearly set forth, unlike previous cases in which we found waiver where the statement was lengthy and the issues were not clearly identified. Therefore, we will address the issues raised." ***Commonwealth v. Williams***, 959 A.2d 1272, 1276 n.1 (Pa. Super. 2008) (citation omitted).

> A. Whether the trial court wrongly excluded from trial evidence of the Appellant's positive character reputation for chastity, which was relevant and admissible character trait, and its exclusion constituted prejudicial error?
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> B. Whether the trial court failed to instruct the Appellant's jury that his positive character reputation for honesty and truthfulness alone may raise a reasonable doubt as to his guilt and defense trial counsel deprived him of his constitutional right to the effective assistance of counsel for failing to object to such failure?
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> C. Whether the sentencing court abused its discretion and imposed a manifestly excessive sentence for involuntary deviate sexual intercourse (IDSI) by sentencing Appellant to a minimum of 10 years and a maximum of 20 years of imprisonment – the statutory maximum, which is 4 years beyond the aggravated range under the sentencing guidelines, thereby focusing exclusively on the crime involved to the exclusion of certain mitigating factors, especially his lack of prior criminal record?
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> D. Whether the sentencing court erred in imposing the statutory maximum sentence for IDSI by relying on Appellant's silence at sentencing as indicative of his failure to take responsibility for the crimes of which he is convicted or lack of remorse, which is an impermissible factor to be relied on in sentencing and violative of his state and federal constitutional rights against self-incrimination?
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> E. Whether the sentencing court erred in imposing the statutory maximum sentence for IDSI by relying on Appellant's failure to appear for the original sentencing hearing, which is an impermissible factor to be relied on in sentencing and there is no evidence that he had fled the jurisdiction or committed any crimes in the interim?

Appellant's Brief at 6 (trial court answers and unnecessary capitalization omitted).

Appellant's first issue relates to his attempt to introduce character evidence during trial. Specifically, Appellant's counsel asked Appellant's

sister, Mary Morrison, to testify as to Appellant's "reputation for sexual morality regarding young girls." N.T., 10/1/2013, at 68. The District Attorney objected, and the trial court sustained the objection. The following exchange then took place.

> [Defense counsel]: May I respond, Your Honor?
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> THE COURT: You may respond.
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> [Defense counsel]: We're allowed to get in reputation evidence of any character trait at issue. I would submit to you that sexual morality involving young girls is a character trait at issue right now.
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> [District Attorney]: [Pa.R.E.] 608 specifically says evidence may refer only to character for truthfulness or untruthfulness.
>
> THE COURT: [Defense counsel]?
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> [Defense counsel]: Well, you Honor, I've [*sic*] leave that for now. I'd like to keep it open. I want to use our time while we still have the Jury before lunch, then I would like to revisit that perhaps.
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> THE COURT: All right. I'll reserve my ruling then. Go ahead. So don't answer the question, but ask another question.

Id.

On appeal, Appellant contends that the District Attorney's description of Pa.R.E. 608 was erroneous, and that defense counsel should have been permitted to present character evidence concerning Appellant's "reputation for the trait of chastity, particularly as to young girls." Appellant's Brief at 28-29. The trial court posits that this testimony was excluded correctly because Appellant's witnesses "improperly testified that they never

witnessed improper conduct between Appellant and [the v]ictim and/or other young girls. Moreover, they did not testify regarding his general reputation and counsel did not provide an offer of proof that the witnesses would have testified to same." Trial Court Opinion, 1/7/2014, at 8. Therefore, the trial court concluded, "[s]ince their testimony 'would not have been limited to testimony concerning Appellant's general reputation in the community, it would not have been admissible.'" ***Id.*** (quoting ***Commonwealth v. Lauro***, 819 A.2d 100, 109 (Pa. Super. 2003)).

We agree that Appellant is not entitled to relief, although we rely on reasons other than those advanced by the trial court.[3] While the trial court sustained the District Attorney's objection initially, the court then indicated that it would "reserve [its] ruling" until a later time, and would permit defense counsel to revisit the issue. However, defense counsel never attempted to address this issue again. Pa.R.E. 103(a) provides that "[a] party may claim error in a ruling to admit or exclude evidence only" where "the ruling admits evidence" or "the ruling excludes evidence." Because the trial court never actually ruled on the admissibility of the relevant evidence, we conclude that Appellant's claim has not been preserved for our review.

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[3] This Court is "'not bound by the rationale of the trial court, and may affirm on any basis.'" ***Commonwealth v. Doty***, 48 A.3d 451, 456 (Pa. Super. 2012) (quoting ***In re Jacobs***, 15 A.3d 509 n.1 (Pa. Super. 2011)).

Appellant's second claim is that "the trial court failed to instruct the Appellant's jury that his positive character reputation for honesty and truthfulness alone may raise a reasonable doubt as to his guilt[.]" Appellant's Brief at 35 (unnecessary capitalization omitted). During trial, Appellant called a parade of witnesses to testify that he has a reputation in the community for truthfulness. Appellant contends that the jury should have been provided with an instruction informing them that character evidence was by itself sufficient to raise a reasonable doubt as to Appellant's guilt. Appellant also claims that defense counsel was ineffective for failing to request such an instruction. The trial court responds that its instruction to the jury relating to the general credibility of witnesses was sufficient. Trial Court Opinion, 1/7/2014, at 9.

It is true that "a defendant who presents character evidence is entitled to a jury instruction telling the jurors that evidence of good character may create a reasonable doubt, thus requiring a verdict of not guilty." ***Commonwealth v. Hoover***, 16 A.3d 1148, 1151 (Pa. Super. 2011) (citing ***Commonwealth v. Neely***, 561 A.2d 1, 3 (Pa. 1989)). However, Appellant's counsel never requested an instruction to that effect. Thus, this claim is waived. ***See Commonwealth v. Poland***, 26 A.3d 518, 523 (Pa. Super. 2011) ("Poland cites to no cases to support his position that the trial court should have given the instruction absent his request. As such, the trial court committed no error in failing to do so.").

To the extent that Appellant couches this issue in terms of a claim of ineffective assistance of counsel, he is also not entitled to relief. Generally, such claims may not be reviewed on direct appeal, and must be raised in a petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. ***See Poland***, 26 A.3d at 523 ("As for [Poland's] argument that counsel was ineffective for failing to request a charge related to his good character, that is an issue for a post-conviction relief petition, not for this direct appeal.").[4]

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[4] Our Supreme Court has explained that trial courts retain discretion to address ineffective assistance of counsel claims prior to the filing of a PCRA petition in certain limited situations:

> We recently held in [***Commonwealth v. Holmes***, 79 A.3d 562 (Pa. 2013),] that claims of ineffective assistance of counsel litigated after our decision in [***Commonwealth v. Grant***, 813 A.2d 726, 739 (Pa. 2002))] are not generally a proper component of a defendant's direct appeal. In ***Holmes,*** this Court reaffirmed the general rule of deferral established in ***Grant,*** and disapproved of expansion of the [exception presented in ***Commonwealth v. Bomar,*** 826 A.2d 831 (Pa. 2003)], which allowed for the presentation of ineffectiveness claims on direct appeal if the trial court held an evidentiary hearing and disposed of the ineffectiveness claims in its opinion. This Court in ***Holmes*** limited the ***Bomar*** exception to its pre[-]***Grant*** facts. We further recognized two exceptions to the ***Grant*** deferral rule, both falling within the discretion of the trial court. First, we held that trial courts retain discretion, in extraordinary circumstances, to entertain a discrete claim of trial counsel ineffectiveness if the claim is both apparent from the record and meritorious, such that immediate consideration best serves the interest of justice. Second, we held that trial courts also have discretion to entertain prolix claims of ineffectiveness if there is a good cause shown and the unitary review thus permitted is accompanied by

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Appellant's final three claims challenge the discretionary aspects of his sentence. Before we may reach the merits of a challenge to the discretionary aspects of sentencing, we must be satisfied that: (1) the appeal is timely; (2) the appellant has preserved his issues; and (3) the appellant has included in his brief a Pa.R.A.P. 2119(f) concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence. ***Commonwealth v. Corley***, 31 A.3d 293, 295-96 (Pa. Super. 2011). Furthermore, the concise statement must raise a substantial question that the sentence is inappropriate under the sentencing code. ***Id.*** at 296.

Instantly, the record indicates that Appellant timely filed this appeal. Appellant also has preserved two of his three discretionary aspects challenges in a motion for modification of sentence. Specifically, Appellant's motion included his claim that the trial court relied impermissibly on Appellant's silence at sentencing, and his claim that the trial court relied impermissibly on Appellant's failure to appear at the original sentencing

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> a knowing and express waiver by the defendant of the right to pursue a first PCRA petition.

Commonwealth v. Arrington, 86 A.3d 831, 856-57 (Pa. 2014) (footnote omitted).

Under the present circumstances, it is clear that the exceptions announced in ***Holmes*** do not apply. Critically, the trial court in this matter has not exercised its discretion by reviewing Appellant's issue, and Appellant has not waived his right to later PCRA review. Accordingly, while Appellant is free to raise this claim in a future PCRA petition, he may not do so on direct appeal.

hearing. However, Appellant's third claim, that the trial court failed to fashion an individualized sentence, and that the sentence was unreasonably harsh as a result, has not been preserved for our review. While Appellant argued in his motion that his sentence was excessive, he did not contend that the trial court's sentence was not individualized.[5] ***Cf. Commonwealth v. Tobin***, 89 A.3d 663, 666 (Pa. Super. 2014) (concluding that discretionary aspects claim was preserved where "[Tobin] did not precisely level the issue made in his Pa.R.A.P.1925(b) statement or on appeal in his post-sentence motion," but "a fair reading of his motion to modify could encompass his position").

We next consider whether Appellant has presented a substantial question with regard to his properly-preserved claims. Appellant has included a Rule 2119(f) statement in his brief, in which he argues that his claims that the trial court considered impermissible sentencing factors present a substantial question. Appellant's Brief at 18-27. We agree, and we proceed to address the merits of these claims. ***See Commonwealth v. Allen***, 24 A.3d 1058, 1064-65 (Pa. Super. 2011) ("This Court has

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[5] Instead, Appellant argued merely that the trial court abused its discretion because his sentence "is outside the standard range" of the sentencing guidelines. Post-Sentence Motions, 5/13/2013, at 3 (unnumbered pages); ***see also*** Defendant's Memorandum of Law in Support of Motion to Modify Sentence, 8/7/2013, at 4 ("[T]he [trial c]ourt sentenced outside the guidelines and the sentence is unreasonable.").

recognized that a claim that a sentence is excessive because the trial court relied on an impermissible factor raises a substantial question.").

Our standard of review of a challenge to the discretionary aspects of sentence 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.

In every case in which the court imposes a sentence for a felony or a misdemeanor, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. The sentencing guidelines are not mandatory, and sentencing courts retain broad discretion in sentencing matters, and therefore, may sentence defendants outside the [g]uidelines. In every case where the court imposes a sentence ... outside the guidelines adopted by the Pennsylvania Commission on Sentencing ... the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines. However, [t]his requirement is satisfied when the judge states his reasons for the sentence on the record and in the defendant's presence. Consequently, all that a trial court must do to comply with the above procedural requirements is to state adequate reasons for the imposition of sentence on the record in open court.

When imposing sentence, a court is required to consider the particular circumstances of the offense and the character of the defendant. In considering these factors, the court should refer to the defendant's prior criminal record, age, personal characteristics and potential for rehabilitation. Where pre-sentence reports exist, we shall ... presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along

> with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself.

Commonwealth v. Antidormi, 84 A.3d 736, 760-61 (Pa. Super. 2014) (citations and quotation marks omitted).

In the present case, Appellant was scheduled to be sentenced on January 31, 2013. However, Appellant failed to appear, and a bench warrant was issued. Appellant was arrested and incarcerated on or about April 4, 2013, and a new sentencing hearing was set for May 2, 2013.

At Appellant's sentencing, defense counsel announced that Appellant maintained his innocence and would be filing an appeal. N.T., 5/2/2013, at 3-4. The trial court chided Appellant for failing to appear at his prior hearing. ***Id.*** at 5-6. Appellant stated that he chose not to appear because "I was just frustrated. I just felt like I -- I was left [*sic*] down. I was at my house. I didn't go nowhere." ***Id.*** at 5. The trial court admitted that "I wasn't aware that I was sentencing [Appellant] today," and proceeded to review a pre-sentence investigation report (PSI)[6] and the relevant sentencing guidelines. ***Id.*** at 6. The trial court then imposed sentence. Prior to imposing sentence, the trial court offered the following explanation, in relevant part.

> THE COURT: All right. Okay, well, since I know you are going to be appealing this, I am not going to waste my breath. The fact that you were not man enough to come to court and

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[6] The trial court did not state on the record that it was reviewing a PSI; however, the notes of testimony indicate that the court did review something prior to sentencing Appellant. N.T., 5/2/2013, at 6. Appellant concedes that the trial court reviewed a PSI. Appellant's Brief at 23.

> face your punishment speaks volumes, in my opinion, for your character.
>
> Most people don't like to come to court and be sentenced and know they are going to SCI; but in most situations, I would say 95 percent of the situations, people come to court and they take their medicine. So I -- you know, I was frustrated isn't -- isn't flowing with me.
>
> So Sentence of this Court -- Commonwealth versus Andrew George Miller, CR-489 of 2011.
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> Sentence of this Court as to One Count of IDSI, a Felony of the First Degree, in violation of Title 18, Section 3123, is that [Appellant] pay costs and be incarcerated in a state correctional institution a minimum of 10 years, maximum of 20 years.
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> The Court is aggravating the Sentence in that [Appellant] has shown absolutely no remorse over his conviction and hid from law enforcement, which required a Bench Warrant being issued for his arrest to face Sentencing.

N.T., 5/2/2013, at 6-7.

We first address Appellant's claim that the trial court erred by considering Appellant's failure to appear at his original sentencing hearing. Critically, Appellant does not direct us to any binding authority suggesting that this is an impermissible consideration at sentencing.[7] Rather, as

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[7] In his brief, Appellant cites to West's Pennsylvania Practice in support of the proposition that a defendant "'[can]not be punished at sentencing for having failed to appear.'" Appellant's Brief at 60 (quoting 16B West's Pa. Prac., Criminal Practice § 31:20). The Pennsylvania Practice article cites ***Commonwealth v. Cortez***, 860 A.2d 1045 (Pa. Super. 2004), *vacated*, 934 A.2d 1151 (Pa. 2007), which is also discussed by Appellant. In that case, a panel of this Court vacated Cortez's judgment of sentence and remanded for resentencing. In concluding that Cortez's sentence was an abuse of discretion, the panel observed that the sentencing court had aggravated the sentence based in part on Cortez's failure to appear for trial. ***Id.*** at 1049.
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observed by the Commonwealth, it appears that the trial court "specifically linked Appellant's nonappearance to his 'character,' an appropriate sentencing consideration." Commonwealth's Brief at 12; ***see Commonwealth v. Riggs***, 63 A.3d 780, 786 (Pa. Super. 2012) ("The sentencing court is given broad discretion in determining whether a sentence is manifestly excessive because the sentencing judge 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.'") (quoting ***Commonwealth v. Andrews***, 720 A.2d 764, 768 (Pa. Super. 1998)). Thus, Appellant's first challenge to the discretionary aspects of his sentence does not entitle him to relief.

However, because it appears that the trial court may have relied impermissibly on Appellant's silence at sentencing, we conclude that a remand is necessary. We find instructive this Court's decision in ***Commonwealth v. Bowen***, 975 A.2d 1120 (Pa. Super. 2009). In that case, a panel of this Court affirmed a sentence based in part on the defendant's purported failure to show remorse. The Court explained that while trial court may take into account a defendant's apparent lack of remorse when

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This Court expressed disapproval that Cortez had received "a significant extra punishment … for not appearing in court, which can be separately punishable by contempt." ***Id. Cortez*** was vacated by a *per curiam* order of our Supreme Court, and remanded for reconsideration in light of ***Commonwealth v. Walls***, 926 A.2d 957 (Pa. 2007) and ***Commonwealth v. Whitmore***, 912 A.2d 827 (Pa. 2006). Thus, ***Cortez*** is not binding precedent.

fashioning a sentence, "silence at sentencing may not constitute the only factor relied upon to find lack of remorse." ***Id.*** at 1124-27. The panel reasoned as follows.

> In the instant case, the trial court indicated that its sentence was based in some part on [Bowen's] failure to show remorse. The record is unclear, however, as to how much of a factor [Bowen's] silence was in the court's finding of lack of remorse. We need not remand for such a determination, however, because as explained *infra,* we affirm the sentence on other grounds….
>
> Despite the trial court's error, [Bowen] is not automatically entitled to have his sentence vacated. The trial court instantly noted several other factors in imposing an aggravated-range sentence, including [Bowen's] lack of a significant job history and "the great emotional trauma his crimes caused the victim," as well as his recidivist history and violations of probation….
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> ***
>
> Even excluding [Bowen's] silence as a factor, the trial court found that the case was "riddled with aggravating circumstances." Importantly, the trial court made this statement after listing several factors that did not involve [Bowen's] silence. It is apparent that the trial court imposed an individualized sentence, … and still sentenced [Bowen] within the sentencing guidelines. Based on the trial court's reliance on these legitimate aggravating factors, we cannot conclude that [Bowen's] sentence was "clearly unreasonable."

Id. at 1127-28 (citations omitted).

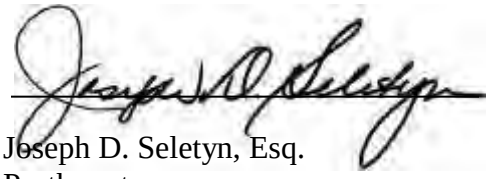
Like the trial court in ***Bowen***, the trial court in this matter does not endeavor to explain what it considered in concluding that Appellant lacked remorse. The court simply points out that it did not say, explicitly, that it relied on Appellant's silence. ***Id.*** at 5 ("Importantly, the [trial c]ourt referenced Appellant's lack of remorse, but did not refer to his silence as

indicia of that factor."). In sharp contrast to ***Bowen***, however, the trial court here relied on only two reasons for giving Appellant the statutory maximum sentence for his IDSI conviction: Appellant's alleged lack of remorse, and his failure to appear at the initial sentencing hearing. ***See*** Trial Court Opinion, 1/7/2014, at 4 ("The [trial c]ourt placed its reasons for deviating from the guidelines on the record; namely, that "[Appellant] has shown absolutely *no remorse* over his conviction *and hid from law enforcement*[.]") (quoting the trial court's May 2, 2013 sentencing order) (italics in original). Thus, unlike ***Bowen***, where remand was unnecessary due to the trial court's thorough justification of its sentence, based on several additional factors, the trial court's sentence here is supported only by one other factor. Additionally, while Bowen was sentenced in the aggravated range of the sentencing guidelines, Appellant was sentenced to the statutory maximum for IDSI, beyond the aggravated range. Accordingly, in light of ***Bowen***, we vacate Appellant's judgment of sentence and remand for resentencing. The trial court must resentence Appellant without taking his silence into consideration.

Judgment of sentence vacated. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Judge Olson concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/24/2014