NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ANTHONY KENNETH LEIGER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1826 MDA 2013

Appeal from the Judgment of Sentence entered September 23, 2013
In the Court of Common Pleas of Clinton County
Criminal Division at No: CP-18-CR-0000247-2013

BEFORE: OTT, STABILE, and MUSMANNO, JJ.

MEMORANDUM BY STABILE, J.: **FILED JULY 14, 2014**

Appellant Anthony Kenneth Leiger appeals the judgment of sentence of the Court of Common Pleas of Clinton County entered September 23, 2013. Appellant challenges the discretionary aspects of his sentence. Specifically, Appellant argues the trial court abused its discretion in imposing a manifestly excessive and inappropriate sentence. Because we find the trial court did not abuse its discretion in fashioning Appellant's sentence, we affirm.

We assume the parties' familiarity with the facts and the procedural history of the case. Briefly, Appellant, while incarcerated at the Clinton County Prison on a burglary charge, failed to return to the prison following his release on community service. Appellant remained at large approximately one day. After being apprehended, Appellant was charged

with escape, 18 Pa.C.S.A. § 5121. Prior to the jury selection, Appellant entered a guilty plea to escape, graded as a felony in the third degree, 18 Pa.C.S.A. § 5121(a), (d).[1] "The Guilty Plea Statement form noted a standard range of RS-9, with the agreement that sentencing would be in the standard range but there was no agreement on situs." Trial Court Opinion, 10/31/13, at 1. Ultimately, the trial court sentenced Appellant to a term of imprisonment of six to sixty months to be served in a state correctional facility consecutively to the sentence he was serving at the time of his escape.

Appellant argues the "sentencing court abused its discretion in sentencing [] Appellant to a term of incarceration at a state correctional facility, and said sentence was clearly unreasonable." Appellant's Brief at 8. The Commonwealth argues that Appellant's Rule 2119(f) statement is defective and that Appellant failed to raise a substantial question regarding his sentence warranting our review.

Appellant's challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Commonwealth v. Sierra***, 752 A.2d 910, 912 (Pa. Super. 2000). To preserve a challenge to the discretionary aspects of a sentence, an appellant must file timely notice of appeal, preserve the argument in a timely post-sentence motion or orally

---

[1] The maximum term of imprisonment for a third degree felony is seven years. ***See*** 18 Pa.C.S.A. § 1103(3).

at sentencing, include a Pa.R.A.P. 2119(f) statement in the appellate brief, and raise a substantial question. ***Commonwealth v. Dewey***, 57 A.3d 1267, 1269 (Pa. Super. 2012).

The first two requirements for triggering our review are readily met here. In fact, Appellant filed a timely notice of appeal and a timely post-sentence motion challenging the discretionary aspects of the sentence. Whether Appellant has met the last two requirements is more problematic.

We agree with the Commonwealth the 2119(f) is woefully inadequate for purposes of our review. The entire 2119(f) statement consists of the following sentence: "The sentencing court abused its discretion in sentencing [] Appellant to a term of incarceration at a state correctional facility, and said sentence was clearly unreasonably." Appellant's Brief at 8. The deficiency is readily apparent considering "[a]t a minimum, the Rule 2119(f) statement must articulate what particular provision of the code is violated, what fundamental norms the sentence violates, and the manner in which it violates that norm." ***Commonwealth v. Mastromarino***, 2 A.3d 581, 585-86 (Pa. Super. 2010) (citation omitted). As such, the 2119(f) is inadequate. In the argument section, however, as noted below, Appellant develops, to some extent, the reasons for its challenge. In light of the foregoing, we decline to find the 2119(f) statement has a fatal defect.

Next, we must determine whether Appellant raised substantial issues for our review. Appellant seems to argue the sentencing court abused its discretion in: (i) not considering Appellant's age, history, conduct while

incarcerated (*i.e.*, enrolled and participated in GED classes and attended drug and alcohol abuse counseling); and, (ii) sentencing him to serve sentence in a state facility, as opposed to a county facility (*i.e.*, Appellant argues he should have been incarcerated in the same county facility from which he previously escaped).

With regard to the first challenge, Appellant does not argue the trial court failed to consider age, history and conduct while incarcerated; rather, he argues the trial court erred in not weighing these circumstances favorably to him.[2] "[W]e have repeatedly held that the mere assertion that the trial court failed to give adequate weight to sentencing factors will not rise to the level of a 'substantial question.'" ***Commonwealth v. Dalberto***, 648 A.2d 16, 22 (Pa. Super. 1994) (citations omitted). Thus, Appellant has failed to raise a substantial question for our review.

With regard to the second challenge (imprisonment in a state facility as opposed to a county facility), we conclude Appellant has raised a

---

[2] It should be noted the trial court ordered and reviewed a pre-sentence investigation report prior to sentencing Appellant. Appellant's Brief at 9. "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. Devers***, 546 A.2d 12, 18 (Pa. 1988).

substantial question. ***See Commonwealth v. Stalnaker,*** 545 A.2d 886 (Pa. Super. 1988). We therefore review the merits of Appellant's challenge.

The trial court's authority to choose the place of confinement derives from Section 9762, which in relevant part provides:

> All persons sentenced three or more years after the effective date of this subsection [November 24, 2008] to total or partial confinement shall be committed as follows:
>
> (1) Maximum terms of five or more years shall be committed to the Department of Corrections for confinement.
>
> (2) Maximum terms of two years or more but less than five years shall be committed to the Department of Corrections for confinement, except upon a finding of all of the following:
>
> > (i) The chief administrator of the county prison, or the administrator's designee, has certified that the county prison is available for the commitment of persons sentenced to maximum terms of two or more years but less than five years.
> >
> > (ii) The attorney for the Commonwealth has consented to the confinement of the person in the county prison.
> >
> > (iii) The sentencing court has approved the confinement of the person in the county prison within the jurisdiction of the court.
>
> (3) Maximum terms of less than two years shall be committed to a county prison within the jurisdiction of the court.

42 Pa.C.S.A. § 9762(b).

Here, the trial court imposed a maximum term of five years in prison. Thus, pursuant to the clear language of Section 9762(b), the trial court had the authority to commit Appellant to a state correctional facility.

Additionally, we find the trial court did not abuse its discretion in choosing a state facility.

> [L]ittle if any guidance exists to aid the trial court in exercising its discretion with respect to determining the place for confinement under 42 Pa.C.S.A. § 9762(2)[3]. While a convicted individual has no constitutional or other inherent right to serve his imprisonment in any particular institution or type of institution, a court should consider the differences between the state and county prison environment in choosing to sentence an individual to a state rather than a county facility.

Stalnaker, 545 A.2d at 889 (citations omitted).

Here, the trial court clearly explained why it committed Appellant to a state institution as opposed to the county prison: "We believe it inappropriate to sentence a defendant to a county correction facility when he

---

[3] Former section 9762 read as follows:

> All persons sentenced to total or partial confinement for:
>
> (1) maximum terms of five or more years shall be committed to the Bureau of Correction for confinement;
>
> (2) maximum terms of two years or more but less than five years may be committed to the Bureau of Corrections for confinement or may be committed to a county prison within the jurisdiction of the court;
>
> (3) Maximum terms of less than two years shall be committed to a county prison within the jurisdiction of the court except that as such facilities become available on dates and in areas designated by the Governor in proclamations declaring the availability of State correctional facilities, such persons may be committed to the Bureau of Correction for confinement.

42 Pa.C.S.A. § 9762 (1988).

was charged with escaping from that facility. Because of his escape history, [Appellant] would not eligible for programming in the County."[4] Trial Court Opinion, 10/31/13, at 1.[5]

In light of the foregoing, we conclude the trial court did not abuse its discretion in ordering Appellant to serve his sentence in a state correctional facility. Accordingly, we affirm the judgment of sentence.

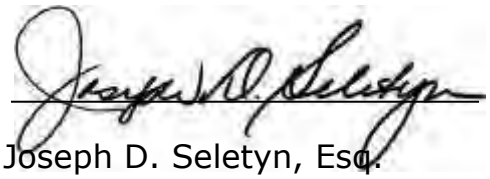
Judgment of sentence affirmed.

---

[4] We find troubling the following statement from the trial court: "Based on the Defendant's desire to file a frivolous appeal, we should have sentenced him to nine to sixty-months." Trial Court Opinion, 10/31/13, at 1. To our knowledge, an appellant's desire to appeal is not a sentencing factor. While individual deterrence from engaging in similar criminal conduct is a proper consideration, using sentencing authority to deter or, even worse, punish an appellant for exercising a right is not a proper sentencing consideration.

[5] The trial court also stated that sentencing Appellant to a state facility was "intended to be an object lesson for other county prisoners who are considering an attempt to escape." Trial Court Opinion, 10/31/13, at 1. Appellant does not challenge the trial court's "message sending" considerations. At any rate, it appears to be a proper consideration, ***see Commonwealth v. Hess***, 745 A.2d 29, 31 (Pa. Super. 2000) ("'Message sending' considerations of this sort [*i.e.*, "sentence imposed depreciated the seriousness of the crime"] are targeted at two audiences: others similarly situated and the public at large. The former requires the sentencing court to predict how the future behavior of others will be altered in response to this sentence.").

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/14/2014