

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

NICOLE LORETTA MELLINGER

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1851 MDA 2013

Appeal from the Judgment of Sentence September 24, 2013  
In the Court of Common Pleas of Dauphin County  
Criminal Division at No(s): CP-22-CR-0005948-2012

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

MEMORANDUM BY OLSON, J.:

**FILED JULY 08, 2014**

Appellant, Nicole Mellinger, appeals from the judgment of sentence entered on September 24, 2013, as made final by the denial of her post-sentence motion on October 8, 2013. We affirm.

The trial court aptly summarized the facts as follows:

During the overnight hours from June 14, 2012 to June 15, 2012, Appellant possessed heroin. She received the heroin from [her] co-defendant Lindsay [K]arlin [("Karlin")], took it back to a residence in Derry Township, and gave the heroin to Donald Otto [("Otto")]. A combination of the consumption of the heroin, Vicodin, and alcohol caused [Otto] to overdose. He became unconscious sometime during the early morning hours. Rather than seeking medical attention, Appellant researched on the computer how to deal with a heroin overdose. Eventually she called her sister [and co-defendant], Lindsey Mellinger [("Sister")], and [Karlin] to help her with trying to aid [Otto]. Again, they conducted research and tried home remedies. They finally called 9-1-1 at about 5:30 a.m. At that point, professionals tried to give medical treatment to [Otto], but he succumbed to

\* Retired Senior Judge assigned to the Superior Court.

the overdose. . . . Appellant gave [S]ister the heroin to hide so the police would not find any drugs on her person.

Trial Court Opinion, 12/10/13, at 3 (internal citations omitted).

On June 25, 2013, Appellant pled guilty to unlawful delivery of a controlled substance,<sup>1</sup> two counts of criminal conspiracy,<sup>2</sup> unlawful possession of a controlled substance,<sup>3</sup> criminal use of a communication facility,<sup>4</sup> tampering with or fabricating physical evidence,<sup>5</sup> and recklessly endangering another person.<sup>6</sup> The trial court ordered a pre-sentence investigation report ("PSI") and deferred sentencing. On September 24, 2013, the trial court sentenced Appellant to an aggregate term of one to two years' incarceration and a consecutive probationary sentence of five years. Appellant filed a post-sentence motion to modify sentence pursuant to Pennsylvania Rule of Criminal Procedure 720 on October 3, 2013. The trial court denied the post-sentence motion on October 8, 2013. This timely appeal followed.<sup>7</sup>

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<sup>1</sup> 35 P.S. § 780-113(a)(30).

<sup>2</sup> 18 Pa.C.S.A. § 903(c).

<sup>3</sup> 35 P.S. § 780-113(a)(16).

<sup>4</sup> 18 Pa.C.S.A. § 7512(a).

<sup>5</sup> 18 Pa.C.S.A. § 4910(1).

<sup>6</sup> 18 Pa.C.S.A. § 2705(a).

<sup>7</sup> On October 17, 2013, the trial court ordered Appellant to file a concise statement of errors complained of on appeal ("concise statement"). **See** *(Footnote Continued Next Page)*

Appellant presents one issue for our review:

Whether the trial court abused its discretion in sentencing Appellant to an aggregate sentence of one to two years of incarceration and a consecutive probationary period of five years where the [trial] court focused exclusively on the seriousness of the crime and failed to consider Appellant's individualized circumstances, relevant history, and rehabilitative needs[?]

Appellant's Brief at 5 (capitalization removed).

Appellant alleges that the trial court's sentence is excessive because it failed to take into consideration mitigating factors and only focused on the severity of the crime when it sentenced her. As such, Appellant's claim challenges the discretionary aspects of her sentence. **See Commonwealth v. Disalvo**, 70 A.3d 900, 902 (Pa. Super. 2013). "We note that "[s]entencing 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." **Commonwealth v. Clarke**, 70 A.3d 1281, 1287 (Pa. Super. 2013) (citation omitted). As Appellant was sentenced within the guidelines, we may only vacate her sentence if we find this "case involves circumstances where the application of the guidelines would be clearly unreasonable[.]" 42 Pa.C.S.A. § 9781(c)(2); **see Commonwealth v. Dodge**, 77 A.3d 1263, 1270 (Pa. Super. 2013).

(Footnote Continued) \_\_\_\_\_

Pa.R.A.P. 1925(b). Appellant filed her concise statement on October 29, 2013. The trial court issued its Rule 1925(a) opinion on December 10, 2013. Appellant's lone issue on appeal was included in her concise statement.

Pursuant to statute, Appellant does not have an automatic right to appeal the discretionary aspects of her sentence. **See** 42 Pa.C.S.A. § 9781(b). Instead, Appellant must petition this Court for permission to appeal the discretionary aspects of her sentence. **Id.**

As this Court has explained:

To reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, 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).

**Commonwealth v. Cook**, 941 A.2d 7, 11 (Pa. Super. 2007) (citation omitted). Appellant filed a timely notice of appeal and properly preserved the issue for our review in her post-sentence motion. Appellant's brief also contains a statement pursuant to Pennsylvania Rule of Appellate Procedure 2119(f). We now turn to whether the appeal presents a substantial question.

"In order to establish a substantial question, the appellant must show actions by the trial court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process."

**Commonwealth v. Williams**, 69 A.3d 735, 740 (Pa. Super. 2013), *appeal denied*, 83 A.3d 415 (Pa. 2014). "The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case

basis.” **Id.** Appellant’s Rule 2119(f) statement alleges that the sentence: (1) was too severe a punishment in light of Appellant’s rehabilitative needs; (2) was contrary to the norms of sentencing because the trial court focused exclusively on the seriousness of the crimes; (3) was flawed because the trial court failed to consider the required sentencing criteria; and (4) was disproportionate when considered in light of her co-defendants’ sentences. Appellant’s claims raise a substantial question. **Id.** (citation omitted) (“A claim that sentence was manifestly excessive presents a substantial question”); **Commonwealth v. Mastromarino**, 2 A.3d 581, 589 (Pa. Super. 2010), *appeal denied* 14 A.3d 825 (Pa. 2011) (citation omitted) (A “substantial question [is] raised where the appellant aver[s that there is] an unexplained disparity between h[er] sentence and that of h[er] co-defendant[s.]”) Thus we will proceed to consider the merits of her challenge to the discretionary aspects of her sentence.

Appellant first contends that the trial court placed undue influence on the severity of the crime and ignored the other factors outlined in Section 9721.<sup>8</sup> Appellant alleges that the trial court focused exclusively upon the seriousness of the crime and ignored her rehabilitative needs. However, “when sentencing an appellant, the trial court is permitted to consider the

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<sup>8</sup> The Section 9721 factors 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. The court shall also consider [the sentencing guidelines].” 42 Pa.C.S.A. § 9721(b).

seriousness of the offense and its impact on the community.” ***Commonwealth v. Marts***, 889 A.2d 608, 615 (Pa. Super. 2005) (citations omitted). “[T]he fact that Appellant disagrees with the sentencing court’s conclusion regarding [her] rehabilitative potential does not render the sentence imposed an abuse of discretion.” ***Id.***

The trial court clearly considered Appellant’s mitigating factors at sentencing. Appellant’s claim is premised on the assumption that although a PSI was ordered, the trial court did not review it. However, the record belies that assertion. At sentencing, the trial court reviewed Appellant’s prior criminal record. N.T., 9/24/2013 at 21. The only document in the certified record containing the information cited by the trial court is the PSI. Thus, although the trial court did not reference the PSI by name, it is evident that the trial court reviewed the PSI. “Where 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.” ***Commonwealth v. Griffin***, 65 A.3d 932, 937 (Pa. Super. 2013), *appeal denied*, 76 A.3d 538 (Pa. 2013) (internal quotation marks and citations omitted). By ordering a PSI and reviewing it at sentencing, the trial court properly considered all of the factors set forth in Section 9721.

Appellant also claims that her sentence is disproportionate when considered in light of her co-defendants’ sentences. First, we note that

sentencing is an individualized process. ***Commonwealth v. Baker***, 72 A.3d 652, 663 (Pa. Super. 2013). Mechanically imposing the same sentence on each co-defendant would violate this principle. As Appellant acknowledges, the charges lodged against her co-defendants and to which they pled guilty differed from the charges that were the subject of Appellant's guilty plea.

Sister pled guilty to unlawful possession of a controlled substance, recklessly endangering another person, and conspiracy to tamper with or fabricate physical evidence. ***See Commonwealth v. Mellinger***, CP-22-CR-0004519-2012. Karlin pled guilty to possession with intent to deliver, possession of a controlled substance, and criminal use of a communication facility. ***See Commonwealth v. Karlin***, CP-22-CR-0005940-2012. Unlike her co-defendants, Appellant pled guilty to seven charges. She supplied Otto with heroin and, although she could have prevented his death, her failure to act ultimately led to Otto's demise. N.T., 9/24/13, at 14. Thus, there were sufficient reasons for the trial court to impose a more severe sentence on Appellant than on her co-defendants.

Lastly, Appellant contends her sentence was excessive, as it constituted too severe a punishment. In the instant case, Appellant was in a position where she could have called medical professionals to help Otto. Instead of doing so, however, she contacted Sister for assistance, and researched home remedies for heroin overdoses on the internet for several hours before finally contacting authorities. N.T., 6/25/13, at 5. Although

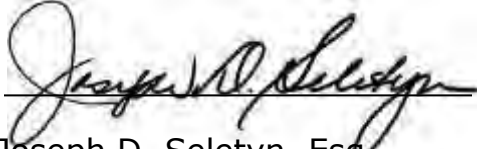
Appellant later expressed remorse for her actions, during (and immediately after) the incident at issue, she hid the heroin in her possession so the police would not find it on her person. *Id* at 6. Further, she cleared her internet search history for that night in an attempt to conceal the amount of time she spent online researching home treatments for a heroin overdose. N.T., 9/24/13, at 25. From these facts, it was reasonable for the trial court to infer that Appellant acted to conceal both her criminal activity and her predominant role in Otto's death. The serious nature of Appellant's crime deserves a serious punishment and as such, we find that her sentence of one to two years' incarceration was not excessive.

Finally, "where a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code." *Griffin*, 65 A.3d at 937 (citation omitted). "We can find no reason to place this case outside of the standard range, which is presumptively where a defendant should be sentenced." *Commonwealth v. Fowler*, 893 A.2d 758, 767 (Pa. Super. 2006) (citation omitted). Thus, we conclude that a guideline sentence in this case was not clearly unreasonable. Accordingly, the trial court did not abuse its discretion by sentencing Appellant to 12 to 24 months' incarceration.

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: 7/8/2014