

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ADAM J. LOPICCOLO

Appellant

No. 1947 MDA 2013

Appeal from the Judgment of Sentence of August 1, 2013
In the Court of Common Pleas of Lebanon County
Criminal Division at No.: CP-38-CR-0001240-2011

BEFORE: DONOHUE, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.:

FILED MAY 23, 2014

Adam J. Lopiccolo appeals his August 1, 2013 judgment of sentence, which was imposed after Lopiccolo was convicted by a jury of, *inter alia*, aggravated assault—causing bodily injury to a police officer, resisting arrest, and disorderly conduct.¹ Lopiccolo challenges the weight and sufficiency of the evidence presented by the Commonwealth at trial, and the discretionary aspects of his sentence. We affirm.

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S. §§ 2702(a)(3), 5104, and 5503. Lopiccolo also was convicted of two summary offenses: criminal mischief, 18 Pa.C.S. § 3304, and public intoxication, 18 Pa.C.S. § 5505.

In its opinion denying Lopiccicolo's post-sentence motions, the trial court summarized the facts presented at trial underlying Lopiccicolo's convictions as follows:

The Commonwealth called multiple witnesses to testify concerning an incident that occurred on June 14, 2011 that gave rise to [Lopiccicolo's] charges. First, Mr. Donald Koch stated that on that date [Lopiccicolo] stumbled into his yard and came after him visibly intoxicated. Mr. Koch testified that [Lopiccicolo] then proceeded to kick over recycling cans spilling bottles and cans all over the street as he staggered away. Another neighbor, Ms. [Phyllis] Schaeffer, attested that she witnessed a man running across the back of her yard and she observed that her mum plants were pulled out and thrown in disarray on the driveway. These events prompted Mr. Koch to contact the police for assistance.

Sergeant Kenneth Zimmerman was the first responding officer. Sgt. Zimmerman testified that when he arrived on the scene, he discovered [Lopiccicolo] lying on the ground with scratches over his body and observed that he had defecated himself. Sergeant Timothy Knight and Officer Frank Betancourt were also called as secondary responding officers. Each of the officers provided consistent testimony concerning the sequence of events.

The officers first attempted to subdue [Lopiccicolo] in order to provide him with medical attention. At this point, [Lopiccicolo] began praying to God entreating for a mixed martial arts fight with the officers. [Lopiccicolo] then launched himself at Sergeant Knight and grabbed onto his right leg just below the knee. This tactic forced Sgt. Knight's knee backward and caused a strained or torn hamstring injury. Sergeant Zimmerman and Officer Betancourt both repeatedly instructed [Lopiccicolo] to release Sergeant Knight and forcibly tried to break his grasp; however, [Lopiccicolo] refused to release his hold. After multiple warnings, Sergeant Zimmerman tased [Lopiccicolo] three times. Somehow this had no effect whatsoever on [Lopiccicolo]. Eventually, Sergeant Zimmerman pushed [Lopiccicolo's] left arm up to the point where he could get the taser under his arm and proceeded to tase [Lopiccicolo] an additional three times. At that point, Sergeant Knight was finally able to extricate himself from

[Lopiccolo's] grasp and after a few minutes the officers were able to get [Lopiccolo] under control and cuffed.

Trial Court Opinion ("T.C.O."), 12/10/2012, at 2-3 (citations to notes of testimony omitted).

During his case-in-chief, Lopiccolo called Megan Langral, his fiancée, as a defense witness. Langral testified that she and Lopiccolo attended a family reunion on the day in question. Somewhat unexpectedly, Langral then testified that Langral put bath salts into Lopiccolo's wine, without his knowledge. Based upon this testimony, Lopiccolo pursued an involuntary intoxication defense, claiming that the unintentional ingestion of bath salts caused him to commit the crimes in question.

In rebuttal, the Commonwealth introduced a toxicology report that indicated that Lopiccolo's blood alcohol content was .249, and that his blood tested positive for the presence of marijuana, but not any chemical compounds for bath salts or other controlled substances. Sergeant Zimmerman returned to the witness stand and testified that, based upon his police experience, bath salts were not ingested orally, but typically were either injected, snorted, or smoked.

Following trial, Lopiccolo was convicted of the aforementioned charges.² On August 1, 2012, the trial court sentenced Lopiccolo to eleven

² The jury found Lopiccolo not guilty of two other counts of aggravated assault, and was unable to reach a verdict on the charge of aggravated
(Footnote Continued Next Page)

months to two years—less one day of incarceration on the aggravated assault count. The court also sentenced Lopiccolo to six months to one year of incarceration on the resisting arrest count, with that sentence ordered to run concurrently with the aggravated assault sentence. The trial court imposed various fines on the remaining charges, and banned Lopiccolo from the neighborhood where he perpetrated his crimes.

On August 13, 2012, Lopiccolo filed post-sentence motions challenging the weight and sufficiency of the evidence and the discretionary aspects of his sentence. On October 15, 2012, Lopiccolo submitted a brief in support of his post-sentence motions. On December 10, 2012, the trial court issued an order denying Lopiccolo's motions, and an accompanying opinion setting forth the court's rationale for doing so.

Following multiple subsequent filings, Lopiccolo filed a petition for relief pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46, seeking the reinstatement of his direct appeal rights. On October 22, 2013, upon the consent of the Commonwealth, the trial court granted Lopiccolo's PCRA petition. On the same day, Lopiccolo filed a notice of appeal. On October 23, 2013, the trial court directed Lopiccolo to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On November 5, 2013, Lopiccolo timely complied. On November 6, 2013,

(Footnote Continued) _____

assault—causing or attempting to cause serious bodily injury. 18 Pa.C.S. § 2702(a)(1).

the trial court issued a statement pursuant to Pa.R.A.P. 1925(a) indicating that it had addressed the claims raised by Lopiccolo in his Rule 1925(b) statement in the court's December 10, 2012 post-sentence motion opinion.

Lopiccolo raises the following three issues for our consideration:

1. Whether the verdict was against the weight of the evidence?
2. Whether the verdict was not supported by sufficient evidence?
3. Whether the sentence of the trial court was excessive?

Brief for Lopiccolo at 6.

Lopiccolo first challenges the weight of the evidence.³ Our review is governed by the following principles:

A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. **Commonwealth v. Widmer**, 744 A.2d 745, 751-52 (Pa. 2000); **Commonwealth v. Brown**, 648 A.2d 1177, 1189 (Pa. 1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. **Widmer**, 744 A.2d at 752. Rather, "the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." **Id.** at 752 (citation omitted). It has often been stated that "a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a

³ To maintain a challenge to the weight of the evidence on appeal, such challenge must have been preserved in a motion prior to sentencing, in an oral motion at sentencing, or a post-sentence motion. **Commonwealth v. Griffin**, 65 A.3d 932, 938 (Pa. Super. 2013). Here, Lopiccolo preserved his claim in a post-sentence motion.

new trial is imperative so that right may be given another opportunity to prevail.” **Brown**, 648 A.2d at 1189.

An appellate court’s standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:

Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. **Brown**, 648 A.2d at 1189. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court’s determination that the verdict is against the weight of the evidence. **Commonwealth v. Farquharson**, 354 A.2d 545 (Pa. 1976). One of the least assailable reasons for granting or denying a new trial is the lower court’s conviction that the verdict was or was not against the weight of the evidence[.]

Widmer, 744 A.2d at 753 (internal citations modified, emphasis added).

Commonwealth v. Clay, 64 A.3d 1049, 1054-55 (Pa. 2013) (citations modified).

The crux of Lopiccolo’s argument is that the jury should have believed, and premised its verdict upon, Langral’s testimony supporting Lopiccolo’s involuntary intoxication defense. Lopiccolo outlines Langral’s testimony, and contends that this evidence demonstrated that he did not act knowingly or intentionally for purposes of his convictions for aggravated assault, resisting arrest, and disorderly conduct. His argument is unavailing.

Langral testified that she slipped bath salts into Lopiccolo’s wine at the family reunion that they attended earlier on the day in question. Langral

offered no substantiating or corroborating details. She testified only that it happened, and did not explain to the jury how, why, or when she placed the salts into Lopiccolo's drink. On the other hand, the Commonwealth introduced evidence establishing that Lopiccolo had a BAC of .249, and that he did not have any traces of bath salts in his blood. This scientific evidence refuted Langral's assertion.

Nonetheless, the jury was free to believe Langral's testimony, even in the face of the toxicology report. The jury decided not to do so. The evidence supports the jury's conclusions. We discern nothing from the record that would indicate that the trial court abused its discretion when it concluded that the verdict did not shock the court's conscience. Lopiccolo's claim fails.

Lopiccolo next challenges the sufficiency of the evidence. As in his weight challenge, Lopiccolo relies exclusively upon his involuntary intoxication defense, arguing that the defense negated any evidence demonstrating that he acted willfully in committing the crimes for which he was convicted.

Our standard of review is well-settled:

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a

defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Estep, 17 A.3d 939, 943-44 (Pa. Super. 2011) (citing ***Commonwealth v. Brooks***, 7 A.3d 852, 856-57 (Pa. Super. 2010)).

Lopiccolo was convicted of aggravated assault, resisting arrest, and disorderly conduct. "A person is guilty of aggravated assault if he . . . attempts to cause or intentionally or knowingly causes bodily injury to . . . a police officer." 18 Pa.C.S. § 2702(a)(3) and (c).

"A person commits [resisting arrest] if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance." 18 Pa.C.S. § 5104.

Lastly, "[a] person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he . . . engages in fighting or threatening, or in violent or tumultuous behavior." 18 Pa.C.S. § 5503.

In Pennsylvania, the viability of involuntary intoxication as a defense is not fully established by decisional or statutory law. **See *Commonwealth v. Collins***, 810 A.2d 698, 700 (Pa. Super. 2002). Nonetheless, our courts have recognized the defense as an affirmative defense, with the burden of proving the defense by a preponderance of the evidence resting upon the defendant. ***Id.*** at 702. Voluntary intoxication, on the other hand, is not a defense to criminal charges. 18 Pa.C.S. § 308 (“Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negative the element of intent of the offense. . . .”).

The evidence presented at trial, viewed in the light most favorable to the Commonwealth, demonstrated that Lopiccolo, while highly intoxicated, attacked a uniformed police officer. Lopiccolo challenged the arresting officers to a mixed martial arts fight, and then grabbed Sergeant Knight by the leg and bent it back in a way that caused injury to Sergeant Knight’s hamstring. Lopiccolo was repeatedly instructed that he was under arrest and to cease with his attack on Sergeant Knight. Lopiccolo refused to let go of Sergeant Knight, and had to be tased multiple times before finally relenting. This evidence provided ample support for each of the elements of the crimes for which Lopiccolo was convicted.

Lopiccolo’s involuntary intoxication defense was unavailing. The only evidence that he advanced in support of the defense was a bare statement

by his fiancée that was unsupported and uncorroborated by any other evidence. In fact, the defense was refuted by the toxicology report, which indicated that Lopiccolo was severely inebriated from alcohol and marijuana, but not from bath salts. The toxicology report adequately demonstrated that his behavior was caused by his **voluntary** consumption of alcohol and marijuana, and not from an involuntary ingestion of another controlled substance. As noted, voluntary intoxication is not a defense to criminal charges in Pennsylvania. Hence, Lopiccolo's sufficiency challenge fails.

In his final issue, Lopiccolo challenges the discretionary aspects of his sentence. It is well-established that "there is no absolute right to appellate review of the discretionary aspects of a sentence." ***Commonwealth v. Mouzon***, 812 A.2d 617, 621 (Pa. 2002). Rather, an appellant seeking to challenge the discretionary aspects of sentence must invoke this Court's jurisdiction by doing the following:

Two requirements must be met before we will review this challenge on its merits. First, an appellant must 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 [pursuant to Pa.R.A.P. 2119(f)]. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. 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. Ferguson, 893 A.2d 735, 737 (Pa. Super. 2006) (quoting **Commonwealth v. McAfee**, 849 A.2d 270, 274 (Pa. Super. 2004)); Pa.R.A.P. 2119(f).

Lopiccolo has included in his brief a Rule 2119(f) statement. Therein, Lopiccolo argues that the trial court considered only the elements of the crime, and ignored the mitigating factors of the case. According to Lopiccolo, the trial court's failure resulted in a sentence that was manifestly excessive. Brief for Lopiccolo at 10. Based upon these assertions, we conclude that Lopiccolo has presented a substantial question sufficient to invoke our jurisdiction. **See Commonwealth v. Boyer**, 856 A.2d 149, 152 (Pa. Super. 2004) (finding a substantial question where the appellant alleged that the trial court imposed a manifestly excessive sentence and focused solely upon the serious nature of the crimes).

Our standard of review of a challenge to the discretionary aspects of a sentence is as follows:

[T]he proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. . . . [A]n abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not 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. In more expansive terms, our Court recently offered: An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

The rationale behind such broad discretion and the concomitantly deferential standard of appellate review is that the

sentencing court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it.

Commonwealth v. Moury, 992 A.2d 162, 169 (Pa. Super. 2010) (quoting ***Commonwealth v. Walls***, 926 A.2d 957, 961 (Pa. 2007))

Presently, the sentencing guidelines called for a standard range sentence of three to twelve months for Lopiccicolo's aggravated assault conviction. The trial court exceeded the guidelines, and sentenced Lopiccicolo to eleven months to two years—less one day. Lopiccicolo contends that the trial court abused its discretion by focusing only upon the elements of the crimes for which Lopiccicolo was convicted, and by ignoring the mitigating evidence that was presented during the sentencing hearing. The mitigating evidence included Lopiccicolo's participation in, and completion of, various drug and alcohol classes, anger management classes, and anxiety control groups. Additionally, Lopiccicolo's brother-in-law informed the judge that Lopiccicolo was a good father to his young child, and had expressed an interest in turning his life around and becoming a productive member of society.

Lopiccicolo's claims that the trial court ignored this evidence and focused solely upon the elements of the crimes are belied by the record. Before imposing Lopiccicolo's sentence, the trial court made the following remarks:

[The c]riminal justice system is not just about rehabilitating an offender[;] that's a component of it. But it is not just about that. It is also about protecting society from those who would do it harm. And it's also about retribution. Society needs to feel that there is punishment that fits the crime. And in this

particular case I mean I remember the testimony about you going into – I mean you were blind drunk. I understand that, I get that. But going into somebody's yard and tearing up their garden, pulling out their flowers and then the owner coming out and saying hey buddy what's going on and you go after the owner. How dare you challenge me when I'm in your yard tearing up your garden. How dare you. Then the police arrived after all the neighbors are trying to figure out what this crazy guy is doing and what he's going to do to them. And you challenge the police to what is it an MMA some kind of full body contact fight. Then as the police were trying – oh, by the way you defecated in your pants and police are trying to get you under control while all your feces are all over the place while you're kicking and biting and screaming and then you grab Sergeant Knight, you twist his leg, you wouldn't let [go]. You're tased, you wouldn't let go. Then you bend his leg backwards in a way that the human leg is not designed to be bent. As a result, causing him to go to the hospital and suffer injuries that I hope have healed by now. I'm not sure about that. Look I understand that when you're sober you might be a really good person. I understand that for your primary component of this sentence has to be to keep you away from alcohol, to give you the skill and tools needed to keep you away from alcohol, but the sentence is not just about you. It's about that neighborhood that you terrorized. It's about those police officers who you endangered. It's about Sergeant Knight who you injured.

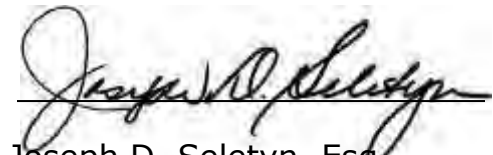
Notes of Testimony, 8/1/2012, at 6-8.

The trial court also noted that it had reviewed the pre-sentence investigation report and had considered all of the other factors presented in the case before imposing its sentence. "When a sentencing court has reviewed a presentence investigation report, we presume that the court properly considered and weighed all relevant factors in fashioning the defendant's sentence." **Commonwealth v. Baker**, 72 A.3d 652, 663 (Pa. Super. 2013) (citing **Commonwealth v. Fowler**, 893 A.2d 758, 767 (Pa. Super. 2006)).

Based upon the foregoing, we cannot conclude that the trial court abused its discretion. The trial court considered not only the pre-sentence report, but also Lopiccolo's need for drug and alcohol counseling. The court concluded that Lopiccolo needed more counseling than that which he already completed. The court recognized both Lopiccolo's need to be punished and his need to be rehabilitated. The court took into account the impact that Lopiccolo's crimes had on the community and on the individual victims. The record demonstrates that the trial court carefully considered a wide array of factors before imposing a sentence calculated to meet all of the court's individual concerns in this case. We observe no abuse of discretion in the court's deliberation or imposition of sentence.

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: 5/23/2014