

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOSE A. RODRIGUEZ,	:	
	:	
Appellant	:	No. 1955 EDA 2013

Appeal from the Judgment of Sentence Entered May 15, 2013,
In the Court of Common Pleas of Lehigh County,
Criminal Division, at No. CP-39-CR-0004638-2012.

BEFORE: BENDER, P.J.E., SHOGAN and FITZGERALD*, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED AUGUST 15, 2014

Appellant, Jose A. Rodriguez, appeals from the judgment of sentence imposed following his guilty plea to delivery of heroin. Following our review of the complete record and briefs, we affirm.

The Commonwealth summarized the facts of the crime at the guilty plea hearing, as follows:

On September 12th of 2012, Detective Madero was monitoring drug activity through the cameras in the 400 block of North Seventh Street. As he had been observing a male for several days, later identified as the defendant, he believed he was involved in selling heroin. There were other detectives who were doing physical surveillance in the area.

Detective Madero indicated that he had observed the defendant hand a packet, a small packet, in exchange for currency, to a male, who immediately handed it to a second male. That second male was stopped and a packet of heroin was recovered. The defendant . . . was reported by the purchaser to

*Former Justice specially assigned to the Superior Court.

have provided that packet of heroin[.] [C]onfirmation of that led Detective Madero to stop the defendant and he had \$124.00 in currency on his person. The estimated weight of that heroin would [be] three one hundred[th]s of a gram.

N.T. (Guilty Plea), 4/15/13, at 16.

On April 15, 2013, Appellant pled guilty to delivery of heroin. In return for Appellant's plea, the Commonwealth agreed to cap Appellant's minimum sentence at the bottom end of the standard range of the guidelines. Following a presentence investigation, the trial court sentenced Appellant on May 15, 2013, to fifteen to thirty-six months of imprisonment and further deemed him RRRI¹ eligible. Appellant filed a post-sentence motion, which was denied, and this appeal followed.

Appellant raises the following issues on appeal:

I. Is there a substantial question for which the Superior Court should grant allowance of appeal of the discretionary aspects of the sentence?

II. Did the court err in sentencing [Appellant] to a harsh and excessive sentence where [Appellant] accepted full[] responsibility for his actions and asked to stay locally so he could find a job to help support his family?

Appellant's Brief at 4 (full capitalization omitted).

Appellant's issues implicate the discretionary aspects of sentencing. Initially, we must consider whether Appellant has waived the opportunity to present this challenge. It is firmly established that a plea of guilty generally

¹ RRRI is recidivism risk reduction incentive program. ***Commonwealth v. Tobin***, 89 A.3d 663, 665 (Pa. Super. 2014).

amounts to a waiver of all defects and defenses except those concerning the jurisdiction of the court, the legality of sentence, and the validity of the guilty plea. **Commonwealth v. Stradley**, 50 A.3d 769, 771 (Pa. Super. 2012). As noted, Appellant entered a negotiated guilty plea to one count of delivery of heroin with a sentence “cap at the bottom end of the standard range.” N.T. (Guilty Plea), 4/15/13, at 2. At first blush, it appears that the rule that “one who pleads guilty and receives a negotiated sentence may not then seek discretionary review of that sentence,” is applicable. **Commonwealth v. O’Malley**, 957 A.2d 1265, 1267 (Pa. Super. 2008) (citing **Commonwealth v. Dalberto**, 648 A.2d 16, 20 (Pa. Super. 1994)). At the plea hearing, however, the trial court advised Appellant that the standard range “has yet to be determined because no one is certain as to your prior record score.” N.T. (Guilty Plea), 4/15/13, at 5.

Following a presentence investigation, it was ultimately determined that Appellant had a prior record score of four with an offense gravity score of six. N.T. (Sentencing), 5/15/13, at 4. The trial court stated that the standard range minimum “is indicated to be from 15 to 21 months” **Id.** at 4. The trial court imposed a sentence of fifteen to thirty-six months of imprisonment; the minimum sentence thus was at the bottom end of the standard range. **Id.**

There are two aspects to this sentence that compel our conclusion that the plea was not a negotiated sentence as that term generally is understood. First, the “cap at the bottom end of the range” does not identify a particular, definite sentence to be imposed. More importantly, however, due to the uncertainty of the sentencing range at the time of Appellant’s plea, there could be no clear understanding of the length of the sentence negotiated.

Thus, as in ***Dalberto***, the plea agreement falls somewhere between a negotiated plea and an open plea. This hybrid plea, as in ***Dalberto***, did not include a specific term of imprisonment, but it did place limitations on Appellant’s sentence. As we stated in ***Dalberto***, “We believe that justice requires that we treat this case as an “open” plea and permit an appeal to the discretionary aspects of sentencing.” ***Id.***, 648 A.2d at 21; ***see also Commonwealth v. Brown***, 982 A.2d 1017 (Pa. Super. 2009) (where negotiated plea called for the appellant to receive a sentence with a minimum term at the bottom end of the standard range of his sentencing guidelines, which the court imposed, the appellant could pursue an appeal regarding the sentencing court’s exercise of discretion with respect to the maximum term of his sentence). Thus, we consider Appellant’s issues implicating the discretionary aspects of his sentence.

The issues identified on appeal allege that the sentence imposed was “harsh and excessive.” Appellant’s Brief at 12. Such a sentencing challenge

implicates the sentencing court's exercise of discretion. It is well-settled law that there is no absolute right to appeal the discretionary aspects of a sentence. ***Commonwealth v. Hartle***, 894 A.2d 800, 805 (Pa. Super. 2006). Rather, an appellant's appeal is considered to be a petition for allowance of appeal. ***Commonwealth v. W.H.M.***, 932 A.2d 155, 162 (Pa. Super. 2007).

As we observed in ***Commonwealth v. Moury***, 992 A.2d 162 (Pa. Super. 2010):

An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:

[W]e conduct a four-part analysis to determine: (1) whether [the] 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 [the] 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).

Id. at 170 (citing ***Commonwealth v. Evans***, 901 A.2d 528 (Pa. Super. 2006)).

Herein, the first three requirements of the four-part test are met, those being that Appellant filed a timely appeal, he raised the challenge in his post-sentence motion, and he included in his appellate brief the necessary separate concise statement of the reasons relied upon for

allowance of appeal pursuant to Pa.R.A.P. 2119(f). Therefore, we determine whether Appellant raises a substantial question requiring us to review the discretionary aspects of the sentence imposed.

A claim of excessiveness can raise a substantial question as to the appropriateness of a sentence under the Sentencing Code, even if the sentence is within the statutory limits. ***Commonwealth v. Mouzon***, 812 A.2d 617, 624 (Pa. 2002). Bald allegations of excessiveness, however, do not raise a substantial question to warrant appellate review. ***Id.*** at 627. Rather, a substantial question will be found “only where the appellant’s Rule 2119(f) statement sufficiently articulates the manner in which the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process....” ***Id.*** Whether a particular issue constitutes a substantial question about the appropriateness of sentence is a question we evaluate on a case-by-case basis. ***Commonwealth v. Austin***, 66 A.3d 798 (Pa. Super. 2013).

In his concise statement, Appellant asserts that the sentence imposed was excessive “and the court failed to give consideration to the reasons for his criminal behavior,” and it was unjust “where he was crime free for thirty-three years and was sent to a State Correctional Institution for selling 30 mg. of heroin because he lost his job and was unable to meet the basic

needs of his wife of thirty years and eight of his eleven children.” Appellant’s Brief at 8.

We conclude that Appellant’s claim challenging the weight afforded to certain mitigating factors does not raise a substantial question that his standard-range sentence is inappropriate. An allegation that the sentencing court failed to consider mitigating factors generally does not raise a substantial question for our review. ***Commonwealth v. Disalvo***, 70 A.3d 900, 903 (Pa. Super. 2013); ***Commonwealth v. Rhoades***, 8 A.3d 912, 918–919 (Pa. Super. 2010). Moreover, where, as here, the sentencing court had the benefit of a pre-sentence investigation report, “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.’” ***Moury***, 992 A.2d at 171 (citation omitted).

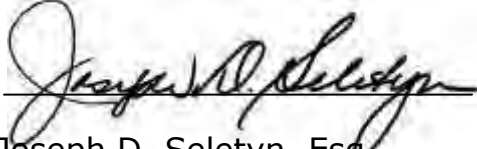
Accordingly, as we conclude that Appellant’s concise statement fails to raise a substantial question warranting appellate review, he is not entitled to relief on his sentencing claim.

Judgment of sentence affirmed. Jurisdiction relinquished.

BENDER, J., files a Dissenting Memorandum.

J-S26023-14

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: 8/15/2014