

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

CATHERINE GABRIEL

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2021 MDA 2013

Appeal from the Judgment of Sentence October 1, 2013
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0000598-2013

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

MEMORANDUM BY PANELLA, J.

FILED JUNE 25, 2014

Appellant, Catherine Gabriel, challenges her sentence of 12 to 24 months' incarceration and her ordered restitution of \$155,000.00. Gabriel contends that the trial court abused its discretion by deviating from the sentencing guidelines without providing any reason for doing so and abused its discretion by improperly considering her uncharged criminal conduct as a factor for the sentence. Additionally Gabriel contends that the ordered amount of restitution was an illegal sentence because she was ordered to compensate a victim to a crime to which she did not plead guilty. We agree

* Retired Senior Judge assigned to the Superior Court.

with Gabriel's arguments and order that her sentence be vacated and remanded to the trial court for resentencing.

Gabriel was charged with two counts of forgery¹ and two counts of theft by failure to make the required disposition of funds.² These charges arose from Gabriel's failure to deposit two checks into her employer's, Este Tuxedo, account. Gabriel pleaded guilty on June 24, 2013 to the Commonwealth's amended charge of theft by unlawful taking in the amount between \$50.00 and \$200.00.³ The charge to which she pled guilty arose from the theft of property belonging to Matthew Esposito. The other charges of forgery and theft by failure to make required disposition of funds were *nolle prosequed*.

Gabriel was sentenced on October 1, 2013, to 12 to 24 months' imprisonment and restitution of \$155,000.00. The ordered amount of restitution was presumably based upon the amount Este Tuxedo was reimbursed by its insurance companies. In response to her sentence, Gabriel filed a motion for reconsideration of her sentence, which the trial court denied. Gabriel then filed this timely appeal.

We will first consider Gabriel's challenges to the discretionary aspects of the trial court's order imposing 12 to 24 months' incarceration.

¹ 18 Pa.C.S.A. § 4101(A)(1), (F-2)

² 18 Pa.C.S.A. § 3927(a), (M-1)

³ 18 Pa.C.S.A. § 3921(a), (M-2)

Sentencing is a matter vested within the sound discretion of the trial court, and this Court will not disturb the sentence on appeal absent manifest abuse of discretion. **See Commonwealth v. Stokes**, 38 A.3d 846, 858 (Pa. Super. 2011). An appeal challenging the discretionary aspects of a sentence is not available as of right. **See Commonwealth v. Urrutia**, 653 A.2d 706, 710 (Pa. Super. 1995).

In order to raise an appeal challenging the discretionary aspects of a sentence the appellant must satisfy four factors. **See Commonwealth v. Malovich**, 903 A.2d 1247, 1250 (Pa. Super. 2006). First the appellant must file a timely appeal. **See id.** Second, the appellant must preserve his objection in the trial court in order for it to be presented on appeal. **See id.** Third, pursuant to Pa.R.A.P. 2119(f), the appellant's brief must include a concise statement for relied upon for allowance of appeal. **See id.** Lastly, the appellant must demonstrate that a substantial question exists as to whether the sentence imposed is inappropriate under the Sentencing Code. **See id.**

A substantial question exists when the appellant advances a colorable argument that the sentencing judge's actions were either: 1) inconsistent with a specific provision of the Sentencing Code or 2) contrary to the fundamental norms which under lie the sentencing process. **See Commonwealth v. Bullock**, 868 A.2d 516, 528 (Pa. Super. 2005).

Furthermore, we consider substantial questions on a case-by-case basis. **See Urrutia**, 653 A.2d at 710. A substantial question is not raised if

the appellant contends that the trial court failed to consider or did not adequately consider certain factors in fashioning the defendant's sentence. **See id.** at 706. An appellant's claim that the trial court did not provide a reason for its deviation from sentencing guidelines presents a substantial question for our review. **See Commonwealth v. Wagner**, 702 A.2d 1084, 1086 (Pa. Super. 1997). An appellant also raises a substantial question when he asserts that the trial court relied on an impermissible factor in fashioning the imposed sentence on the defendant. **See Commonwealth v. Monahan**, 860 A.2d 180, 182 (Pa. Super. 2004).

We must first determine if Gabriel has satisfied all of our procedural requirements enunciated above. In the instant matter, Gabriel has satisfied all four requirements. We note that Gabriel articulated in her Rule 2119(f) statement that her sentence was unduly harsh and excessive because the trial court failed to provide a reason for which it departed from the sentencing guidelines set forth in 204 Pa. Code § 303.16 and that the trial court improperly considered her uncharged crimes as a factor in sentencing. Such claims raise substantial questions for us to review. **See Monahan**, 860 A.2d at 182; **Wagner**, 702 A.2d at 1086.

Turning to the merits, we will first consider Gabriel's contention that the trial court impermissibly considered her uncharged criminal conduct in fashioning her sentence. "Not only does the caselaw authorize a sentencing court to consider unprosecuted criminal conduct, the sentencing guidelines

essentially mandate such consideration when a prior record score inadequately reflects a defendant's criminal background." **Commonwealth v. P.L.S.**, 894 A.2d 120, 131 (Pa. Super. 2006). **See also Commonwealth v. Shugars**, 895 A.2d 1270, 1278 (Pa. Super. 2006). However, "uncharged criminal conduct may not be used for sentencing purposes when the record is devoid of the necessary evidentiary link between the defendant and the uncharged prior conduct." **P.L.S.**, 894 A.2d at 131.

For example, in **P.L.S.**, this Court determined that there was sufficient evidence to consider the uncharged prior sexual assaults as part of the sentence as part of the defendant's sentence for one count of sexual assault because the evidence linking the appellant to the other crimes came from the appellant himself and was confirmed by the victims. **See id.** at 132.

Here, the record indicates that the trial court considered the uncharged string of thefts that lasted over a period of two years that amounted to over \$100,000.00 dollars as part of Gabriel's sentence for her guilty plea. **See** N.T., 10/1/2013, at 5-6. However, such consideration is an abuse of the trial court's discretion.

The record offers no evidentiary support that Gabriel committed this uncharged string of thefts that resulted in \$100,000.00. Unlike **P.L.S.**, Gabriel has not admitted to the criminal conduct that the trial court considered in making its sentence. Additionally, there is no evidentiary support for Gabriel's uncharged conduct by the victims of these crimes. As

such, it was an abuse of the trial court's discretion to consider such uncharged criminal conduct. The Commonwealth's mere assertion that Gabriel's guilty plea to the theft between \$50.00 and \$200.00 amounts to an admittance of her culpability of her prior uncharged conduct is meritless. The acceptance of the plea is not the equivalent to an outright admittance of the uncharged criminal conduct. As such, Gabriel did not admit to stealing from Este Tuxedo over the period of two years, and as a result, the trial court abused its discretion in considering that conduct in fashioning her sentence.

As noted in ***Commonwealth v. Bowen***, 975 A.2d 1120, 1127 (Pa. Super. 2009), the trial court's error of considering an inappropriate factor for sentencing will not automatically entitle the appellant to have his sentence vacated. If there is significant support for sentencing in excess of the guidelines in the case, then the sentence will be affirmed by this Court. ***See id.*** In the instant matter, we will not vacate Gabriel's sentence if the trial court has offered other reasons to substantiate its deviation from the sentencing guidelines.

The trial court stated that it was going to deviate from the sentencing guidelines in the presence of the defendant and understood what the proper sentencing guidelines were for the offense to which Gabriel pled guilty. Gabriel contends that the trial court abused its discretion when it provided no reason for its deviation from the sentencing guidelines.

The trial court is permitted to deviate from the sentencing guidelines. **See Commonwealth v. Garcia-Rivera**, 983 A.2d 777, 780 (Pa. Super. 2009). However, it must demonstrate that it understands the sentencing guideline ranges in the presence of the defendant. **See id.** The trial court must also provide a legally sufficient reason for imposing a sentence that deviates from the guidelines. **See id.**; 42 Pa.C.S. §9721(b). “Where the trial judge deviates from the sentencing guidelines . . . he must set forth on the record, at sentencing, in the defendant’s presence, the permissible range of sentences under the guidelines and, at least in summary form, the factual basis and specific reasons which compelled the court to deviate from the sentencing range.” **Commonwealth v. Royer**, 476 A.2d 453, 457 (Pa. Super. 1984).

When the trial court fails to provide a reason for deviating from the sentencing guidelines, it necessarily abuses its discretion when imposing a sentence on the defendant. **See Commonwealth v. Wagner**, 702 A.2d 1084, 1086 (Pa. Super. 1997). We may vacate a sentence if we find that the sentencing court sentenced outside the guidelines and the sentence is unreasonable because the decision was irrational or was not guided by sound judgment. **See Commonwealth v. Walls**, 926 A.2d 957, 961 (Pa. 2007).

We conclude that the sentence imposed on Gabriel constitutes an abuse of discretion because the trial court failed to provide sufficient reasons

to deviate from the sentencing guidelines. The record indicates that the reason the trial court deliberately deviated from the guidelines was because of her past uncharged criminal conduct that resulted in the theft of \$155,000.00. **See** N.T. 10/1/2013 at 6. However, as we have previously stated, it was improper for the trial court to consider Gabriel's uncharged criminal conduct. As such, the trial court needed to offer another reason for deviating from the sentence. Because there was no other reasons put forth by the trial court to exceed the sentencing guidelines for the offense to which Gabriel pleaded guilty, the trial court abused its discretion in ordering the sentence. We therefore agree with Gabriel's contention that the trial court abused its discretion as it departed from the guidelines with no reason for so doing and order that her sentence of 12-24 months' incarceration be vacated.

We now shift our analysis to the legality of the restitution sentence imposed on Gabriel. Gabriel asserts that the trial court imposed an illegal restitution sentence as it ordered Gabriel to pay restitution of \$155,000.00.

Claims contesting the legality of the court's authority to order restitution are questions of law, and are subject to plenary and *de novo* review. **See Commonwealth v. Pleger**, 934 A.2d 715 (PA. Super. 2007). "An illegal sentence can never be waived..." **Commonwealth v. Jacobs**, 900 A.2d 368, 374 (Pa. Super. 2006) (citation omitted). Challenges concerning the amount of restitution involve the discretionary aspects of

sentencing, while questions regarding the court's authority with respect to ordering restitution implicate the legality of the sentence. **See *In Re M.W.***, 725 A.2d 729, 731, n.4 (Pa. 1999).

We first observe that the Commonwealth is incorrect that Gabriel is challenging the discretionary aspects of her restitution sentence. Gabriel does, in fact, argue that the amount of restitution is excessive—but she does so because, she contends, there is no support in the record for the award of the restitution amount, thus resulting in an illegal sentence.⁴

A sentence is illegal where a statute bars the court from imposing that sentence. **See *Commonwealth v. Archer***, 722 A.2d 203, 209 (Pa. Super. 1998) (en banc). The sentence of restitution must be based upon statutory authority. **See *Commonwealth v. Harner***, 617 A.2d 702, 704 (Pa. 1992). Mandatory restitution, as part of a defendant's sentence, is authorized by 18 Pa.C.S.A. § 1106 and states, in relevant part, the following:

§ 1106. Restitution for injuries to person or property

(a) General rule.—Upon conviction for any crime wherein *property has been stolen . . .* the offender shall be

⁴ During the Sentencing hearing, Gabriel never challenged the restitution sentence. Counsel for Gabriel stated, “[w]e’re not necessarily challenging it [the restitution sentence], Your Honor.” N.T., 10/1/2013, at 2. As such, all discretionary challenges to the restitution sentence have been waived. In order for this restitution sentence to be legal, however, there must be a basis for it on the record.

sentenced to make restitution in addition to punished prescribed therefor.

(b)(1)(i) Regardless of current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss. The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim's Compensation Board or other government agency but shall order the defendant to pay any restitution ordered for loss previously compensated by the board to the Crime Victim's Compensation Fund or other designated account when the claim involves a government agency award by any amount that the victim has received from an insurance *but shall order the defendant to pay any restitution ordered for loss previously compensated by an insurance company to the insurance company.*

18 Pa.C.S.A. § 1106(a)-(b)(1)(i) (emphasis added). The statute evidences the intent to provide the victim with the fullest compensation for her losses incurred as a direct result of the defendant's criminal conduct. **See Commonwealth v. Burwell**, 58 A.3d 790, 794 (Pa. Super. 2012); **Commonwealth v. Stradley**, 50 A.3d 769, 773 (Pa. Super. 2012).

Our Court has also explained how the trial court should compute a restitution award. The dollar value of the injury suffered by the victim as a result of the crime assists the court in calculating the appropriate amount of restitution. **See Commonwealth v. Mourar**, 504 A.2d 197, 208 (Pa. Super. 1986), **abrogated on other grounds by Commonwealth v. Boyd**, 835 A.2d 812 (Pa. Super. 2003). A sentencing order imposing restitution must not exceed the victim's losses. **See Commonwealth v. Fuqua**, 407 A.2d 24, 26 (Pa. Super. 1979). The court must also ensure that the record

contains a factual basis for the appropriate amount of restitution. **See Commonwealth v. Valent**, 463 A.2d 1127, 1128 (Pa. Super. 1983).

The defendant is only responsible for restitution as to the “losses flowing from the conduct for which the defendant has been held criminally accountable.” **Harner**, 617 A.2d at 706. **See also Commonwealth v. Cooper**, 466 A.2d 195, 197 (Pa. Super. 1983). Furthermore, because of the explicit language in § 1106, restitution is a proper sentence under that the Crimes Code only if there is a “direct causal connection between the crime and the loss.” **Commonwealth v. Barger**, 956 A.2d 458, 465 (Pa. Super. 2008) (en banc) (citation omitted).

For instance, in **Cooper**, we vacated the trial court’s order that required the defendant to pay restitution for the costs of a victim’s death borne by the victim’s family because the defendant only pled guilty to leaving the scene of the accident and not was not found criminally responsible for having struck the victim. **See** 466 A.2d at 197. Similarly, in **Harner** we vacated a restitution order based upon the value of a couch that was allegedly lost due to conduct for which the defendant was not found criminally responsible.

Here, we conclude that the order to pay \$155,000.00 in restitution is an illegal sentence. Gabriel only pled guilty to theft in the amount of \$50.00

< \$200.00.⁵ As such, Gabriel is only liable for restitution for the losses sustained by the victim of that crime—Matthew Esposito. Just as the defendant in **Cooper** was only liable for the losses sustained to victim through his guilty plea to leaving the scene of an accident, Gabriel is only liable to the losses sustained by her victim, Matthew Esposito. Therefore, any restitution sentence imposed upon Gabriel by calculation of the losses sustained by the victims of Gabriel’s uncharged crimes is illegal.

After careful review of the record, there is no indication of a factual basis for the restitution order of \$155,000.00. The record indicates that these losses, sustained by the insurance companies, Travelers Insurance and Harleysville Insurance, were for compensating Gabriel’s employer, Este Tuxedo. The record offers no indication of the amount of losses sustained by the victim of the crime to which Gabriel pled guilty.

If an insurance company compensated Esposito’s loss at a value greater than the stolen property, Gabriel is liable for all of the money conferred upon Esposito by his insurance. While it is possible that Esposito is the owner of Este Tuxedo, there is no indication of such fact in the record to establish that he was compensated for the losses sustained by Este Tuxedo. Because the record offers no factual support for the ordered restitution, the restitution sentence of \$155,000.00 is hereby vacated and remanded to the

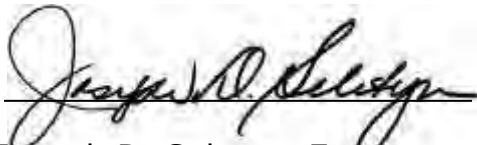
⁵ 18 Pa.C.S.A. § 3921(a), (M-2).

trial court for re-sentencing. On remand, the trial court must determine what losses were sustained by Esposito or by an insurance company compensating Esposito, and order that amount to be paid by Gabriel.

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

Strassburger, J., files a dissenting memorandum.

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: 6/25/2014