

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JERMAINE NORMAN

Appellant

No. 2198 EDA 2013

Appeal from the Judgment of Sentence May 28, 2013
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0001169-2013
CP-39-CR-0001172-2013

BEFORE: SHOGAN, J., OTT, J., and PLATT, J.*

MEMORANDUM BY OTT, J.:

FILED JUNE 17, 2014

Jermaine Norman appeals from the judgment of sentence¹ of an aggregate 15 to 60 months' imprisonment imposed on May 28, 2013, in the Lehigh County Court of Common Pleas. The sentence was imposed after

* Retired Senior Judge assigned to the Superior Court.

¹ We note that Norman purported to appeal from the July 2, 2013, order of the trial court denying his post sentence motion *nunc pro tunc*. However, "[i]n a criminal action, appeal properly lies from the judgment of sentence made final by the denial of post-sentence motions." ***Commonwealth v. Shamberger***, 788 A.2d 408, 410 n.2 (Pa. Super. 2001) (*en banc*), *appeal denied*, 800 A.2d 932 (Pa. 2002). Therefore, we have corrected the caption accordingly.

Norman entered guilty pleas on April 24, 2013, to two counts of forgery² in two separate complaints. Because Norman's notice of appeal was untimely filed, we quash this appeal.

The relevant facts and procedural history underlying this appeal were summarized by the trial court as follows:

[Norman] entered pleas of guilty on April 24, 2013, to one (1) count of Forgery (18 Pa.C.S.A. § 4101(a)(2)) in each of the above-captioned cases. In exchange for the plea, the Commonwealth agreed to bind the Court to a minimum sentence that would not exceed the midpoint of the standard range of the sentencing guidelines and concurrency between the cases. Also, the Commonwealth agreed not to pursue the other counts of the Informations. Thereafter, on May 28, 2013, [Norman] was sentenced to a term of imprisonment in a state correctional institution of not less than fifteen (15) months nor more than sixty (60) months on each Forgery offense. The sentences imposed were ordered to run concurrently to each other. On the same date, this Court sentenced [Norman] on a violation of probation and parole on a Driving Under the Influence charge in Case No. 5415/2011. [Norman] was resentenced to serve the balance of his sentence of not less than one (1) month nor more than twenty-three (23) months, with parole eligibility after serving one-third (1/3) of his sentence, consecutive to the above sentences. Additionally, [Norman] was sentenced to serve not less than six (6) months nor more than eighteen (18) months on the probation sentence, consecutive to the parole violation. On or about July 1, 2013, [Norman] filed Post Sentence Motions *Nunc Pro Tunc*. Subsequently, by Order and Opinion dated July 2, 2013, [the trial court] denied [Norman's] requested relief.

Trial Court Opinion, 9/12/2013, at 1-2. This appeal followed.³

² 18 Pa.C.S. § 4101(a)(2).

³ On August 19, 2013, the trial court ordered Norman to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). (*Footnote Continued Next Page*)

On appeal, Norman challenges the discretionary aspects of his sentence. In particular, he argues the maximum sentence of 60 months' imprisonment "when taken together with his sentences for parole and probation violations was extremely harsh." Norman's Brief at 11. He emphasizes that his crime was a non-violent offense "carried out for the purpose of maintaining [his] family." *Id.* at 13.

Preliminarily, however, we must determine if this appeal was timely filed, since our jurisdiction is dependent upon the filing of a timely notice of appeal. *Commonwealth v. Nahavandian*, 954 A.2d 625, 629 (Pa. Super. 2008).

Pursuant to Pennsylvania Rule of Criminal Procedure 720(A)(2), a timely-filed post-sentence motion tolls the 30-day period for filing a direct appeal. However, for Rule 720(A)(2) to apply, the post-sentence motion **must be timely filed**, that is, filed "no later than 10 days after imposition of sentence." Pa.R.Crim.P. 720(A)(1). An untimely post-sentence motion does not toll the 30-day appeal period, and a defendant who files an **untimely motion** must still file a notice of appeal **within 30 days** of the imposition of sentence to preserve his direct appeal rights. *Commonwealth v. Green*, 862 A.2d 613, 618-619 (Pa. Super. 2004) (*en*

(Footnote Continued) _____

Norman complied with the court's directive and filed a concise statement on September 11, 2013.

banc), *appeal denied*, 882 A.2d 477 (Pa. 2005). **See also** Pa.R.Crim.P. 720(A)(3).

However, pursuant to a court's inherent power to modify or rescind any order within 30 days of its entry,⁴ a trial court has the discretion to grant a request to file a post-sentence motion *nunc pro tunc* if: (1) the request is made within 30 days after the imposition of sentence, (2) the defendant "demonstrate[s] sufficient cause, *i.e.* reasons that excuse the late filing[.]" and (3) the trial court renders a decision on the defendant's request within 30 days after imposition of sentence. **Commonwealth v. Dreves**, 839 A.2d 1122, 1128 (Pa. Super. 2003) (*en banc*). Otherwise, once the 30-day appeal period has run, the trial court is jurisdictionally precluded from considering a request for *nunc pro tunc* relief.

Here, Norman was sentenced on May 28, 2013. Therefore, his 30-day appeal period expired on June 27, 2013. Norman filed a post-sentence motion *nunc pro tunc* on July 1, 2013, and the trial court denied the motion the next day, both of which occurred after the 30-day appeal period had already expired.⁵ Therefore, Norman's notice of appeal, filed on July 29, 2013, was manifestly untimely, and we are constrained to quash this appeal.

⁴ **See** 42 Pa.C.S. § 5505.

⁵ We note that on the same day he was sentenced, Norman signed a document entitled "Important Post-Sentence Information" that set forth his pertinent post-sentence and appeal rights. **See** "Important Post-Sentence Information," 5/28/2013. Further, during the sentencing hearing, the trial (*Footnote Continued Next Page*)

Nevertheless, even if we were to address the challenge to his sentence, we would conclude that he is entitled to no relief.⁶ This Court will consider the merits of a challenge to the discretionary aspects of a sentence only if it “appears that a substantial question exists as to whether the sentence imposed is appropriate under the Sentencing Code.” ***Commonwealth v. Ventura***, 975 A.2d 1128, 1133 (Pa. Super. 2009), *appeal denied*, 987 A.2d 161 (Pa. 2009) (citation omitted). A substantial question exists when an appellant sets forth “a colorable argument that the sentence imposed is either inconsistent with a specific provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing process.” ***Id.***

(Footnote Continued) _____

court inquired whether Norman had completed that form. N.T., 5/28/2013, at 13. Therefore, Norman was aware of the time constraints for filing a timely post-sentence motion.

⁶ The standard of review for a claim challenging the discretionary aspects of sentencing is well-established:

Sentencing is a matter vested in the sound discretion of the judge, and will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that then sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Sheller, 961 A.2d 187, 190 (Pa. Super. 2008) (citation omitted), *appeal denied*, 980 A.2d 607 (Pa. 2009).

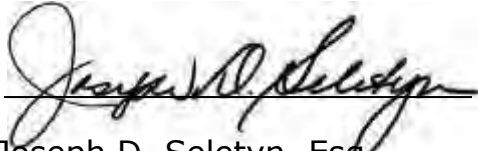
Norman first argues the trial court “offered no reasoning for the sentence imposed” and failed to consider the fact that the crime was a non-violent offense. Norman’s Brief at 13. However, Norman was sentenced in the standard range of the guidelines, pursuant to a negotiated plea agreement. Moreover, the trial court ordered and reviewed a presentence investigation (PSI) report before imposing his sentence. This Court has previously held that when the sentencing court had the benefit of a PSI report, “this fact alone [is] adequate to support the sentence, and due to the court’s explicit reliance on that report, we are required to presume that the court properly weighed the mitigating factors present in the case.” ***Commonwealth v. Fowler***, 893 A.2d 758, 766 (Pa. Super. 2006). ***See also Commonwealth v. Downing***, 990 A.2d 788, 794 (Pa. Super. 2010). Thus, no relief would be warranted on his first argument.

Second, Norman contends his maximum sentence was excessive in light of the fact that the court imposed a consecutive term for his probation/parole violations. However, a claim that the trial court imposed consecutive, rather than concurrent, sentences raises a substantial question “in only the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment.” ***Commonwealth v. Austin***, 66 A.3d 798, 808 (Pa. Super. 2013) (quotation omitted), *appeal denied*, 77 A.3d 1258 (Pa. 2013). No such “extreme circumstances” exist in the present case.

Indeed, pursuant to the negotiated plea agreement, the trial court imposed concurrent sentences in the forgery cases. However, the court directed that the probation and parole violation sentences run consecutively to the sentences imposed for the new crimes. As the trial court stated in its order denying Norman's post-sentence motion *nunc pro tunc*, "[w]e see no reason why [a defendant] should be afforded a 'volume discount' for his crimes by having all sentences run concurrently." Order, 7/2/2013, at 3 n.1, quoting **Commonwealth v. Hoag**, 665 A.2d 1212, 1214 (Pa. Super. 1995). We find this especially true where, as here, the consecutive sentences were for separate incidents, in particular, probation/parole violations and new crimes. Accordingly, no relief would be warranted on this claim.

Appeal quashed. Jurisdiction relinquished.

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: 6/17/2014

