NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RICARDO ACEVEDO-RIVERA, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2617 EDA 2013

Appeal from the Judgment of Sentence August 29, 2013
in the Court of Common Pleas of Monroe County
Criminal Division at No.: CP-45-CR-0001672-2012

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

MEMORANDUM BY PLATT, J.: **FILED MAY 15, 2014**

Appellant, Ricardo Acevedo-Rivera, appeals from the judgment of sentence entered after his jury conviction of one count each of simple assault, disorderly conduct, and recklessly endangering another person.[1] We affirm.

We take the following facts from our review of the record, including the trial court's November 15, 2013 opinion and the notes of testimony. On July 14, 2012, Appellant called his ex-girlfriend, Edith Rivera, and left her a message that he would be coming to her home to retrieve a backpack, stating that, if "any other men [were] there[,] he was going to kick their ass

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 2701(a)(1), 5503(a)(1), and 2705, respectively.

and fight whoever was there." (N.T. Trial, 6/13/13, at 20). On arriving at Rivera's home, Appellant engaged in a verbal altercation with Lloyd Harper, an individual standing outside on Rivera's property. Edwardo Velez, Rivera's son, handed Appellant the backpack and told him to leave. Appellant and Velez then fought until Appellant bit off a large piece of Velez's ear and pulled it away from his skull. Velez was transported by ambulance to Pocono Medical Center where he ultimately underwent surgery to repair the damage to his ear and skull.

On January 11, 2013, Appellant pleaded guilty to simple assault, recklessly endangering another person, and criminal mischief. The trial court granted Appellant's motion to withdraw the plea on April 5, 2013, and the case proceeded to a one-day jury trial on June 13, 2013.

Velez did not testify at trial or fill out a victim impact statement, but the Commonwealth presented four other witnesses. Appellant and another individual testified on his behalf.

Specifically, Commonwealth witness, Lieutenant Jennifer Lyon of the Stroud Area Regional Police Department, testified that, when she responded to the crime scene on July 14, 2012, she observed Velez covered in blood and holding his ear. Appellant admitted to her that he had been in a fight with Velez, but denied that he had bitten him. Lt. Lyon listened to the voicemail that was recorded prior to the incident in which Appellant threatened Rivera that, if any men were on her property when he arrived to

retrieve his backpack, he would fight them. When Lt. Lyon subsequently took Appellant into custody, he yelled, "I did bite [Velez's] ear off. So what. I fight street. Nobody gets it over on me. Street fighting is what I do and I will do whatever it takes to win." (N.T. Trial, 6/13/13, at 22).

Jessica Franza, who was visiting Rivera's home at the time of the assault, witnessed Appellant and the victim fighting and stated that the "[w]hole side of [Velez's] face was full of blood and [the] whole top of his ear was missing." (***Id.*** at 32). The Commonwealth introduced photographs taken by Sergeant Robert Eberle of the Stroud Regional Police Department that documented the victim's injuries. On rebuttal, the Commonwealth presented *crimen falsi* evidence through Appellant's previous probation officer, Bernie Sekora of the Monroe County Probation Department.

Angel Robles, who had driven Appellant to get the backpack and unsuccessfully attempted to convince him to leave as soon as he had retrieved it, testified on Appellant's behalf. Mr. Robles testified that he did not see Appellant bite Velez's ear because he had turned away toward his car at that time. Appellant testified that, during his fight with Velez, he "bit [Velez's] ear off" so that Velez would release him from a headlock. (***Id.*** at 65).

At the conclusion of trial, the jury convicted Appellant of the previously-listed charges. The trial court ordered the preparation of a pre-sentence investigation report (PSI). On August 29, 2013, the trial court

sentenced Appellant to an aggregate term of incarceration in a state correctional institution for not less than twenty-four nor more than forty-eight months. (***See*** Order, 8/29/13, at unnumbered page 2). The trial court denied Appellant's post-sentence motion and Appellant timely appealed.[2]

Appellant raises two questions for our review:

> [1.] Did the [trial] court abuse its discretion by sentencing Appellant harsher after a trial than was originally recommended before the trial, thus punishing Appellant for exercising his Constitutional rights, as well as by dismissing valid mitigating factors?
>
> [2.] Was the verdict against the weight of the evidence?

(Appellant's Brief, at 5).

Appellant's first issue challenges the discretionary aspects of his sentence, which "must be considered a petition for permission to appeal." ***Commonwealth v. Kelly***, 33 A.3d 638, 640 (Pa. Super. 2011) (citation omitted). To preserve claims relating to the discretionary aspects of a sentence properly, an appellant must first raise them with the trial court. ***See Commonwealth v. Foster***, 960 A.2d 160, 163 (Pa. Super. 2008), *affirmed*, 17 A.3d 332 (Pa. 2011).

Further,

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[2] Pursuant to the trial court's order, Appellant filed a timely statement of errors on October 9, 2013, and the court filed an opinion on November 15, 2013. ***See*** Pa.R.A.P. 1925.

> [w]hen challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question as to the inappropriateness of the sentence. 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. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. That is, 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. We examine an appellant's Rule 2119(f) statement to determine whether a substantial question exists. Our inquiry must focus on the **reasons** for which the appeal is sought, in contrast to the **facts** underlying the appeal, which are necessary only to decide the appeal on the merits.

Commonwealth v. Ahmad, 961 A.2d 884, 886-87 (Pa. Super. 2008) (case citations, internal quotation marks and footnotes omitted) (emphases in original).

In the case before us, Appellant did not raise his allegation that the court abused its discretion in "dismissing valid mitigating factors," (Appellant's Brief, at 5), with the trial court. (***See*** Post-Sentence Motions, 9/04/13, at unnumbered pages 1-2). Specifically, in his Rule 2119(f) statement, Appellant claims that the court failed to consider his "numerous letters of support and recommendation, his expressions of remorse, his desire to make restitution, and his lack of a prior criminal record." (Appellant's Brief, at 10). However, in his post-sentence motion, Appellant asserted that the court failed to consider that Velez did not testify or produce a victim impact statement. (***See*** Post-Sentence Motions, 9/04/13,

at unnumbered page 2 ¶ 5). This failed to preserve his mitigating factors argument. ***See Commonwealth v. Rush***, 959 A.2d 945, 949 (Pa. Super. 2008), *appeal denied*, 972 A.2d 521 (Pa. 2009) ("[F]or any claim that was required to be preserved, this Court cannot review a legal theory in support of that claim unless that particular legal theory was presented to the trial court.") (citation omitted). Accordingly, Appellant has not met this procedural requirement for his mitigating factor argument.

Moreover, an argument that the court failed to consider mitigating factors does not raise a substantial question. ***See Commonwealth v. Moury***, 992 A.2d 162, 175 (Pa. Super. 2010) ("That the court refused to weigh the proposed mitigating factors as Appellant wished, absent more, does not raise a substantial question.") (citations omitted). Accordingly, we need not review the merits of Appellant's first argument.

Appellant did properly preserve his second allegation, that "the [trial] court abuse[d] its discretion by sentencing [him] harsher after a trial than was originally recommended before the trial, thus punishing Appellant for exercising his Constitutional rights." (Appellant's Brief, at 5). Specifically, Appellant included this issue in a post-sentence motion and in his Rule 2119(f) statement. (***See*** N.T. Motion for Modification, 8/25/11, at 9-11; Appellant's Brief, at 8-9). Additionally, we conclude that this argument raises a substantial question. ***See Commonwealth v. Rickabaugh***, 706 A.2d 826, 843 (Pa. Super. 2007), *appeal denied*, 736 A.2d 603 (Pa. 1999)

(citing ***Commonwealth v. Bethea***, 379 A.2d 102, 103-04 (Pa. 1977)) (concluding it is constitutionally impermissible for court to impose a more severe sentence merely because the defendant exercised his constitutional right to a jury trial). Therefore, we will review the merits of this claim.

Our standard of review of a sentencing challenge is well-settled:

> Sentencing 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. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the 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.

In reviewing a sentence on appeal, the appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:

> (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
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> (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
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> (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.
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> In all other cases[,] the appellate court shall affirm the sentence imposed by the sentencing court.

42 Pa.C.S.A. § 9781.

Commonwealth v. Glass, 50 A.3d 720, 727 (Pa. Super. 2012), *appeal denied*, 63 A.3d 774 (Pa. 2013) (case citations omitted).

In this case, the court sentenced Appellant within the aggravated range of the sentencing guidelines for his convictions of simple assault and reckless endangerment. (***See*** Guideline Sentence Form, 9/16/13, at unnumbered pages 1, 3). Appellant argues, however, that the sentence was "excessive in that it was harsher than what had originally been proposed when [he] entered his *nolo contendere*[3] plea, only to later go to trial. . . . One must conclude that Appellant was being punished for exercising his right to trial." (Appellant's Brief, at 13). We disagree.

At the sentencing hearing, the court stated that:

> This was a fight between [Appellant] and [Velez]. [Appellant] . . . got the upper-hand on [Velez] and . . . aggressively and violently bit and tore at [Velez's] ear in such a manner that he not only bit off the top half of the ear but he pulled his ear actually away from his skull. I saw the photographs of the injury. It was really a horrific injury that [Velez] suffered in this case.

(N.T. Sentencing, 8/27/13, at 9). The court also observed that Appellant was thirty-two years of age, with fifteen arrests and thirteen convictions; was granted probation once and parole twice that later were revoked; and

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[3] Appellant states that he entered a *nolo contendere* plea; however, the record reveals that he pleaded guilty. (***Compare*** Appellant's Brief, at 13 ***with*** Order, 1/11/13 and Guilty Plea Colloquy, 1/11/13, at unnumbered page 1).

that he had been incarcerated in county and state prisons in New York and Pennsylvania. (***See id.*** at 9-10).

The sentencing court further noted that the PSI indicated that, even while incarcerated, Appellant exhibited "behavioral problems and assaultive behavior" that resulted in him being placed in solitary confinement and denied parole. (***Id.*** at 10). The court determined that a state prison would have resources to handle Appellant's behavior that a county jail would not. (***See id.***). Finally, the court noted that this was Appellant's second conviction involving the same victim, that he had tested positive for cocaine at his PSI interview, and that he has a "lengthy history for aggressive and defiant behavior[.]" (***Id.*** at 10-11).

Based on the foregoing and our independent review of the entire record in this matter, we conclude that the trial court did not abuse its discretion in sentencing Appellant where the sentence imposed was reasonable and there is no evidence that the court was punishing Appellant for exercising his constitutional right to a trial. ***See Glass***, ***supra*** at 727. Appellant's first issue lacks merit.

In Appellant's second issue, he argues that the jury's verdict was against the weight of the evidence. (***See*** Appellant's Brief, at 14-16).[4] This issue lacks merit.

Our standard of review of a challenge to the weight of the evidence is well-settled:

> [T]he weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice.

Commonwealth v. Moreno, 14 A.3d 133, 135 (Pa. Super. 2011), *appeal denied*, 44 A.3d 1161 (Pa. 2012) (citation omitted). To succeed on a challenge to the weight of the evidence, "the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the [C]ourt." ***Commonwealth v. Shaffer***, 722 A.2d 195, 200 (Pa. Super. 1998), *appeal denied*, 739 A.2d 165 (Pa. 1999) (citation omitted).

In the case before us, Appellant argues that "[f]or a jury to find . . . that [he] was the aggressor or that he acted in a way other than in self-defense shocks the conscience." (Appellant's Brief, at 14). We disagree.

A person is guilty of simple assault when he attempts to cause bodily injury to another. 18 Pa.C.S.A. § 2701(a)(1). "The use of force against a

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[4] Appellant preserved his weight of the evidence challenge by raising it in his post-sentence motions. (***See*** Post-Sentence Motions, 9/04/13, at 2); ***see also*** Pa.R.Crim.P. 607(A).

person is justified when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person." ***Commonwealth v. Emler***, 903 A.2d 1273, 1279 (Pa. Super. 2006) (citing 18 Pa.C.S.A. § 505(a)).

At trial, Appellant testified that he bit off the top of Velez's ear so that Velez would release him from a headlock. (***See*** N.T. Trial, 6/13/13, at 65). Specifically, Appellant stated that Velez held him with his head pinched between Velez's body and arm, and that from this angle he bit the top of the Velez's ear. (***See id.*** at 74-75).

Lieutenant Lyon arrived at the scene of the biting incident after it had occurred and found Velez covered in blood and holding his ear. (***See id.*** at 14). While at the scene, she listened to a voicemail message left by Appellant prior to him coming to Rivera's home in which he angrily stated that if there were "any other men there he was going to kick their ass and fight whoever was there." (***Id.*** at 20; ***see id.*** at 21). After being taken into custody, Appellant admitted to biting the victim and told Lt. Lyon that "nobody gets it over on [him]" and that he "will do whatever it takes to win." (***Id.*** at 22).

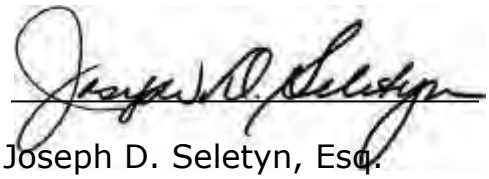
The jury also heard testimony from Rivera's friend, Ms. Franza, who observed the victim and Appellant fighting, and she stated that the "[w]hole side of [Velez's] face was full of blood and [the] whole top of his ear was missing." (***Id.*** at 32). They also reviewed pictures taken by Sergeant

Eberle showing the extent of the victim's injuries. (***See id.*** at 35-37). Finally, the Commonwealth presented evidence of *crimen falsi* through the introduction of the testimony of Appellant's prior probation officer. (***See id.*** at 77).

Based on the foregoing, we conclude that it was within the province of the jury to find that Appellant was not acting in self-defense when he bit the victim's ear and that, therefore, his actions were not justified. ***See Emler***, ***supra*** at 1279. Accordingly, we conclude that the trial court properly found that the jury's verdict does not shock one's sense of justice. (***See*** Trial Court Opinion, 11/15/13, at 6); ***see also Moreno***, ***supra*** at 135; ***Shaffer***, ***supra*** at 200.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/15/2014