NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MARQUISE P. WALIYYUDDIN Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3650 EDA 2015

Appeal from the Judgment of Sentence Entered July 31, 2015
In the Court of Common Pleas of Philadelphia County
Criminal Division at No: CP-51-CR-0008582-2011

BEFORE: STABILE, J., SOLANO, J., and STEVENS, P.J.E.*

MEMORANDUM BY STABILE, J.: **FILED NOVEMBER 07, 2016**

This case returns to us following our remand to the Court of Common Pleas of Philadelphia County ("trial court") to resentence Appellant for his involuntary manslaughter conviction. Upon review, we affirm.

The facts underlying this case are undisputed. As recounted by a prior panel of this Court:

> On the evening of Saturday, May 14, 2011, [Appellant] was at the apartment of his friend, Katrina Rodriguez [("Rodriguez")], who was the mother of [Aiden Santiago ("Santiago")[1]], a healthy three-month-old baby boy. [Appellant] was the godfather of [Santiago], and had babysat for him on several occasions without incident. Also present was [Appellant]'s boyfriend, Luis Torres [("Torres")]. At around 11:00 p.m., [Appellant] told Rodriguez that he wanted to keep [Santiago] for

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* Former Justice specially assigned to the Superior Court.

[1] Although Santiago was a minor at the time of the incident, it is not necessary for us to protect his identity by using his initials as he is deceased.

> an overnight stay. Rodriguez agreed that [Appellant] could take [Santiago] to the apartment that [Appellant] shared with Torres until the next day. [Appellant] and Torres left with [Santiago], who was alert and without any observable problems at the time.
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> Sometime during the afternoon of the next day, Torres left [Appellant] and [Santiago] to visit Torres' mother for dinner. During dinner, Torres received a frantic call from [Appellant], who told Torres that [Santiago] was not breathing. Torres, his brother, and his aunt left the house and rushed to [Appellant]'s apartment. When they arrived and saw [Santiago], Torres'[] aunt called 911.
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> Paramedics arrived at the apartment at approximately 7:30 p.m. [Santiago] was taken to St. Christopher's Hospital, where, despite emergency cranial surgery, he died at 11:55 p.m. The autopsy of [Santiago] revealed subarachnoid and subdural hematomas, and optic-nerve hemorrhages, all consistent with vigorous shaking of the baby's head. The medical examiner requested a consult from a pediatric neuropathologist, who concluded that [Santiago] died from abusive head trauma.
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> [Appellant] gave a statement to police on May 16, 2011. In that statement, he admitted to getting frustrated when [Santiago] awoke during the night crying, and that he "was rocking him harder, and was shaking him, just trying to get him to stop crying." He further admitted putting [Santiago] into his car seat and "rocking the car seat back and forth pretty hard" causing [Santiago] to bounce back and forth in the seat. [Appellant] stated that he "could hear [Santiago's] head bouncing back on the back of the car seat." According to [Appellant], this eventually caused [Santiago] to stop crying.

Commonwealth v. Waliyyuddin, No. 2883 EDA 2013, unpublished memorandum at 1-2 (Pa. Super. filed November 25, 2014) (citing Trial Court Opinion, 1/6/14, at 2-3)).

The procedural history of this case is as follows.[2] On May 17, 2011, Appellant was charged with third degree murder[3] (18 Pa.C.S.A. § 2502(c))

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[2] Unless otherwise specified, these facts come from this Court's November 25, 2014 decision.

[3] The docket in this matter reflects that Appellant was not charged with involuntary manslaughter at the outset.

and endangering the welfare of a child ("EWOC") (18 Pa.C.S.A. § 4304(a)(1)). On August 2, 2011, a criminal information charging Appellant with third-degree murder, EWOC and involuntary manslaughter (18 Pa.C.S.A. § 2504(a)) was filed. After a three-day bench trial, Appellant was found guilty of involuntary manslaughter and EWOC. On May 24, 2013, the trial court sentenced Appellant to 4 to 8 years' imprisonment for involuntary manslaughter and 1 to 2 years' imprisonment for EWOC. Appellant's aggregate sentence therefore was 5 to 10 years' imprisonment. Appellant filed a post-sentence motion, which the trial court denied. Appellant timely appealed to this Court, raising two issues for our review. First, Appellant argued that the trial court imposed an illegal sentence because involuntary manslaughter and EWOC convictions merged for sentencing purposes. Second, Appellant challenged the discretionary aspects of his sentence. On appeal, a panel of this Court agreed with Appellant's merger argument, concluding that involuntary manslaughter and EWOC should have merged at sentencing. ***Waliyyuddin***, No. 2883 EDA 2013, at 9-10. As a result, we vacated Appellant's sentence and remanded the case to the trial court for resentencing.[4]

Upon remand, on July 31, 2015, the trial court resentenced Appellant to 5 to 10 years' imprisonment for involuntary manslaughter. On August 3,

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[4] Because we vacated the judgment of sentence, we declined to address Appellant's challenge to the discretionary aspects of his sentence.

2015, Appellant filed a post-sentence motion, which the trial court denied on November 17, 2015. Appellant once again filed a timely appeal to this Court. Following Appellant's filing of a Pa.R.A.P. 1925(b) statement of errors complained of on appeal, the trial court issued a Pa.R.A.P. 1925(a) opinion.

On appeal,[5] Appellant raises three issues for our review:

1. Did not the trial court err in sentencing Appellant beyond the aggravated range of the Sentencing Guidelines based on an improper factor, that is, the age of the victim, which the Guidelines already contemplate and provide for in the grading of the crime and in the offense gravity score, thus failing to provide adequate reasons for deviating from the Sentencing Guidelines?

2. Did not the trial court err in improperly relying on Appellant's arrest record as evidence of prior criminality?

3. Did not the trial court err in imposing a sentence both manifestly excessive and unreasonable under all of the circumstances of this case?

Appellant's Brief at 4.[6]

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[5] When reviewing a challenge to the trial court's discretion, our standard of review is as follows:

> 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. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to 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.

Commonwealth v. Bowen, 55 A.3d 1254, 1263 (Pa. Super. 2012) (quoting ***Commonwealth v. Cunningham***, 805 A.2d 566, 575 (Pa. Super. 2002)), ***appeal denied***, 64 A.3d 630 (Pa. 2013).

[6] Appellant's first and third issues are related to the extent they implicate the excessiveness of his sentence.

Because Appellant's issues implicate only the discretionary aspects of his sentence, we note it is well-settled that "[t]he right to appeal a discretionary aspect of sentence is not absolute." ***Commonwealth v. Dunphy***, 20 A.3d 1215, 1220 (Pa. Super. 2011). Rather, where an appellant challenges the discretionary aspects of a sentence, an appellant's appeal should be considered as a petition for allowance of appeal. ***Commonwealth v. W.H.M.***, 932 A.2d 155, 162 (Pa. Super. 2007). As we stated 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:
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> > [W]e conduct a four-part analysis to determine: (1) whether 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 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)). Whether a particular issue constitutes a substantial question about the appropriateness of sentence is a question to be evaluated on a case-by-case basis. ***See Commonwealth v. Kenner***, 784 A.2d 808, 811 (Pa. Super. 2001), ***appeal denied***, 796 A.2d 979 (Pa. 2002).

Here, Appellant has satisfied the first three requirements of the four-part ***Moury*** test. Appellant filed a timely appeal to this Court, preserved the issue on appeal through his post-sentence motions, and included a Pa.R.A.P.

2119(f) statement in his brief.[7] We, therefore, must determine only if Appellant's sentencing issues raise a substantial question.

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Paul***, 925 A.2d 825, 828 (Pa. Super. 2007). We have found that 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 underlie the sentencing process." ***Commonwealth v. Phillips***, 946 A.2d 103, 112 (Pa. Super. 2008) (citation omitted), ***appeal denied***, 964 A.2d 895 (Pa. 2009). "[W]e cannot look beyond the statement of questions presented and the prefatory [Rule] 2119(f) statement to determine whether a substantial question exists." ***Commonwealth v. Christine***, 78 A.3d 1, 10 (Pa. Super. 2013), ***affirmed***, 125 A.3d 394 (Pa. 2015).

This Court does not accept bald assertions of sentencing errors. ***See Commonwealth v. Malovich***, 903 A.2d 1247, 1252 (Pa. Super. 2006). When we examine an appellant's Rule 2119(f) statement to determine whether a substantial question exists, "[o]ur inquiry must focus on the reasons for which the appeal is sought, in contrast to the facts underlying

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[7] Rule 2119(f) provides that "[a]n appellant who challenges the discretionary aspects of a sentence in a criminal matter shall 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." Pa.R.A.P. 2119(f).

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) (quoting ***Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa. Super. 2005)). A Rule 2119(f) statement is inadequate when it "contains incantations of statutory provisions and pronouncements of conclusions of law[.]" ***Commonwealth v. Bullock***, 868 A.2d 516, 528 (Pa. Super. 2005) (citation omitted). We consistently have held that bald assertions of excessiveness are insufficient to present a substantial question. ***See Commonwealth v. Fisher***, 47 A.3d 155, 159 (Pa. Super. 2012) ("[The a]ppellant simply asserts: 'A substantial question is presented about the sentence where the Court imposed a manifestly unreasonable sentence in excess of the guidelines without sufficient justification." . . . This amounts to a bald assertion that [the a]ppellant's sentence was excessive, devoid of supporting legal authority."); ***see also Moury***, 992 A.2d at 170 ("As to what constitutes a substantial question, this Court does not accept bald assertions of sentencing errors. An appellant must articulate the reasons the sentencing court's actions violated the sentencing code.").

Here, Appellant asserts in his Rule 2119(f) statement:

> The [trial] court . . . assigned special, and overwhelming significance to the age of the child victim in articulating the reason for its departure from the aggravated range of the Sentencing Guidelines in fashioning the sentence imposed at the resentencing, even though the Guidelines already contemplate the under twelve population as particularly vulnerable: 18 Pa.C.S.A. § 2504(b) raises the grading of involuntary manslaughter from a first degree misdemeanor to a second degree felony "where the victim is under twelve years of age and is in the case [sic], custody or control of the person who caused the death." Similarly, the offense gravity score has been raised

> from six to eight where the victim is a child in the care of the perpetrator. Thus, the [trial] court failed to support its imposition of a manifestly excessive and unreasonable sentence with justification based on the circumstances of this matter.
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> Further, the [trial] court relied entirely on Appellant's arrest record as predictors of the instant matter, and of future conduct, despite any hint of misbehavior in Appellant's prison record.
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> Accordingly, there are substantial questions as to the sentencing court's actions contrary to the fundamental norms underlying the sentencing process, resulting in an excessive and unreasonable sentence.

Appellant's Brief at 14-15. Based on the foregoing Rule 2119(f) statement, we conclude that Appellant has raised a substantial question with respect to his first and second issues on appeal. ***See Commonwealth v. Goggins***, 748 A.2d 721, 732 (Pa. Super. 2000) ("When fashioning a sentence, a sentencing court may not 'double count' factors already taken into account in the sentencing guidelines."), ***appeal denied***, 759 A.2d 920 (Pa. 2000); ***Commonwealth v. Tirado,*** 870 A.2d 362, 365 (Pa. Super. 2005) (finding appellant raised a substantial question for the Court's review when claiming that the trial court "considered factors already included in the guidelines."); ***see also Commonwealth v. Oliver***, 693 A.2d 1342, 1347-48 (Pa. Super. 1997) ("The claim that a sentencing court imposed a sentence outside of the guidelines and failed to state adequate reasons for the sentence imposed does present a substantial question that the sentence is inappropriate under the Sentencing Code."). However, his third issue claiming that the sentence is excessive does not raise a substantial question to the extent it is not

subsumed by the first issue.[8] ***See Fisher***, 47 A.3d at 159 ("[A] bald assertion that a sentence is excessive does not itself raise a substantial question justifying this Court's review of the merits of the underlying claim."); ***see also Commonwealth v. Bromley***, 862 A.2d 598, 604 (Pa. Super. 2004) (explaining defendant did not raise a substantial question by merely asserting sentence was excessive when he failed to reference any section of Sentencing Code potentially violated by the sentence), ***appeal denied***, 881 A.2d 818 (Pa. 2005). Accordingly, we address the merits of Appellant's first two issues.

After careful review of the record, and the relevant case law, we conclude that the trial court accurately and thoroughly addressed the merits of the issues considered on appeal. ***See*** Trial Court Opinion, 12/22/15, at 3-7. Accordingly, we affirm the trial court's July 31, 2015 judgment of sentence. We further direct that a copy of the trial court's December 22, 2015 Rule 1925(a) Opinion be attached to any future filings in this case.

Judgment of sentence affirmed.

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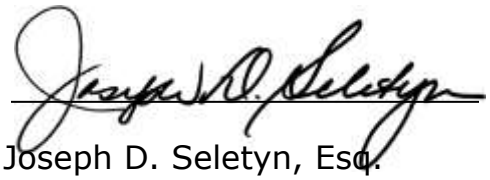
[8] Even if we were to grant review of Appellant's third issue, he still would not be entitled to relief as explained in the trial court's Rule 1925(a) opinion.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/7/2016