

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

ALEXANDER CARTAGENA

Appellant

No. 2721 EDA 2016

Appeal from the Judgment of Sentence March 7, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012937-2011

BEFORE: BOWES, J., OTT, J., AND FORD ELLIOTT, P.J.E.

MEMORANDUM BY BOWES, J.:

FILED APRIL 20, 2017

Alexander Cartagena appeals from the judgment of sentence of ten years and three months to twenty seven years imprisonment that was imposed after he was convicted by a jury of burglary, theft and trespass. We reject Appellant's challenge to the discretionary aspects of his sentence and affirm.

During the early morning hours of July 7, 2011, Appellant forcibly entered a private home occupied by Amanda Short and her boyfriend, Joshua Raymond, both of whom were asleep. At approximately 6:00 a.m., Mr. Raymond discovered the burglary. Ms. Short inventoried her possessions and reported that items worth approximately \$3,400 were stolen. While processing the crime scene, members of the Philadelphia

Police Department lifted a handprint from the kitchen table that they subsequently determined belonged to Appellant. Appellant was arrested on July 29, 2011, and on October 19, 2012, proceeded to a jury trial where he was convicted of the above-delineated crimes.

The case proceeded to sentencing on March 7, 2013. Appellant was a repeat felony offender, and the standard range matrix called for sentences of: 1) five to six years for burglary (plus twelve for aggravated range); 2) two to three years for theft; and 3) one year and nine months to two and one-half years for criminal trespass. Appellant received a sentence of seven to twenty years for burglary and a consecutive sentence of three years and three months to seven years for theft. The sentence on criminal trespass was imposed concurrently with the burglary sentence. While a motion to modify the sentence does not appear in the record, there is an order dated April 2, 2013, wherein the motion was denied. No direct appeal was filed.

On April 5, 2013, Appellant filed a *pro se* motion asking for leave to file a motion to modify his sentence *nunc pro tunc*. This document was docketed as a *pro se* PCRA petition, but was never processed and counsel was not appointed. On September 3, 2015, Appellant filed another *pro se* PCRA petition. At that point, counsel was appointed and filed an amended petition, asking that Appellant's appellate rights be reinstated. Counsel maintained that the April 5, 2013 document was a timely PCRA petition, as indicated on the docket. The Commonwealth did not oppose the grant of

relief in the form of reinstatement of Appellant's appellate rights. Thus, Appellant was granted leave to file an appeal *nunc pro tunc*, and this timely appeal followed. He raises this issue: "Does Appellant's theft by unlawful taking sentence constitute an abuse of discretion and should the matter be remanded for resentencing?" Appellant's brief at 4.

As we recently observed in ***Commonwealth v. McLaine***, 150 A.3d 70, 76 (Pa.Super. 2016) (citation omitted), "[a]n appellant is not entitled to the review of challenges to the discretionary aspects of a sentence as of right." Instead, to invoke our jurisdiction involving a challenge to the discretionary aspects of a sentence, an appellant must satisfy the following four-part test:

(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.

In the present case, the appeal is timely, a challenge to the sentence was preserved in a motion to modify, and Appellant's brief contains a Pa.R.A.P. 2119(f) statement. We now proceed to examine if the statement raises a substantial question.

A substantial question as to the inappropriateness of a sentence under the Sentencing Code is present "only 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. Glass***, 50 A.3d 720, 727 (Pa.Super. 2012). We do not examine anything other than the statement of questions presented and the 2119(f) statement when determining if a substantial question exists. ***Commonwealth v. Christine***, 78 A.3d 1, 10 (Pa.Super. 2013).

Herein, in his 2119(f) statement, Appellant complains about the consecutive nature of the burglary and theft sentences but also focuses upon the fact that the theft sentence exceeded the guideline recommendations. Appellant’s brief at 9 (sentence for theft was “almost twice the upper end of the guidelines”). Appellant avers that the sentence “imposed is excessive and unreasonable[.]” ***Id.*** Since the sentences on theft exceeded the applicable guidelines and Appellant maintains that it was excessive and unreasonable, we conclude that Appellant has raised a substantial question. A position that the sentencing court failed to justify an unreasonable sentence that is not within the applicable guideline ranges raises a substantial question. ***McLaine, supra; Commonwealth v. Eby***, 784 A.2d 204, 206 (Pa.Super. 2001) (“A claim that the sentencing court imposed an unreasonable sentence by sentencing outside the guideline ranges presents a ‘substantial question’ for our review.”).

We now examine our standard of review:

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.

Commonwealth v. Shull, 148 A.3d 820, 831 (Pa.Super. 2016) (citation omitted).

A sentencing court is permitted to deviate from the sentences recommended in the guidelines, as they are merely advisory. ***Commonwealth v. Walls***, 926 A.2d 957 (Pa. 2007); ***McLaine, supra***. When a court does sentence outside the guidelines, it “must place on the record its reasons for the deviation.” ***Commonwealth v. Garcia-Rivera***, 983 A.2d 777, 780 (Pa.Super. 2009).

The Superior Court’s standard of review of a deviation sentence was extensively analyzed by the seminal Supreme Court decision in ***Commonwealth v. Walls***, 926 A.2d 957 (Pa. 2007). The ***Walls*** Court stressed the deferential nature of our examination of any sentence, stating that the “sentencing court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it.” ***Id.*** at 961 (citation and quotation marks omitted). It continued that the sentencing court is in a superior position than this

Court when deciding on an appropriate sentence because it observes the defendant and his or her articulation of remorse or indifference. “Simply stated, the sentencing court sentences flesh-and-blood defendants and the nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review.” **Id.**

Our Supreme Court noted that this Court’s ability to review a sentence is constrained by 42 Pa.C.S. § 9781(c). That statute provides that we can vacate a sentence and remand for re-sentencing only if we find 1) that the court intended to sentence within the guidelines but “applied the guidelines erroneously;” 2) a sentence was imposed within the guidelines “but the case involves circumstances where the application of the guidelines would be clearly unreasonable;” or 3) “the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.” 42 Pa.C.S. § 9781(c). “In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.” **Id.**

Thus, in this case, we may reverse the sentence if it is “unreasonable.” While the statute does not contain a definition of what renders a sentence unreasonable, the **Walls** Court filled that gap, ruling that “‘unreasonable’ commonly connotes a decision that is ‘irrational’ or not guided by sound judgment.” **Id.** at 963. Our High Court admonished that the reversal of a sentence on grounds of unreasonableness should “occur infrequently, whether the sentence is above or below the guideline ranges, especially

when the unreasonableness inquiry is conducted using the proper standard of review.” **Id.** (emphasis added).

Our High Court concluded that this Court can find a sentence not guided by sound judgment or irrational in only two situations. First, it is unreasonable if the sentencing court did not weigh the “general standards applicable to sentencing found in Section 9721, *i.e.*, the protection of the public; the gravity of the offense in relation to the impact on the victim and the community; and the rehabilitative needs of the defendant. 42 Pa.C.S. § 9721(b).” **Id.** at 964; **see** 42 Pa.C.S. § 9721(b) (In determining whether to impose a sentence of imprisonment, “the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.).

Second, we are allowed to reverse a departure sentence if it is unreasonable under the guidelines provided by 42 Pa.C.S. § 9781(d):

In reviewing the record the appellate court shall have regard for:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
- (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
- (3) The findings upon which the sentence was based.

(4) The guidelines promulgated by the commission.

42 Pa.C.S. § 9781(d).

Appellant claims that the trial court did not “adequately” consider his plea for mercy and drug addiction or the fact that his criminal history did not include crimes of violence. Appellant’s brief at 10. Thus, Appellant does not suggest that the trial court violated § 9721(b) by failing to examine the factors outlined therein, which the court indicated that it did. Rather, Appellant is merely asking this Court to re-weigh those circumstances and remand for imposition of a more lenient sentence. This, we are not permitted to do. ***Commonwealth v. Macias***, 968 A.2d 773, 778 (Pa.Super. 2009) (“We cannot re-weigh the sentencing factors and impose our judgment in the place of the sentencing court.”).

Appellant’s second position implicates § 9781(d). He avers that the court did not proffer sufficient reasons to support a departure sentence. Appellant’s brief at 11. The trial court articulated that it weighed the following facts when imposing its term of imprisonment. First, Appellant admitted that he had a significant addiction to cocaine and relapsed after his last term in jail since he enjoyed using that drug. Second, Appellant had been sentenced to the maximum term of imprisonment on two prior crimes and yet committed the present offense shortly after being paroled. Third, Appellant had a number of parole violations. In addition, the Commonwealth points out that Appellant had seventeen prior arrests with

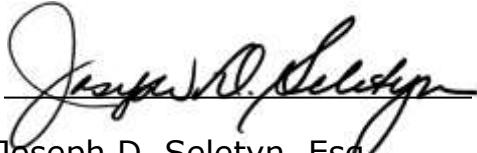
sixteen prior convictions, including several for burglary. Thus, the repeat felony offender prior record score did not fully account for Appellant's criminal history.

We now review the § 9781(d) factors. The nature and circumstances of the offense supported the sentence in that Appellant forcibly entered a home occupied by a sleeping couple and stole numerous items worth thousands of dollars. Appellant's history and characteristics do not provide grounds for reversal since he had a significant prior record for which his prior record score of Repeat Felony Offender did not fully account. The sentencing court had the opportunity to view Appellant and assess the sincerity of his pleas for mercy. The above-delineated findings upon which the sentence was based were valid grounds for a deviation sentence. ***Commonwealth v. Darden***, 531 A.2d 1144 (Pa.Super. 1987) (deviation sentence justified where prior record score did not adequately account for defendant's prior criminal history); ***see also Commonwealth v. Andrews***, 720 A.2d 764 (Pa.Super. 1998) (same), *affirmed on other grounds*, 768 A.2d 309 (Pa. 2001). Finally, while the sentence was above the guidelines, the guidelines could not adequately account for Appellant's unapologetic return to use of cocaine and his past criminal activity. Since the sentence was neither irrational nor unguided by sound judgment, we must affirm.

Judgment of sentence affirmed.

J-S20013-17

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line drawn through the middle of the text.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/20/2017