NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
ROBERT LEWIS BLANCK	:	
	:	
Appellee	:	No. 2321 EDA 2017

Appeal from the Judgment of Sentence April 3, 2017
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0008863-2015

BEFORE: GANTMAN, P.J., DUBOW, J., and KUNSELMAN, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED OCTOBER 10, 2018**

Appellant, the Commonwealth of Pennsylvania, appeals from the judgment of sentence entered in the Montgomery County Court of Common Pleas, following Appellee, Robert Lewis Blanck's jury trial convictions of aggravated assault, simple assault, and REAP.[1] We affirm.

In its opinion, the trial court fully and correctly sets forth the relevant facts and procedural history. Therefore, we have no need to restate them.

The Commonwealth raises one issue for our review:

> WHETHER THE SENTENCING COURT ABUSE[D] ITS DISCRETION BY IMPOSING A BELOW-MITIGATED RANGE SENTENCE WHERE [APPELLEE] PISTOL-WHIPPED…VICTIM, FOLLOWED HIM AS HE FLED, SHOT HIM IN THE GUT FROM POINT-BLANK RANGE, AND LEFT HIM IN THE STREET BLEEDING, AND ITS ONLY REASONS FOR THE DOWNWARD

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[1] 18 Pa.C.S.A. §§ 2702(a)(1) and 2702(a)(4), 2701(a)(1), and 2705, respectively.

> DEPARTURE WERE (A) [APPELLEE] HAVING NO PRIOR RECORD; (B) [APPELLEE] LIVING A "GOOD LIFE" TO THAT POINT; AND (C) BLAMING…VICTIM?

(Commonwealth's Brief at 5).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Commonwealth v. Sierra***, 752 A.2d 910, 912 (Pa.Super. 2000). Prior to reaching the merits of a discretionary sentencing issue:

> [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).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006). When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in its brief a separate concise statement demonstrating a substantial question as to the appropriateness of the sentence under the Sentencing Code. Pa.R.A.P. 2119(f); ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002). The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830 A.2d 1013 (Pa.Super. 2003). A substantial question exists "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." ***Sierra, supra*** at 912-13.

Whether the sentencing court relied on unreasonable factors to impose a sentence below the recommendation of the guidelines presents a substantial question. ***Commonwealth v. Sims***, 728 A.2d 357 (Pa.Super. 1999), *appeal denied*, 560 Pa. 703, 743 A.2d 918 (1999). Nevertheless,

> Consultation of the guidelines will…further the goal of the guidelines, *viz.*, increased uniformity, certainty, and fairness in sentencing. Guidelines serve the laudatory role of aiding and enhancing the judicial exercise of judgment regarding case-specific sentencing. Guidelines may help frame the exercise of judgment by the court in imposing a sentence. Therefore, based upon the above, we re-affirm that **the guidelines have no binding effect, create no presumption in sentencing, and do not predominate over other sentencing factors**—they are advisory guideposts that are valuable, may provide an essential starting point, and that must be respected and considered; they recommend, however, rather than require a particular sentence.

Commonwealth v. Walls, 592 Pa. 557, 570, 926 A.2d 957, 964-65 (2007) (emphasis added). Further, where the sentencing court had the benefit of a presentence investigative ("PSI") report, we can presume the court "was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." ***Commonwealth v. Devers***, 519 Pa. 88, 101-02, 546 A.2d 12, 18 (1988).

Our standard of review concerning the discretionary aspects of

sentencing states:

> 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.

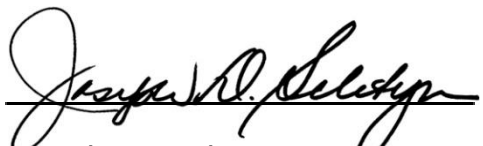
Commonwealth v. Hyland, 875 A.2d 1175, 1184 (Pa.Super. 2005), *appeal denied*, 586 Pa. 723, 890 A.2d 1057 (2005).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Gail A. Weilheimer, we conclude the Commonwealth's issue merits no relief. The trial court opinion comprehensively discusses and properly disposes of the question presented. (***See*** Trial Court Opinion, filed December 11, 2017, at 9-16) (finding: Appellee's sentence, while outside guideline range, is reasonable; before sentencing, court reviewed Appellee's PSI report, to which parties had no objections; court also considered Victim's impact statement and letter from Appellee's wife; during sentencing hearing, court heard testimony of Victim and Appellee's step-daughter, as well as Appellee's allocution; in fashioning sentence, court considered factors in Section 9781(d) and totality of circumstances surrounding Appellee's offenses; Victim's tampering and criminal mischief on Appellee's property catalyzed incident; Victim was initially thrown out of Appellee's home due to drinking and erratic behavior associated

with Victim's criminal history; Victim cut off electricity to Appellee's home, even though he knew Appellee's son's nebulizer required electricity to function; Victim also threw beer can at Appellee's parked car in driveway; during incident, Victim was intoxicated and became physical with Appellee; court also took notice of law enforcement's inaction despite previous calls from Appellee's wife regarding potential confrontation with Victim; Appellee has no criminal history, and his conduct was part of isolated incident with Victim; Appellee is not at risk of re-offending and causing danger to public; court acted within its discretion in imposing upon Appellee sentence that fell six months below guideline range; sentence adequately protects public and meets Appellee's rehabilitative needs; Commonwealth failed to articulate how six-month deviation from sentencing guidelines prevents adequate public protection or fails to meet Appellee's rehabilitative needs). The record supports the trial court's rationale, and we see no reason to disturb it. ***See Hyland, supra***. Accordingly, we affirm on the basis of the trial court opinion.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/10/18

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	Common Pleas Court No.: CP-46-CR-0008863-2015
v.	:	
ROBERT BLANCK	:	Superior Court No.: 2321 EDA 2017

OPINION

WEILHEIMER, J. **December 11, 2017**

The Commonwealth (Appellant) instantly appeals to the Superior Court of Pennsylvania ("Superior Court") from the trial court's Judgment of Sentence, imposed on April 3, 2017, and from the trial court's subsequent denial of the Commonwealth's June 19, 2017, Motion to Modify Sentence. Based upon the following, Robert Blanck's ("Appellee's") Judgment of Sentence was proper and should be affirmed.

FACTUAL HISTORY

The jury's findings in the instant matter can be concisely summarized as follows: On November 15, 2015, Appellee, while visibly possessing a firearm (.38 caliber revolver handgun), attempted to cause serious bodily injury and/or bodily injury to Edward Maligente ("Victim"), placing Victim in reasonable fear of the same, and/or death. (***See generally*** N.T. – Jury Trial, 11/28/16-11/29/16.)

More specifically, Victim and Appellee were previously "best friends" for several years before the incident that took place. (***Id.*** at 54, 188, 231.) Victim, after being jailed for violating his DUI probation by possessing marijuana, was released sometime shortly after Labor Day in October of 2015, at which time he sought to live with Appellee and Appellee's wife, Elizabeth "Libby" Livingston ("Wife"). (***Id.*** at 33, 35, 45-46, 59, 189, 231-32.) After about a month-and-a-half of living with Appellee, and a few days prior to the incident that took place, Victim had a "falling out" with Appellee and Wife due to, *inter alia*, Victim's continued alcohol use and an incident involving the Appellee's and Wife's dog whilst in the care

of Victim; and as such, Victim was precluded from living in the family home any further.[1] (*Id.* at 33, 35, 46, 61-62, 133, 189-90, 232-33.)

Sometime earlier in the evening on November 15, 2015, after being kicked out, Victim attempted to retrieve some belongings, including a knife, from Appellee's home but was denied by Wife, who threatened to, and did, call the police.[2] (*Id.* at 47-48, 62-63, 65-66, 136.) Being on probation and fearing apprehension by law enforcement for the second time because of Appellee and his Wife, Victim ran down the street to his friend, "Missy's", house with whom he was then staying, and there he began drinking alcohol. (*Id.* at 48-49, 64.) Victim continued to drink, becoming intoxicated and increasingly upset about being kicked out of Appellee's house; then around 11:00 P.M. on the same night, went to the back of the Appellee's property with a pair of snipping tools to cut the main electrical wire providing power from the street transformer to Appellee's house. (*Id.* at 33-35, 68-69, 89, 193, 195, 200-02, 242.) This caused an electrical arc/short, the house lights to flicker, the back of the house to completely lose electricity, which alarmed Wife, Appellee, and their children.[3] (*Id.*) Victim testified at trial that he cut the electricity despite knowing it was important to Appellee and his Wife especially because their younger son's nebulizer[4] used electricity; and despite the danger of electrocution Victim posed to himself should he have been shocked by the strong electrical current coming from the street's transformer. (*Id.* at 65, 69-70.)

Appellee, alarmed at the noise of the electrical arc and the flickering lights, came out of the back of the house, confronted Victim and asked him to leave to which he refused until he was finished cutting the electricity, there was an ensuing struggle between the pair, and Appellee eventually hit Victim on the

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[1] Despite kicking Victim out of Appellee's family home, Appellee graciously permitted Victim to sleep in Appellee's van that is typically parked across the street from the home, which is where it was the night of the incident. (*Id.* at 233-34.)

[2] There was also a call around 5:30 P.M. made by Wife to the police station after Victim had been obnoxiously banging on the front door of Appellee's home. (*Id.* at 156, 170, 191-92.) Wife also was at the police station a few days prior to the incident, at which time she verbally requested help from law enforcement. (*Id.* at 194.)

[3] Victim's actions on the night in question, at a minimum, amounted to tampering and criminal mischief. (*Id.* at 161-63, 170.)

[4] Appellee's son uses a nebulizer, a machine that turns liquid medicine into a mist to assist with breathing and treat asthma.

side of the head with his gun. (***Id.*** at 35-36, 102-03, 242-43.) Victim went down the side alley to the front of the house, threw a beer can at Appellee's vehicle parked directly in front of the house, and then began to make his way down the street to the police station. (***Id.*** at 37-39, 92.) Appellee came out of the front of the house, and verbally confronted Victim as he was going down the street toward the police station, when Victim turned around and threw a beer, and began swinging, at Appellee; then Appellee pulled out his gun and shot Victim in the lower abdomen. (***Id.*** at 37-39, 79, 88-89, 91, 93-94, 246.) A neighbor attempted to assist Victim as he was starting to run away, but Victim was combative and told the neighbor to, "Get off of me." (***Id.*** at 40-43, 98-99, 104.) The neighbor advised Victim to lie down instead of running because he had been shot, and eventually directed the belligerent Victim to the police station where they were eventually met by first responders. (***Id.*** at 40-43, 99, 104.) From there, Victim was transported to Paoli Hospital where he underwent surgery for his injuries. (***Id.*** at 43-44.)

PROCEDURAL HISTORY

On December 11, 2015, the Criminal Complaint and Affidavit of Probable Cause were filed with this Court of Common Pleas for the County of Montgomery ("trial court"). ("Crim Complaint/Prob Cause", 12/11/15.) On February 16, 2016, the Commonwealth filed the Bill of Information, charging Appellee with Count 1 – Aggravated Assault (Felony in the 1st Degree); Count 2 – Simple Assault; Count 3 – Possession of an Instrument of Crime with Intent Employ it Criminally; Count 4 – Recklessly Endangering Another Person; Count 5 – Aggravated Assault (Felony in the 2nd Degree). (***See*** "Bill of Information", 6/16/16.)

A two (2)-day jury trial was held between November 28, 2016, and November 29, 2016, after which the jury unanimously found Appellee guilty of Counts 1, 2, 4, and 5; and found him not guilty of Count 3. ("Disposition – Deferred Sentence", 11/29/16; ***See also*** N.T. – Jury Trial.) After trial, Sentencing was deferred so that a Pre-Parole Investigation ("PPI") Evaluation and a Pre-Sentence Investigation ("PSI") and Report could be completed. (***Id.***)

On April 3, 2017, the Sentencing Hearing was held, at which time Defense Counsel placed mitigation on the record, and after which the undersigned sentenced Appellee to the following: On Count 1, three (3) to six (6) years' imprisonment at a State Correctional Institution ("SCI"), with commitment to date from April 3, 2017, and credit for time served from November 20, 2016, to December 7, 2016; followed by two (2) years' probation, consecutive to the expiration of parole on Count 1; on Count 4, two (2) years of probation, consecutive to his sentence imposed on Count 1; on Count 2, no further penalty was imposed as it merged with Count 1 for sentencing; and finally on Count 5, no further penalty was imposed. (***See** generally* N.T. – Sentencing, 4/3/17; ***see also*** "Order-Sentence/Penalty Imposed", 4/3/17.) Thus, Appellee's total sentence amounted to three (3) to six (6) years' imprisonment followed by four (4) years' probation. (***Id.***)

On April 11, 2017, the Commonwealth filed its Post-Sentence Motion to Modify Sentence, in which Commonwealth Counsel, who had not been present during the jury trial[5], alleged the trial court abused its discretion in deviating from the standard sentencing guidelines by accepting certain mitigating factors (delineated within the Commonwealth's written motion). (***See*** Comm.'s Post-Sentence Motion to Modify Sentence, 4/11/17.) In said Post-Sentence Motion, Commonwealth Counsel failed to cite to any facts from the transcript of the actual jury trial. (***See id.***) On June 19, 2017, Argument on said Commonwealth's Post-Sentence Motion was heard, after which the trial court denied the same. (***See*** N.T. – Argument on Comm.'s Post-Sentence Motion, 6/19/17; "Court Order", 6/19/17.)

On July 18, 2017, the Commonwealth filed its Notice of Appeal with the Superior Court, wherein it appealed Appellee's April 3, 2017, Judgment of Sentence, and the trial court's June 19, 2017, denial of its Post-Sentence Motion to Modify Sentence. (***See*** "Notice of Appeal", 7/18/17.) On August 1, 2017, the trial court ordered the Commonwealth to file its Concise Statement of Matters Complained of on

[5] The trial court also notes that not only was the Commonwealth Counsel at the sentencing and post-sentencing phases of trial not present during the jury trial and thus not intimately aware of the facts of this case, but also the Commonwealth Counsel that was present during the jury trial did not sign-on to the Post-Sentence Motion to Modify Sentence. (***See*** Comm.'s Post-Sentence Motion to Modify Sentence, 4/11/17.)

Appeal ("Concise Statement") pursuant to Pennsylvania Rule of Appellate Procedure (Pa. R.A.P.), 1925(b), which it did on August 18, 2017, raising the following issues:

> 1. IT IS RESPECTFULLY SUBMITTED THAT THIS COURT'S DEVIATION BELOW THE SENTENCING GUIDELINES IN THE ABOVE-CAPTIONED CASE WAS UNREASONABLE AND AN ABUSE OF DISCRETION FOR THE FOLLOWING REASONS:
>
> a. THIS COURT IMPROPERLY RELIED ON DEFENDANT ROBERT LEWIS BLANCK'S LACK OF PRIOR RECORD; THE GUIDELINE SENTENCE RECOMMENDATION ALREADY CONTEMPLATED HIS PRIOR RECORD SCORE;
>
> b. THIS COURT ALSO IMPROPERLY FOCUSED ON REHABILITATION, WHERE THE PRIMARY PURPOSE OF GUIDELINE OPTIONS FOR LEVEL 5 CRIMES SHOULD BE THE PROTECTION OF THE PUBLIC AND GRAVITY OF THE OFFENSES;
>
> c. THIS COURT LASTLY ERRED BECAUSE IT SUGGESTED THAT THE VICTIM'S ACTIONS WERE CONTRIBUTORY. THE JURY CONVICTED DEFENDANT OF TWO COUNTS OF AGGRAVATED ASSAULT, AMONG OTHER OFFENSES. DEPRECIATING THE GRAVITY OF SUCH CRIMES BY CONSIDERING EXTRANEOUS FACTS (*I.E.*, FACTS IRRELEVANT TO THE ELEMENTS OF THE OFFENSES) IS NOT A PROPER BASIS FOR THE DOWNWARD DEVIATION FROM THE GUIDELINES.

("1925(b) Order for Concise Statement", 8/1/17; "Concise Statement", 8/18/17.)

DISCUSSION

I. STANDARDS OF REVIEW

The issue put forth in the Commonwealth's (Appellant's) Concise Statement prompts the Superior Court to apply the following standard of review in the instant Appeal: A trial court's discretion in sentencing is broad, "and the reviewing court should not disturb [its] exercise of that discretion except for substantial reasons." ***Commonwealth v. Widmer ("Widmer I")***, 667 A.2d 215 (Pa. Super. 1995), *reargument denied, appeal granted* 680 A.2d 1161, *reversed* 689 A.2d 211 (Pa. 1997). Specifically, a sentence "will not be disturbed unless it is outside statutory limits or manifestly excessive so as to inflict

too severe a punishment." ***Commonwealth v. Phillips***, 601 A.2d 816, *appeal granted* 610 A.2d 45, *affirmed* 633 A.2d 604. Moreover, "[a]n abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused." ***Stumpf v. Nye***, 950 A.2d 1032, 1035–36 (Pa. Super. 2008).

Moreover, in ***Widmer II***, *infra*, the Superior Court reiterated the well-known definition of 'abuse of discretion' as follows:

> The term 'discretion' imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Commonwealth v. Widmer ("Widmer II"), 744 A.2d 745, 753 (Pa. 2000) (emphasis added).

IV. THE FINAL JUDGMENT OF SENTENCE WAS APPROPRIATE AND THE TRIAL COURT DID NOT ABUSE ITS DISRECTION IN DEVIATING FROM THE GUIDELINES.

The Commonwealth, in its Concise Statement, alleged Appellee's Judgment of Sentence of three (3) to six (6) years' imprisonment followed by four (4) years' probation was an abuse of the trial court's discretion in deviating from the guidelines. (***See*** "Concise Statement", 8/18/17.) For the reasons that will follow, the trial court did not abuse its discretion in fashioning Appellee's final Judgment of Sentence, which deviated six (6) months below the guidelines.

Section 9781 outlines the right to appellate review of sentence as follows:

> [...] The [...] Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony [...] to the appellate court that has initial jurisdiction for such appeals. Allowance of an appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.

42 Pa. C.S.A. § 9781(b). "As a general rule, when sentence is imposed outside the [s]entencing [g]uidelines, [...] [the Superior Court] will conclude that there is a substantial question that the sentence imposed is not appropriate under the [g]uidelines and will allow the Commonwealth's appeal." ***Commonwealth v. Sheridan***, 502 A.2d 694, 695 fn. 3 (Pa. Super. 1985) (citing ***Commonwealth v. Drumgoole***, 491 A.2d 1352 (Pa. Super. 1985)).

A trial court's discretion in sentencing is broad, "and the reviewing court should not disturb [its] exercise of that discretion except for substantial reasons." ***Commonwealth v. Widmer ("Widmer I")***, 667 A.2d 215 (Pa. Super. 1995), *reargument denied, appeal granted* 680 A.2d 1161, *reversed* 689 A.2d 211. Specifically, a sentence "will not be disturbed unless it is outside statutory limits or manifestly excessive so as to inflict too severe a punishment." ***Commonwealth v. Phillips***, 601 A.2d 816, *appeal granted* 610 A.2d 45, *affirmed* 633 A.2d 604. Section 9781 provides the following factors that the Superior Court must ensure the sentencing court analyzed in fashioning a reasonable sentence:

> [...] The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds: [...] the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable. In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.
>
> [...] 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.A. § 9781(c)-(d). ***See also Commonwealth v. Septak***, 518 A.2d 1284 (Pa. Super. 1986). "[W]hen reviewing sentencing matters, [the Superior Court] must accord the sentencing court great weight as it is in the best position to view defendant's character, displays of remorse, defiance or indifference, and overall effect and nature of crime." ***Commonwealth v. Hanson***, 856 A.2d 1254 at 1260 (Pa. Super. 2004).

Moreover, while a sentence outside of the guidelines may be affirmed provided it is reasonable, "it is imperative that sentencing court determine the correct starting point in the guidelines before sentencing outside [of] them." ***Commonwealth v. Johnakin***, 502 A.2d 620, 623 (Pa. Super. 1985) (citing ***Drumgoole***, 491 A.2d at 1355) (other citations omitted). As such, when a sentence deviates from the guidelines, the sentencing court is typically, "required to provide a contemporaneous written statement of its reasons for doing so." ***Commonwealth v. Ritchey***, 779 A.2d 1183, 1186 (Pa. Super. 2001) (citation omitted). "This requirement [can also be] satisfied when the [sentencing] court states its reasons for the sentence on the record and in the defendant's presence." ***Id.*** (citation omitted). "However, there is no requirement that a sentencing court must evoke 'magic words' in a verbatim recitation of the guidelines ranges to satisfy," the requirements for imposing a sentence that deviates from the same. ***Commonwealth v. Griffin***, 804 A.2d 1, 8 (Pa. Super. 2002), *appeal denied* 868 A.2d 1198, *certiorari denied* 545 U.S. 1148.

The Superior Court in ***Commonwealth v. Hoch***, affirmed the sentencing court's deviation below the mitigated range of the sentencing guidelines for aggravated assault, criminal attempt (burglary), resisting arrest, and possession of instruments of crime. ***See*** 936 A.2d 515 (Pa. Super. 2007). The trial court in ***Hoch*** based its deviation from the guidelines on, *inter alia*, the defendant's mental health status. ***Id.*** at 518. The Commonwealth argued there was no factual basis respecting the defendant's mental health status, but the Superior Court noted the defendant, "appeared for intake at a mental health case management unit and arranged for outpatient treatment at that unit." ***Id.*** at 520. As well, the PSI report indicated that, "in 2001, [the defendant] exhibited paranoia at his workplace." ***Id.*** Defense Counsel in ***Hoch*** also referred to the PSI report, pointing out the defendant, "had an intermittent substance abuse problem beginning at a relatively early age." ***Id.*** Moreover, with respect to the unique facts of the underlying incident, the defendant was found on the victim's property with only a shirt; his underwear had been torn from his person as he climbed over the victim's fence. ***Id.*** The trial court reasoned, "the burglary was different from the usual burglary in which a person enters into a home to steal goods out of

the house; [the defendant] did not intend to steal or harm anyone, and in [his] mind, the violence he exhibited was in an attempt to flee[,]" from the victim, an off-duty police officer, who had chased the defendant from the property and ultimately tackled him. ***Id.*** The Superior Court further noted, "although [the defendant's] conduct established the elements of the crimes charged, it is apparent that the trial court exercised its discretion in fashioning a sentence based upon [the defendant's] individual circumstances." ***Id.*** Thus, the Superior Court found the trial court did not abuse its discretion in sentencing below the mitigated guidelines, and that the ultimate sentence was reasonable. ***Id.*** at 520-21.

Here, Appellee's Judgment of Sentence, while outside the guidelines, is reasonable and should be affirmed. The trial court reviewed copies of Appellee's PSI and PPI reports before the Sentencing Hearing was held on April 3, 2017, to which there were no objections by counsel for either party, and only one (1) amendment was made respecting the amount of time credit that was due to Appellee. (N.T. – Sentencing Hr'g at 3-4, 4/3/17.) As well, the trial court was presented with the Victim's impact statement and a letter from Appellee's Wife. (***Id.*** at 4-5.) During the Sentencing Hearing, the trial court also heard testimony from Victim, (***id.*** at 5-10,) and from Appellee's step-daughter, Brittanie Livingston, (***id.*** at 11-19.) After counsel for both parties made argument, (***id.*** at 20-29,) Appellee allocated with an apology to Victim and to his own family, (***id.*** at 28-29.) Finally, in fashioning a reasonable sentence for Appellee, the trial court considered the factors outlined in Section 9781(d), as well as, the unique circumstances in this case, as follows:

> THE COURT: I remember this case very clearly. [...] I did listen very closely to all of the facts. And [Defense Counsel] is correct in the respect that this should never have gotten to this point. If this would have been a circumstance where there might have been intervention [by law enforcement] earlier, [Victim] may not have ever been in front of the house. If [Victim,] while never justifying being shot[,] under these circumstances was not an angel by any stretch on [November 15, 2015] and was behaving badly on this day[.] [T]hat being said, [Appellee], if you would have stayed in your house and called the police, if you would have walked to the police station, the fact that you came out after you were

> separated from the danger of [Victim] to come out of your house with a gun, that is what caused this horrific experience. And now what is a horrific experience for everyone involved.
>
> When you pull the trigger on that gun in the middle of the street when [Victim] was not endangering you or your family at that moment, that was when the crime was committed.
>
> [Defense Counsel] did a skilled job at trial making it very clear to the jury that this really does come down to a couple of minutes or a couple of seconds of a decision in this case. And the jury was very thoughtful about this and watched the video.[6] Some of the jurors were crouching behind the laptop as they reviewed the video again and again.
>
> And particular[ly] concerning to the [c]ourt [was] that after [Victim] was shot, you went back and checked on the damage to your car. That's a concern. This wasn't an, oh, my God, I can't believe what I just did, let me call 911 and try to help him out immediately.
>
> This was, I shot him, let me check on my car, then eventually the police came.
>
> There's some mitigation in this case as you have lived a good life until this really bad day, and you have been a good father to both your own son and to those that you have chosen to father.[7] And the [c]ourt does not ignore that.
>
> But I also cannot excuse the behavior on this day and the significant harm that you caused as a result of using your gun against another human being when neither you nor your family were presently at risk at that time.
>
> Your actions on this day do not negate this good person you've been up until this point nor does it prevent you from being a good person in the future, but it will interrupt your life because of the harm that you caused to another human being on this day.

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[6] There was video surveillance nearby that captured the shooting portion of the November 15, 2015, incident in the street out front of Appellee's home.

[7] Referring to Appellee's step-children with whom he accepted responsibility as a father.

> [Appellee], please stand.
>
> As a result of the fact that [up until] this point of your life, you have had no prior record and have had not only no contact with the system, but have led a good life, I do consider that a mitigating factor. I also recall the particular circumstances on this day and the actions and the contributory actions of [Appellee] that led to the circumstances for which he was in front of your home[8].
>
> But you are responsible for his injury, so while I give you some mitigation, it will not cause you to be excused from your responsibility here.

(***Id.*** at 29-32.) The trial court then gave Appellee a total sentence of three (3) to six (6) years' imprisonment followed by four (4) years' probation for his convictions. (***Id.*** at 32.) (***See also*** "Order-Sentence/Penalty Imposed", 4/3/17.)

The trial court was aware of the correct starting point in the guidelines before sentencing outside of them. ***See*** 9871(d)(4) ("The guidelines promulgated by the commission."); ***see also Johnakin***, *supra,* 502 A.2d at 623. The trial court noted the standard guidelines as follows:

> THE COURT: Before we start, let me just clarify, I do have for the lead charge aggravated causing serious bodily injury, standard range is thirty-six to fifty-four, plus or minus twelve, and then with a deadly weapon enhancement, that is fifty-four to seventy-two, plus or minus twelve; is that correct?
>
> [COMM'W]: Yes, Your Honor, that's what I have.

(N.T. – Sentencing Hr'g at 20.) The Commonwealth also conceded the simple assault would merge with the one (1) aggravated assault charge, but noted there were two (2) separate events (backyard pistol-whipping and front-yard stabbing) and as such, two (2) separate aggravated assaults. (***Id.*** at 24-25.) As well, the Sentencing Guideline Form was made part of the record and was ultimately received into evidence as Commonwealth's Exhibit C-1. (***See*** N.T. – Argument at 3-4, 6/19/17.)

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[8] Not for why Victim was shot, but why he was in front of Appellee's home.

Although Appellee's total sentence of three (3) to six (6) years' imprisonment is outside of the above-guidelines, the trial court properly considered the totality of the circumstances surrounding the underlying incident. Victim's tampering and criminal mischief on Appellee's property started the whole turn of events; Victim was initially thrown out of Appellee's home due to drinking and erratic behavior that is consistent with Victim's criminal history (*i.e.* DUI and violation of probation); Victim specifically caused property damage by attempting to completely cut off the electricity supply to Appellee's home, knowing well the electricity was particularly important because Appellee's son's nebulizer depended on it[9], as well as by throwing a beer can at Appellee's vehicle parked in the driveway; Victim was intoxicated at the time of the incident, violating his probation; and Victim became physical with Appellee instead of completely disengaging from the situation (and vice versa). (N.T. – Jury Trial at 33-35, 46, 59, 61-62, 68-70, 89, 133, 161-63, 189-90, 200-02, 232-33.) Moreover, the trial court took note of law enforcement's inaction despite previous calls from and contact with Wife indicating potential issues with Victim. (***Id.*** at 47-48, 62-63, 65-66, 136, 156, 170, 191-94.) Appellee's actions, while meeting the elements of the crimes charged, were clearly part of an isolated incident unique to these circumstances, which is bolstered by Appellee's complete lack of a criminal history. (N.T. – Sentencing Hr'g at 29-32.) This is not a case where Appellee is at risk of re-offending and causing a danger to the public; the incident is limited to his individual interaction with Victim, such that Appellee mistakenly believed he was justified in shooting Victim on the basis of self-defense. (***See*** *generally* N.T. – Jury Trial.) Notably, Appellee was doing Victim a favor by even allowing him to sleep in Appellee's van despite being kicked out of the family home. (***Id.*** at 33, 35, 189, 231-34.) As such, the trial court, with the benefit of Appellee's PSI and PPI reports, was well within its discretion in giving Appellee a total sentence that fell six (6) months below the guidelines.

The public is adequately protected despite Appellee's total sentence is six (6) months below the standard guidelines, particularly given the unique set of circumstances as outlined *supra*, and Appellee's

[9] Again, Victim testified he knew Appellee's son used a nebulizer apparatus and that such required electricity. (N.T. – Jury Trial at 65.)

rehabilitative needs will be adequately met by the same. (***See generally*** N.T. – Argument, 6/19/17.) Despite the jury's rejection of Appellee's self-defense argument *at trial* by convicting him of aggravated assaults, the trial court appropriately considered the totality of circumstances *at sentencing* by fashioning a reasonable total sentence. The record from Argument on the Commonwealth's Motion to Modify Sentence reflects the Commonwealth's lack of ability to articulate how the six (6)-month deviation prevents the public from being adequately protected or Appellee's rehabilitative needs being met, as well as, Commonwealth counsel's lack of supporting references from the jury trial record for his modification argument, as follows:

> THE COURT: [Commonwealth], explain to me, when you're complaining that because my sentence is six months below the guidelines, how you think a difference of six months is going to address the protection of the public or the rehabilitative needs of [Appellee] differently.
>
> [COMM'W]: Well, Your Honor, I think that my argument is not necessarily six months is going to make an impact as far as the question you're asking. My argument is that legally, on a *de novo* standard, that the [c]ourt shall consider the guidelines that are put in front of the [c]ourt.
>
> THE COURT: The [c]ourt did consider the guidelines and stated that on the record at the time of sentencing, but you are saying that the fact that I am six months below the guidelines [...], that my sentence of three to six years is not consistent with the gravity offense, the protection of the public, or even the rehabilitative needs of [Appellee], so one needs to recognize those actions were more than a mere overreaction, so explain to me how that six-month differential makes a difference.
>
> [COMM'W]: It makes a difference because the legislature has set up that particular timeframe to find that that's an appropriate amount of time that [Appellee] would need to –
>
> THE COURT: That doesn't answer the question. How does an additional six months address his rehabilitative needs differently than three to six years will –

[COMM'W]: Well, Your Honor –

THE COURT: --when we know he's serving 80 percent of his maximum based on how the state prison works?

[COMM'W]: Yes, Your Honor.

I just feel like it's not long enough for him to reflect upon what he's done. I mean, at sentencing, we saw evidence presented by family members. We saw arguments by [defense] counsel stating that the [c]ourt got it wrong.

It wasn't [Appellee]. He still doesn't get it to this day that it was wrong for him to pick up a weapon and shoot somebody and cause these injuries. Even after we heard all the evidence from [Victim] in this case, [Appellee] still doesn't get it that it was inappropriate, and I feel that that's not enough time for him to be rehabilitated.

THE COURT: Give me a reason. Just saying it's not enough time when you're talking about a six-month differential doesn't give me a reason.

Tell me about a program difference. Tell me about something, but this is a man who has never served one day in jail before this instance and who will be in jail for – it says three years, but we all know realistically, it's four to four and a half years if he does 80 percent of his maximum.

So how does that not send a message about the gravity of the offense?

[COMM'W]: Well, that information was considered by the legislature when they created the guidelines.

THE COURT: And the state legislature also gives the [c]ourt discretion.

[COMM'W]: It does, Your Honor, and in this case, the deadly weapon enhancement was not – if you look at the sentence that was given out, it was 36 months, which is at the mitigated absolute bottom of the range if the deadly weapon enhancement was not considered.

When you consider the deadly weapon enhancement, the bottom mitigated range is 42 months, so if you look at that and say, "Okay, what

are the reasons why," we have lack of prior record, which again, in the cases that I put through my motion[,] is not an appropriate basis to mitigate; being led a good life, again, the case law I have represents that it's not an appropriate basis to deviate from the guidelines; and then third, the actions of [Victim], which [defense] counsel again stood up and said, "Well, we need to consider that."

Well, Your Honor, I get it. I wasn't here for the jury trial in this case.

THE COURT: You were not, and you did not – and I'm stating on the record you did not address the facts as clearly in any way directly on point with what happened in front of this jury, and you weren't here for it.

[COMM'W]: Well, Your Honor, I believe there was a type of self-defense that was put up in the jury trial whether I was here or not, and that obviously was rejected by the jury as they convicted [Appellee] of not only aggravated assault with a deadly weapon, but also aggravated assault, which you sentenced on.

So even if I wasn't here, I can still look at what was presented to the jury, and I can come to the appropriate conclusion that self-defense was rejected by the jury.

THE COURT: Well, [c]ounsel, you didn't make one transcript reference in your motion. You referenced the sentencing transcript. You did not make one transcript reference to the jury trial itself.

[COMM'W]: I did. I only referenced what was presented in the sentencing hearing.

THE COURT: I understand, but you did make arguments about the impact of [Victim] and [...] Page 4, Paragraph 13 [of the Commonwealth's Motion], you're making reference to the facts of the case when you were not here for the trial itself.

[COMM'W]: Well, that was presented by [Victim] in the sentencing hearing. I kept my record closed to what was presented in the sentencing hearing because I thought that was what was appropriate for a sentencing hearing.

(*Id.* at 11-16.) The trial court then referenced its previous reasoning from the Sentencing Hearing for deviating from the guidelines to fashion Appellee's reasonable sentence, and gave additional reasoning for denying the Commonwealth's motion to modify the same, as follows:

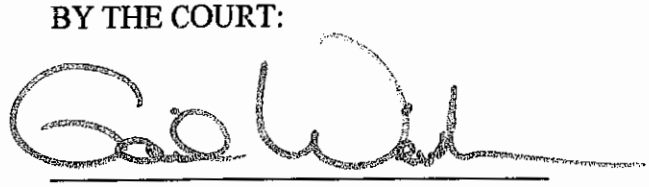
> THE COURT: [...] At the time of sentencing, the [c]ourt gave substantial consideration to the entire trial transcript, the Pre-Sentence Investigation, the Victim Impact Statement, arguments of counsel, and all of the reasons that the [c]ourt already placed on the record.
>
> The [c]ourt finds it incredibly curious that counsel for the Commonwealth who's making this argument now and argued at sentencing was not counsel at trial.
>
> Counsel at trial has never been present to object to the sentence given, nor did he even sign on to this motion. This was signed on to by two people who were not present for any aspect of the trial, which the [c]ourt heard and considered in its entirety. The recitation of the facts in the Commonwealth's motion does not fully represent what happened at trial.
>
> The [c]ourt put significant thought and consideration in its mitigated sentence in this case. That mitigated sentence is appropriate within the [c]ourt's discretion, and as such, Commonwealth's motion to reconsider is denied.
>
> The [c]ourt will not change the sentence because, [Appellee], while it is a significant amount of time in your life, it is still an appropriate sentence based on the crime that was committed.

(*Id.* at 16-17.)

CONCLUSION

Wherefore, Appellee's April 3, 2017, Judgment of Sentence should be affirmed.

BY THE COURT:



GAIL A. WEILHEIMER, J.

Copy mailed on December 12, 2017, to:
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