

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
HEATH E. MILLER	:	
	:	
Appellant	:	No. 545 WDA 2017

Appeal from the Judgment of Sentence October 18, 2016
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0006379-2016,
CP-02-CR-0007169-2014, CP-02-CR-0007999-2016,
CP-02-CR-0008943-2014, CP-02-CR-0014928-2010,
CP-02-CR-0015145-2010, CP-02-CR-0015147-2010,
CP-02-CR-0015148-2010

BEFORE: GANTMAN, P.J., SHOGAN, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, P.J.:

FILED JUNE 11, 2018

Appellant, Heath E. Miller, appeals *nunc pro tunc* from the judgment of sentence entered in the Allegheny County Court of Common Pleas, following his negotiated guilty plea to two counts of burglary and one count each of criminal trespass and criminal mischief.¹ We affirm.

The relevant facts and procedural history of this case are as follows. On June 20, 2011, Appellant entered guilty pleas to multiple counts of burglary, conspiracy to commit burglary, theft, and related offenses at four separate Docket numbers, 14928-2010, 15145-2010, 15147-2010, and 15148-2010.

¹ 18 Pa.C.S.A. §§ 3502(a)(2), 3503(a)(1)(ii), and 3304(a)(5), respectively.

The court sentenced Appellant on December 13, 2011, to an aggregate term of twenty-four (24) months' intermediate punishment, plus five (5) years' probation. On November 18, 2014, Appellant entered negotiated guilty pleas to multiple counts of burglary and related offenses at Docket Nos. 7169-2014 and 8943-2014. That same day, the court sentenced Appellant to an aggregate term of eleven and one-half (11½) to twenty-three (23) months' incarceration, plus four (4) years' probation and compliance with the mental health court prescription program. Subsequently, the mental health court program assumed supervision of Appellant's probation at the 2010 docket numbers as well.

Appellant committed two additional burglaries in May 2016. On September 27, 2016, Appellant entered negotiated guilty pleas to two (2) counts of burglary and one (1) count each of criminal trespass and criminal mischief at Docket Nos. 6397-2016 and 7999-2016. Pursuant to an agreement with the Commonwealth, on October 18, 2016, the court sentenced Appellant to two (2) to four (4) years' incarceration, plus five (5) years' probation at Docket Nos. 6379-2016 and 7999-2016, to be served concurrently. On the same date, the court also revoked Appellant's probation at the 2010 and 2014 docket numbers and resentenced Appellant to a term of four (4) to eight (8) years' incarceration, consecutive to the sentences at Docket Nos. 6379-2016 and 7999-2016. In total, the court sentenced Appellant to an aggregate term of six (6) to twelve (12) years' incarceration,

plus five (5) years' probation.

Appellant filed a timely post-sentence motion at all eight (8) docket numbers on October 27, 2016, which the court denied on November 8, 2016. On March 6, 2017, Appellant filed a *pro se* motion for reinstatement of his direct appeal rights *nunc pro tunc* and appointment of appellate counsel, which the court granted on March 9, 2017. On April 7, 2017, Appellant filed a timely notice of appeal *nunc pro tunc* at all docket numbers. The court ordered Appellant on April 13, 2017, to file a concise statement of errors complained of on appeal per Pa.R.A.P. 1925(b); Appellant complied on July 3, 2017, following an extension.

Appellant raises one issue for our review:

IS THE IMPOSITION OF THE AGGREGATE SENTENCE OF SIX (6) TO TWELVE (12) YEARS' INCARCERATION FOLLOWING THE IMPOSITION OF TWO NEW SENTENCES PURSUANT TO A NEGOTIATED PLEA, AND SIX PROBATION VIOLATION SENTENCES, MANIFESTLY EXCESSIVE, UNREASONABLE, AND AN ABUSE OF THE SENTENCING COURT'S DISCRETION? SPECIFICALLY, DID THE COURT IMPOSE A MANIFESTLY EXCESSIVE SENTENCE THAT IS WHOLLY UNREASONABLE AND NOT IN CONFORMITY TO THE SENTENCING CODE (42 PA.C.S.A. § 9721(B)), INSOFAR AS IT IS CONTRARY TO (1) THE SPECIFIC NEED FOR PROTECTION OF THE PUBLIC IN RELATION TO [APPELLANT]'S ACTIONS, (2) THE GRAVITY OF THE OFFENSE AS IT RELATES TO THE IMPACT ON THE LIVES OF THE VICTIMS, AND (3) [APPELLANT]'S NEED FOR REHABILITATION?

(Appellant's Brief at 14).

Appellant argues the aggregate sentence is disproportionate to his crimes. Appellant complains the court failed to consider the relevant criteria

contained in the Sentencing Code, which resulted in a sentence that is inconsistent with the protection of the public, the gravity of the offense as it relates to the impact on the community, and Appellant's rehabilitative needs. Appellant contends the sentencing court focused primarily on the impact of Appellant's crimes on the victims and Appellant's inability to curb his drug addiction. Appellant asserts the sentencing court failed to consider Appellant's allocution, his medical and psychological needs, and the progress he had made while incarcerated awaiting sentencing. Appellant maintains the sentencing court did not discuss on the record his medical and psychological needs. Appellant concludes this Court should vacate his judgment of sentence and remand this matter to the trial court with appropriate instructions. As presented, Appellant challenges the discretionary aspects of his sentence. ***See Commonwealth v. Lutes***, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing). ***See also Commonwealth v. Dodge***, 77 A.3d 1263, 1268 (Pa.Super. 2013), *appeal denied*, 625 Pa. 648, 91 A.3d 161 (2014) (stating argument that court disregarded factors, such as rehabilitation and nature and circumstances of offenses, implicates discretionary aspects of sentencing).

Generally, "while a guilty plea which includes **sentence negotiation** ordinarily precludes a defendant from contesting the validity of his...sentence other than to argue that the sentence is illegal or that the sentencing court did not have jurisdiction, **open** plea agreements are an exception in which a

defendant will not be precluded from appealing the discretionary aspects of the sentence.” **Commonwealth v. Tirado**, 870 A.2d 362, 365 n.5 (Pa.Super. 2005) (emphasis in original). “An ‘open’ plea agreement is one in which there is no negotiated sentence.” **Id.** at 363 n.1.

Here, Appellant entered negotiated guilty pleas at Docket Nos. 6379-2016 and 7999-2016, as to sentencing also; and the court imposed the agreed-upon sentences. Appellant cannot challenge the discretionary aspects of the negotiated sentences imposed at Docket Nos. 6379-2016 and 7999-2016. **See id.** Theoretically, however, Appellant can challenge the discretionary aspects of his revocation sentences at the 2010 and 2014 docket numbers, because those sentences do not stem from a sentence negotiation. **Id.**

When reviewing the outcome of a revocation proceeding, this Court is limited to determining the validity of the proceeding, the legality of the judgment of sentence imposed, and the discretionary aspects of sentencing. **Commonwealth v. Cartrette**, 83 A.3d 1030 (Pa.Super. 2013) (*en banc*). “In general, the imposition of a sentence following the revocation of probation is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal.” **Commonwealth v. Hoover**, 909 A.2d 321, 322 (Pa.Super. 2006). Following the revocation of probation, the court may impose a sentence of total confinement if any of the following conditions exist: the defendant has been convicted of another crime;

the conduct of the defendant indicates it is likely he will commit another crime if he is not imprisoned; or, such a sentence is essential to vindicate the authority of the court. **See** 42 Pa.C.S.A. § 9771(c). The Sentencing Guidelines do not apply to sentences imposed following a revocation of probation. **Commonwealth v. Ferguson**, 893 A.2d 735, 739 (Pa.Super. 2006), *appeal denied*, 588 Pa. 788, 906 A.2d 1196 (2006). “[U]pon sentencing following a revocation of probation, the trial court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence.” **Commonwealth v. Coolbaugh**, 770 A.2d 788, 792 (Pa.Super. 2001).

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 (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) (internal citations omitted). “The determination of what constitutes a substantial question must be evaluated

on a case-by-case basis.” **Commonwealth v. Anderson**, 830 A.2d 1013, 1018 (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. An allegation that the sentencing court failed to consider certain mitigating factors, absent more, does not raise a substantial question for our review. **Commonwealth v. Rhoades**, 8 A.3d 912, 918-19 (Pa.Super. 2010), *appeal denied*, 611 Pa. 651, 25 A.3d 328 (2011), *cert. denied*, 565 U.S. 1263, 132 S.Ct. 1746, 182 L.Ed.2d 536 (2012). “[C]laims that a penalty is excessive and/or disproportionate to the offense can raise substantial questions.” **Commonwealth v. Malovich**, 903 A.2d 1247, 1253 (Pa.Super. 2006). **See also Commonwealth v. Vega**, 850 A.2d 1277 (Pa.Super. 2004) (providing claim that sentence is manifestly excessive and disproportionate to crime, particularly in light of facts surrounding criminal episode and appellant’s background, raises substantial question).

Pursuant to Section 9721(b), “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.” 42 Pa.C.S.A. § 9721(b). “[T]he court shall make as part of the record, and disclose in open court at the time of sentencing, a

statement of the reason or reasons for the sentence imposed.” **Id.** Nevertheless, “[a] sentencing court need not undertake a lengthy discourse for its reasons for imposing a sentence or specifically reference the statute in question....” **Commonwealth v. Crump**, 995 A.2d 1280, 1283 (Pa.Super. 2010), *appeal denied*, 608 Pa. 661, 13 A.3d 475 (2010). Rather, the record as a whole must reflect the sentencing court’s consideration of the facts of the case and the defendant’s character. **Id.** “In particular, the court should refer to the defendant’s prior criminal record, his age, personal characteristics and his potential for rehabilitation.” **Commonwealth v. Griffin**, 804 A.2d 1, 10 (Pa.Super. 2002), *appeal denied*, 582 Pa. 671, 868 A.2d 1198 (2005), *cert denied*, 545 U.S. 1148, 125 S.Ct. 2984, 162 L.Ed.2d 902 (2005). **See also Commonwealth v. Carrillo-Diaz**, 64 A.3d 722 (Pa.Super. 2013) (explaining where revocation court presided over defendant’s plea hearing and original sentencing, as well as his probation revocation hearing and sentencing, court had sufficient information to evaluate circumstances of offense and character of defendant when sentencing following revocation).

Instantly, Appellant failed to raise at sentencing or in his post-sentence motion his claims regarding: (1) the court’s failure to consider Appellant’s allocution and progress made during incarceration; (2) the court’s unequal consideration of sentencing factors; and (3) the aggregate sentence being disproportionate to Appellant’s crimes. Therefore, Appellant waived those claims on appeal. **See Evans, supra.**

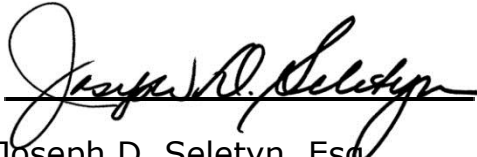
Moreover, even if Appellant had properly preserved all of his sentencing claims, he would not be entitled to relief. (**See** Trial Court Opinion, filed August 23, 2017, at 6-16) (finding: Appellant's aggregate sentence is warranted in light of totality of circumstances; Appellant has participated in mental health court since 2014, before which he was on probation for several burglary convictions at 2010 docket numbers; sentencing court spent nearly two years supervising Appellant on his six burglary cases; Appellant met with court approximately two dozen times; court became familiar with Appellant's behavior, background, criminal history, and rehabilitative needs; court did not impose current sentence upon Appellant to punish him for relapsing; while he participated in mental health court program, Appellant relapsed and violated conditions of treatment programs several times; when court confronted Appellant about his behavior in past, Appellant apologized for his mistakes and made excuses for his violations; court advised Appellant his conduct would not be tolerated and warned Appellant that if he continued to violate terms of mental health court program, court would revoke his participation in program and resentence Appellant on his six previous burglary convictions; subsequently, Appellant committed two burglaries in May 2016; sentencing court has headed mental health court for over five years and is aware of struggles mental health court participants experience when addressing addiction and mental health issues; Appellant took advantage of court's willingness to work with him, while he repeatedly demonstrated disinclination

to take treatment and recovery seriously; Appellant's behavior placed himself and society at risk, and demonstrated disregard for law and authority; after most recent offenses, Appellant publicly mocked and taunted police, hid from law enforcement, and did not seek treatment assistance; in doing so, Appellant demonstrated substantial lack of remorse for his crimes, and unwillingness or incapability to transition to law-abiding life; thus, Appellant's allocution at sentencing hearing had little impact on sentencing court; Appellant's failure to transition to sober, law-abiding citizen, despite numerous opportunities afforded him, makes him threat to himself and society; Appellant's repeated burglaries, despite receiving drug and alcohol treatment, mental health treatment and support of Justice Related Services, probation, and participation in mental health court, demonstrate Appellant made conscious choice to engage in criminal behavior; Appellant's prior, more lenient sentences failed to deter him from criminal activity, and Appellant was aware he would be subject to lengthier sentences if he continued to engage in criminal activity; thus, under circumstances, current lengthier sentence is warranted). Therefore, even if Appellant had properly preserved his issues, we would affirm on the basis of the trial court opinion.

Judgment of sentence affirmed.

J-S13009-18

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/11/2018