

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
JAMES BANKS	:	
	:	
Appellant	:	No. 710 WDA 2018

Appeal from the Judgment of Sentence February 27, 2018
 In the Court of Common Pleas of Allegheny County Criminal Division at
 No(s): CP-02-CR-0015867-2014

BEFORE: OTT, J., MURRAY, J., and STEVENS*, P.J.E.

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

Appellant James Banks appeals from the judgment of sentence entered in the Court of Common Pleas of Allegheny County on February 27, 2018, as made final by the denial of his post-sentence motion on April 25, 2018, following this Court’s remand for resentencing due to the imposition of an illegal sentence on a robbery conviction.¹ We affirm.

This Court previously summarized this relevant facts and procedural history herein as follows:

A full recitation of the facts adduced at trial is provided in the trial court’s opinion. **See** Trial Court Opinion (TCO), 2/15/17, at 3-8. Briefly stated, the victim, Anthony Matthews, was sleeping in his City of Pittsburgh apartment at approximately 8:30 a.m. on October 10, 2014, when he awoke to find three knife-wielding men standing at his bedside. **Id.** at 3. [Matthews] immediately recognized two of the unmasked men, Appellant and Jerome

¹ While the Order is dated April 19, 2018, it was not entered on the docket until April 25, 2018.

* Former Justice specially assigned to the Superior Court.

Banks, as the younger brothers of his former girlfriend, London Banks. **Id.** The third man demanded money. **Id.** at 4. As Matthews attempted to get out of his bed, one of the intruders stabbed him in the abdomen. **Id.** When Matthews began to struggle with his assailants, Appellant stabbed him in the back. **Id.** The melee continued for some time, until Matthews heard Appellant tell his brother, Jerome, “[h]it him, hit him, hit him.” **Id.** Jerome then struck Ma[t]thews in the head six or seven times with a brick. **Id.** After this, Appellant and his cohorts fled, but not before stealing a game system and a laptop from [] Matthews’ apartment. **Id.** at 5.

Matthews managed to call 911 while he crawled into the hallway of his apartment building, where a neighbor assisted him. **Id.** In the ambulance on the way to the hospital, and believing he was going to die, Matthews told the attending paramedic that he was stabbed by his ex-girlfriend’s brothers. **Id.** at 6. Although he survived, Matthews was placed in a medically induced coma for two days before police could speak with him. **Id.** When the police were finally able to communicate with Matthews, he identified Appellant and Jerome Banks as his assailants. **Id.** Matthews’ injuries required multiple surgeries, resulted in extensive nerve damage in his hands and back, and left him struggling with post-traumatic stress, including severe anxiety and sleeplessness. **Id.** at 7.

The Commonwealth charged Appellant with attempted homicide, 18 Pa.C.S. § 901; robbery, 18 Pa.C.S. § 3701(a)(1); burglary, 18 Pa.C.S. § 3502(a)(1); aggravated assault, 18 Pa.C.S. § 2702(a)(1); as well as conspiracy to commit each of those offenses, 18 Pa.C.S. § 903. Following a trial held on December 2-3, 2015, the jury found Appellant not guilty of conspiracy to commit homicide, but guilty of all the remaining charges. On July 14, 2016, the trial court sentenced Appellant to 15-30 years’ incarceration for attempted homicide, with consecutive terms of 7-14 years’ and 4-8 years’ incarceration for conspiracy to commit robbery and burglary, respectively, and a concurrent term of 8-16 years’ incarceration for robbery. The trial court also ordered Appellant to serve a consecutive term of 5 years’ probation for robbery. Thus, Appellant received an aggregate sentence of 26-52 years’ incarceration and 5 years’ probation.

Appellant timely filed post-sentence motions challenging the weight of the evidence supporting his convictions and the discretionary aspects of his sentence. The trial court denied Appellant’s post-sentence motions on August 5, 2016, from which he filed a timely notice of appeal. Appellant filed a timely, court-

ordered Pa.R.A.P. 1925(b) statement on December 5, 2016, and the trial court issued its Rule 1925(a) opinion on February 15, 2017.

Commonwealth v. Banks, No. 1286 WDA 2016, unpublished memorandum at 1-2 (Pa. Super. filed 12/18/17).

On appeal, a panel of this Court concluded the trial court had not abused its discretion in denying Appellant's post-sentence motion claim that the verdict was against the weight of the evidence. ***Id.*** at 5-6. However, we agreed with Appellant and the Commonwealth that the trial court had imposed an illegal sentence for the robbery conviction. ***Id.*** 6-7. Stating it is possible that a correction of Appellant's illegal sentence would upset the overall sentencing scheme the trial court had envisioned, we vacated Appellant's sentence in its entirety and remanded for resentencing. As a result, we declined to address Appellant's second claim pertaining to the discretionary aspects of the vacated sentence. ***Id.*** at 7.

Following a hearing on February 27, 2018, the trial court sentenced Appellant to an aggregate term of twenty-six (26) to fifty-two (52) years in prison followed by four (4) years of probation. Appellant filed a Motion for Leave to File Post-Sentence Motions *Nunc Pro Tunc*, and the trial court granted the same and directed Appellant to file a post-sentence motion on or before March 28, 2018. Appellant complied and filed his Post-Sentence Motion to Modify Sentence on March 26, 2018, wherein he challenged the discretionary aspects of his sentence. The trial court denied Appellant's post-sentence

motion in its Order entered on April 25, 2018. Appellant filed a timely notice of appeal with this Court on May 14, 2018.

Appellant entered an Order pursuant to Pa.R.A.P. 1925 directing Appellant to file a concise statement of matters complained of on appeal, and appellant complied on May 30, 2018. Therein, Appellant raised the following issue:

A. The lower court erred in imposing a sentence that is manifestly unjust, unreasonable, and excessive. Moreover, the sentence imposed is contrary to the Sentencing Code, and the fundamental norms underlying the sentencing process in that the court failed to consider and apply all of the required sentencing factors under 42 Pa.C.S. §9721 and 42 Pa.C.S. §9725. While the court at sentencing emphasized the gravity of the offenses in relation to the impact on the victim, it failed to appropriately consider the history, character and condition of [Appellant], as well as his rehabilitative needs. More specifically, [Appellant] was suffering from a drug addiction and had never been afforded the opportunity to address his addiction through treatment. In addition, [Appellant] had no prior history of violence, and had only misdemeanor convictions. He also expressed sincere remorse for the injuries the victim suffered. Although the court imposed standard range sentences, it abused its discretion in running them consecutively so as to amount to a virtual life sentence for [Appellant].

The trial court filed an Order of Court on June 1, 2018, wherein it stated it had addressed Appellant's instant sentencing claim and set forth its reasons for imposing the sentence in its previous opinion filed pursuant to Pa.R.A.P. 1925(a) on February 15, 2017.

In his brief, Appellant presents the following Statement of Questions Presented:

1. Did the trial court abuse its discretion in sentencing [Appellant] to an aggregate term of 26-52 years of imprisonment, to be followed by 4 years of probation, in that the sentence is manifestly unjust, unreasonable, and excessive, is contrary to the Sentencing Code, and the fundamental norms underlying the sentencing process in that the court failed to apply, as it must, all required sentencing factors including the gravity of the offense in relation to the impact on the victim, the history, character and condition of [Appellant], and his rehabilitative needs?

Brief for Appellant at 6.

Appellant raises several challenges to the discretionary aspects of his sentence. Our standard and scope 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. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by a 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. Antidormi, 84 A.3d 736, 760 (Pa.Super. 2014) (citation omitted), *appeal denied*, 95 A.3d 275 (Pa. 2014). Before we reach the merits of Appellant's claim, we observe that there is no automatic right to appeal from the discretionary aspects of sentencing. ***Id.*** at 759. To invoke this Court's jurisdiction, we must first determine whether:

(1) the appellant preserved the issue either by raising it at the time of sentencing or in a post-sentence motion; (2) the appellant filed a timely notice of appeal; (3) the appellant set forth a concise statement of reasons relied upon for the allowance of his appeal pursuant to Pa.R.A.P. 2119(f); and (4) the appellant raises a substantial question for our review.

Commonwealth v. Dunphy, 20 A.3d 1215, 1220 (Pa.Super. 2011) (citation and footnotes omitted). If the appeal satisfies each of these four requirements, we will then proceed to decide the substantive merits of the case. **Antidormi**, 84 A.3d at 759.

Herein, Appellant filed a timely appeal, preserved his sentencing claim in a post-sentence motion, and included in his appellate brief a statement of the reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f); therefore, we proceed to consider whether Appellant has raised a substantial question for our review.

“The determination of what constitutes a substantial question must be evaluated on a case-by-case basis.” **Commonwealth v. Prisk**, 13 A.3d 526, 533 (Pa.Super. 2011). Further:

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.

Id. (internal citations omitted).

In his Pa.R.A.P. 2119(f) statement, Appellant admits the sentence imposed for each individual conviction was in the standard range but posits the aggregate sentence is manifestly unjust and unreasonable in light of the trial court’s failure to consider mitigating factors or his rehabilitative needs. Appellant further maintains the sentence is clearly excessive, disproportionate to the offense, and constitutes too severe a punishment. Brief at 12, 14-18.

Appellant states that as he is currently twenty-six (26) years old, he will likely be under the court's supervision for the remainder of his life, and the trial court failed to consider the impact this sentence will have on the community, including his family. ***Id.*** at 29-30.

In light of the foregoing, we find Appellant's question presented raises a substantial question for our review; therefore, we will proceed to review the merits of this claim. ***See Commonwealth v. Swope***, 123 A.3d 333, 339 (Pa.Super. 2015) (assertion that consecutive sentences are unduly excessive together with claim that sentencing court failed to consider appellant's rehabilitative needs and mitigating factors presents a substantial question); ***see also Commonwealth v. Raven***, 97 A.3d 1244, 1253 (Pa.Super. 2014), *appeal denied*, 105 A.3d 736 (Pa. 2014) (stating "An appellant making an excessiveness claim raises a substantial question when he sufficiently articulates the manner in which the sentence violates either a specific provision of the [] Sentencing Code or a particular fundamental norm underlying the sentencing process. . . . [T]his Court has held that an excessive sentence claim—in conjunction with an assertion that the court failed to consider mitigating factors—raises a substantial question") (internal quotations and citations omitted).

Our standard of review in this context 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.

Commonwealth v. Shugars, 895 A.2d 1270, 1275 (Pa.Super.2006). Additionally, our review of the discretionary aspects of a sentence is confined by the statutory mandates of 42 Pa.C.S. §§ 9781(c) and (d). Subsection 9781(c) provides:

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;
- (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
- (3) 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.

42 Pa.C.S. § 9781(c).

In reviewing the record, we consider:

- (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).

Raven, 97 A.3d at 1253–54.

Our review of the record confirms that the trial court adequately considered Appellant’s rehabilitative needs and the relevant mitigating factors

and, ultimately, imposed a sentence consistent with our sentencing code and the fundamental norms underlying the sentencing process. The trial court calculated the appropriate guidelines range for each offense and had the benefit of a presentence investigation report. Prior to rendering its sentence on February 27, 2018, the trial court had entertained Appellant's request that his sentences run consecutively rather than concurrently, as Appellant asked that it do so at both the sentencing hearing and during the hearing held on his post-sentence motion. **See** N.T. Hearing, 8/5/16, at 7-8; N.T. Sentencing, 2/27/18, at 3. In response, the court indicated that:

"I understand, sir, you were hoping for at least some part of that sentence to be concurrent, but I think after the trial and the facts that came out at this trial, I still believe that this is the appropriate sentence in this case; and, therefore, I have reimposed it while correcting the math error that we made.

N.T. Sentencing, 2/27/18, at 5-6.

Despite Appellant's assertions to the contrary, the trial court expressed the reasoning underlying its sentence, which included not only the severe implications Appellant's conduct foisted upon the victim but also the impact of his convictions upon his family and his lack of remorse, at his initial sentencing hearing held on July 14, 2016, as follows:

There's certainly a recovery from the physical aspects of the injuries. And while I understand that Mr. Matthews still has some problems from those physical aspects, he's done pretty well on that side.

The harder part to recover from is from the emotional side. And this is something that you have imposed on Mr. Matthews that he is going to have to live with the rest of his life.

This is not something that he's going to recover from easily, because what you've taken from him is you've taken from him his feeling of basic security in the place that he should be most secure.

You think about where you are the safest in life, where is that? That's your home. It's your bed. It's your bedroom. That is where you should feel absolutely safest and most secure in your life. And you have taken from him that ability to have a sound night's sleep in a place that he feels is safe and secure.

It hasn't been all that long since this incident. He still has that problem. He's going to continue to have that problem. That's not going to go away. It's going to last him for years of coming into a bedroom where he should be able to just come and throw down on that bed, but instead coming in and looking in closets, of looking underneath beds to make sure that there's nobody there. Of doing a once-over of his entire home to make sure that there's nobody lurking. Of double-checking those locks multiple times before he even attempts to go to sleep.

When he goes to sleep, what's he lay there worrying about? He lays there and worries every night that somebody is going to come into that room, that safe, secure place -- that place that should be safe and secure -- and that they are going to brutally attack him. And that's what this was. This was an absolutely brutal and vicious attack on this young man for no apparent reason.

You hear him tell his story at trial. And he has great courage. There's no doubt. To crawl out of that room with his intestines hanging out of his body, bleeding everywhere to go to try find himself help. That's courageous. But just because he's courageous does not mean that he will not continue to suffer from the emotional harm that you have caused to him from this vicious attack.

Not only have you taken his safety and security, you've taken his trust in the worst possible way, because he knew you. He knew your brother. Because he was dating your sister. You're people that he should have been able to trust.

And now all of a sudden people that he knows, when he looks at them, he has to wonder, Is this person going to do the same thing to me as the Banks brothers did? Everybody he meets, whether stranger or friend, is now suspect to him. And that is something that he will also live with the rest of his life.

So you have sentenced him to an internal hell that he is not going to recover from anytime soon. That's what you've done. Those are your choices. Your actions. And the fact that there is no explanation for them just makes everything worse. It makes it

harder for him to recover.

To have a reason: I understand why this happened. I understand that I had something that they wanted. I understand that I did their sister wrong. You know, then it might be easier for him to recover. But the fact that there is no explanation, that this is just an out-of-the-blue attack for no reason is going to be something that's going to linger and make the recovery time for him emotionally even longer.

You made these choices.

It's good to see you apologize to your family, that you're recognizing that your actions also affect them. You have a horrible impact on Mr. Matthews and his family. But you also have a horrible impact on your own family. You have two children who are going to grow up basically without their dad. They may come see you in the state prison system, but that's not the same as having a father who is present in their lives, a father who can teach them right from wrong, a father who can be there and support them in decisions that they make. A father who can financially support them. But instead you leave all of that burden of support, both emotional and financial, on other people.

So you have failed your family with your choices. And you have impacted them.

There will be an impact on your life, too. You can tell me, I should be able to see my children; I should be able to have my children grow up with me. You foreclosed that the minute you walked into that apartment, grabbed those knives and tried to kill Mr. Matthews. You took that from yourself.

I get asked numerous times when I meet people and tell them I'm a judge how many people have I sent to jail, how many people have I sent to prison. Do you know how many I tell them? None. I've never sent anyone. Your actions send yourself.

And so the fact that you will not be present in your child's life, your children's lives, the fact that you will not be present for your mom who has been here for you and tried to be a support, those are your choices, and those are the consequences of your choices.

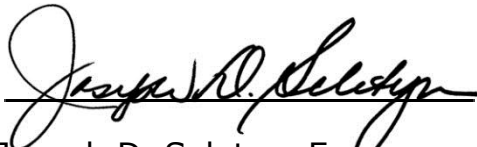
I only hope that the amount of time that you have in the state prison system gives you an opportunity to maybe understand what you've done and maybe show a little remorse for what you've done, because to this day I don't see it.

N.T. Sentencing, 7/14/16, at 17-21.

The trial court imposed a sentence within the standard range of the sentencing guidelines for each of Appellant's convictions, and as the foregoing excerpt evinces, it considered all of the evidence presented at trial and reviewed Appellant's presentence report prior to imposing its individualized sentence under the circumstances of this case. As such, we discern no abuse of discretion.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/10/2018