

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
DAVID ANDREW DESPER	:	
	:	
Appellant	:	No. 373 EDA 2019

Appeal from the Judgment of Sentence Entered December 13, 2018  
In the Court of Common Pleas of Chester County Criminal Division at  
No(s): CP-15-CR-0002771-2017

BEFORE: BOWES, J., SHOGAN, J., and STRASSBURGER, J.\*

MEMORANDUM BY BOWES, J.: **FILED OCTOBER 29, 2019**

David Andrew Desper appeals from the judgment of sentence of twenty to forty years of imprisonment imposed after he pled guilty to third-degree murder and possession of an instrument of crime ("PIC"). We affirm.

The trial court offered the following summary of the incident underlying Appellant's convictions.

On June 28, 2017, Appellant was driving his 2011 Chevy Silverado truck approaching southbound ("SB") Route 202 in the left lane of SB Route 100, in West Goshen Township, Chester County. Both Route 202 and Route 100 are two lane divided highways. Bianca Roberson ("[Ms.] Roberson") was operating a 2009 Chevy Malibu in the right lane of SB Route 100. Before Route 100 ends and merges onto SB Route 202, the two lanes merge into one lane with the left lane narrowing and forcing the vehicles in that lane to merge into the right lane. Witnesses reported that prior to the shooting, the two vehicles were "jostling" for position just prior to the merge. At that point, Appellant aimed his firearm out his open passenger window and

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\* Retired Senior Judge assigned to the Superior Court.

fired it striking [Ms.] Roberson in the left side of her head. The Chevy Malibu went off the road striking trees bordering the highway. Appellant did not stop and according to witnesses sped away on SB Route 202.

When emergency vehicles arrived at the scene, it was initially believed that [Ms.] Roberson died as a result of the motor vehicle accident. It was discovered during the autopsy performed the following day that the cause of death was a gunshot wound to the head. Area police began an immediate investigation to identify the driver of the truck observed leaving the scene of the incident. As a result of obtaining eye witness testimony, and photographs and video from traffic cameras on Routes 100, 202 and on side roads, Appellant's truck was identified and a search for Appellant began. Four days after the incident, July 2, 2017, after a thorough investigation but before police could make an arrest, Appellant surrendered himself, his truck, and his firearm to the police.

Trial Court Opinion, 3/27/19, at 3-4.

Appellant was charged with murder in the first degree, murder in the third degree, criminal homicide, recklessly endangering another person, and PIC. He agreed to plead guilty to third-degree murder and PIC in exchange for dismissal of the other charges. In so doing, Appellant acknowledged that he "intentionally shot the firearm at Bianca Roberson one time" and that he "had no lawful justification or excuse and acted with malice." *Id.* at 5 (citing Written Plea Colloquy, 9/5/18, at 2(a)). Further, Appellant admitted that he "did not stop or call for assistance and instead fled the area. [Appellant] left his red pickup truck at a friend's house and went to Delaware. After several days, [Appellant] voluntarily surrendered to authorities." *Id.* (citing Written Plea Colloquy, 9/5/18, at 2(a)).

The trial court accepted the plea, ordered a presentence investigation, and scheduled a sentencing hearing. Both Appellant and the Commonwealth presented the trial court with sentencing memoranda, which the trial court considered along with a presentence investigation report and “hundreds of letters submitted on behalf of the victim and Appellant.” *Id.* at 6.

The trial court described Appellant’s position as to the cause of the incident, and the reaction to the crime in the community, as follows.

[J]ust prior to the tragic incident he was travelling home from work in his usual route. He had finished work earlier than usual that day and did not have any specific plans and was therefore in no rush. He saw the Chevy Malibu come up quickly behind him and it swerved abruptly at him from his right towards his lane. He moved his truck over to get out of the way and then saw the Chevy swerve at him again, forcing him onto the left shoulder. He was afraid, pulled his gun from the top of the console area, and fired one shot out of the passenger side window of his truck.

Appellant explained that he was afraid when he took the gun out and fired it. He stated he did not know who the driver of the Chevy Malibu was or that the other driver had been struck by his bullet until the incident was reported later on social media.

There was much about the homicide, open guilty plea, and sentencing published on social media. The horrific nature of her family’s loss and the specifics of the crime were indeed a tragedy that garnered tremendous attention and commentary. [Ms.] Roberson, a young African American woman, looking forward to her first year in college at Jacksonville University in Florida where she had earned a four year merit scholarship, was shot and killed while driving on a highway. Appellant was identified as a white male in his late twenties with no history of any contact with the police prior to this incident. Quickly, the court of public opinion concluded that the shooting was a road rage incident and/or was racially motivated. A firestorm erupted urging the Commonwealth to treat this matter as a hate crime. In response, a

comprehensive investigation into Appellant's family and social contacts was initiated to determine if the shooting may have been racially motivated. There was no evidence found or presented to this court that race played a part in the reason Appellant fired his weapon at Roberson.

Trial Court Opinion, 3/27/19, at 5-6 (cleaned up).

At the highly-attended sentencing hearing, the trial court heard multiple witnesses on behalf of the Commonwealth and Appellant. Religious leaders, the school superintendent, and family and friends of the victim informed the court of what a kind, caring, and well-loved person Ms. Roberson had been, spoke to the horrific impact her death had upon them and the community, and pleaded with the court to impose the maximum penalty allowed by law. On the issue of Appellant's motivation to commit the crime, most of the individuals offered by the Commonwealth decried the senselessness of Appellant's actions, and questioned how something as insignificant as a desire to get in front of the victim's car on the highway could have possibly inspired Appellant to kill. However, the victim's mother expressed her belief that Appellant must have been motivated by racism. **See** N.T. Sentencing, 12/13/18, at 43 ("[Appellant] is the racist that shot my daughter and left her for dead on the side of the road. He had to do this based on the color of her skin and no other reason. What other reason can [Appellant] use to justify how he felt entitled to end her life?").

Appellant presented family and friends who indicated that Appellant was a kind, hard-working man— really just a "big kid" who liked to play with

cars—who made one really bad decision. *Id.* at 50. Appellant maintained that, at the time of the incident, he was afraid because he heard a horn and tires screeching and saw a car swerving towards him, that he did not see who was driving the other car, and that he had grabbed his gun and fired in a moment of panic. He expressed remorse, saying that he would do anything to take it back.

The Commonwealth asked the trial court to impose the statutory maximum sentence for both offenses, for an aggregate term of twenty-two and one-half to forty-five years of imprisonment. The Commonwealth highlighted that Appellant endangered every person who was on that road at the time he fired his gun and turned Bianca Roberson’s car “into a driverless missile.” *Id.* at 74. It further argued that “this case could not be more chilling” because one of the following things must be true: either Appellant knew that he was shooting at a young, African American woman, or Appellant had no idea at whom he was firing his gun. *Id.* at 75. The Commonwealth explained that it sought the statutory maximum term of imprisonment for Appellant because there was nothing “wrong with his past that made him capable of doing this,” but rather, that Appellant is “just the kind of person that ha[d] no problem making [the] choice” to fire his gun at the victim instead of using his brakes and backing down from the traffic confrontation. *Id.* at 76.

At the close of the hearing, the trial court indicated that it believed that Appellant was sorry, but did not believe that he acted out of fear. The trial court expressed its belief that Appellant decided to shoot Ms. Roberson because he was angry. The trial court sentenced Appellant to a standard-range, statutory maximum term of twenty to forty years of imprisonment for his third-degree-murder conviction,<sup>1</sup> along with a concurrent sentence of one to two years for PIC.

Appellant filed a timely motion for reconsideration of sentence, which the trial court promptly denied. Appellant timely appealed, and both Appellant and the trial court complied with Pa.R.A.P. 1925. Appellant presents the following question for our consideration.

Did the [trial c]ourt err and commit an abuse of discretion in sentencing the Appellant to the statutorily maximum sentence of twenty (20) to forty (40) years [of] imprisonment for the crime of third degree murder by failing to impose an individualized sentence upon the Appellant and by taking into consideration improper factors?

Appellant's brief at 5.

The following principles apply to our consideration of whether Appellant's questions raise a viable challenge to the discretionary aspects of his sentence.

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<sup>1</sup> The parties agree that, given the offense gravity score for third-degree murder and the fact that Appellant used a deadly weapon, the sentencing guidelines called for a standard range minimum sentence of between ninety months to the statutory maximum of twenty years. **See** N.T. Sentencing, 12/13/18, at 3.

An appellant is not entitled to the review of challenges to the discretionary aspects of a sentence as of right. Rather, an appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction. We determine whether the appellant has invoked our jurisdiction by considering the following four factors:

(1) whether appellant has filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether appellant's brief has a fatal defect; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

***Commonwealth v. Samuel***, 102 A.3d 1001, 1006-07 (Pa.Super. 2014) (citations omitted).

Appellant filed a timely notice of appeal and his brief contains a statement of reasons relied upon for his challenge to the discretionary aspects of his sentence as required by Pa.R.A.P. 2119(f). Thus, we consider whether each of those issues was preserved in his motion for reconsideration and raises a substantial question.

Appellant first avers that the trial court failed to impose an individualized sentence because it disregarded mitigating factors and based its sentence solely on the nature of the crime and the impact on the victim's family. Appellant's brief at 11-13. As the trial court accurately noted in its opinion, Appellant did not raise this claim in his post-sentence motion. Trial Court Opinion, 3/27/19, at 9. Rather, in the post-sentence motion, Appellant contended that the trial court "did not properly weigh" his rehabilitative needs. Motion for Reconsideration of Sentence, 12/21/18, at unnumbered 2. Such a

claim does not raise a substantial question. **See, e.g., Commonwealth v. Zirkle**, 107 A.3d 127, 133 (Pa.Super. 2014) (“[A] claim that a court did not weigh the factors as an appellant wishes does not raise a substantial question.”). Moreover, even if we were to reach the substance of the claim, it is well-settled that this Court “cannot re-weigh the sentencing factors and impose our judgment in the place of the sentencing court.” **Commonwealth v. Macias**, 968 A.2d 773, 778 (Pa.Super. 2009). No relief is due on Appellant’s first allegation.

Appellant’s remaining issues in his Rule 2119(f) statement allege that the trial court considered improper factors in imposing his sentence. If preserved, such claims do raise substantial questions. **See, e.g., Commonwealth v. Dodge**, 77 A.3d 1263, 1273 (Pa.Super. 2013) (holding claim that the trial court relied upon impermissible sentencing factors presented a substantial question).

Appellant contends that the trial court (1) inappropriately focused on the fact that Appellant had a loaded firearm where he lawfully possessed the weapon; (2) decided that Appellant fired his gun because he was angry although there was no evidence to establish anger rather than fear motivated Appellant; and (3) heard “inflammatory and inaccurate” statements that the shooting was motivated by racism, and did not affirmatively state that it was not considering the racism allegations as a sentencing factor. Appellant’s brief at 13-15.



Appellant did not raise the claim concerning unsubstantiated allegations of racism in his post-sentence motion or at the sentencing hearing. Therefore, it is not preserved for appeal.<sup>2</sup> **See, e.g., Commonwealth v. Jones**, 858 A.2d 1198, 1204 (Pa.Super. 2004) (holding discretionary aspects issue waived because it was raised neither at sentencing nor in a post-sentence motion). The remaining improper-factor allegations were raised in his motion for reconsideration of sentence, and we proceed to address them on their merits, mindful of the following legal principles.

“When reviewing sentencing matters, this Court must accord the sentencing court great weight as it is in the best position to view the defendant’s character, displays of remorse, defiance or indifference, and the overall effect and nature of the crime.” **Commonwealth v. Ventura**, 975 A.2d 1128, 1134 (Pa.Super. 2009). Hence, we review the sentencing court’s sentencing determination for an 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. Antidormi**, 84 A.3d 736, 760 (Pa.Super. 2014).

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<sup>2</sup> Furthermore, the trial court has affirmatively represented that the allegations that Appellant was racist were not substantiated and did not play any role in the determination of Appellant’s sentence. **See** Trial Court Opinion, 3/27/19, at 6, 10-11. Appellant cites no evidence to contradict the trial court.

With these principles in mind, we turn to Appellant's arguments that the trial court erred and abused its discretion in considering as sentencing factors that Appellant was driving with a loaded weapon and that he fired his weapon out of anger rather than fear. We begin by offering the context of the trial court's statements, reproducing in pertinent part the statement of the trial court's reasoning offered on the record at the sentencing hearing:

[Appellant], I believe you are sorry. And I believe you would take it all back if you could. And I believe that you would, not only for your own good, but for the good of the Roberson family.

I've read the 84 letters that were sent by your family and friends, and there were themes throughout. All are shocked that you shot Bianca, because it was so out of character. They called you a gentle giant.

You've been known as a person who goes out of his way to help others. All who know you grieve your loss of freedom, and most express their heartfelt sympathy for Bianca's family and friends. Many said they've never even seen you angry.

But nowhere in any of those letters did anyone describe a man who carries a loaded gun in his truck; a man who would feel so competitive to be first in the line of cars, that he'd pick up the gun, take off the safety, aim at Bianca's head, and pull the trigger.

I don't believe you were afraid. If you're afraid when you're driving, you hit the brakes. And I believe that it was anger.

Nowhere in those letters did anyone describe a man who would then run and leave his victim in a wrecked car on the side of the road.

Nowhere in those letters did anyone describe a man who would hide his truck, go to work, go to the beach, all the while acting as if nothing happened.

Nowhere in those letters did anyone describe a man who would wait to turn himself in until the police had worked tirelessly

for days tracking you down, while Bianca's family feared her killer would never be found.

The only thing you did right was plead guilty and spare Bianca's family and friends the horror of a jury trial.

[Appellant], you took Bianca's life and future from her. You decided to end her time on earth because she made you angry. You robbed her parents of their future, watching Bianca grow, graduate from college, marry, have children, all because you were angry. You deprived Bianca of her life. You deprived her family, her friends, and our community of her life.

Given the gravity of the offense as it relates to the impact on the life of the victim, her life is over, the impact on the victim's family and community, it's my duty to deprive you of your liberty for a very significant period of time.

Unfortunately that means your family, friends, and community suffer a loss and will also be deprived of your company. But they will be able to see you, to talk to you, to correspond with you. And one day you will be free again and part of their lives. Your actions ensured Bianca's family will never enjoy her company again.

It is my job to impose a sentence 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 the community, and the rehabilitative needs of the defendant. In this case, the gravity of the offense and its impact are certainly the most significant.

I appreciate how you present now, [Appellant], as somebody who is painfully sorry, would do anything that you could to take it back. But you can't.

I believe that day you were extraordinarily angry. And I think that if that hadn't been what was going on, you would have braked and let the person who was trying to get in front of you get in front of you.

N.T. Sentencing, 12/13/18, at 87-90.

The trial court stated in its opinion that it was aware from the start of the case that Appellant was in lawful possession of his firearm on the day in question. It explained that “the description of Appellant by his family and friends as a ‘gentle giant’ who never acted out of anger to be at odds with the man before the court; a man who resolved a traffic incident with a gun.” Trial Court Opinion, 3/27/19, at 20. The trial court further indicated that the point of its reference to Appellant’s possession of the weapon at the sentencing hearing “was that carrying a weapon that day was a regretful choice, not an illegal one.” ***Id.***

Regarding the rejection of Appellant’s claim of shooting out of fear and the supposition that he acted out of anger, the trial court noted that it credited evidence that Appellant’s pickup truck was a much larger vehicle than Ms. Roberson’s sedan, that Ms. Roberson had been speeding and passing people left and right before the shooting, and that Appellant opted to continue to travel at a speed fast enough to kick up dirt and debris on the shoulder of the road when his lane ended, rather than breaking and merging behind Mr. Roberson’s vehicle. ***Id.*** at 17-18. The trial court continued:

the most immediate instinctive action a driver takes when in fear of a collision is to slow down and/or apply the brakes to avoid a collision. Even if we were to give credit to Appellant’s statement that he heard a horn blowing and screeching tires, the natural impulse remains the same, to brake or slow down. It is not to maintain speed and fire a weapon. There is no circumstance this court can envision where firing a gun at a moving car will stop it. We found Appellant’s explanation that he acted out of fear to be an attempt to validate his reckless and heedless act of firing a gun at [Ms.] Roberson. We find it more credible that [Ms.] Roberson

sped up to Appellant's truck just prior to the merge and Appellant chose not to give her the right of way as is required by the traffic control devices on the road. [Ms.] Roberson did not permit Appellant to merge in front of her and Appellant chose to continue at the same speed while on the shoulder instead of braking and pulling behind Roberson who had the right of way. The facts indicate that out of frustration and resentment, Appellant chose to reach for his gun, point it at [Ms.] Roberson, and pull the trigger.

***Id.*** at 19.

From our review of the certified record, we find no indication that the trial 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." ***Antidormi, supra*** at 760. On the contrary, the trial court considered all relevant factors and acted within its discretion in judging Appellant's credibility and making reasonable inferences from the facts presented. We discern no reason to disturb the trial court's determination to impose a standard-range sentence based upon the factors before it.<sup>3</sup>

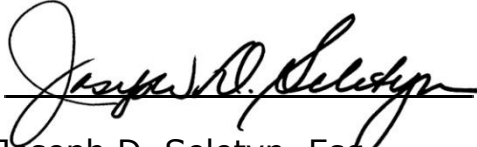
Judgment of sentence affirmed.

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<sup>3</sup> Although a standard-range sentence for third-degree murder also happened to be the statutory maximum in this instance, we note that, by imposing only a concurrent term of one to two years for PIC, the trial court did not impose the statutory maximum aggregate sentence sought by the Commonwealth.

J-S48007-19

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 10/29/19