

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

DEVON BLACKWELL

Appellant

No. 204 WDA 2013

Appeal from the Judgment of Sentence February 14, 2012  
In the Court of Common Pleas of Allegheny County  
Criminal Division at No(s): CP-02-CR-0007407-2011

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and WECHT, J.

MEMORANDUM BY OTT, J.:

**FILED DECEMBER 18, 2013**

Devon Blackwell appeals from the judgment of sentence of 21 to 120 months' incarceration followed by three years' probation imposed on February 14, 2012, in the Allegheny County Court of Common Pleas. His sentence was imposed after Blackwell entered a guilty plea to three counts of possession with intent to deliver a controlled substance (cocaine and heroin) ("PWID"), and two counts of possession of a controlled substance (cocaine).<sup>1</sup> On appeal, he challenges the discretionary aspects of his sentence. For the reasons that follow, we affirm.

On December 7, 2011, Blackwell entered a guilty plea on the above-stated charges. At the plea hearing, counsel requested that the trial court

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<sup>1</sup> 35 P.S. §§ 780-113(a)(30) and (a)(16), respectively.

send Blackwell to a drug treatment program through Justice Related Services (JRS), rather than jail. N.T., 12/7/2011, at 25. The trial court, however, noted that a sentence other than incarceration was “not even close to the guidelines[,]” particularly since this was Blackwell’s second conviction for PWID, and even a mitigated range sentence called for 15 months’ incarceration. **Id.** at 25, 30. The court indicated it was familiar with Blackwell since he was on probation with the same court for “selling drugs” at the time of his arrest on the present charges. **Id.** at 28. The trial court also noted it was aware that the last time Blackwell was incarcerated, he had “a misconduct involving shanking another inmate.” **Id.** Accordingly, the trial court postponed sentencing and ordered a presentence investigation report (PSI), stating, “if [Blackwell] wants me to consider anything outside the guidelines in this case, then he is going to need a presentence report[.]” **Id.** at 29.

On February 14, 2012, Blackwell appeared for sentencing. After indicating that it had reviewed the PSI, the trial court imposed concurrent standard range sentences of 21 to 120 months’ incarceration,<sup>2</sup> followed by

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<sup>2</sup> The standard range sentence for Blackwell’s convictions of PWID was a minimum sentence of 21 to 27 months’ incarceration, with a mitigated range of 15 months and an aggravated range of 33 months. **See** Guideline Sentence Form. Therefore, Blackwell’s sentence fell within the low standard range of the sentencing guidelines.

three years' probation, on two of his PWID charges. The court imposed no further penalty on the remaining charges.

Blackwell filed a timely post sentence motion seeking reconsideration of his sentence,<sup>3</sup> and requesting leave to amend the motion once the notes of testimony were transcribed. No amendment was ever filed. Thereafter, Blackwell apparently filed a *pro se* PCRA petition, which was neither docketed nor included in the certified record. **See** Motion to Withdraw as Counsel, 1/18/2013. Counsel, however, was appointed, and on January 10, 2013, filed a motion to withdraw averring that because the trial court never ruled upon Blackwell's post sentence motion, Blackwell's direct appeal rights

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<sup>3</sup> Specifically, Blackwell claimed his sentence was excessive and unreasonable for the following reasons:

- i. The sentence imposed failed to consider the nature and characteristics of the crime and the defendant.
- ii. The sentence imposed focused solely on the serious nature of the offenses to the exclusion of other factors. The Court is bound to consider the rehabilitative needs of the defendant in imposing a sentence as required by 42 Pa.C.S. § 9721(b). When the Court rejected the treatment plan for the defendant, the Court did not consider the rehabilitative needs of the defendant.
- iii. The sentence imposed is contrary to the norms underlying the sentencing code.

Post Sentence Motion, 2/24/2012, at ¶ 6(a).

had not yet accrued.<sup>4</sup> On January 17, 2013, the clerk or courts entered an order on the docket denying Blackwell's post sentence motion by operation of law. **See** Pa.R.Crim.P. 720(B)(3). This timely direct appeal followed.<sup>5</sup>

Blackwell's sole claim on appeal challenges the discretionary aspects of his sentence. He argues, first, that during his sentencing hearing, the trial court failed to place any reasons on the record for the sentence it imposed in violation of 42 Pa.C.S. § 9721(b).<sup>6</sup> In addition, Blackwell contends his sentence is unreasonable because the trial court emphasized his prior convictions, which were "already subsumed within his [prior record score]

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<sup>4</sup> On January 23, 2013, the trial court entered two orders. The first granting PCRA counsel's petition to withdraw and the second notifying Blackwell of its intention, pursuant to Pa.R.Crim.P. 907, to dismiss his PCRA petition without conducting an evidentiary hearing. The docket, however, does not reflect an order that dismissed the un-docketed PCRA petition.

<sup>5</sup> On January 25, 2013, the trial court directed Blackwell to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Blackwell complied with the trial court's directive and filed a concise statement on February 14, 2013.

<sup>6</sup> Section 9721(b) of the Sentencing Code provides, in relevant part:

In every case in which the court imposes a sentence for a felony or misdemeanor ... the court shall make as a 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.

42 Pa.C.S. § 9721(b).

and 'second subsequent' status,"<sup>7</sup> and ignored mitigating factors. Blackwell's Brief at 11.

The standard of review for a claim challenging the discretionary aspects of sentencing is well-established:

Sentencing is a matter vested in the sound discretion of the judge, and will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that then 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. Sheller***, 961 A.2d 187, 190 (Pa. Super. 2008) (citation omitted), *appeal denied*, 980 A.2d 607 (Pa. 2009).

"A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a

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<sup>7</sup> As a "second or subsequent" offender of 35 P.S. § 780-113(a)(30), Blackwell was subject to the enhanced penalty provision set forth in 35 P.S. § 780-115:

(a) Any person convicted of a second or subsequent offense under clause (30) of subsection (a) of section 13 of this act or of a similar offense under any statute of the United States or of any state may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

35 P.S. § 780-115(a). Here, Blackwell's sentencing guideline form reflects that the statutory maximum sentence that could be imposed was 120 to 240 months' imprisonment for his conviction of PWID (cocaine), and 180 to 360 months' imprisonment for his conviction of PWID (heroin). **See** Guideline Sentence Forms.

claim is not absolute.” **Commonwealth v. Hoch**, 936 A.2d 515, 518 (Pa. Super. 2007) (citation omitted). To reach the merits of a discretionary issue, this Court must 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. Stein**, 39 A.3d 365, 370 (Pa. Super. 2012) (citation omitted).

Here, Blackwell complied with the procedural requirements for this appeal by filing a post-sentence motion for reconsideration of sentence and a timely notice of appeal, and by including in his appellate brief a statement of reasons relied upon for appeal pursuant to **Commonwealth v. Tuladziecki**, 522 A.2d 17 (Pa. 1987), and Pa.R.A.P. 2119(f). Therefore, we may address the merits of the claims on appeal.

First, Blackwell contends that the trial court failed to provide any reasons on the record for the sentence it imposed. While we agree that such a claim raises a substantial question for our review,<sup>8</sup> Blackwell failed to raise this issue at sentencing, in his post-sentence motion, or, in his Rule 1925(b)

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<sup>8</sup> **See Commonwealth v. Macias**, 968 A.2d 773, 776 (Pa. Super. 2009) (“The failure to set forth adequate reasons for the sentence imposed has been held to raise a substantial question.”) (citation omitted).

concise statement, and the trial court did not address this claim in its opinion. Therefore, it is not preserved for our review.<sup>9</sup> **See Commonwealth v. Mann**, 820 A.2d 788, 794 (Pa. Super. 2003) (holding appellant's failure to raise "the specific claim regarding the sentencing court's alleged failure to state the reasons for his sentence on the record" either at sentencing or in his post sentence motion waives the claim for appellate review), *appeal denied*, 831 A.2d 599 (Pa. 2003).

Next, Blackwell argues his sentence is unreasonable because the trial court "double-counted" his criminal history. Specifically, he contends the

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<sup>9</sup> We note even if this issue were preserved we would find it meritless. Although it is true that during the sentencing hearing, the trial court did not make a lengthy statement regarding its reasons for imposing a sentence in the low standard range, the court did acknowledge that it had reviewed Blackwell's PSI. N.T., 2/14/2012, at 7. **See Commonwealth v. Coss**, 695 A.2d 831, 834 (Pa. Super. 1997) (requirement that trial court state reasons for sentence on the record "can be satisfied by the trial court indicating, on the record, that it has been informed by a presentence report."). Moreover, there was a lengthy discussion about Blackwell's potential sentence during the guilty plea hearing. **See** N.T., 12/7/2011, at 25-32. The trial court indicated that it was familiar with Blackwell since Blackwell was on probation by that same court at the time he committed the present offense. Further, the court noted that Blackwell "didn't do well while he was incarcerated" in the past since he had a "misconduct involving shanking another inmate." **Id.** at 28. The trial court stated that based on Blackwell's behavior to date, it could not justify "a departure outside the mitigated range of the guidelines." **Id.** at 30. However, the court stated that it would reserve judgment as to an appropriate sentence until after it reviewed any information Blackwell provided in his PSI. Therefore, upon review of the transcripts of both the plea and sentencing hearings, as well as the trial court's opinion, it is clear the trial court imposed a low standard range sentence based upon Blackwell's failure to curb his criminal behavior despite opportunities provided to him in the past.

trial court “over-emphasized” his prior record when those prior offenses were already “accounted for in both his ‘second subsequent’ status and his prior record score.” Blackwell’s Brief at 16. A claim that a trial court “relied on factors already taken into account in determining his prior record score and offense gravity score” raises a substantial question for our review. ***Commonwealth v. Goggins***, 748 A.2d 721, 731 (Pa. Super. 2000), *appeal denied*, 759 A.2d 920 (Pa. 2000). ***See also Commonwealth v. Johnson***, 873 A.2d 704, 708 (Pa. Super. 2005) (finding claim that the trial court imposed a sentence “based on solely one’s criminal history raises a substantial question.”), *appeal denied*, 887 A.2d 231 (Pa. 2005).

Preliminarily, we note that,

we can reverse a standard-range sentence only if the sentence is clearly unreasonable when viewed in light of the four statutory factors outlined in [42 Pa.C.S. § 9781\(d\)](#). [Section 9781\(d\)](#) provides that when we review this type of question, we 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.

***Commonwealth v. Corley***, 31 A.3d 293, 298 (Pa. Super 2011) (internal citations omitted).

The trial court, in its opinion, provided the following explanation for its decision to impose a low standard range sentence:



This Court sentenced [Blackwell] to a period of incarceration of [21] to [120] months, the minimum being at the bottom of the standard range, and the maximum designed to allow [Blackwell] to demonstrate by his behavior when he has been sufficiently rehabilitated to earn parole. [Blackwell's] long history of using drugs started at age ten and he was first adjudicated delinquent of selling drugs at age sixteen. In fact, [Blackwell] was on probation with this Court for a prior delivery when he was arrested on these charges. [Blackwell] failed to present compelling evidence of mitigating factors. To the contrary, this Court remains concerned about [Blackwell's] desire and ability to abide by the laws of the Commonwealth. He presented as an angry man with serious mental health issues. Despite a JRS<sup>3</sup> plan and ongoing mental health services, [Blackwell] continued to use and sell illegal drugs. While detained on a prior case, he received a misconduct for assaulting another inmate with a weapon. Furthermore, while he was acquitted of homicide, in addition to this conviction, he does have five adult convictions and a juvenile record. [Blackwell is 23 years old.] Considering the totality of the circumstances, a standard range sentence was not excessive or unreasonable.

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<sup>3</sup> Justice Related services (JRS) provides mental health and drug treatment plans for offenders in the criminal justice system.

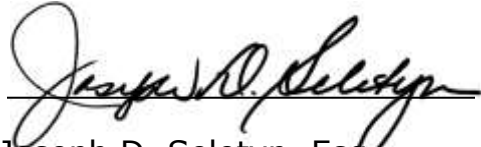
Trial Court Opinion, 5/13/2013, at 5-6 (record citations omitted). Accordingly, the trial court did not "over-emphasize" Blackwell's prior criminal history, but rather, considered his inability to curb his criminal behavior despite the opportunities provided to him. We detect no abuse of discretion on the part of the trial court in imposing a low standard range sentence.<sup>10</sup>

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<sup>10</sup> To the extent that Blackwell also contends the trial court failed to adequately consider mitigating factors, such as the small amount of drugs he  
*(Footnote Continued Next Page)*

Judgment of sentence affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/18/2013

(Footnote Continued) \_\_\_\_\_

possessed and his addiction problems, we note that such a claim does not raise a substantial question for our review. **See Commonwealth v. Moury**, 992 A.2d 162, 175 (Pa. Super. 2010) ("That the court refused to weigh the proposed **mitigating factors** as Appellant wished, absent more, **does not raise a substantial question.**").