

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
	:	
v.	:	
	:	
ERIKA ROSA,	:	
	:	
Appellant	:	No. 2086 EDA 2012

Appeal from the Judgment of Sentence entered June 18, 2012,
in the Court of Common Pleas of Bucks County,
Criminal Division, at No(s): CP-09-CR-0006544-2011.

BEFORE: BOWES, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED AUGUST 20, 2013**

Appellant, Erika Rosa, appeals from the judgment of sentence imposed following her guilty plea to the charges of conspiracy to deliver heroin,¹ corrupt organizations,² and criminal use of a communication facility.³ We affirm.

The trial court summarized the relevant factual and procedural history of this case as follows.

In December of 2010, the Thirty-Second Statewide Investigating Grand Jury began hearing evidence concerning a large scale heroin distribution ring operating in six counties within the Commonwealth — Philadelphia, Chester, Delaware, Montgomery, Perry and Bucks. The Grand Jury issued three Presentments: Presentment No. 2, issued March 23, 2011, Presentment No. 8,

¹ 18 Pa.C.S. § 903(c) (as to 35 P.S. § 780-113(a)(30)).

² 18 Pa.C.S. § 911(b)(4).

³ 18 Pa.C.S. § 7512(a).

*Retired Senior Judge assigned to the Superior Court.

issued June 21, 2011 and Presentment No. 18, issued October 13, 201[1]. Those Presentments collectively recommended the Attorney General arrest and prosecute 31 individuals, including [Appellant], for violations of the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-113(a), and other offenses under the Crimes Code. The Grand Jury identified Fausto Ezequiel Valdez-Cordero, AKA Jose Morales, AKA "Prima," AKA "Pepe," AKA "Keka," [(Valdez-Cordero)] as the head of this extensive heroin trafficking operation. The Grand Jury summarized the testimony as to [Appellant] as follows:

Agent Riley interviewed [Appellant], who stated she was the girlfriend of [Valdez-Cordero]. She had been with Valdez-Cordero for eight (8) years. According to [Appellant], Valdez-Cordero had been selling heroin for the past five to six (5-6) years. [Appellant] admitted taking part in Valdez-Cordero's heroin business by translating drug customers' calls for Valdez-Cordero, a Spanish-speaking Dominican illegally residing in the United States. [Appellant] would ask the customers who they were, how much heroin they wanted to buy and where they needed the heroin delivered. [Appellant] also admitted to picking up drug money from customers.

At the time of her arrest, [Appellant] was charged with Possession with Intent to Deliver Heroin, Conspiracy to Delivery of Heroin, two counts of Corrupt Organizations and four counts of Criminal Use of a Communication Facility. At the outset, [Appellant] agreed to fully cooperate with the investigating agents in identifying and arresting the others involved in this drug distribution ring and, initially, it appeared that she was in fact doing so. The extent of [Appellant's] cooperation was set forth in Presentment No. 8 and was confirmed by Agent Riley at the time of sentencing. The Presentment states:

According to Agent Riley, agents intercepted numerous telephone calls from "Jerry," later identified as Gerald Felder. Felder is a mid-level dealer. Every few days, Felder would order between 50 and 100 bundles of heroin. As noted previously, 100 bundles, or 1,400 packets, equals ten (10) racks, or approximately 42 grams of heroin. The cost

for ten (10) racks would be approximately \$6,000. Thus, every few days, Felder was distributing up to 1,400 packets through his street-level dealers, then using part of the proceeds to purchase more heroin, thereby repeating the cycle.

On February 15, 2011, the date agents executed numerous search warrants, [Appellant] was interviewed by [agents of the Office of Attorney General, Bureau of Narcotics Investigation and Drug Control ("BNIDC")]. [Appellant] admittedly was supposed to pick up \$14,000 in drug money from Gerald Felder. [Appellant] cooperated with the agents and placed a recorded telephone call to Felder, in which Felder made arrangements with [Appellant] to turn over the money. At the drop-off location, agents arrested Felder and seized from him \$15,600.

As a result of [Appellant's] perceived cooperation, the Commonwealth agreed to *nol pros* six counts of the criminal information and further agreed not to invoke applicable mandatory minimum sentencing provisions. [Appellant] entered a guilty plea to the remaining three counts. On June 18, 2012, this court imposed an aggregate term of incarceration of thirteen to twenty-six years. On June 28, 2012, [Appellant] filed a Motion for Modification of Sentence. By Order dated July 2, 2012, [the trial court] denied that motion. [Appellant] thereafter filed a timely Notice of Appeal.

Trial Court Opinion, 10/5/2012, at 1-3.⁴

On appeal, Appellant challenges the discretionary aspects of her sentence, claiming that, while the imposed sentence is within the suggested guidelines, it is unreasonable in light of the circumstances.⁵

⁴ Both Appellant and the trial court complied with the provisions of Pa.R.A.P. 1925.

⁵ In ***Commonwealth v. Brown***, 982 A.2d 1017 (Pa. Super. 2009), we explained that where a defendant pleads guilty without any agreement as to

It is well established that a criminal defendant does not have an absolute right to challenge the discretionary aspects of her sentence on appeal. **See Commonwealth v. Bishop**, 831 A.2d 656, 660 (Pa. Super. 2003). Before this Court will consider such a claim, two preliminary requirements must be met:

First, the appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of his sentence. [Pa.R.A.P. 2119(f)]. Second, he must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. [42 Pa.C.S. § 9781(b)].

Id. (citations omitted).

“The determination of whether a substantial question exists must be determined on a case-by-case basis.” **Commonwealth v. Hartman**, 908 A.2d 316, 320 (Pa. Super. 2006) (citation omitted). This Court has explained that: “[a] substantial question exists where an 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.** (quoting **Commonwealth v. Koren**, 646 A.2d 1205, 1208-1209 (Pa. Super. 1994)). Finally, we note that issues challenging the discretionary aspects of sentence must be raised in a post-sentence motion or by presenting the

sentence, (i.e. an open plea), the defendant retains the right to petition this Court for allowance of appeal with respect to the discretionary aspects of sentencing. Thus, Appellant herein may properly seek permission to appeal this issue.

claim to the sentencing court during the sentencing proceedings. **Commonwealth v. Watson**, 835 A.2d 786, 791 (Pa. Super. 2003). Absent such efforts, an objection to a discretionary aspect of a sentence is waived. **Id.**

Instantly, Appellant filed a timely post-sentence motion and has included a Rule 2119(f) statement in her brief. The remaining question, therefore, is whether Appellant has raised a substantial question for our review. Appellant contends that her aggregate 13-to-26-year sentence is unreasonable because the trial court failed to consider the suggested sentencing guidelines and certain mitigating factors. Appellant's Brief at 10. Appellant's claim that the court erred by imposing an aggravated range sentence without consideration of mitigating circumstances raises a substantial question. **See Commonwealth v. Felmlee**, 828 A.2d 1105, 1107 (Pa. Super. 2003).

Although Appellant presents a substantial question, no relief is due. Appellant argues that the trial court failed to consider her cooperation and acceptance of responsibility, her lack of a prior record, her mental health diagnosis of major depressive disorder, her children's dependence upon her for support, and her remorsefulness in fashioning her sentence. Appellant's Brief at 10. However, the record belies her claims.

Before imposition of sentence, the trial court acknowledged receipt of information packets sent to the court by defense counsel on Appellant's

behalf. N.T., 6/18/2012, 45. Next, the court placed on the record the sentencing guideline ranges applicable to each crime for which Appellant pled guilty.⁶ *Id.* at 45-46. The trial court then acknowledged its intent to exceed those guidelines and set forth the following explanation.

[Appellant] has not pled guilty to one event of a relatively minor amount of drugs. She has pled guilty to engaging in a massive conspiracy from January of 2009 through February of 2011. And so I find the sentencing guidelines have absolutely no relation to this case whatsoever.

I take into account in imposing sentence the information I received from [defense counsel] concerning, first of all, the depression that [Appellant] suffers from. I see in court all the time individuals who come before me and other judges who suffer from depression. I find that they are most often victims and not predators because they are often helpless and often try to overcome their depression by engaging in drug use and getting into a life that spirals down from there which can include prostitution, formal or informal, in order to get drugs to make themselves feel better.

That is not what happened here. That is the person she fed. That is not the person she is. She has taken control of her life, depression or no depression, and she has done so at the expense of other people.

I have read the letters that [the defense has] submitted to me and I do not comprehend it, as [the district attorney] has indicated, the person that they describe versus the person that I

⁶ The applicable sentencing guidelines are as follows. For the crime of conspiracy to deliver heroin: 36 to 54 months' incarceration in the standard range, +/- 12 months for the mitigated and aggravated ranges; for the crime of criminal use of a communication facility: restorative sanctions to nine months' incarceration, in the standard range +/- 3 months for the mitigated and aggravated ranges, and; for the crime of corrupt organizations: nine to 16 months' incarceration in the standard range, restorative sanctions to nine months' incarceration in the mitigated range, and 16 to 25 months in the aggravated range. Trial Court Opinion, 10/5/2012, at 3.

know her to be. She has concealed her true self and her true identity from her community.

* * *

What this woman did is she brought the drug dealer to her children. She took her children and put them with a drug dealer[.] . . . She lived off of that money.

All I heard is how the cooperators in this case are in danger because of this organization. Well, that is the organization she created, that she participated in. The telephone conversation that I heard was from a conversation with Victor Ballard. Victor Ballard is not some 10-year-old creep at a junior high school or 15-year-old creep at a junior high school selling marijuana in the school yard or at the basketball courts. Victor Ballard is a long-time drug dealer. He is a dangerous man. And she felt free to smack him verbally and otherwise. She was in control, not Victor Ballard.

I take into account the degree of her involvement. She is not just a translator. She is not just involved partially or didn't get sucked into some vortex. She has made conscious decisions on a daily basis to engage in a corrupt organization that deals with death.

When you say that she doesn't know what's going to happen, she does know. There is not a person that lives in Philadelphia or a person that lives in Bucks County that doesn't understand what happens to people when they use heroin. She cannot have been surprised that there would be bodies found, and there was a body found in Bucks County. I don't hold her responsible for it, but it had one of her stamps. She may not be responsible for that body, but she is responsible for some body.

And she wasn't thinking of her children and she wasn't thinking of the mother of that child, the father of that child, the sister of that child who has a drug addiction that they could never recover from. . . . She acted for greed and greed alone because she is not herself a drug addict. I can tell from her physical condition that she is not a drug addict. She did it for profit at the expense of everyone else in her community and in my community.

And cooperation or no cooperation, if she had cooperated - not cooperated as I went through in the sentencing guidelines, she would not have seen the light of day. She has decided to cooperate, and I mean minimally cooperate. She continues to protect those who would take other people's children.

And so to impose any other sentence than what I am going to impose would ignore the fact that she knew that she threatened serious harm, she knew her conduct would create and cause serious harm. She did so for no other reason than greed. She had no excuse or justification. She utilized others to carry out her criminal plot. And she has shown no sense of actual remorse. Her remorse was, you are correct, when I put her in prison. That is the first time that she felt remorse. And that is the first time and that is remorse for herself, not remorse for the people that she has hurt.

There is an undue risk this defendant will continue to commit crimes by her attitude of failing to continue in her cooperation. She is clearly in need of correctional treatment. And a lesser sentence would depreciate the seriousness of the crimes that she has engaged in.

In imposing sentence I take into account what she said to Victor Ballard, when she was encouraging him, for lack of a better term, to -- what to do with his family members, what he needed to do with his family members to make sure that he wasn't interfering with their operation. That is pretty much what she thinks about family.

But she will do this time because of her conduct and only her conduct.

Id. at 47-53.

Our review of the record demonstrates that the trial court considered each mitigating item, including numerous character statements submitted by Appellant's friends and family, in fashioning Appellant's statement. Accordingly we find no abuse of discretion.

Judgment of sentence affirmed.

J. A15031/13

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 8/20/2013