

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	
v.	
EDUARDO CARDONA,	
Appellant	No. 2121 EDA 2011

Appeal from the Judgment of Sentence December 15, 2008
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0005190-2007

COMMONWEALTH OF PENNSYLVANIA,	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	
v.	
EDUARDO CARDONA,	
Appellant	No. 2122 EDA 2011

Appeal from the Judgment of Sentence December 15, 2008
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0005211-2007

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY STEVENS, P.J.

Filed: February 12, 2013

Eduardo Cardona (hereinafter "Appellant") appeals *nunc pro tunc*,
from the judgment of sentence entered in the Court of Common Pleas of

Philadelphia County on December 15, 2008¹ at which time he was sentenced to an aggregate prison term of seven (7) years to twenty (20) years to be followed by five (5) years of probation after he entered an open guilty plea to charges of Robbery, Burglary, Criminal Conspiracy to Commit Burglary, Possession of an Instrument of Crime, and Criminal Trespass.² Upon our review of the record, we affirm.³

The trial court has set forth the procedural history herein as follows:

On October 22, 2008, Appellant entered guilty pleas to robbery, two counts of burglary, criminal conspiracy to commit burglary, possession of an instrument of crime, and criminal trespass. On December 15, 2008, Appellant was sentenced to an aggregate term of seven (7) to twenty (20) years['] incarceration followed by five (5) years reporting probation. Appellant's timely filed motion for reconsideration of sentence was denied on January 14, 2009. Appellant subsequently filed a

¹ The charges originally were assigned to three lower court docket numbers, and this Court consolidated these appeals *sua sponte* pursuant to Pa.R.A.P. 513 in a *Per Curiam* Order filed on May 9, 2011.

² 18 Pa.C.S.A. § 3701(a)(1); 18 Pa.C.S.A. 3502(a); 18 Pa.C.S.A. §§ 903, 3502(a); 18 Pa.C.S.A. § 907(a); 18 Pa.C.S.A. § 3503(a)(1)(ii), respectively. Specifically, the trial court sentenced Appellant to concurrent prison sentences of four (4) years to ten (10) years in prison for the Robbery, Burglary, and Conspiracy to Commit Burglary charges along with a consecutive prison term of three (3) years to ten (10) years on the Criminal Trespass charge and further required that Appellant serve a term of five years probation for Possession of an Instrument of Crime following his period of incarceration. N.T., 12/15/08, at 25-27.

³ Although Appellant purports to appeal from both the judgment of sentence and the Order entered on January 14, 2009, denying his motion for reconsideration of sentence, an appeal properly lies from the entry of judgment, not from the order denying post-trial motions. *Hart v. Arnold*, 884 A.2d 316, 325 n. 2 (Pa. Super. 2005), *appeal denied*, 587 Pa. 695, 897 A.2d 458 (2008).

notice of appeal to this Court^[4] on February 3, 2009. Appellant's counsel failed, however[,] to comply with the lower court's 1925(b) order dated July 17, 2009. On October 22, 2009, this Court issued an order directing Appellant to file a statement of matters complained of on appeal within twenty-one (21) days of the date of the Order. Appellant failed to submit a 1925(b) statement within the mandated period. On October 22, 2010, this Court again remanded for counsel to file a 1925(b) concise statement or statement of intent to file an *Anders/Santiago* brief. On January 31, 2011, prior counsel for Appellant filed a statement of intent to file an *Anders/Santiago* brief. On June 28, 2011, this Court quashed the appeal and remanded for reinstatement of Appellant's right to direct appeal as well as appointment of new counsel. On July 14, 2011, the lower court reinstated Appellant's right to direct appeal *nunc pro tunc* and appointed new counsel. On February 14, 2012, counsel for Appellant filed a timely concise statement of matters complained of on appeal.

Trial Court Opinion, filed 2/29/12 at 1-2 (footnotes omitted).

In his concise statement of matters complained of on appeal, Appellant avers that:

[t]he Sentence Was Excessive and An Abuse of Discretion and the Trial Court Did Not Place Adequate Reasons On The Record For Imposing Such An Excessive Sentence.

In his brief, Appellant includes the following question for our review:

Whether the sentence was excessive and an abuse of discretion and the trial court did not place adequate reasons on the record for imposing such an excessive sentence.

Brief for Appellant at 5.

⁴ The trial court references the Superior Court when it refers to "this Court" with the first letter in "court" capitalized.

At the outset, we note that Appellant has waived the assertion he raises in his Statement of the Reasons for Review of the Discretionary Aspects of Sentencing claim that “the trial court focused solely on the seriousness of the crimes charged when it imposed its sentence” as well as the argument to which he devotes a few sentences in his brief that the trial court failed to give proper consideration to his personal needs and mitigating factors when fashioning its sentence for his failure to raise these claims in his Pa.R.A.P. 1925(b) statement. **See** Appellant’s Brief at 8, 11.⁵ Appellant's only sentencing issue raised in that statement challenges the trial court's alleged failure to place adequate reasons on the record for imposing its sentence and its abuse of discretion in imposing an excessive sentence. However, Appellant raises for the first time in his brief claims the trial court focused only on the seriousness of the crimes at sentencing and that the trial court failed to consider relevant factors when fashioning its sentence such as the Appellant’s completion of a GED and life skills program while incarcerated, his acceptance of responsibility for his actions by pleading guilty and cooperating with investigation officers, and his apologizing to the court and the victims. Brief for Appellant at 8, 11. As

⁵ It is noteworthy that while Appellant's Statement of the Reasons for Review of the Discretionary Aspects of Sentencing” indicates that Appellant was convicted of conspiracy to commit third degree murder, conspiracy to commit aggravated assault and aggravated assault, he actually pled guilty to Robbery, Burglary, Criminal Conspiracy to Commit Burglary, Possession of an Instrument of Crime and Criminal Trespass.

these issues are distinct from that which he asserts in his concise statement, we find them waived. ***Commonwealth v. Heilman***, 876 A.2d 1021, 1028 (Pa. Super. 2005) *citing* ***Commonwealth v. Lord***, 553 Pa. 415, 719 A.2d 306 (1998).

Appellant's remaining argument that the sentencing court imposed an excessive sentence and did so without providing sufficient reasons for doing so on the record constitutes a challenge to the discretionary aspects of his sentence. "Appellant's guilty plea does not bar his discretionary challenge because there was no agreement as to the sentence Appellant would receive. ***See Commonwealth v. Ritchey***, 779 A.2d 1183, 1185 (Pa. Super. 2001) (acknowledging precedent that, where there are no sentencing restrictions in the plea agreement, the entry of a guilty plea will not preclude a challenge to the discretionary aspects of sentencing)." ***Commonwealth v. Messmer***, 863 A.2d 567, 571-572 (Pa. Super. 2004). Accordingly, we will next consider it and in doing so apply the following standard of review:

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 claim is not absolute. When challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question as to the inappropriateness of the sentence. Two requirements must be met before we will review this challenge on its merits. First, an 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 a sentence. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. That is, [that] the sentence violates either a specific provision of the sentencing

scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process. We examine an appellant's Pa.R.A.P. 2119(f) statement to determine whether a substantial question exists. Our inquiry must focus on the *reasons* for which the appeal is sought, in contrast to the *facts* underlying the appeal, which are necessary only to decide the appeal on the merits. ***Commonwealth v. Ahmad***, 961 A.2d 884, 886–87 (Pa. Super. 2008) (citations, quotation marks and footnote omitted).

Commonwealth v. Brooks, 2013 WL 66474, at * 3 (Pa. Super. Jan. 7, 2013) (italics in original).

Also, “[i]n reviewing Appellant's sentencing issues, we are mindful that 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. Moreover, the sentencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding his crime.” ***Id.*** at *4 (citations and internal quotation marks omitted).

Herein, Appellant was permitted to file his appeal *nunc pro tunc*, and in his post-sentence motion he stated his sentence was excessive and exceeded the guidelines without justification. Nevertheless, while Appellant’s brief contains a Pa. R.A.P. 2119(f) statement, he alleges in the first part thereof merely that the aggregate sentence “is manifestly excessive and unreasonable under the circumstances.” Brief for Appellant at 8. In doing so, Appellant does not challenge a specific provision of the sentencing scheme nor does he cite to any particular fundamental norm

underlying the sentencing process that he believes was violated.⁶ His general statement that the sentence was excessive and unreasonable amounts to a bald assertion which is devoid of supporting legal authority. Because Appellant's statement does not present a substantial question in this regard, we will not review this sentencing claim. ***Commonwealth v. Fisher***, 47 A.3d 155, 159 (Pa. Super. 2012) (citation omitted).

Even were Appellant's Pa.R.A.P. 2119(f) statement to be read to present a substantial question, Appellant would not be entitled to relief. Appellant concedes in the argument portion of his brief that "the trial court imposed a sentence that was in the standard range of the guidelines." Brief for Appellant at 10. This Court has determined that where a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code and that the imposition of consecutive, rather than concurrent, sentences may raise a substantial question in only the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment. ***Commonwealth v. Lamonda***, 52 A.3d 365, 372 (Pa. Super. 2012).

⁶ The Commonwealth objects to this Court's discretionary review of Appellant's sentencing claims in light of the "imprecise, indefinite and inaccurate" nature of the statement. **See** Commonwealth's Brief at 5.

Moreover, despite his admission that his aggregate sentence was in the standard range of the guidelines, Appellant argues “the trial court did not provide justification on the record to justify such an extreme upward departure from the sentencing guidelines.” Brief for Appellant at 10. To the contrary, the trial court did set forth its reasons for imposing its sentence and explained its rationale as follows:

After reviewing the pre-sentence investigation report and mental health evaluation as well as considering the evidence presented at sentencing, the court imposed an aggregate seven to twenty years’ incarceration. Although the sentences on some of the charges, viewed in isolation, constituted an upward deviation from the guidelines, the overall sentencing scheme implemented by the lower court resulted in a sentence consistent with the aggregate standard range. Specifically, because the Appellant committed numerous distinct acts victimizing multiple individuals, the court determined that running sentences consecutively was appropriate. See N.T. 12/15/2008, at 19 (expressing agreement with the Commonwealth’s sentencing structure). The aggregate of the standard ranges for the six offenses is approximately six to eleven years.^[6] The aggregate minimum sentence imposed, namely seven years, thus fell in the low end of the standard range contemplated by the court.

Although the structuring of the individual periods of incarceration may have somewhat disguised the court’s intention, the sentence is equivalent to one in which the court imposed a standard range sentence on each charge running consecutively. The court evaluated both the nature of the crimes as well as the character of [] Appellant before fashioning a sentence. The court also considered the impact to the victims, Mr. Ramirez particularly,⁷ and acknowledged the co-defendant’s

⁷ It was revealed at the sentencing hearing that Appellant and his co-defendant broke into Mr. Ramirez’s home when he was there alone. Appellant beat Mr. Ramirez with a stick and his co-defendant stabbed him with the knife Appellant told him to bring. The two stole and destroyed
(Footnote Continued Next Page)

sentence.⁸ Ultimately, the deplorable series of break-ins, destruction, and terror accomplished by [] Appellant revealed his dangerous propensity and motivated the court's sentence. The sentence neither lacked sufficient grounds, nor was manifestly unreasonable.

⁶72 to 133 months, derived from the summation of each standard range: Robbery, (54-72+-12); Burglary, (9-16+-6); Burglary, 9-16+-6); Criminal Conspiracy (3-14+-6); Possession of an Instrument of Crime, (RS-6 +-3); Criminal Trespass, (RS 9+-3).

Trial Court Opinion, filed 2/29/12 at 2-3.

Accordingly, we conclude that Appellant's issues raised on appeal merit no relief and affirm his judgment of sentence.

Judgment of sentence affirmed.

(Footnote Continued) _____

personal property worth approximately five thousand (\$5,000.00) dollars, and Appellant was forced to flee his home in his underwear to seek help. N.T., 12/15/08, at 9-14.

⁸ Appellant's co-defendant, who also pled guilty, was sentenced to eight (8) years to twenty (20) years in prison followed by an eight (8) year to twenty (20) year term of reporting probation. N.T., 12/15/08 at 17.