

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

NELSON LEE

Appellant

No. 238 EDA 2012

Appeal from the Judgment of Sentence of December 30, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012687-2007

BEFORE: PANELLA, J., LAZARUS, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

Filed: March 18, 2013

Nelson Lee (“Appellant”) appeals from his December 30, 2011 judgment of sentence. We affirm.

The trial court summarized the procedural history of this case:

On July 1, 2008, [Appellant] entered a negotiated guilty plea on charges of Burglary¹ as a felony of the second degree and Possession of an Instrument of Crime² as a misdemeanor of the first degree. That same day, this Court sentenced the Appellant to a term of six to twenty-three months['] confinement on the Burglary charge to be followed by two years['] reporting probation on the charge of Possession of an Instrument of Crime.

¹ 18 Pa. C.S. § 3502(A).

² 18 Pa. C.A. § 907(A).

The Appellant petitioned for release on early parole, which this Court granted on September 3, 2008. On May 26, 2010, the Appellant’s probation was revoked, and this Court’s violation of probation hearing was deferred in order to obtain the benefit of a pre-sentence investigation. The Appellant failed to appear [at]

his violation of probation hearing and a bench warrant was issued. On August 30, 2010, the Appellant was brought back into custody, and on September 30, 2010, this Court found him in violation of his probation and sentenced him to six to twenty-three months of confinement, with two years['] reporting probation.

The Appellant petitioned for release on early parole, which this Court again granted on December 20, 2010, specifying that he must participate in drug treatment at the Luzerne Treatment Center. The Appellant then violated the terms of his release. The Appellant failed to appear at his violation of probation hearing on December 6, 2011, and a bench warrant was issued. The Appellant was brought back into custody on December 20, 2011. On December 30, 2011, this Court held a hearing in which it found the Appellant in anticipatory violation of his probation, terminated his parole, and revoked his probation. This Court then sentenced the Appellant to one and a half to three years['] confinement.

On January 5, 2012, the Appellant filed a motion to reconsider the sentence. Before this Court could respond to the motion, the Appellant filed a *pro se* notice of appeal to the Superior Court. Counsel was then appointed for this appeal. This Court denied the motion for reconsideration on January 9, 2012, and on January 19, 2012 this Court ordered the Appellant to submit a Statement of Errors Complained of on Appeal pursuant to Pennsylvania Rule of [Appellate] Procedure 1925(b).

On February 8, 2012, the Appellant filed a Statement of [Errors] Complained of on Appeal and a petition for an extension of time to file a supplemental statement pending receipt of the notes of testimony. On April 26, 2012, the notes of testimony became available and this Court ordered Appellant to submit a supplemental Statement of [Errors] Complained of on Appeal. The Appellant submitted his final statement on May 7, 2012.

Trial Court Opinion ("T.C.O."), 5/25/2012, at 1-2.

Appellant raises one issue for our review:

Did not the court err as a matter of law, abuse its discretion, and violate general sentencing principles when, following a revocation of parole and probation, the court imposed a manifestly unreasonable and excessive sentence of 1 ½ to 3

years['] incarceration, and where, the court failed to adequately consider appellants' rehabilitative needs?

Appellant's Brief at 3.

Appellant challenges the discretionary aspects of his sentence. The right to appeal the discretionary aspects of sentencing is not absolute. ***Commonwealth v. Trippett***, 932 A.2d 188, 202 (Pa. Super. 2007). Before reaching the merits of Appellant's issue, we must ensure that our jurisdiction properly is invoked:

An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:

We conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, **see** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S. § 9781(b).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. 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.

As to what constitutes a substantial question, this Court does not accept bald assertions of sentencing errors. An appellant must articulate the reasons the sentencing court's actions violated the sentencing code.

Commonwealth v. Moury, 992 A.2d 162, 170 (Pa. Super. 2010) (internal quotation marks and modifications omitted; citations modified).

Here, Appellant has complied with the first three prongs of the analysis. Appellant filed a timely notice of appeal and preserved the issue in his motion for reconsideration of his sentence. Appellant has included in his brief a statement pursuant to Pa.R.A.P. 2119(f). Appellant contends that the sentencing court failed to consider all relevant factors, and in particular, his rehabilitative needs, when fashioning his sentence. Appellant also argues that his sentence was excessive and unreasonable. Appellant's Brief at 8-10.

Having determined that Appellant complied with the technical requirements for a discretionary challenge, we must determine whether Appellant has raised a substantial question. Appellant alleges that the court did not consider his rehabilitative needs and suggests that the sentencing court was unaware of these needs when sentencing occurred. Appellant's Brief at 8-10. Generally, an allegation that a sentencing court failed to consider certain factors does not raise a substantial question. *Moury*, 992 A.2d at 171.

Our decision in *Commonwealth v. Williams*, 562 A.2d 1385 (Pa. Super. 1989), is instructive. In that case, the appellant alleged that the sentencing court did not consider mitigating factors in sentencing, including the appellant's poor physical health, her steady employment, her support of her child, and testimony from community members about her sincere efforts to change. *Id.* at 1387. This Court found that Appellant failed to raise a substantial question because the appellant did not allege that the court was

unaware of these factors. Rather, the appellant was only asking for this Court to substitute its judgment for that of the sentencing court, which we will not do. *Id.* at 1388.

Moreover, Appellant's claim that his sentence is excessive is merely a bald assertion that the court abused its discretion. A bald assertion will not raise a substantial question. *Moury*, 992 A.2d at 170.

Here, Appellant asserts that his "rehabilitative needs were not addressed" at sentencing. Appellant's Brief at 8. He alleges as well that the court "failed to carefully consider all relevant factors" and that the court "failed to exhibit any familiarity with the rehabilitative needs of appellant, and failed to consult any pre-sentence report." Appellant's Brief at 9. Finally, Appellant alleges that the sentencing court failed to consider his long-standing drug addiction. Appellant's Brief at 9-10. However, Appellant does not allege that the sentencing court was unaware of his drug addiction or his rehabilitative needs. In fact, the same sentencing court already had made drug treatment part of Appellant's prior sentence. There is no indication that Appellant has raised an issue that his sentence is "(1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." *Moury*, 992 A.2d at 170.

We find no substantial question to be raised. Accordingly, we do not reach the merits of Appellant's argument. We affirm the judgment of sentence.

Judgment of sentence affirmed. Jurisdiction relinquished.