NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JOSEPH MCGRATH Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2393 EDA 2011

Appeal from the Judgment of Sentence August 26, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0000658-2011
CP-51-CR-0000698-2011 CP-51-CR-0006929-2010

BEFORE: LAZARUS, J., OLSON, J., and FITZGERALD, J.*

MEMORANDUM BY LAZARUS, J. **FILED MAY 10, 2013**

Joseph McGrath appeals from the judgment of sentenced imposed, in the Court of Common Pleas of Philadelphia County, after pleading guilty to criminal solicitation of murder,[1] witness intimidation,[2] criminal conspiracy to commit witness intimidation,[3] aggravated assault,[4] and criminal conspiracy to commit aggravated assault.[5] McGrath's counsel also seeks to withdraw

---

* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 902, 2502.

[2] 18 Pa.C.S. § 4952.

[3] 18 Pa.C.S. §§ 903, 4952.

[4] 18 Pa.C.S. § 2702.

[5] 18 Pa.C.S. §§ 903, 2702.

pursuant to the dictates of ***Anders v. California***, 386 U.S. 738 (1967), ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009), and ***Commonwealth v. McClendon,*** 434 A.2d 1185 (Pa. 1981). Upon review, we grant counsel's petition to withdraw and affirm McGrath's judgment of sentence.

The trial court summarized the facts of this case as follows:

> On March 19, 2010, at approximately 5:00 p.m. on the 1800 block of East Airdrie Street in the City and County of Philadelphia, Pennsylvania, the complaining witness, Neil Laun was walking to the corner store. [McGrath] walked over to Mr. Laun, grabbed him by the shoulder, punched him in the face and kicked him to the ground. [McGrath] started kicking and stomping Mr. Laun about the face, head, chest, and back, repeating, "Give me the money. Give me the money." [McGrath] also engaged an unidentified co-conspirator in stomping and kicking Mr. Laun. Amber Pratt, Mr. Laun's neighbor, yelled at the perpetrators to stop and called the police. [McGrath] then threatened to kill Ms. Pratt if she called the cops. [McGrath] and his unidentified co-conspirator left the scene in a vehicle.
>
> Mr. Laun was transported by fire rescue to Aria Frankford Division Hospital and then transferred to Aria Torresdale Division Hospital. He was admitted to the ICU in critical condition. He suffered from four broken ribs, four broken vertebrae . . ., a broken right orbital socket, a broken jaw, multiple facial fractures and a punctured lung. Mr. Laun was placed on a ventilator due to respiratory failure. Additionally, a doctor informed Mr. Laun that [had] he sustained one more punch, he would have died. At the time of the incident, Mr. Laun weighed approximately 170-180 pounds, while [McGrath] weighed approximately 300 pounds.
>
> On May 1, 2010, Nicole Rosa sent [McGrath] several text messages stating that she wished to purchase Xanax from him at his residence. At the time that these text messages were sent, Ms. Rosa was seated in a car with two First Judicial District Warrant Unit Officers ("FJD warrant officers"), who were looking to apprehend [McGrath].

> [McGrath] sent a text message to Ms. Rosa, which stated, "Are you coming over? Hurry up. I want to go to bed." Ms. Rosa delayed the purchase by saying that she was on her way. After approximately one minute, two FJD warrant officers walked up to [McGrath's] house, entered it and arrested him. Nathaniel McGrath, [McGrath's] nephew, was the only other person in the house at the time of [McGrath's] arrest.
>
> While at Curran-Fromhold Correctional Facility, [McGrath] made numerous telephone calls from the prison that were recorded by the Philadelphia Prisons and Public Call, Incorporated. The transcripts of these recordings were dated from May 3, 2010 [to] May 26, 2010. The messages revealed the following: on May 3, 2010, [McGrath] called his nephew, Nathaniel, and informed him that Ms. Rosa had "set him up" and he wanted her dead. He told his nephew to mix battery acid with a batch of heroin that was to be sold to Ms. Rosa by [McGrath's] accomplice in drug selling[,] a Leomar Arce. [McGrath] informed Nathaniel that he would find Ms. Rosa's phone number in his cell phone. On May 19, 2010, [McGrath] had a telephone conversation with his sister and told her that he wanted complainant, [Ms.] Rosa, dead.
>
> In the afternoon of May 10, 2010, according to the prison log [McGrath] met with Nathaniel and Leomar for approximately twenty minutes. During subsequent recorded prison phone conversations with Nathaniel, [McGrath] instructed Nathaniel to pay Mr. Laun $500 every time he did not appear in court. Complainant Laun, subsequently met with the assigned assistant district attorney on October 19, 2010, and corroborated the information from the recorded prison phone conversations. Mr. Laun informed the ADA that he was physically approached by Nathaniel three times and offered $500 to not appear in court. Mr. Laun also stated that on one occasion Leomar pulled up his shirt, showed him bullet holes, and told him that this is what could happen to him.

Trial Court Opinion, 8/15/12, at 2-4 (citations omitted).

McGrath pled guilty to the above-referenced offenses in separate proceedings on March 3, 2011 and May 3, 2011. The trial court sentenced him on August 26, 2011 to twenty to forty years' incarceration plus two five-year terms of probation to run consecutively to his sentence of incarceration.

McGrath then filed a motion for reconsideration of sentence and a motion to withdraw his guilty plea, which the court denied on September 1, 2011, without a hearing.

McGrath filed a timely notice of appeal, and on December 28, 2011, he filed a timely statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). The trial court filed its Rule 1925(a) opinion on August 15, 2012.

On November 8, 2012, pursuant to ***Anders***, McGrath's counsel filed a petition to withdraw and an accompanying brief. "When faced with a purported ***Anders*** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw." ***Commonwealth v. Rojas***, 874 A.2d 638, 639 (Pa. Super. 2005). Furthermore, counsel must comply with certain mandates when seeking to withdraw pursuant to ***Anders***, ***Santiago***, and ***McClendon***. These mandates are not overly burdensome and have been summarized as follows:

> Direct appeal counsel seeking to withdraw under ***Anders*** must file a petition averring that, after a conscientious examination of the record, counsel finds the appeal to be wholly frivolous. Counsel must also file an ***Anders*** brief setting forth issues that might arguably support the appeal along with any other issues necessary for the effective appellate presentation thereof.
>
> ***Anders*** counsel must also provide a copy of the ***Anders*** petition and brief to the appellant, advising the appellant of the right to retain new counsel, proceed *pro se* or raise any additional points worthy of this Court's attention.
>
> If counsel does not fulfill the aforesaid technical requirements of ***Anders***, this Court will deny the petition

> to withdraw and remand the case with appropriate instructions (e.g., directing counsel either to comply with ***Anders*** or file an advocate's brief on Appellant's behalf).

Commonwealth v. Woods, 939 A.2d 896, 898 (Pa. Super. 2007) (citations omitted).

Moreover, the ***Anders*** brief that accompanies counsel's petition to withdraw must:

> (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Santiago, 978 A.2d at 361.

Here, counsel has filed a petition averring that, after a thorough review of the record, he finds the appeal to be wholly frivolous, and states his reasons for so concluding. ***Santiago***, ***supra***. Counsel also filed a brief that provided a summary of the case's factual and procedural history and included citations to the record. Counsel provided a copy of the ***Anders*** petition and brief to McGrath, advised him of the right to retain new counsel, proceed *pro se*, and raise any additional points worthy of this Court's attention. Accordingly, we find counsel has met the requirements of ***Anders***, ***McClendon***, and ***Santiago***.

Once counsel has satisfied the above requirements, this Court conducts its own review of the proceedings and renders an independent

judgment as to whether the appeal is, in fact, wholly frivolous. ***Commonwealth v. Wright***, 846 A.2d 730, 736 (Pa. Super. 2004).

McGrath preserved the following issues in his 1925(b) statement of errors complained of on appeal:

> 1. Was the sentencing court's sentence excessive?
>
> 2. Was the sentencing court's denial of [McGrath's] timely filed motion to reconsider improper?
>
> 3. Was [McGrath's] plea of guilty made knowingly, voluntarily and intelligently?

Pa.R.A.P. 1925(b) Statement, 12/18/11.

McGrath's allegation that his sentence was excessive is a challenge to the discretionary aspect of his judgment of sentence. Judicial review of the discretionary aspects of a judgment of sentence is granted only upon a showing that there is a substantial question that the sentence was inappropriate and contrary to the fundamental norms underlying the Sentencing Code. ***Commonwealth v. Tuladziecki***, 422 A.2d 17 (Pa. 1987). 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 in the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Commonwealth v. Brown***, 741 A.2d 726, 735 (Pa. Super. 1999) (*en banc*).

The trial court did not abuse its discretion by ordering McGrath to serve his sentences consecutively. The decision to impose consecutive or concurrent sentences is left to the sound discretion of the trial court. ***Commonwealth v. Prisk***, 13 A.3d 526 (Pa. Super. 2011). A challenge to a sentencing court's decision to impose consecutive sentences does not generally establish a substantial question. ***Id.*** Whether a claim alleging that a consecutive sentence is excessive raises a substantial question depends upon a determination "whether the decision to sentence consecutively raises the aggregate sentence to, what appears on its face to be, an excessive level in light of the criminal conduct at issue in the case." ***Commonwealth v. Mastromarino***, 2 A.3d 581, 587 (Pa. Super. 2010).

McGrath's criminal conduct included kicking a victim until he was unconscious, ordering others to bribe and intimidate the victim, and directing them to kill the woman who "set him up." In light of this conduct, the excessive sentence claim does not raise a substantial question.

Counsel for McGrath also suggests as a potential issue that the trial court failed to consider certain mitigating factors. It is well settled that a claim that the court did not consider mitigating factors does not raise a substantial question. ***Commonwealth v. Cannon***, 954 A.2d 1222, 1229 (Pa. Super. 2008). Furthermore, in this case the trial court had the benefit of a presentence report. "Where a presentence report exists, and the sentence is within the sentencing guideline ranges, the appellate court should presume the sentencing court was aware of any and all relevant

information contained in the report and weighed those considerations along with all mitigating factors." ***Commonwealth v. Ellis***, 700 A.2d 948, 958 (Pa. Super. 1997).

All of these reasons support our conclusion that the trial court did not impose an excessive sentence.

McGrath asserts that the trial court erred when it denied his motion for reconsideration of sentence filed pursuant to Pa.R.Crim.P. 720. It is well-settled that the purpose of Rule 720 is to provide the sentencing court with the opportunity to modify its sentence and to correct any errors that may have occurred at sentencing. ***Commonwealth v. Cottman***, 476 A.2d 40 (Pa. Super. 1984). In light of the seriousness of McGrath's offenses and his failure to establish that his sentence was excessive, the trial court did not err when it denied his motion for reconsideration.

McGrath next argues that the trial court erred by denying his motion to withdraw his guilty plea. He alleges that he did not enter his pleas knowingly and intelligently because counsel failed to advise him that the court could order his sentences to run consecutively.

To withdraw a guilty plea after sentence has been entered, there must be a showing of prejudice that results in a manifest injustice to the defendant. ***Commonwealth v. Middleton***, 473 A.2d 1358 (Pa. 1984). To establish manifest injustice, a defendant must show that his guilty plea was involuntary or was entered into unknowingly. ***Commonwealth v. Young***, 695 A.2d 414 (Pa. Super. 1997).

During the guilty plea, the court should ask the following questions of the defendant:

1. Does the defendant understand the nature of the charges to which he or she is pleading guilty or *nolo contendere*?
2. Is there a factual basis for the plea?
3. Does the defendant understand that he or she has the right to a trial by jury?
4. Does the defendant understand that he or she is presumed innocent until found guilty?
5. Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?
6. Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Pa.R.Crim.P. 590 – Comment.

Here, McGrath's oral colloquy and his signature on the written plea agreement ensure that his plea was entered voluntarily, knowingly, and intelligently. ***See Commonwealth v. Sauter***, 567 A.2d 707, 708-09 (Pa. Super. 1989) (recognizing propriety of supplementing in-court colloquy with written statement of appellant's rights in decision whether guilty plea was entered knowingly and intelligently). With respect to the requirements set forth in Rule 590, the record indicates the following: (1) McGrath understood the charges against him; (2) he agreed to the Commonwealth's summary of the case against him; (3) he understood his right to a trial by jury; (4) he understood that he was presumed innocent unless the Commonwealth proved his guilty beyond a reasonable doubt; (5) the court

informed McGrath that the maximum aggregate sentence that could be imposed for the crimes he was charged with was 100 years' incarceration and a fine of $125,000; and (6) the court informed him that it was not bound by the terms of the plea agreement unless it accepted the agreement. N.T. 3/3/11, 7-22, 27; N.T. 4/29/11, 7-16, 19.

"The law does not require that a defendant be pleased with the outcome of his decision to enter a plea of guilty. All that is required is that the defendant's decision to plead guilty be knowingly, voluntarily and intelligently made." ***Commonwealth v. Yager***, 685 A.2d 1000, 1003 (Pa. Super. 1996). The record supports the trial court's conclusion that McGrath's guilty plea met those requirements, and accordingly he is not entitled to relief.

Because McGrath's claims are frivolous, we grant counsel's request to withdraw.

Judgment of sentence affirmed. Petition to withdraw as counsel granted.

Judgment Entered.

Prothonotary

Date: 5/10/2013