NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DEVINE MORRIS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2451 EDA 2011

Appeal from the Judgment of Sentence Entered August 12, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0002164-2010

BEFORE: BENDER, J., BOWES, J., and LAZARUS, J.

MEMORANDUM BY BENDER, J.: **FILED MAY 29, 2013**

Appellant, Devine Morris, appeals from the judgment of sentence of 27 to 54 years' incarceration, imposed after he was convicted, *inter alia*, of third-degree murder. Appellant challenges the sufficiency of the evidence to sustain his murder conviction, as well as discretionary aspects of his sentence. We affirm.

During Appellant's three-day, non-jury trial in June of 2011, the Commonwealth presented evidence that Appellant shot and killed the victim, Nasime Odd, on November 20, 2009, inside the Crazy Hands Barbershop in Philadelphia. At the conclusion of his trial, Appellant was convicted of third-

degree murder, possessing an instrument of crime (PIC), and two violations of the Uniform Firearms Act (VUFA), 18 Pa.C.S. §§ 6101-6127.[1]

Appellant was subsequently sentenced to the aggregate term of incarceration stated *supra*. He filed a timely post-sentence motion for reconsideration of his sentence, which the court denied. Appellant then filed a timely notice of appeal, as well as a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Herein, Appellant presents the following two issues for our review:

> I. Is [Appellant] entitled to an arrest of judgment on all charges where the verdict is not supported by sufficient evidence?[2]
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> II. Is [Appellant] entitled to a remand to the Sentencing Court for a new Sentencing Hearing where the Sentencing Court violated its discretion in imposing sentence?

Appellant's Brief at 3.

Our standard of review of Appellant's first issue is well-settled:

> In reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense. ***Commonwealth v. Moreno***, 14 A.3d

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[1] Specifically, Appellant was convicted of violating section 6106 (carrying a firearm without a license) and 6108 (carrying a firearm on a public street in a city of the first class). We will refer to these convictions as VUFA 6106 and VUFA 6108.

[2] While Appellant's issue states that he is challenging "all charges" of which he was convicted, his argument only addresses the sufficiency of the evidence to sustain his third-degree murder conviction.

> 133 (Pa. Super. 2011). Additionally, we may not reweigh the evidence or substitute our own judgment for that of the fact finder. ***Commonwealth v. Hartzell***, 988 A.2d 141 (Pa. Super. 2009). The evidence may be entirely circumstantial as long as it links the accused to the crime beyond a reasonable doubt. ***Moreno, supra*** at 136.

Commonwealth v. Koch, 39 A.3d 996, 1001 (Pa. Super. 2011).

Appellant challenges his conviction of third-degree murder, which is defined as "any killing with malice that is not first or second degree murder." ***Commonwealth v. Levin***, 816 A.2d 1151, 1152 (Pa. Super. 2003) (citing 18 Pa.C.S. § 2502(c)). This Court has explained that:

> Malice consists of a "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured...." Malice may be found where the defendant consciously disregarded an unjustified and extremely high risk that his actions might cause serious bodily injury.

Id. at 1153 (quoting ***Commonwealth v. DiStefano***, 782 A.2d 574, 582 (Pa. Super. 2001)). Moreover, "malice may be inferred from the use of a deadly weapon on a vital part of the body." ***Commonwealth v. Seibert***, 622 A.2d 361, 364 (Pa. Super. 1993) (citations omitted).

Instantly, Appellant argues that the Commonwealth's evidence demonstrated that he shot and killed the victim "out of anger or rage" after arguing with the victim about "an ongoing dispute." Appellant's Brief at 9. Therefore, he contends that he acted in the heat of passion, not with malicious intent and, consequently, he should have been convicted of voluntary manslaughter, not third-degree murder.

After reviewing the record, we conclude that Appellant's argument is meritless. The evidence presented by the Commonwealth was summarized by the trial court as follows:

> Andrea Whitehead, the decedent's wife[,] testified that her husband owned and operated the Crazy Hands Barbershop. Appellant, whom Ms. Whitehead knew as "Wheezy," was a barber who worked at the shop. At the time of the killing Appellant was behind in his rent payments to the decedent. About four (4) days before the shooting Appellant and the decedent had an argument inside the barbershop over this issue.
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> Both Samuel Minor and his brother-in-law, Anthony Slocum[,] were regular customers at Crazy Hands Barbershop and were present at the time of the fatal confrontation between the decedent and Appellant, whom the witnesses knew as "Wheeze." Samuel Minor testified that he was in the barber chair and the decedent was about halfway through finishing his haircut when Appellant came in and started talking about the rent issue. As the discussion started escalating into an argument, the decedent said, "Calm down. Why [are] you getting serious?" Appellant repeatedly said, "I love you man." Appellant and the decedent started walking towards the door when Appellant said "pussy" and pulled out a gun. The decedent started running towards the back of the shop and Appellant chased him. Both the witness and Slocum ran out of the shop. The witness then heard gunfire. After the gunfire stopped and after the witness saw Appellant flee from the shop and get into a sky-blue Maxima, the witness went back into the shop to try to render aid to the victim. He saw the gun by the radiator. As he was over the body police arrived and ordered him to the ground. The witness complied and was handcuffed.
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> Anthony Slocum testified that he also was a regular customer of the barber shop and went to the shop with Mr. Minor that evening. He was sitting in a chair across from the barber chair when Appellant came in. Appellant started talking with the decedent. As Appellant's voice got loud, the decedent kept telling him to "chill out." Appellant kept saying, "I love you, man." Appellant walked to the door, pulled out a gun and started shooting. When the decedent saw the gun he started running towards the back. Appellant started firing and the

witness and Minor fled the shop. After the shooting stopped they went back to the shop. Minor went in and the witness stayed outside. Police arrived and ordered them to the ground. The witness complied.

Philadelphia Police Officer William Postowski testified that on November 20, 2009 at approximately 10:20 p.m. he was on routine patrol about two (2) blocks from the barbershop when he heard multiple gunshots. He went to the scene and saw Samuel Minor, wearing a barber's apron run into the barbershop. He went in and ordered Minor to the ground. Minor complied and was handcuffed. The decedent, who appeared to be shot in the head, was in the rear of the shop. Minor told him that he witnessed the shooting and told him that the shooter left in a blue vehicle. He saw a handgun near the feet of the victim and saw spent shell casings throughout the barbershop.

Philadelphia Police Officer Andre Daniels testified that on November 20, 2009 at approximately 11:20 p.m., he was on routine patrol in a marked vehicle near 2800 Lehigh when Appellant jogged towards him and said, "I did it." The officer said, "Did what?" Appellant said two more times, "I did it. I did it. You know what I did." The officer asked Appellant if he was high and Appellant said yes. Believing Appellant may have been high[,] the officer got out of the car, asked Appellant to put his hands on the car and frisked him. Appellant had a bottle containing [phencyclidine, also known as] PCP[,] in his pocket. While arresting Appellant for drug possession Appellant said that his heart was hurting and he was having trouble breathing. The officer took him to Hahnemann Hospital.

The crime scene investigator, Officer William Whitehouse[,] processed the scene. In addition to finding blood stains, the officer recovered the gun. There were two (2) unfired cartridges in the magazine and one additional unfired cartridge jammed between the magazine assembly and the chamber. Eleven (11) fired cartridge casings were recovered inside the shop and six (6) bullets or bullet jackets were recovered from the front portion of and outside the barber shop.

The firearms expert, Officer Lawrence Flagler[,] testified that the recovered gun's magazine had a capacity of sixteen (16) rounds. All of the recovered fired cartridge casings were matched to that gun. All of the other recovered ballistics

> evidence including the body bullet was consistent with being fired from that gun.
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> The medical examiner, Dr. Gary Collins[,] testified that the decedent received three gunshot wounds. The fatal wound entered the back of his head, above the left ear and lodged in the brain. The other two bullet wounds were to the left side of his back and to the left shoulder.

Trial Court Opinion (T.C.O.), 9/28/12, at 4-7 (citations to the record omitted).

We conclude that this evidence sufficiently demonstrated that Appellant acted with a "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty." ***Levin***, 816 A.2d at 1153. Appellant pointed a gun at the victim and, as the victim fled, Appellant shot at him at least 11 times, striking him in his back, shoulder, and head.[3] The fact that Appellant shot the victim in the head, in and of itself, demonstrates that Appellant acted maliciously. ***Seibert***, 622 A.2d at 364. Furthermore, we disagree with Appellant that the evidence in this case could only sustain a conviction of voluntary manslaughter. The Commonwealth argues, and we agree, that the "serious provocation" element of that offense was arguably absent, as evidenced by the victim's repeated requests for Appellant to "calm down" during their argument. ***See*** 18 Pa.C.S. § 2503(a). Moreover, the fact that Appellant shot the victim

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[3] Moreover, the evidence indicated that Appellant attempted to fire a twelfth shot, which "jammed between the magazine assembly and the chamber." T.C.O. at 6.

multiple times in the back as he tried to flee undercuts his "heat of passion" assertion. Instead, such conduct was unquestionably malicious and, thus, we conclude that the evidence was sufficient to sustain Appellant's conviction of third-degree murder.

Next, Appellant's challenges discretionary aspects of his sentence. In assessing these claims, we are guided by the following legal principles:

> 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, 886-887 (Pa. Super. 2008) (citations, quotation marks and footnote omitted; emphasis in original).

Appellant has presented a Rule 2119(f) statement in his brief to this Court. Therein, he claims that the court imposed "maximum sentences" for all of his convictions except for PIC, and then directed that those terms of

imprisonment run consecutively, resulting in a manifestly excessive sentence. Additionally, Appellant contends that the sentence "violates the sentencing norms established in 42 Pa.C.S.[] § 9721(b)" because it "far exceed[s] what is necessary to protect the public, or to provide for the rehabilitative needs of [Appellant]." Appellant's Brief at 11. Appellant also argues that the court sentenced him to a lengthier term of incarceration because the court believed it had given Appellant "a 'break' … by finding him not guilty of Murder in the First[-]Degree." ***Id.*** Appellant alleges that this amounted to consideration of an impermissible sentencing factor. ***Id.***

While we conclude that these claims present substantial questions for our review,[4] the majority of the assertions presented in the argument portion of Appellant's brief are different from the issues raised in his Rule 2119(f) statement. For instance, Appellant states that "the [s]entencing [c]ourt focused primarily, if not exclusively, on the seriousness of the crime," and he also contends that the court improperly considered his criminal history even though that factor was already accounted for in the

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[4] ***See Commonwealth v. Dodge***, 859 A.2d 771, 776 (Pa. Super. 2004), *vacated and remanded on other grounds*, 935 A.2d 1290 (Pa. 2007) (finding substantial question where there were numerous standard range sentences imposed to run consecutively); ***Commonwealth v. Simpson***, 829 A.2d 334, 338 (Pa. Super. 2003) (concluding that a claim that court considered impermissible factors in fashioning a sentence raises substantial question); ***Commonwealth v. House***, 537 A.2d 361, 364 (Pa. Super. 1988) (considering claim that sentence violated 42 Pa.C.S. § 9721(b) as presenting substantial question).

Sentencing Guidelines. Appellant's Brief at 13. Appellant further alleges that the court failed to consider mitigating circumstances that made his conduct "far different from any other murders in the [t]hird[-][d]egree," such as "the fact … that he was acting very strangely on the night of the incident," and "that there had been a long running disagreement by and between the victim and [Appellant] over the payment of rents." ***Id.***

Not only are these arguments not included in Appellant's Rule 2119(f) statement, but Appellant also fails to provide any citations to the transcript of the sentencing hearing to support his allegations. The only assertion presented in both Appellant's Rule 2119(f) statement and the argument portion of his brief is that the court sentenced Appellant to a lengthier term of imprisonment because it gave him a "break" by not convicting him of first-degree murder. However, Appellant again fails to cite any portion of the record or statements by the court that would support this claim.

Despite Appellant's underdeveloped and unsupported arguments, we have assessed his sentence and conclude that it was not an abuse of the court's discretion.[5] First, contrary to Appellant's claim, the record makes

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[5] It is well-settled that this Court may reverse a sentence "only if the sentencing court abused its discretion or committed an error of law." ***Commonwealth v. Marts***, 889 A.2d 608, 613 (Pa. Super. 2005) (citation omitted). Furthermore, in evaluating a sentence, "[w]e must accord the sentencing court's decision great weight because it was in the best position to review the defendant's character, defiance or indifference, and the overall effect and nature of the crime." ***Id.*** (citation omitted).

clear that he did not receive "maximum" sentences for his convictions of third-degree murder, VUFA 6106, and VUFA 6108. ***See*** Appellant's Brief at 10 (stating "[t]he [c]ourt imposed the maximum sentence" for these three offenses). Instead, Appellant received standard range sentences for those crimes.[6] ***See*** T.C.O. at 8 ("We note that the sentences for Murder, VUFA[]6108 and PIC were within the standard range of the guidelines."); N.T. Sentencing Hearing, 8/12/11, at 3-4. While Appellant did receive a sentence higher than the guidelines for his offense of VUFA 6108, ***see*** T.C.O. at 8, and the court imposed all of his sentences to run consecutively, the court's decision was supported by the record and its statements during the sentencing hearing.

For instance, the court had the benefit of a presentence report and declared at the sentencing hearing that it reviewed that report. N.T. Sentencing Hearing, 8/12/11, at 71. The court also heard testimony from Appellant's mother, who discussed her history of drug abuse and its negative impact on Appellant. Furthermore, Appellant's counsel informed the court of

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[6] Specifically, at Appellant's sentencing hearing, the parties agreed that based on Appellant's prior record score of four, the standard range minimum sentences for his crimes were as follows: (1) 186 months to statutory limit (40 years) for third-degree murder; (2) 36 to 48 months for VUFA 6106; (3) 9 to 16 months for VUFA 6108; and (4) 9 to 16 months for PIC. ***See*** N.T. Sentencing Hearing, 8/12/11, at 3-4. Appellant received 20 to 40 years' imprisonment for his murder conviction, 3½ to 7 years for his VUFA 6106 offense, and 1 to 2 years' incarceration for his PIC conviction. He received 2½ to five years for his VUFA 6108 offense.

Appellant's own struggles with drug abuse. The court additionally considered the testimony of the victim's wife and daughter, as well as several other family members, who all detailed the grievous impact that the victim's murder had on his family and the community. Ultimately, the court indicated that it was imposing a lengthy sentence because of "the facts of this case," including the impact of Appellant's crimes on the victim's family, Appellant's drug use, and his "poor impulse control." ***Id.*** at 71. The court further concluded that "the actions that [Appellant] took on that day" evinced that he is "a danger to the community." Finally, the court stated that it considered "the number of times [Appellant] has been previously arrested, his convictions, [and] his violations of parole." ***Id.*** Based on all of these factors, the court imposed a lengthy term of incarceration. We ascertain no abuse of discretion in this decision, and Appellant's scant argument does not convince us otherwise. Therefore, Appellant's sentence must stand.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 5/29/2013