NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. MIKE GONZALEZ, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2554 EDA 2012

Appeal from the Judgment of Sentence Entered August 3, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0001099-2008

BEFORE: BENDER, P.J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY BENDER, P.J. **FILED DECEMBER 20, 2013**

Appellant, Mike Gonzalez, appeals from the judgment of sentence of an aggregate term of seven and one-half to fifteen years' incarceration, imposed following the revocation of two terms of probation. Appellant contends that the trial court misapplied the required factors to be considered at sentencing, and that his sentences are manifestly excessive. After careful review, we affirm.

Appellant was convicted of involuntary manslaughter at docket number CP-51-CR-0205941-2001 following a non-jury trial on May 17, 2002. The facts adduced at trial were that Appellant inflicted a skull fracture on his infant daughter, and she died as a result. Appellee's Brief at 2. On July 8,

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* Retired Senior Judge assigned to the Superior Court.

2002, Appellant was sentenced to a term of one and one-half to three years' incarceration followed by seven years' probation.

On August 28, 2008, Appellant pled guilty at docket number CP-51-CR-0001099-2008 to corruption of minors and was sentenced to a negotiated term of five years' probation. The factual basis for the plea was that Appellant had engaged in sexual intercourse on multiple occasions with a fifteen-year-old girl. N.T. Guilty Plea, 8/28/08, at 16. On one occasion, Appellant provided her with alcohol, and she became intoxicated and lost consciousness. ***Id***. When she awoke, Appellant was on the couch with her, and his penis was in her vagina. ***Id***.

On February 7, 2012, Appellant entered a plea of guilty at docket number CP-51-CR-0008170-2011 to rape, unlawful contact with a minor, and endangering the welfare of a child. The factual basis for that plea was that Appellant had engaged in weekly sexual intercourse with his step-daughter, who was eleven years old. N.T. Guilty Plea, 2/7/12, at 8.

On August 3, 2012, following a hearing, the trial court revoked Appellant's terms of probation in cases CP-51-CR-0205941-2001 and CP-51-CR-0001099-2008 as a result of his new conviction at CP-51-CR-0008170-2011. Following the revocation, Appellant was resentenced to five to ten years' incarceration at CP-51-CR-0205941-2001. Appellant was also resentenced to a consecutive term of two and one-half to five years' incarceration at CP-51-CR-0001099-2008.

Appellant filed a timely notice of appeal, as well as a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant now presents the following questions for our review:

> A. Did not the sentencing court violate the requirements of 42 Pa.C.S. §[]9721(b)? of the Sentencing Code which states that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant, as the lower court seemed to exclusively focus on [A]ppellant's criminal conduct rather than his rehabilitative needs or mitigating circumstances?
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> B. Was not the lower court's sentence violative of the precepts of the Pennsylvania Sentencing Code, and contrary to the fundamental norms of the sentencing process, and therefore was it not manifestly unreasonable, excessive, and an abuse of discretion?

Appellant's Brief at 4.

We note that there is "no absolute right to appellate review of the discretionary aspects of a sentence." ***Commonwealth v. Mouzon***, 812 A.2d 617, 621 (Pa. 2002). The appellant must present a "substantial question" to this Court for review by submission of a statement as required by Pa.R.A.P. 2119(f). ***See id.*** Rule 2119(f) states that an appellant must include in his brief "a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of the sentence." Pa.R.A.P. 2119(f).

> [T]he Rule 2119(f) statement must specify where the sentence falls in relation to the sentencing guidelines and what particular provision of the Code is violated (*e.g.,* the sentence is outside the guidelines and the court did not offer any reasons either on the

> record or in writing, or double-counted factors already considered). Similarly, the Rule 2119(f) statement must specify what fundamental norm the sentence violates and the manner in which it violates that norm (*e.g.*, the sentence is unreasonable or the result of prejudice because it is 500 percent greater than the extreme end of the aggravated range). If the Rule 2119(f) statement meets these requirements, we can decide whether a substantial question exists.

Commonwealth v. Goggins, 748 A.2d 721, 727 (Pa. Super. 2000). "Generally, 'in order to establish a substantial question, appellant must show actions by the sentencing court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.'" ***Commonwealth v. Sims***, 728 A.2d 357, 359 (Pa. Super. 1999) (quoting ***Commonwealth v. Gaddis***, 639 A.2d 462, 469 (Pa. Super. 1994)).

Appellant claims in his Rule 2119(f) statement that the sentencing court failed "to address all relevant sentencing criteria." Appellant's Brief at 9. Such a claim "raises a substantial question that the sentence imposed violates a fundamental norm underlying the sentencing process." ***Commonwealth v. Riggs***, 63 A.3d 780, 786 (Pa. Super. 2012).

Appellant also claims that the trial court abused "its discretion in balancing the factors and circumstances bearing on [his] sentence." Appellant's Brief at 9. Although a trial court is vested with the discretion to balance sentencing factors, "the manner in which a trial judge exercises that discretion raises a substantial question for appellate review." ***Commonwealth v. Coulverson***, 34 A.3d 135, 143 (Pa. Super. 2011). Moreover, in the instant case, Appellant claims his maximum sentence is

extraordinarily long. A trial court's failure to properly balance sentencing factors is particularly called into question where the maximum sentence in question is extraordinarily long. ***Id.*** Accordingly, this claim also raises a substantial question for our review, and we will address Appellant's sentencing claims on the merits.

Appellant first argues that the trial court focused exclusively on the seriousness of the underlying crimes, and did not account for factors such as Appellant's background. We find this claim meritless.

When imposing a sentence, a trial court is required to "follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S. § 9721(b).[1] The record demonstrates that the trial court considered the applicable sentencing factors when imposing Appellant's sentences:

> In imposing the consecutive sentences of five to ten years of incarceration followed by two and a half to five years [of] incarceration, the trial court considered, *inter alia*, [Appellant]'s pre-sentence investigation, the expert testimony of Dr. Ziv along with her expert report that provided the basis for the court to find that [Appellant] is a sexually violent predator, its

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[1] Appellant's sentences were imposed pursuant to a probation revocation, to which the Sentencing Guidelines do not apply. ***See Commonwealth v. Reeves***, 923 A.2d 1119, 1129 (Pa. 2007). Moreover, the sentencing court may consider the same sentencing alternatives that it had at the time of initial sentencing following a revocation of probation. 42 Pa.C.S. § 9771(b).

opportunity to observe [Appellant] during the violation and sentencing hearings, counsels' arguments, [Appellant]'s statements during the violation and sentencing hearings, and the support of [Appellant]'s sister and brother-in-law. [Appellant], as a sexually violent predator, has the combination of a deviant sexual interest and antisocial behavior that puts him in the category of an individual with the greatest indication of recidivism. The trial court also considered the fact that when [Appellant] pled guilty to the corruption of minors charge, he was on probation for involuntary manslaughter, and he was repeatedly sexually assaulting his own stepdaughter. He continued these violent assaults after his stepdaughter became pregnant as a result of the sexual assaults, and even after his stepdaughter terminated this pregnancy by abortion.

Based upon the foregoing, the trial court's sentence was consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and [Appellant]'s rehabilitative needs. This was particularly true given that [Appellant] committed multiple violent sexual offenses while on probation and is classified as an individual with a 100% risk of recidivism.

…

[Appellant] had several opportunities of probation and rehabilitation. Each time while serving a probationary term, both under his conviction for involuntary manslaughter and then while under probation for corruption of minors, [Appellant] committed direct violations of his probation by committing another violent or sexual crime. While on probation for involuntary manslaughter, [Appellant] sexually assaulted his stepdaughter starting around the time she was ten years old. He continued this criminal behavior while on probation for the corruption of minors conviction, after his stepdaughter became pregnant as a result of the sexual assaults, and even after his stepdaughter terminated the pregnancy by abortion. Moreover, the trial court sentenced [Appellant] to a sentence that did not exceed the maximum period of incarceration allowable under a conviction of a felony of the second degree and under a misdemeanor of the first degree for each respective offense. For these reasons, [Appellant]'s sentence was reasonable and an appropriate exercise of its discretion.

Trial Court Opinion (TCO), 6/27/13, at 3 – 4, 5 (citations to the record omitted). In addition, the trial court considered that Appellant had the support of his family, and reviewed a report that provided Appellant's mental health, drug and alcohol, family, and employment history. N.T. Sentencing, 8/3/12, at 82, 83 - 84. Accordingly, we conclude that the trial court considered the proper factors when imposing Appellant's sentence.

Appellant also claims that his sentences are manifestly excessive, as the maximum sentences are unusually lengthy.[2] As support for this claim, Appellant relies on ***Coulverson***, ***supra***, in which the defendant was sentenced to a term of eighteen to ninety years' incarceration. In ***Coulverson***, the defendant's maximum sentence was five times his minimum sentence. Because it subjected the defendant to ninety years of correctional supervision, it was also essentially a *de facto* life sentence. ***Id.*** at 139. Even though Coulverson was sentenced to multiple consecutive terms of the statutory maximum sentence, the trial court

> offered no acknowledgement whatsoever of the Sentencing Guidelines except to document that the lower end of the sentences it imposed was in the standard range. Moreover, although the court imposed a prison sentence for Felony I

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[2] The sentences at issue are to run consecutively to Appellant's sentence of eight to twenty years' incarceration for his new conviction at docket number CP-51-CR-0008170-2011. We note that Appellant did not file a direct appeal from his conviction at docket number CP-51-CR-0008170-2011, and his sentence for that conviction is not reviewable in the instant appeal.

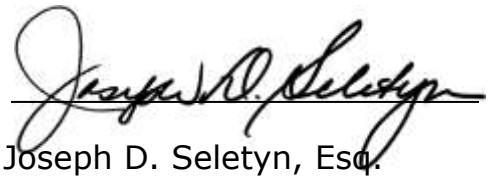
> Burglary … it provided no discussion whatsoever of the circumstances involved or its reasoning in imposing that sentence. Additionally, although the court pronounced an illegal 20–year Robbery sentence for Coulverson's theft of $10 from the rape victim's purse, it never adverted to the underlying circumstances or explained why that offense merited such a sentence. Indeed, even coupled with its admonition emphasizing the impact on the rape victim and her family, *supra,* the court's discussion offers a regrettably scant explanation for imposition of sentence on any of Coulverson's convictions.

Id. at 146. The trial court also failed to take into account Coulverson's traumatic childhood, mental illness, cooperation with law enforcement, lack of prior record, and remorse. ***Id.*** at 143, 146.

In the instant case, Appellant was sentenced to one term of five to ten years' incarceration, and one term of two and one-half to five years' incarceration. Both of Appellant's maximum sentences are only two times the minimum sentence. In fact, Appellant's sentences would be illegal if his maximum sentences were any shorter, as a minimum sentence of confinement may not exceed one-half of the maximum imposed. 42 Pa.C.S. § 9756(b)(2). The trial court considered Appellant's prior rehabilitative attempts, noting that Appellant had been presented with "several opportunities of probation and rehabilitation," and each time, Appellant "committed direct violation of his probation by committing another violent or sexual crime." TCO at 6. As such, Appellant's claim that his maximum sentences are manifestly excessive is without merit.

Judgment of sentence ***affirmed***.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/20/2013