NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOHN BEDNARIK II, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2663 EDA 2012

Appeal from the Order Entered September 14, 2012
In the Court of Common Pleas of Lehigh County,
Criminal Division, at No(s): CP-39-CR-0002899-2012

BEFORE: PANELLA, OLSON and STRASSBURGER,* JJ.

MEMORANDUM BY OLSON, J. **FILED SEPTEMBER 10, 2013**

Appellant, John Bednarik, II, appeals from the judgment of sentence entered September 14, 2012, as made final by the denial of his post-sentence motion, sentencing him to nine to 21 months' incarceration, followed by 15 months' probation, for convictions of one count of invasion of privacy,[1] and one count of criminal attempt to commit invasion of privacy.[2] For the following reasons, we vacate and remand for resentencing.

The trial court summarized the relevant factual and procedural background of this matter as follows.

> On May 29, 2012, [C.S.], [ ], was in her office in Dooling Hall [at DeSales University]. Around 10:00 a.m., [C.S.] was utilizing a

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[1] 18 Pa.C.S.A. § 7507.1(a)(1).

[2] 18 Pa.C.S.A. § 901(a).

* Retired Senior Judge assigned to the Superior Court.

breast pump, which caused her breasts to be exposed, when she heard something in the ceiling. [C.S.] looked up, saw a ceiling tile moved, and observed a camera lens. [C.S.] covered herself up and ran out of her office. Outside in the hallway, [C.S.] ran into [Appellant] exiting an adjacent office. [Appellant], a graduate of DeSales, worked as the Director of Campus Environment and knew [C.S.]. [Appellant] said, "[C.S.], it's just me. I'm sorry. This is only the second time I've done this. Things are really bad at home and I've got a thing for you." [C.S.] asked where the camera was, and [Appellant] walked into the adjacent office. [C.S.] followed and observed a ladder and a ceiling tile moved. [C.S.] went to University officials and campus security subsequently recovered a video camera from [Appellant]. The camera's content was downloaded and viewed. The video showed [C.S.] in her office partially nude and utilizing the breast pump. [Appellant] admitted recording [C.S.] and stated he did it for his own sexual gratification.

Upon further investigation, additional incidents involving [Appellant] and University employees were discovered. It was determined that on or about February 1, 2011, [M.Q.], [ ], and [T.R.], [ ], were changing in a women's locker room at DeSales when they observed a male figure peering in through a window. The figure quickly dropped down from view. At the time, the women did not know who was looking in the window. The following day, [Appellant] approached [M.Q.] and apologized. [Appellant] told [M.Q.] that he was just doing work on the window and did not see anything. University officials later determined there were no work orders relating to the window, and if there had been, there were policies in place for work that was done near locker rooms.

Additionally, on or about March 1, 2012, [L.Z.], [ ], entered the same wom[e]n's locker room, changed, and proceeded to leave. At the time, [L.Z.] was unaware that anything had occurred. Subsequently, when police viewed the video from [Appellant's] camera in relation to [C.S.], they observed video of [L.Z.] entering the facility and changing. No nudity was observed due to the angle of camera, which had been placed in the locker room under a towel. Police also observed [Appellant] on the video as he removed the camera. When questioned, [Appellant] admitted placing the camera in the locker room. [Appellant] was subsequently charged as stated above.

Trial Court Opinion, 11/30/2012, at 2-3.

On September 14, 2012, Appellant pled guilty to one count of invasion of privacy and one count of criminal attempt to commit invasion of privacy. He also entered an ***Alford*** plea to an additional count of criminal attempt to commit invasion of privacy.[3] Appellant waived his right to a presentence investigation report. The trial court immediately sentenced Appellant as set forth above.

On September 18, 2012, Appellant filed a motion to modify and reduce his sentence, stating that he had failed to inform the court of certain hardships that incarceration would create for him and his family. Following a hearing on September 24, 2012, the trial court denied Appellant's motion. This timely appeal followed.

Appellant presents one issue on appeal:

> Whether the [trial court] abused its discretion and imposed a sentence in violation of the Sentencing Code as the sentence was unreasonable, based upon facts other than those presented at plea and sentencing, lacking sufficient basis in reasons placed on the record, and based upon improper factors, to wit: (a) that Appellant was employed by a Catholic organization and is himself a practicing Catholic; (b) that some of the victims were Appellant's co-workers; and (c) that Appellant was in a position of trust within his place of employment?

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[3] An ***Alford*** plea is a *nolo contendere* plea in which the defendant does not admit guilt but waives his trial and voluntarily, knowingly, and understandingly consents to the imposition of punishment by the trial court. ***See North Carolina v. Alford***, 400 U.S. 25, 37 (1970).

Appellant's Brief at 4.[4]

Appellant's sole issue on appeal challenges the discretionary aspects of his sentence. Initially, we note that, while a guilty plea which includes sentence negotiation ordinarily precludes a defendant from contesting his or her sentence other than to argue that the sentence is illegal or that the sentencing court lacked jurisdiction, open plea agreements are an exception in which a defendant may appeal the discretionary aspects of the sentence. ***See Commonwealth v. Guth****,* 735 A.2d 709, 711, n.3 (Pa. Super. 1999). Here, the plea agreement did not contain a negotiated sentence and, therefore, does not preclude appellate review of Appellant's discretionary sentence challenge. ***Commonwealth v. Johnson***, 961 A.2d 877, 879 (Pa. Super. 2008).

Furthermore, under well-accepted Pennsylvania law,

> [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. 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.[5] Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. In order to

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[4] The requirements of Pennsylvania Rule of Appellate Procedure 1925 have been satisfied in this matter.

[5] ***See*** Pa.R.A.P. 2119(f).

> establish a substantial question, the appellant must show actions by the trial court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.

Commonwealth v. McAfee, 849 A.2d 270, 274 (Pa. Super. 2004) (internal citations omitted). Moreover, we note that when determining whether an appellant has set forth a substantial question "[o]ur 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. Tirado***, 870 A.2d 362, 365 (Pa. Super. 2005) (emphasis in original).

In the present case, Appellant's brief contains the requisite Rule 2119(f) concise statement, and, as such, is in technical compliance with the requirements to challenge the discretionary aspects of a sentence. ***See*** Appellant's Brief at 9-10. Therefore, we proceed to determine whether Appellant has presented a substantial question that the sentence appealed from is not appropriate under the Sentencing Code. ***See McAfee***, 849 A.2d at 274.

Appellant asserts that his appeal presents a substantial question because the trial court failed to place sufficient reasons for its sentence on the record and because the sentence is so disproportionate as to implicate the fundamental norms that underlie the sentencing process. Appellant's Brief at 10. This Court has held that an assertion that the trial court failed to sufficiently state its reasons for imposing a sentence within the

aggravated range raises a substantial question. ***See Commonwealth v. Miller***, 835 A.2d 377, 380 (Pa. Super. 2003); ***see also Commonwealth v. Hyland***, 875 A.2d 1175, 1183-1184 (Pa. Super. 2005) (holding that claim that sentencing court imposed a sentence at the top of the aggravated range without considering mitigating circumstances raises a substantial question); ***Commonwealth v. McNabb***, 819 A.2d 54, 56-57 (Pa. Super. 2003) (holding that allegations that sentencing court did not adequately state its reason for the sentence and impermissibly considered certain factors raised a substantial question). Consequently, we proceed to consider the merits of Appellant's appeal.

Within his appeal, Appellant, *inter alia*, challenges the trial court's reliance upon Appellant's religion and employment by a Catholic university when determining his sentence. Specifically, at Appellant's sentencing hearing, the trial court stated as follows:

> I'm going to indicate why I gave you aggravated range sentences. Number one, and I want this noted on the sentence sheet, the [Appellant] was…Director of Campus Environment, and a graduate of DeSales University, was in a position of special trust and confidence.
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> …
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> Number three, the [Appellant] was in a Catholic university environment where he was expected to behave in a certain manner and failed to do so. I'm putting those down as reasons as to why your sentence is in the aggravated range. All right.
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> …
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> Now, [Appellant], I understand that this is a little devastating to you. I just want you to understand something. I have an

> understanding of the environment that you were in. I went to Catholic grade school, Catholic high school. I went to a Catholic college and I went to a Catholic law school.
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> So putting aside the legal requirement, I would have given you the sentence even if it weren't a Catholic university, but you were brought up in a Catholic environment and you understand that even beyond your legal obligation, you betrayed a bigger trust.
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> …
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> You understand what DeSales University is about. One of my sisters graduated from that university. She was in the first female graduating class that went there all four years. You probably let down a lot of people.

N.T., 9/14/2012, at 70-72. Within its Rule 1925 opinion, the trial court re-affirmed that it sentenced Appellant in the aggravated range partly because Appellant "was in a Catholic university environment where he was expected to behave in a certain manner and failed to do so." Trial Court Opinion, 11/30/2012, at 4.

On appeal, Appellant argues, *inter alia*, that the trial court's reliance upon Appellant's religion was an abuse of discretion in violation of the sentencing code. Appellant's Brief at 12. According to Appellant, his "religion and the affiliation of his employer are not proper and reasonable bases for deviating from the standard range of the sentencing guidelines." ***Id.*** at 15. Appellant cites to the Pennsylvania's longstanding neutral position regarding an individual's particular religion, and argues that the trial court in this matter "ignored these basic truths." ***Id.*** at 16.

In response, the Commonwealth concedes that reliance upon a defendant's employment at a Catholic university may be an impermissible sentencing factor. Commonwealth's Brief at 7-8. Furthermore, the Commonwealth explains that if a court relies upon an improper factor, but there is significant other support for imposition of the sentence, the sentence need not be vacated. ***Id.*** at 7. The Commonwealth acknowledges, however, that where the improper sentencing factor involves a constitutional right, the sentence should be vacated. ***Id.*** Recognizing that within its explanation for sentencing, the trial court in this matter made several references to Appellant's connection to a Catholic university, the Commonwealth states that it "is satisfied to have this Honorable Court decide whether the Establishment Clause of the First Amendment has been violated and the sentence be vacated." ***Id.*** at 8.

Pursuant to longstanding United States Supreme Court law, the religion of a defendant is a constitutionally impermissible sentencing factor. ***See e.g. Zant v. Stephens***, 462 U.S. 862, 885 (1983) (*habeas* case). Furthermore, the Commonwealth is correct that, even if reliance upon an impermissible factor is harmless, where that impermissible factor involves a constitutional right, the sentence must be vacated. ***See Commonwealth v. Bethea***, 379 A.2d 102, 106-107 (Pa. 1977).

Based upon our review of the notes of testimony from Appellant's sentencing hearing, this issue is a close-call. To the extent that the trial court relied upon the fact that Appellant was employed at a Catholic

university, and within that employment environment was placed in a position of trust wherein he was expected to behave in a certain way, we do not believe that Appellant's constitutional right was violated. Appellant's religion is not the influential factor within that consideration. Rather, the key factors relied upon within that consideration are Appellant's employment, his position of trust within that employment, and the independent standards required by his employer. For present purposes, we see no reason to distinguish Appellant's case from the sentencing considerations for a public servant. For example, if a law enforcement officer is convicted of a crime, that individual's unique position of public trust, his or her violation of that trust, and the violation of the enforcement agency's internal codes and regulations are permissible considerations when determining an appropriate sentence.

We are concerned, however, by the trial court's reliance upon and statement that, as an individual brought up in a Catholic environment[6], Appellant betrayed a "bigger trust" beyond that of his legal obligation. The trial court's statement in this regard appears to sentence appellant for

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[6] We note that at no time did the trial court expressly state during the sentencing hearing that Appellant was a practicing Catholic or directly address Appellant's religious affiliation or religious views as asserted by Appellant in his brief. Appellant's Brief at 16. However, the trial court was certainly aware that Appellant attended a Catholic high school and a Catholic university, and expressly stated that Appellant was "brought up in a Catholic environment". N.T., 9/14/2012, at 61, 72. Thus, it is reasonable to infer that the trial court considered Appellant to be a Catholic.

violation of an authority greater than the law. Reliance upon Appellant's violation of a religious principle, however, is an improper sentencing factor. Indeed, as our Supreme Court has explained, "[o]ur courts are not ecclesiastical courts and, therefore there is no reason to refer to religious rules or commandments to support the imposition of [a sentence]." ***Commonwealth v. Chambers***, 599 A.2d 630, 644 (Pa. 1991) (death penalty case holding that prosecutor's reliance upon the Bible in support of imposition of the death penalty is reversible error *per se*).

Consequently, though a close-call, we are constrained to agree with Appellant that the trial court improperly relied upon Appellant's religion when setting forth the factors offered to justify Appellant's aggravated sentence. Furthermore, while we have no reason to question the trial court's assessment that Appellant may be subject to an aggravated sentence, even absent consideration of Appellant's religion, we nevertheless conclude that the trial court's improper consideration of religion violated Appellant's constitutional rights. Therefore, we are constrained to vacate Appellant's judgment of sentence and remand for resentencing.

Judgment of sentence vacated. Cased remanded for re-sentencing. Appellate jurisdiction relinquished.

Judgment Entered.

Prothonotary

Date: 9/10/2013