

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MICHAEL HEINZE,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 3107 EDA 2012

Appeal from the Judgment of Sentence entered August 21, 2012,  
in the Court of Common Pleas of Bucks County,  
Criminal Division, at Nos: CP-09-CR-0002111-11; CP-09-CR-0002113-11;  
CP-09-CR-0002116-11; CP-09-CR-0002117-11; CP-09-CR-0002120-11; CP-  
09-CR-0002177-11; CP-09-CR-0002209-11; CP-09-CR-0003910-11; CP-09-  
CR-0002080-12; CP-09-CR-0002081-12 and CP-09-CR-0002082-12

BEFORE: SHOGAN, ALLEN, and FITZGERALD,\* JJ.

MEMORANDUM BY ALLEN, J.:

**FILED JULY 03, 2013**

Michael Heinze ("Appellant") appeals from the judgment of sentence imposed after he pleaded guilty to multiple counts of robbery, simple assault, and possession of an instrument of crime, at eleven separate docket numbers.<sup>1</sup> We affirm.

The pertinent facts and procedural history can be summarized as follows: police detectives from Bensalem Township and Philadelphia participated in an investigation of a series of armed robberies that occurred in Bucks, Montgomery, and Philadelphia counties. The investigation

---

<sup>1</sup> 18 Pa.C.S.A. §§ 3701; 2701, and 907.

revealed that between November 28, 2010 and February 3, 2011, Appellant committed eleven separate armed robberies at various business establishments. Appellant was subsequently arrested, and charged with various crimes at eleven separate docket numbers.

On May 31, 2011, Appellant entered an open guilty plea on the seven cases that occurred in Bucks County. Trial Court Opinion, 1/31/13, at 9. At the request of all parties, sentencing was deferred to facilitate transfer of the other cases from Philadelphia and Montgomery Counties. *Id.* On August 30, 2011, Appellant entered into an open guilty plea at Docket No. 3910-2011, the case that arose in Montgomery County. On July 10, 2012, Appellant entered into an open guilty plea at Docket Nos. 2080-2012, 2081-2012, and 2082-2012, the cases that arose in Philadelphia County.

On August 21, 2012, the trial court sentenced Appellant to the following terms of imprisonment:

Docket No. 2081-2012:	9-20 years for robbery (F-1)
Docket No. 2116-2011:	a concurrent 9-20 years for robbery(F-1)
Docket No. 2117-2011:	a concurrent 9-20 years for robbery(F-1)
Docket No. 2177-2011:	a concurrent 9-20 years for robbery(F-1)
Docket No. 2209-2011:	a concurrent 9-20 years for robbery(F-1)
Docket No. 2080-2012:	a consecutive 10 years of probation for robbery (F-1)
Docket No: 2082-2012:	10 years of probation for robbery (F-1), concurrent with the other terms of

	probation but consecutive to incarceration
Docket No. 2111-2011:	10 years of probation for robbery, concurrent with the other terms of probation but consecutive to incarceration (Robbery F-1)
Docket No. 2120-2011:	10 years of probation for robbery (F-1), concurrent with the other terms of probation but consecutive to incarceration
Docket No. 3910-2011:	10 years of probation for robbery (F-1) concurrent with the other terms of probation but consecutive to incarceration
Docket No. 2113-2011:	10 years of probation for robbery (F-1) concurrent with the other terms of probation but consecutive to incarceration.

No further penalties were imposed on the remaining counts. Appellant therefore received an aggregate sentence of nine to twenty years of imprisonment followed by ten years of probation.

On August 31, 2012, Appellant filed a post-sentence motion for reconsideration of his sentence. On October 10, 2012, the trial court granted Appellant credit for time served. Appellant filed a timely notice of appeal. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises one issue for our review:

A. WHETHER THE SENTENCING COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER APPELLANT'S

MITIGATING EVIDENCE AND RELYING ON FACTORS ALREADY  
CONTEMPLATED BY THE AVAILABLE SENTENCING  
GUIDELINES IN IMPOSING SENTENCE?

Appellant's Brief at 4.

Appellant challenges a discretionary aspect of his sentence. A challenge to the discretionary aspects of a sentence is not appealable as of right. Rather, Appellant must petition for allowance of appeal pursuant to 42 Pa.C.S.A. § 9781. ***Commonwealth v. Hanson***, 856 A.2d 1254, 1257 (Pa. Super. 2004). When an appellant challenges a discretionary aspect of sentencing, we must conduct a four-part analysis before we reach the merits of the appellant's claim. ***Commonwealth v. Martin***, 611 A.2d 731, 735 (Pa. Super. 1992). In this analysis, we must determine: (1) whether the present appeal is timely; (2) whether the issue raised on appeal was properly preserved; (3) whether Appellant has filed a statement pursuant to Pa.R.A.P. 2119(f); and (4) whether Appellant has raised a substantial question that his sentence is not appropriate under the sentencing code. ***Id.***

Here, Appellant met the first requirement by filing a timely notice of appeal. Next, Appellant filed a post-sentence motion sufficient to preserve his issue. Additionally, Appellant's brief contains a "concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence" as required by Pa.R.A.P. 2119(f). See Appellant's Brief at 12-14. Finally, we must determine whether Appellant has presented a substantial question for appellate review.

“The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. Generally, however, in order to establish a substantial question, the 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. Phillips***, 879 A.2d 1260, 1264 (Pa. Super. 2005).

Appellant argues that the trial court abused its discretion by imposing sentences that exceeded the aggravated range of the sentencing guidelines, by failing to consider mitigating evidence, and by utilizing factors that were subsumed elements of the offenses. Appellant’s Brief at 11. This assertion raises a substantial question for our review. ***See Commonwealth v. Booze***, 953 A.2d 1263, 1278 (Pa. Super. 2008) (“an allegation that the court failed to state adequate reasons on the record for imposing an aggravated-range sentence ... raises a substantial question for our review”).

Preliminarily, we note that in his 1925(b) statement, and in his post-sentence motion, Appellant argues only that his sentences at Docket Nos. 2081-12, 2116-11, 2117-11, 2177-11 and 2209-12 exceeded the aggravated range of the sentencing guidelines.<sup>2</sup> To the extent that

---

<sup>2</sup> The concise statement listed the sentence at Docket No. 2082-12 as being outside of the guideline range. However, at Docket No. 2082-12, the guidelines recommended a sentence of 3 years in the mitigated range, 4-5 years in the standard range, and 6 years in the aggravated range. Appellant received a sentence of consecutive ten years of probation at Docket No. (Footnote Continued Next Page)

Appellant in his brief argues that any other of his sentences exceeded the guideline ranges, such claims are waived, as they were not raised before the trial court.

For Appellant's robbery convictions at Docket Nos. 2081-12, 2116-11, and 2117-11, 2177-11, and 2082-12, the guidelines recommended a sentence of 3 years in the mitigated range, 4-5 years in the standard range, and 6 years in the aggravated range. Appellant received concurrent sentences of 9-20 years for robbery at each of these docket numbers. Appellant asserts that the trial court abused its discretion by imposing sentences in excess of the guideline ranges.<sup>3</sup> Upon review, we find no abuse of discretion.

"Sentencing Guidelines are purely advisory in nature. . . . [T]he Guidelines do not alter the legal rights or duties of the defendant, the prosecutor or the sentencing court. The guidelines are merely one factor

*(Footnote Continued)* \_\_\_\_\_

2082-12. This did not exceed the aggravated range of the guidelines. The trial court in its Pa.R.A.P. 1925(a) opinion indicates that Appellant intended to challenge the sentence at Docket No. 2209-12 as being outside of the guideline range, rather than the sentence at Docket No. 2082-12.

<sup>3</sup> To the extent that Appellant argues that the trial court failed to consider mitigating factors in sentencing him at Docket Nos. 2080-2012, 2082-2012, 2111-2011, 2120-2011, 3910-2011 and 2113-2011, such a claim does not raise a substantial question for our review. **See Commonwealth v. Corley**, 31 A.3d 293, 297 (Pa. Super. 2011) ("a claim that the court failed to consider certain mitigating factors does not present a substantial question"). Moreover, these sentences did not exceed the guideline ranges.

among many that the court must consider in imposing a sentence.” ***Commonwealth v. Yuhasz***, 923 A.2d 1111, 1118 (Pa. 2007). “A court may depart from the guidelines if necessary, to fashion a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offense as it relates to the impact on the life of the victim and the community.” ***Commonwealth v. Sheller***, 961 A.2d 187, 190 (Pa. Super. 2008); 42 Pa.C.S.A. § 9721(b). However, “[w]hen a court chooses to depart from the guidelines . . . it must “demonstrate on the record, as a proper starting point, [its] awareness of the sentencing guidelines.” Further, the sentencing court must provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines. ***Id.***; 42 Pa.C.S.A. § 9721(b). However, “a court can satisfy the requirement to prepare a contemporaneous written statement of reasons for deviating from the sentencing guidelines by stating those reasons on the record in the presence of the defendant.” ***Commonwealth v. Jones***, 942 A.2d 903, 908 (Pa. Super. 2008); ***Commonwealth v. Catanch***, 581 A.2d 226 (Pa. Super. 1990).

“When reviewing a sentence outside of the guideline range, the essential question is whether the sentence imposed was reasonable. An appellate court must vacate and remand a case where it finds that the sentencing court sentenced outside the sentencing guidelines and the

sentence is unreasonable.” **Commonwealth v. Crook**, 966 A.2d 585, 590 (Pa. Super. 2009) (citations omitted); 42 Pa.C.S.A. § 9781(c)(3).

In making a reasonableness determination, there are four factors we consider:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
- (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
- (3) The findings upon which the sentence was based.
- (4) The guidelines promulgated by the commission.

42 Pa.C.S.A. § 9781(d); **Sheller**, 961 A.2d at 191.

Where a sentence fails to properly account for these four statutory factors, it may be found unreasonable. “A sentence may also be found unreasonable if the sentence was imposed without express or implicit consideration by the sentencing court of the general standards applicable to sentencing. These general standards mandate that a sentencing court impose a sentence 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.” **Sheller, id. citing Commonwealth v. Walls**, 926 A.2d 957, 964 (2007); 42 Pa.C.S.A. § 9721(b).

Here, at the sentencing hearing, after reviewing the sentencing guidelines, the trial court heard statements from Appellant’s counsel as well



as the Assistant District Attorney, who recounted Appellant's prior criminal record. N.T., 8/21/12, at 18. The trial court then heard statements from Appellant's mother and aunt, who testified to Appellant's character, employment history, and history of drug abuse. *Id.* at 19-25. The trial court also heard from Appellant, who recounted his attempts at rehabilitation, conveyed his desire to recover from his drug addiction, and expressed remorse for his crimes. *Id.* at 28-36. Additionally, Appellant's counsel reviewed Appellant's employment history, his education and background, and his family circumstances. The trial court made the following observations:

... I could tell that [Appellant] is intelligent. He has a photographic memory of these cases.

\*\*\*

[T]he scary thing is on the nightly news, since there are cameras literally everywhere, there is always something on the news that shows a potential defendant getting attacked within a store or a defendant attacking someone else, or something like that, and it's astounding to me that he wasn't shot.

\*\*\*

And being so intelligent, it is also amazing to me that he has not used his brains to make money to sustain his [drug] habit. There are men and women I'm sure who are addicted to drugs who make money legally and unlike [Appellant], ... had to resort to illegal ventures in order to sustain his habit.

\*\*\*

In this case he literally scared the living daylight out of these victims.

\*\*\*

I have the right to sentence you concurrently or consecutively. If I were to sentence you consecutively, you

would spend an enormous amount of time going from one case to the other.

\*\*\*

Now, instead, what I'm going to do, because I do take into account your age, is impose a sentence on one case rather than making these sentences consecutive, I'm going to impose it on one case and then periodically thereafter make the sentence either concurrent or with probation.

\*\*\*

I'm going to impose a sentence here ... that takes into account - or tries to - all eleven of your cases. I'm actually doing that because if I were to add up just what the guideline sentences are, you would have to serve forty-four years as a minimum, just if I took the lowest number in the guidelines of four years and multiply it by eleven, you would be in forever. I don't intend to impose a life sentence.

*Id.* at 20-21, 39-41.

Based on the foregoing, we conclude that the trial court properly considered the relevant sentencing factors, and placed adequate reasons on the record for its decision to sentence Appellant in the aggravated range at Docket Nos. 2081-12, 2116-11, 2117-11, 2177-11 and 2209-12. The trial court considered the relevant statutory factors including the nature and circumstances of the offense, the history and characteristics of the defendant, and the sentencing guidelines. The trial court considered the gravity of the offenses, and the impact Appellant's crimes on the victims and the community. Additionally the trial court evaluated mitigating factors such as Appellant's need for rehabilitation, expressly providing in its sentencing determination that Appellant is "to have a mental health and drug evaluation

and abide by any and all treatment” given Appellant’s “age and ... need for severe drug treatment.” N.T., 8/21/12, at 41.

In making its decision to impose five, concurrent, aggravated range sentences at Docket Nos. 2081-12, 2116-11, 2117-11, 2177-11 and 2209-12, the trial court explained that the sentences reflected the trial court’s desire to avoid imposing an effective life sentence, which would have been permissible under a strict application of the guidelines. Instead, while the five sentences were in the aggravated range, the trial court’s overall sentencing scheme allowed Appellant the benefit of a shorter sentence than he would have received had the trial court strictly complied with the sentencing guidelines. “[I]mposition of consecutive rather than concurrent sentences rests within the trial court’s discretion.” ***Commonwealth v. Harvard***, 64 A.3d 690 (Pa. Super. 2013). Had the trial court exercised its discretion to impose consecutive sentences at Docket Nos. 2081-12, 2116-11, 2117-11, 2177-11 and 2209-12, even in the mitigated range Appellant could have received a minimum sentence of fifteen years, which exceeds the minimum sentence of nine years that Appellant actually received. We conclude, therefore that Appellant’s sentences outside the guidelines ranges were not unreasonable. ***See Crook, supra***. In view of the fact that the trial court complied with applicable law and the requirements of the Sentencing Code, and provided adequate reasons for its sentence on the record, we find no abuse of discretion. Therefore, we affirm the judgment of sentence.

J-S38030-13

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Sambitt", written over a horizontal line.

Prothonotary

Date: 7/3/2013