

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

KEVIN A. MAXWELL

Appellant

No. 3446 EDA 2012

Appeal from the Judgment of Sentence November 16, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012238-2010;
CP-51-CR-0012242-2010

BEFORE: GANTMAN, J., OLSON, J., and WECHT, J.

MEMORANDUM BY GANTMAN, J.:

FILED DECEMBER 04, 2013

Appellant, Kevin A. Maxwell, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his jury trial convictions for two (2) counts each of rape and sexual assault and one (1) count of involuntary deviate sexual intercourse ("IDSI").¹ We affirm.

The relevant facts and procedural history of this appeal are as follows. In December 2008 and January 2009, Appellant raped two prostitutes. In both cases, Appellant found his victims while driving his pickup truck. Appellant offered to pay the victims for sex and drove each woman to the back of a nearby cemetery. After parking his vehicle, Appellant refused to

¹ 18 Pa.C.S.A. §§ 3121, 3124.1, 3123, respectively.

pay his victims, threatened them with violence, and raped them. Appellant left each victim naked in the cemetery. Appellant also took nude photographs of one of the victims, and he demanded money or a cell phone from the other victim.

On February 15, 2012, a jury convicted Appellant of two counts each of rape and sexual assault and one count of IDSI. At the conclusion of the proceedings, the court ordered a pre-sentence investigation ("PSI") report and deferred sentencing. With the benefit of the PSI report, the court conducted Appellant's sentencing hearing on November 16, 2012. For the rape convictions, the court sentenced Appellant to consecutive terms of six (6) to twelve (12) years' imprisonment.² The court imposed a concurrent term of six (6) to twelve (12) years' imprisonment for the IDSI conviction, and it imposed no further penalty for the sexual assault convictions. Thus, the court sentenced Appellant to an aggregate term of twelve (12) to twenty-four (24) years' imprisonment.

Appellant timely filed a motion for reconsideration of sentence on November 26, 2012, claiming the court imposed aggravated range sentences for the rape convictions without proper consideration of mitigating factors. Specifically, Appellant argued, "It is submitted that given

² With a prior record score of zero (0) and an offense gravity score of twelve (12), the standard range for Appellant's rape convictions was forty-eight (48) to sixty-six (66) months, plus or minus twelve (12) months for aggravating or mitigating circumstances.

[Appellant's] impeccable prior record and close family ties that the sentence imposed by the Trial Court was excessive and an abuse of discretion." (Motion for Reconsideration, filed 11/26/12, at 2). Prior to the entry of an order disposing of the post-sentence motion, Appellant filed a notice of appeal on December 11, 2012.³ On December 14, 2012, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant subsequently complied.

On June 7, 2013, Appellant filed an application for remand. In it, Appellant asked this Court to remand the case with instructions to the trial court to rule on the post-sentence motion. On June 25, 2013, this Court remanded with the following instructions:

The trial court is hereby directed to forthwith enter an order denying the post-sentence motion by operation of law. **See** Pa.R.Crim.P. 720(B)(3)(a) (providing that post-sentence motions shall be decided within 120 days of the filing of the motion, and if the judge fails to decide the motion within 120 days or to grant an extension, the motion shall be deemed denied by operation of law); 720(B)(3)(c) (providing that, when a post-sentence motion is denied by operation of law, the clerk of courts shall

³ When post-sentence motions are timely filed, the judgment of sentence does not become final for the purposes of an appeal until the trial court disposes of the motions or the motions are denied by operation of law. **Commonwealth v. Borrero**, 692 A.2d 158, 160 (Pa.Super. 1997); Pa.R.Crim.P. 720(A)(2), comment (stating defendant cannot take direct appeal "while his...post-sentence motion is pending"). When an appellant files a notice of appeal before the court has ruled on his post-sentence motions, the judgment of sentence has not become "final" and any purported appeal will be interlocutory and unreviewable. **Borrero, supra** at 160.

forthwith enter an order on behalf of the court and serve a copy of the order on the parties that the motion is deemed denied); **see also** Pa.R.A.P. 905(a)(5) (providing that a notice of appeal filed after the announcement of a determination but before the entry of an appealable order shall be treated as filed after such entry and on the day thereof). Upon entry of the said order, the trial court clerk of courts is directed to certify and transmit a supplemental record, including copies of the trial court's order and an updated trial court docket, to the Prothonotary of this Court.

(Order, filed 6/25/13, at 1). This Court also retained jurisdiction. On July 10, 2013, the trial court entered an order denying Appellant's post-sentence motion by operation of law. This Court received a supplemental record, including the order denying the post-sentence motion, on July 25, 2013.

Appellant now raises one issue for our review:

DID THE TRIAL COURT ERR BY DENYING APPELLANT'S
MOTION FOR RECONSIDERATION OF SENTENCE?

(Appellant's Brief at 3).

On appeal, Appellant complains that the court imposed aggravated range sentences for the rape convictions. Appellant contends the sentences are excessive, because the court improperly focused on the seriousness of the crime and Appellant's lack of remorse. Appellant insists the court failed to consider his character or rehabilitative needs, and it failed to provide adequate reasons to support the imposition of aggravated range sentences. Appellant concludes the court abused its discretion, and this Court must vacate the judgment of sentence and remand the matter for re-sentencing. Appellant's challenge is to the discretionary aspects of his sentence. **See**

Commonwealth v. Lutes, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Commonwealth v. Sierra***, 752 A.2d 910, 912 (Pa.Super. 2000). Prior to reaching the merits of a discretionary sentencing issue:

[W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, **see** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted).

Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or raised in a motion to modify the sentence imposed at that hearing. ***Commonwealth v. Mann***, 820 A.2d 788 (Pa.Super. 2003), *appeal denied*, 574 Pa. 759, 831 A.2d 599 (2003).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing

Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). “The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal ‘furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court’s evaluation of the multitude of factors impinging on the sentencing decision to **exceptional** cases.” ***Commonwealth v. Phillips***, 946 A.2d 103, 112 (Pa.Super. 2008), *cert. denied*, 556 U.S. 1264, 129 S.Ct. 2450, 174 L.Ed.2d 240 (2009) (quoting ***Commonwealth v. Williams***, 562 A.2d 1385, 1387 (Pa.Super. 1989) (*en banc*)) (emphasis in original).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830 A.2d 1013 (Pa.Super. 2003). 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 of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.” ***Sierra, supra*** at 912-13. “A substantial question is raised where an appellant alleges the sentencing court erred by imposing an aggravated range sentence without consideration of mitigating circumstances.” ***Commonwealth v. Hyland***, 875 A.2d 1175, 1183 (Pa.Super. 2005), *appeal denied*, 586 Pa. 723, 890 A.2d 1057 (2005).

Instantly, Appellant’s motion for reconsideration of sentence did not mention his current contention that the court failed to provide adequate

reasons to support the sentences for the rape convictions. Appellant also failed to raise his current argument at the sentencing hearing. Instead, Appellant asserts the argument for the first time on appeal. Thus, the argument on appeal is waived. **See Mann, supra.** Nevertheless, Appellant's motion for reconsideration of sentence and Rule 2119(f) statement did preserve his claim regarding the court's purported error in imposing an aggravated range sentence without consideration of mitigating circumstances. As presented, Appellant's claim appears to raise a substantial question as to the discretionary aspects of his sentence. **See Hyland, supra.**

Our standard of review concerning the discretionary aspects of sentencing is as follows:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Id. at 1184 (quoting **Commonwealth v. Rodda**, 723 A.2d 212, 214 (Pa.Super. 1999) (*en banc*)).

"[A] court is required to consider the particular circumstances of the offense and the character of the defendant." **Commonwealth v. Griffin**, 804 A.2d 1, 10 (Pa.Super. 2002), *cert. denied*, 545 U.S. 1148, 125 S.Ct.

2984, 162 L.Ed.2d 902 (2005). “In particular, the court should refer to the defendant’s prior criminal record, his age, personal characteristics and his potential for rehabilitation.” ***Id.***

Instantly, the record belies Appellant’s contention that the court failed to consider the mitigating factors at issue. Specifically, the court received a lengthy statement from defense counsel. Counsel stated that Appellant “worked all his life,” did not have a prior criminal record, and has “a very supportive family.” (***See*** N.T. Sentencing, 11/16/12, at 9.) Thereafter, Appellant’s parents pled for leniency, explaining that Appellant was “still relatively young” and had demonstrated good character as a member of their family. (***Id.*** at 11). In addition to the statements from Appellant’s counsel and family members, the court had the benefit of a PSI report. Therefore, we can presume it considered the relevant factors when sentencing Appellant. ***See Commonwealth v. Tirado***, 870 A.2d 362 (Pa.Super. 2005) (stating where sentencing court had benefit of PSI, law presumes court was aware of and weighed relevant information regarding defendant’s character and mitigating factors).

Further, the court provided valid reasons to support the sentences imposed. Initially, the court emphasized that Appellant left his victims “put out naked” in a cemetery during the early morning hours in winter. (***See*** N.T. Sentencing at 8.) The court also explained that Appellant showed no remorse for such dehumanizing actions:

I guess what really turns my stomach about this is probably no doubt that he was a good family member, good son, good [employee], good friend, but these women, prostitutes or not, are human beings. These were crimes that were committed against them that were vial, disgusting, hurtful, and it doesn't matter if they were prostitutes or anyone else.

* * *

So it doesn't matter to me if they were prostitutes or Sunday school teachers. They were raped. They were sexually assaulted. Period. That's what the jury found. That's what the evidence pointed to. I don't really hear an ounce of compassion for them from anybody who was involved in inflicting that harm.

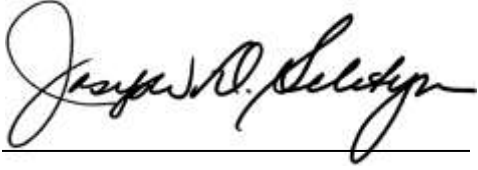
(*Id.* at 13-14).

Here, the sentencing court stated with particularity its reasons for imposing Appellant's sentence. The court considered the nature and circumstances of the offenses. The court also observed Appellant, considered the statements from Appellant's counsel and family, evaluated the PSI, and announced its findings. Under these circumstances, we see no abuse of discretion. ***See Hyland, supra.*** Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

J-S70013-13

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013