

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

JOHN ASHBHEY GASS

Appellant

No. 349 MDA 2012

Appeal from the Judgment of Sentence of November 10, 2011  
In the Court of Common Pleas of Lackawanna County  
Criminal Division at No(s): CP-35-CR-0001830-2010

BEFORE: SHOGAN, J., LAZARUS, J., and OTT, J.

MEMORANDUM BY LAZARUS, J.

Filed: January 25, 2013

John Ashbey Gass appeals from his judgment of sentence imposed in the Court of Common Pleas of Lackawanna County after a jury convicted him of possession of a controlled substance with intent to deliver (“PWID”)<sup>1</sup> and criminal use of a communication facility.<sup>2</sup> Upon review, we affirm.

On March 19, 2010, a confidential informant (“CI”) appeared at the Scranton Police Department and told police that he was acquainted with an individual he knew as “Smoke,” from whom he could purchase heroin. In the presence of Officer Justin Butler, CI placed a call to “Smoke” and the two agreed to meet at a convenience store in Scranton so CI could purchase

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<sup>1</sup> 35 Pa.C.S.A. § 780-113(a)(30).

<sup>2</sup> 18 Pa.C.S.A. § 7512.

heroin. The police provided CI with \$100 in "buy money" for use in the transaction and performed a thorough search of CI's person to ensure he possessed no contraband prior to the controlled buy. CI also informed Officer Butler that "Smoke" was a short black male who would be driving a small silver pickup truck-type vehicle.

Officer Butler drove CI to the prearranged location and CI exited Officer Butler's vehicle to wait for "Smoke" to arrive. Detective David Mitchell was also situated in a black SUV in the convenience store parking lot taking surveillance photos. CI subsequently returned to Officer Butler's vehicle and informed him that "Smoke" had changed the buy location to a nearby Wendy's restaurant. The two drove to the restaurant; the CI exited Officer Butler's vehicle and entered a silver Subaru Baja, which is a small pickup-type truck, driven by "Smoke." Upon returning to Officer Butler's vehicle, the CI handed him unsealed glassine packets that subsequently tested positive for heroin.

While taking photos in the convenience store parking lot, Detective Mitchell had obtained the tag number of the Subaru Baja driven by "Smoke." A subsequent records search showed that the vehicle had been pulled over by Officer Jeffrey Luntz of the Pocono Mountain Regional Police that same day while being driven by Gass.<sup>3</sup> Police then used Gass' name and date of

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<sup>3</sup> The vehicle was not registered in Gass' name, but rather that of an unidentified female.

birth to obtain two photographs of him, which were subsequently shown to CI in an attempt to confirm the connection between the nickname "Smoke" and the individual named John Ashbey Gass. CI did, in fact, identify the individual in the photos as the person he knew as "Smoke." Officer Butler also recognized the individual in the photos as the person who had sold heroin to CI.

Gass was arrested and charged with one count of PWID. After a preliminary hearing on July 7, 2010, Gass was bound over for trial. Subsequently, on April 8, 2011, Gass entered a plea of guilty to PWID, but later was allowed to withdraw his plea in August 2011. On October 11, 2011, the Commonwealth filed a motion to amend the criminal information to include one count of criminal use of a communication device. Gass filed an omnibus pretrial motion, as well as a motion to quash the amendment to the criminal information, both of which were denied.

After jury selection, trial commenced on October 24, 2011. That morning, the Commonwealth moved to dismiss Juror No. 8, Berry Matthews, on the grounds that he had failed to disclose that he had been charged with aggravated assault in 1974, grand larceny in 1987 and felony drug charges in 1990. After a hearing, the trial court granted the motion and excluded Matthews from the panel.

The jury convicted Gass on both counts and, on November 10, 2011 the trial court sentenced him to an aggregate of three to six years'

incarceration. Post-sentence motions were denied and, on February 14, 2012, Gass filed this timely appeal, in which he raises the following issues:

1. Whether the trial court erred in failing to suppress the [CI's] identification of [Gass].
2. Whether the trial court erred when it allowed the Commonwealth to amend the criminal information and add another count against [Gass] only days before the commencement of trial.
3. Whether the trial court abused its discretion when [it] dismissed a member of the [j]ury.
4. Whether the trial court erred when it allowed the Commonwealth to play audio recordings of [Gass] speaking on the telephone from the Lackawanna County Prison.
5. Whether the [j]ury's verdict went against the weight of the evidence presented at trial.
6. Whether the [CI] constituted a reliable witness.
7. Whether the trial court abused its discretion when it sentenced [Gass].

Brief of Appellant, at 5.

Gass first claims that the trial court erred in failing to suppress the CI's pretrial identification of him. Gass asserts that, because officers only showed the CI two pictures, both of which were of Gass, the identification was "so suggestive as to deprive [Gass] of his right to due process." Brief of Appellant, at 14. The trial court, in denying suppression, reasoned that, because the purpose of the identification was not to identify the defendant

but simply to confirm the defendant's given name, the identification was admissible. We agree.

Our standard and scope of review in evaluating a suppression issue are well-settled:

We are limited to determining whether the lower court's factual findings are supported by the record and whether the legal conclusions drawn therefrom are correct. We may consider the evidence of the witnesses offered by the Commonwealth, as verdict winner, and only so much of the evidence presented by the defense that is not contradicted when examined in the context of the record as a whole. We are bound by facts supported by the record and may reverse only if the legal conclusions reached by the court were erroneous.

***Commonwealth v. Wade***, 33 A.3d 108, 114 (Pa. Super. 2011) (citation omitted).

Whether an out-of-court identification is to be suppressed as unreliable, and therefore violative of due process, is determined from the totality of the circumstances. ***Commonwealth v. Fulmore***, 25 A.3d 340, 346 (Pa. Super. 2009) (citation omitted). Suggestiveness alone does not warrant exclusion. ***Commonwealth v. Kubis***, 978 A.2d 391, 396 (Pa. Super. 2009) (citation omitted). Rather, a pretrial identification will only be suppressed as violative of due process rights if the facts demonstrate that the identification procedure was so infected by suggestiveness as to give rise to a substantial likelihood of irreparable misidentification. ***Id.*** (citation and quotation marks omitted).

Further, even if a pretrial identification is tainted by impermissibly suggestive procedures, an in-court identification will be permitted if, considering the totality of the circumstances, the identification had an origin sufficiently distinguishable to be purged of the primary taint. ***Commonwealth v. Douglass***, 701 A.2d 1376, 1379 (Pa. Super. 1997) (citation and quotation marks omitted). The factors to consider in determining whether an independent basis exists for the identification are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. ***Id.***

Here, we begin by emphasizing that the police did not show the photographs to CI in an attempt to positively identify Gass as the individual who sold CI drugs. It was not a situation in which someone was victimized by an assailant and was later called upon to visually identify his theretofore unknown attacker. Rather, Gass was previously known to CI, albeit under another name. Police presented him with photographs known to be of Gass simply to confirm that he was the same individual CI had previously known only as "Smoke." ***See Commonwealth v. Causey***, 833 A.2d 165 (Pa. Super. 2003) (single photo shown to victim not unduly suggestive when

used merely to confirm identity of defendant, which victim had already given).

Even assuming, *arguendo*, that CI's out-of-court identification was tainted, CI's in-court identification of Gass was properly admitted based upon the totality of the circumstances. ***Douglass, supra***. CI had ample opportunity to view Gass during the drug transaction, at which time he was seated directly next to Gass in the cab of his truck. CI testified that he had spoken with Gass twenty to thirty times prior to the date of the controlled buy. N.T. Trial, 10/24/11, at 62. CI also knew the type of vehicle Gass drove, having seen him operate it approximately twenty times. ***Id.*** at 65.

In addition to CI's identification, two police officers independently identified Gass. Detective Mitchell took photographs of Gass driving the Subaru Baja at the original buy location, which images were identified by Detective Mitchell and entered into evidence at trial. Officer Butler was sitting in a car directly facing that in which CI and Gass sat as the controlled buy occurred. He positively identified Gass as the individual from whom CI purchased the heroin. In sum, there was an independent basis for CI's in-court identification, which was corroborated by two additional law-enforcement witnesses. As such, Gass' claim fails.<sup>4</sup>

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<sup>4</sup> Gass' assertion that CI may not have been able to adequately view Gass at the time of the incident due to drug intoxication is not supported by the record. In any event, the testimony of Detective Mitchell and Officer Butler, *(Footnote Continued Next Page)*

Next, Gass claims that the trial court erred when it allowed the Commonwealth to amend its criminal information to add another count only days before the commencement of trial, in violation of Pa.R.Crim.P. 564.

Rule 564 provides as follows:

The court may allow an information to be amended when there is a defect in form, the description of the offense(s), the description of any person or any property, or the date charged, provided the information as amended does not charge an additional or different offense. Upon amendment, the court may grant such postponement of trial or other relief as is necessary in the interests of justice.

Pa.R.Crim.P. 564.

This Court has stated that:

the purpose of [Rule 564] is to ensure that a defendant is fully apprised of the charges, and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed. The test to be applied is whether the crimes specified in the original indictment or information involve the same basic elements and evolved out of the same factual situation as the crimes specified in the amended indictment or information. If so, then the defendant is deemed to have been placed on notice regarding his alleged criminal conduct.

***Commonwealth v. Duda***, 831 A.2d 728, 732 (Pa. Super. 2003) (citations and quotation marks omitted).

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

as well as the photographic evidence admitted at trial, provided an independent basis to identify Gass.



Here, Gass was originally charged with PWID.<sup>5</sup> Right before trial, the trial court allowed the Commonwealth to amend the information to add a charge of criminal use of a communication facility.<sup>6</sup> Both crimes involved the same underlying facts. The only additional fact necessary for the Commonwealth to prove criminal use of a communication facility is the use of a communication facility, such as a telephone,<sup>7</sup> to commit PWID. In the original information, the affidavit of probable cause, and at the preliminary hearing, the Commonwealth referred to Gass' use of a cellular telephone to

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<sup>5</sup> The PWID statute prohibits "the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance." 35 Pa.C.S.A. § 780-113(a)(30).

<sup>6</sup> Criminal use of a communication facility is defined as follows:

A person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under [Title 18 or] The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section.

18 Pa.C.S.A. § 7512(a). Gass' charge of PWID constitutes a felony under the Controlled Substance, Drug, Device and Cosmetic Act.

<sup>7</sup> "Communication facility" is defined as "a public or private instrumentality used or useful in the transmission of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part, including, but not limited to, telephone, wire, radio, electromagnetic, photoelectronic or photo-optical systems or the mail." 18 Pa.C.S.A. § 7512(c).

arrange the drug purchase with CI. Accordingly, Gass was fully apprised of the facts underlying both charges and was thus placed on notice regarding his alleged criminal conduct. *Duda, supra*. This claim, therefore, is meritless.

Gass next claims that the trial court abused its discretion in granting the Commonwealth's motion to dismiss a member of the jury for failure to disclose prior felony charges. This claim garners Gass no relief.

The trial court conducted *voir dire* and jury selection on October 17, 2011. However, trial did not actually commence until October 24, 2011. In the interim, counsel for the Commonwealth conducted background checks on all jurors and discovered that juror no. 8, Berry Matthews, had failed to disclose on his jury questionnaire that he had been charged with aggravated assault in 1974, grand larceny in 1987 and felony drug charges in 1990. All charges were later withdrawn and Matthews apparently did not understand that he was still required to disclose the charges because the questionnaire "clearly and unambiguously sought information regarding past **arrests**." Trial Court Opinion, 5/8/12, at 7 (emphasis added).

"The decision whether to disqualify a juror is committed to the sound discretion of the trial court and is reversible only in the event of a 'palpable abuse of discretion.'" *Commonwealth v. Hetzel*, 822 A.2d 747, 756 (Pa. Super. 2003). The test for determining whether a prospective juror should be disqualified is as follows:

whether he is willing and able to eliminate the influence of any scruples and render a verdict according to the evidence, and this is to be determined on the basis of answers to questions and demeanor. . . . It must be determined whether any biases or prejudices can be put aside on proper instruction of the court. . . . A challenge for cause should be granted when the prospective juror has such a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses that the court will presume a likelihood of prejudice or demonstrates a likelihood of prejudice by his or her conduct or answers to questions[.]

***Commonwealth v. Lesko***, 15 A.3d 345, 413 (Pa. 2011).

Here, the trial court dismissed Matthews “in an abundance of caution” and “to ensure impartiality and fairness to both parties.” Trial Court Opinion, 5/8/12, at 7. The court reasoned that Matthews’ “error in not disclosing [his] arrests, which included a felony drug arrest, precluded the Commonwealth’s ability to further question [him] and consider the same during its selection.” ***Id.***

Gass argues that, because Matthews’ concealment of his prior arrest record was unintentional, the court erred in disqualifying him. While unable to find any Pennsylvania case law directly on point, Gass cites a California case, ***People v. San Nicolas***, 101 P.3d 509 (Ca. 2004), in support of his claim. In ***San Nicolas***, five months after a jury convicted him of a double murder and related offenses, the defendant moved for a new trial on the ground of jury misconduct. Specifically, defendant discovered that one juror had failed to disclose on his questionnaire that he had criminal charges

pending, that he had a prior arrest in which the charges were ultimately dropped, and that he had previously been a victim of a crime. Upon questioning, the juror indicated that he had not intentionally omitted the information and the trial court accepted his explanations. Accordingly, the trial court denied the defendant's motion for a new trial. On appeal, the California Supreme Court affirmed, finding that the trial court did not abuse its discretion in concluding that the juror's failure to disclose the stabbing incident was not deliberate and that he was not biased.

Gass suggests we apply the California court's rationale and find that, where the juror's failure to disclose was not deliberate, disqualification is unnecessary. However, this argument ignores the clear standards of review applicable to both *San Nicolas* and the instant matter. In *San Nicolas*, the Court was reviewing the trial court's refusal to disqualify on an abuse-of-discretion standard. Having concluded that the trial court's factual findings were supported in the record, the Supreme Court upheld the trial court's exercise of discretion.

Here, we are reviewing the trial court's disqualification of a juror under an even more stringent standard, that of a "palpable abuse of discretion." *Hetzel, supra*. The record demonstrates that, while unintentional, Matthews' failure to disclose his prior arrests was potentially prejudicial to the Commonwealth, especially in light of the fact that one of Matthews' arrests was for a drug offense. Moreover, Gass has failed to allege the

manner in which he was prejudiced by Matthews' exclusion from the panel. In light of this, we can discern no palpable abuse of discretion in the trial court's disqualification of the juror in question.

Next, Gass claims that the trial court erred when it allowed the Commonwealth to play audio recordings of Gass speaking on the telephone from the Lackawanna County Prison. Gass claims that, in doing so, the Commonwealth identified him as an inmate, which could have led the jury to make its decision on an improper basis. Gass cites case law requiring that a defendant shall not appear in front of a jury in prison garb in support of his position.

"The admissibility of evidence is a matter for the discretion of the trial court and a ruling thereon will be reversed on appeal only upon a showing that the trial court committed an abuse of discretion." *Commonwealth v. Johnson*, 42 A.3d 1017, 1027 (Pa. 2012). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous. *Id.*

Generally, evidence is admissible if it is relevant, *see* Pa.R.E. 402, meaning that it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. There are,

however, exceptions to this general rule. For instance, Pennsylvania Rule of Evidence 403 provides as follows:

Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Pa.R.E. 403. As used in the rule, "unfair prejudice" means "a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." *Id.*, Comment. "This Court has previously stated that all evidence in a criminal proceeding is prejudicial to the defendant, and that relevant evidence is to be excluded only when it is 'so prejudicial that it may inflame the jury to make a decision based upon something other than the legal propositions relevant to the case.'" *Commonwealth v. Colon*, 846 A.2d 747, 753 (Pa. Super. 2004) (citations omitted).

Here, the Commonwealth, through the testimony of Lackawanna Prison Captain of Intelligence Robert Maguire, introduced audio recordings of telephone calls Gass placed while incarcerated. The recordings were introduced for two purposes. One, to connect Gass to the cellular phone number contacted by CI to arrange the drug transaction.<sup>8</sup> This evidence was

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<sup>8</sup> Gass called that cell phone number approximately 85 times from prison. N.T. Trial, 10/24/11, at 140-42.

key to the Commonwealth's ability to establish that Gass committed the crime of criminal use of a communication facility. Second, the recordings were introduced to confirm Gass' use of the nickname "Smoke." As previously discussed, CI knew Gass only as "Smoke" and, thus, it was crucial to the Commonwealth's case to connect Gass with that nickname. This corroborating evidence was especially important given the defense's attempt to cast doubt on CI's identification of Gass.

In ruling on defense counsel's objection to the tapes, the trial court found as follows:

THE COURT: Okay. In this case I do think that the probative value outweighs the prejudicial effect. Because identity is an issue in this case, the evidence tends to corroborate the testimony of the Commonwealth witnesses, and that's why the Commonwealth is seeking to introduce it, so for that reason and that reason alone, I will overrule the Defendant's objection. I am going to allow the tape.

N.T. Trial, 10/24/11, at 132.

In light of the foregoing, we do not find an abuse of discretion on the part of the trial court in admitting the tapes. The tapes, as corroboration for the questioned identification testimony, were an essential element of the Commonwealth's case. Gass has not demonstrated that the potential prejudice of the recordings outweighed the probative value of the evidence such that it could have inflamed the jury to make a decision based upon something other than the legal propositions relevant to the case. ***Colon, supra.*** Accordingly, this claim is meritless.

Next, Gass claims that the jury's verdict was against the weight of the evidence.<sup>9</sup> For this Court to reverse the trial court's verdict on weight of the evidence grounds, we must determine that the verdict is so contrary to the evidence as to shock one's sense of justice. ***Commonwealth v. Brown***, 23 A.3d 544, 557-58 (Pa. Super. 2011) (citations and quotation omitted).

Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

***Id.*** at 558 (citation omitted).

Here, the trial court concluded that "[t]he Commonwealth proved the elements of the charges contained within the Criminal Information and corroborated the testimony from several sources. Accordingly, the verdict of

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<sup>9</sup> In a separate claim, Gass asserts that the CI did not constitute a reliable witness. Issues of witness credibility are for the finder of fact and are properly considered as part of a weight-of-the-evidence analysis. ***Commonwealth v. Ferguson***, 475 A.2d 810, 816 (Pa. Super. 1984) ("[T]he ability of a witness to positively identify an accused will affect that witness's credibility; and, therefore, the failure or uncertainty of a witness in making an identification at a given confrontation procedure goes to the weight to be accorded that witness's identification."). We have reviewed the trial court's exercise of discretion on this issue and found no abuse.



guilt certainly did not offend this court's sense of justice." Trial Court Opinion, 5/8/12, at 9. Upon careful review of the record, in particular the trial transcript, we can ascertain no abuse of discretion on the part of the trial court in so finding and, accordingly, this claim fails.

Finally, Gass alleges that the trial court abused its discretion when it sentenced him. When the discretionary aspects of a judgment of sentence are questioned, an appeal is not guaranteed as of right. ***Commonwealth v. Moore***, 617 A.2d 8, 11 (Pa. Super. 1992). Rather, two criteria must be met before an appeal may be taken. First, the 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 the sentence." Pa.R.A.P. 2119(f); ***Commonwealth v. Zugay***, 745 A.2d 639, 653 (Pa. Super. 2000) (citation omitted). Second, an appeal will only be granted when a "substantial question" has been presented. 42 Pa.C.S.A. § 9781(b); ***id.*** An appellate court will find a "substantial question" and review the decision of the trial court only where an aggrieved party can articulate clear reasons why the sentence imposed by the trial court compromises the sentencing scheme as a whole. ***Commonwealth v. Tuladziecki***, 522 A.2d 17 (Pa. 1987).

Here, Gass has included in his brief a concise statement pursuant to Rule 2119(f), setting forth the reasons in support of his appeal, and has thus complied with the technical requirements. Specifically, Gass asserts that the

trial court did not adequately state either the reasons for its sentence or the applicable sentencing guidelines on the record. This contention raises a substantial question. ***Commonwealth v. Ventura***, 975 A.2d 1128 (Pa. Super. 2009). Accordingly, we will address the substance of Gass' claim.

We begin by noting that:

In fashioning a sentence, the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of offense as it relates to the impact on life of the victim and on the community, and the rehabilitative needs of the defendant. A court is required to consider the particular circumstances of the offense and the character of the defendant.

***Id.*** at 1133-34 (citations and quotation marks omitted).

Although Gass' Rule 2119 statement asserts a claim that the trial court did not adequately state its reasons in support of his sentence, he raises another issue entirely in his argument section. In his brief, Gass claims that "the trial court did not consider certain subjective factors" such as Gass' drug-addicted parents, his lack of education and his attempts at self-betterment. Brief of Appellant, at 23. Neither claim has merit.

"Where the sentencing judge had the benefit of a presentence investigation report, it will be presumed that he or she was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." ***Commonwealth v. Fowler***, 893 A.2d 758, 766-7 (Pa. Super. 2006). Here, the trial court had

the benefit of a pre-sentence report. Gass' counsel indicated on the record that he had reviewed the report with his client and had "no specific exceptions or objections" to it. N.T. Sentencing, 11/11/11, at 7. In addition, Gass and his counsel both spoke on Gass' behalf prior to the imposition of sentence. Accordingly, we may presume that the court was in possession of all relevant factors and considered them in imposing sentence.

***Fowler, supra.***

Moreover, a review of the sentencing transcript reveals that the trial court did, in fact, clearly state its reasoning on the record. The trial court stated the following at the time of sentencing:

THE COURT: Okay, Mr. Gass. Whenever a Court has the responsibility of imposing a sentence that deprives another citizen of liberty even for a period of time, it's a very – It's not easy to do and I think [courts] take that task very very seriously.

And we certainly don't take it lightly. This is a case that I have given a great deal of consideration.

I had the opportunity to review your file [and] the presentence investigation, and to read what was available in the report about your background, and now your attorney has had the opportunity to shed some additional light on your background.

I hope for your sake that what you are saying here today is true. That you intend at this point in your life to turn your life around for the sake of your children and to pursue furthering your education so that when you are released you will be able to be a father to your children and be a good role model for them, an opportunity that you were deprived of.

. . .

The reason for this sentence, this sentence is an upward departure, but the reason for this sentence is, is that you do have a prior record score of five.

You have three prior felony convictions for possession of a controlled substance with intent to deliver.

You have demonstrated that you are engaged in a business of selling controlled substances for a living between Luzerne County and New York State, and now Lackawanna County, that in the past, you have failed to successfully comply with probation or parole.

I noted in your criminal history, that there were multiple parole or probation violations that were lodged against you.

The Court has taken all of these things into consideration in determining the sentence.

N.T. Sentencing, 11/11/11, at 10-11, 12-13.

The trial court clearly took into consideration the presentence report and the information offered in support of Gass by his attorney, as well as Gass' prior convictions, his habitual criminality and his refusal to accept responsibility for his crimes, *see id.* at 10 ("I feel I wasn't guilty of these charges but the jury do otherwise[.]"). As such, we can discern no abuse of discretion on the part of the trial court in fashioning its sentence.

Judgment of sentence affirmed.