

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DENNIS ALLEN YENSER, JR.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 354 EDA 2013

Appeal from the Judgment of Sentence of January 9, 2013
In the Court of Common Pleas of Lehigh County
Criminal Division at No.: CP-39-CR-0003513-2011

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DENNIS ALLEN YENSER, JR.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 358 EDA 2013

Appeal from the Judgment of Sentence of January 8, 2013
In the Court of Common Pleas of Lehigh County
Criminal Division at No.: CP-39-CR-0003386-2011

BEFORE: BOWES, J., LAZARUS, J., and WECHT, J.

MEMORANDUM BY WECHT, J.

FILED DECEMBER 16, 2013

Dennis Yenser, Jr. ("Appellant") appeals from two separate judgments of sentence. At No. 358 EDA 2013, Appellant appeals the judgment of sentence entered on January 8, 2013, which was imposed after Appellant was found to be in violation of a previously imposed sentence of intermediate punishment. At No. 354 EDA 2013, Appellant appeals the

judgment of sentence entered on January 9, 2013, which was imposed after Appellant violated parole in a separate case. On both cases, we affirm.¹

On December 12, 2011, at CP-39-CR-0003513-2011, Appellant pleaded guilty to one count of driving under the influence (“DUI”),² which was his third DUI offense. On that same date, Appellant was sentenced to one to three years’ imprisonment in the Lehigh County Prison, followed by two years of probation.

On December 21, 2011, at CP-39-CR-0003386-2011, Appellant pleaded guilty to burglary³ pursuant to a plea agreement.⁴ Following the review of a pre-sentence investigative report, the trial court determined that Appellant had struggled with drugs and alcohol in the past. The trial court had Appellant evaluated to determine whether he was a viable candidate for the Treatment Continuum Alternative Program (“TCAP”), a drug and alcohol

¹ Appellant filed two separate notices of appeal from the two judgments of sentence, and each appeal has been assigned its own docket number. However, although Appellant appeals two separate judgments, he has filed two substantially identical briefs, both of which raise the same issues and present the same arguments. In response, the Commonwealth also has filed two very similar briefs at each docket number. Thus, for ease of disposition, we *sua sponte* consolidate these appeals, and resolve both herein.

² 75 Pa.C.S. § 3802(d)(3).

³ 18 Pa.C.S. § 3502(a).

⁴ The negotiated plea agreement required Appellant to enter a guilty plea to burglary, graded as a second-degree felony, in exchange for a sentence within the standard range of the sentencing guidelines set to run concurrently with the sentence imposed upon a third case number.

treatment-based intermediate punishment program. On January 30, 2012, the trial court sentenced Appellant to eighteen months to seven years in a state correctional institution. On February 2, 2012, Appellant filed a post-sentence motion requesting to withdraw his guilty plea and/or a modification of his sentence. On March 1, 2012, following a hearing, the trial court denied Appellant's motion to withdraw his guilty plea. However, the trial court vacated Appellant's prison sentence and resentenced Appellant to TCAP for twenty-two months, to be followed by five consecutive years of probation.

On August 23, 2012, after completing the minimum incarceration portion of his DUI sentence, Appellant was paroled to the Keenan House to participate in TCAP. As a condition of his parole, Appellant was required to attend and to complete inpatient treatment at the Keenan House, as well as any recommended aftercare. Appellant was only at the Keenan House for five days before he escaped. The Lehigh County Adult Probation Department filed a parole violation for failure to complete treatment and because Appellant's whereabouts were unknown. Appellant was found three months later at his home. On January 8, 2013, at a **Gagnon II**⁵ hearing, Appellant conceded that he ran away from the TCAP facility. Based upon his criminal

⁵ **See Gagnon v. Scarpelli**, 411 U.S. 778 (1973).

history and his escape from the TCAP facility, the trial court sentenced Appellant to four to ten years in a state correctional facility.

On January 9, 2013, at another ***Gagnon II*** hearing stemming from the violation of his parole on the DUI sentence, Appellant again conceded that he violated his parole based upon the allegations lodged against him by the Lehigh County Adult Probation Department. Pursuant to Appellant's concession, his parole and probation were revoked by the trial court. The trial court then resentenced him to serve the balance of his one to three-year sentence for his DUI guilty plea, along with an additional one to two years' incarceration on his probation sentence. The trial court ordered this sentence to run concurrently with Appellant's four to ten-year sentence imposed for his burglary case.

On January 16, 2013, Appellant filed a motion to reconsider his new sentence in the DUI case. The trial court denied Appellant's motion on January 25, 2013. On January 30, 2013, Appellant filed a timely notice of appeal docketed at No. 354 EDA 2013. On February 5, 2013, the trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On February 20, 2013, Appellant filed his concise statement. On March 26, 2012, the trial court issued its Pa.R.A.P. 1925(a) opinion.

On January 16, 2013, in his burglary case, Appellant also filed a motion to reconsider his sentence. The trial court denied Appellant's motion

on January 18, 2013. On January 30, 2013, Appellant filed a timely notice of appeal docketed at No. 358 EDA 2013. On February 1, 2013, the trial court ordered Appellant to file a concise statement of errors complained of on appeal. On February 20, 2013, Appellant filed his concise statement. On February 28, 2013, the trial court issued its Pa.R.A.P. 1925(a) opinion.

In Appellant's briefs, he raises nearly identical issues. Appellant's fundamental issue as to each case is: Whether the sentence imposed by the court is manifestly excessive or otherwise unjustified based upon the nature of the Appellant's probation violation. Brief for Appellant at 7 (for both docket numbers). Appellant's claim challenges the discretionary aspects of his sentence.

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. 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).

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. 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.

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. 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.

Commonwealth v. Phillips, 946 A.2d 103, 112 (Pa. Super. 2008) (some citations omitted).

In both briefs, Appellant has complied with the first three prongs of the required analysis. Appellant has filed timely notices of appeal and has preserved the issue in his motions for reconsideration of his sentence. Appellant has included in each brief a statement pursuant to Pa.R.A.P. 2119(f). Having determined that Appellant complied with the technical requirements for a discretionary challenge, we must determine whether Appellant has raised a substantial question.

In both briefs, Appellant includes nearly identical Rule 2119(f) statements. Appellant's Rule 2119(f) statement in his brief filed at docket number 354 EDA 2013 states as follows:

The [Appellant] is requesting that the Appellate Court review the sentence received based upon his belief that, even though the [Appellant] was violated from his probation what [*sic*] the [Appellant] believes were only technical violations of his supervision, which requires that there be an appropriate balancing of the type of sentence and length of sentence must be [*sic*] imposed based upon those violations. The [Appellant] believes that the violations were not so egregious as to warrant the additional period of incarceration as [the trial court] ordered

on [the] probation portion of his sentence and that, without proper consideration of other alternatives, the [trial court's] sentence was manifestly excessive

Brief for Appellant at 10.

Similarly, Appellant's Rule 2119(f) statement at docket number 358

EDA 2013 states as follows:

The [Appellant] is requesting that the Appellate Court review the sentence received based upon his belief that the [trial court] gave a manifestly excessive sentence and failed to take into consideration all relevant factors regarding the [Appellant] and his history prior to the imposition of sentencing. Further, [Appellant] believes that the violations were not so egregious that [they] warranted the lengthy sentence as imposed and, as such, the sentence was manifestly excessive

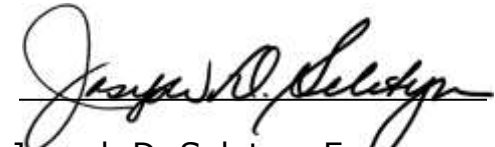
Brief for Appellant at 10.

A 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. Similarly, a Rule 2119(f) statement must specify what fundamental norm the sentence violates and the manner in which it allegedly violates that norm. ***Commonwealth v. Goggins***, 748 A.2d 721, 725 (Pa. Super. 2000). Appellant's Rule 2119(f) statement is nothing more than a bald assertion that Appellant's sentence was excessive. Appellant's brief is devoid of citations to supporting legal authority or specific arguments in support of his claim. Neither Rule 2119(f) statement addresses where Appellant's sentence falls within the sentencing guidelines or what sentencing provision the trial court violated. Furthermore, Appellant's Rule 2119(f) statement also does not enumerate what fundamental norms the

trial court violated in fashioning Appellant's post-violation sentences. Because of these failures, Appellant's Rule 2119(f) is deficient and, therefore, Appellant does not present a substantial question. Thus, we cannot review his sentencing claim. ***See Commonwealth v. Reynolds***, 835 A.2d 720, 733 (Pa. Super. 2003).

Judgments of sentence affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/16/2013