NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. NAZEER BURKS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 390 MDA 2012

Appeal from the Judgment of Sentence of January 4, 2012,
in the Court of Common Pleas of Lycoming County,
Criminal Division at No. CP-41-CR-0000486-2011

BEFORE: SHOGAN, OTT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: Filed: March 14, 2013

This is an appeal from a judgment of sentence. We affirm.

The relevant background underlying this matter can be summarized as follows. A jury convicted Appellant of firearms not to be carried without a license and of tampering with or fabricating physical evidence. The trial court sentenced Appellant on January 4, 2012.[1] Appellant timely filed post-sentence motions, which the trial court denied. This appeal followed.

In his brief to this Court, Appellant asks us to consider the following questions:

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[1] On April 11, 2012, the court issued an order correcting what it deemed to be typographical errors in the original sentencing order.

*Retired Senior Judge assigned to the Superior Court.

> 1. WHETHER THE VERDICT ISSUED WAS AGAINST THE WEIGHT OF THE EVIDENCE SINCE LITTLE EVIDENCE WAS SHOWN TO PROVE THAT THE DEFENDANT WAS EVER IN POSSESSION OF THE WEAPON IN QUESTION.
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> 2. WHETHER THE COURT ERRED IN ALLOWING NON-RELEVANT AND PREJUDICIAL EVIDENCE TO BE HEARD BY THE JURY DUE TO ALLOWING IN EVIDENCE OF DRUGS IN A CASE WITH NO DRUG CHARGES AND ALLOWING THE COMMONWEALTH TO REOPEN THE CASE AFTER THE DEFENSE HAD RESTED.
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> 3. WHETHER THE COURT ISSUED A SENTENCE THAT WAS MANIFESTLY EXCESSIVE IN LIGHT OF THE DEFENDANT'S CIRCUMSTANCES.

Appellant's Brief at 4 (suggested answers omitted).

Under his first issue, Appellant complains that the jury's verdicts are contrary to the weight of the evidence introduced by the Commonwealth at trial. The thrust of Appellant's argument is that the Commonwealth offered scant evidence that Appellant possessed a firearm on the day in question. Appellant inartfully asserts:

> With no possession or constructive possession, there can be no finding of guilty on the Carrying a Weapon without a License Charge. Further, if the gun was at no time in the control of the defendant, he could not have attempted to conceal the weapon and therefore would also not be guilty of Tampering with Evidence because there would have been evidence to tamper with.

Appellant's Brief at 10.

> . . . Our standard of review for a challenge to the weight of the evidence is well-settled: The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses. As an appellate court, we cannot substitute our judgment for that of the finder of fact. Therefore,

> we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. Our appellate courts have repeatedly emphasized that [o]ne 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.
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> Furthermore,
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> > where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Rabold, 920 A.2d 857, 860-61 (Pa. Super. 2007) (citations and quotation marks omitted).

In response to Appellant's post-sentence motions, the trial court ruled on Appellant's weight-of-the-evidence claim. The court rejected the claim and provided a thorough discussion of its reasons for doing so. Trial Court Opinion and Order, 02/14/12, at 2-7. In short, the court summarized the Commonwealth's evidence and concluded that, while the evidence mostly was circumstantial, it was sufficient, if credited by the jury, to establish that Appellant possessed a firearm. Implicit in the court's opinion is a conclusion that the jury clearly credited the Commonwealth's evidence. In a similar vein, the court determined, "In reviewing all of the direct and circumstantial evidence, this [c]ourt cannot conclude that the verdict was 'irreconcilably contradictory to incontrovertible facts, human experience of the laws of nature or based on mere conjecture.'" ***Id.*** at 4 (citations omitted).

On appeal, other than baldly asserting that the trial court erred by denying his post-sentence motion regarding the weight of the evidence, Appellant fails to highlight how the trial court palpably abused its discretion by rejecting his weight-of-the-evidence claim. Moreover, we can discern no such abuse on part of the trial court. Thus, Appellant's first issue warrants no relief.

The second question Appellant presents to this Court actually contains two issues. Appellant first argues that the trial court erred by allowing the Commonwealth to present testimony to the jury regarding drugs that were discovered in the general area where officers observed Appellant. According to Appellant, this evidence was irrelevant and, thus, inadmissible.

In order to preserve for appellate review his claim that the trial court erred in admitting evidence, Appellant was required to lodge a contemporaneous objection when the Commonwealth attempted to admit the complained of evidence. ***See Commonwealth v. Melendez-Rodriguez***, 856 A.2d 1278, 1287 (Pa. Super. 2004) ("[T]he record reflects that [the a]ppellant's trial counsel never objected at trial or in any pre-verdict motion to the admissibility of these photographs. Instead, he raised this issue for the first time in a 1925(b) statement after he filed his notice of appeal, and the trial court addressed the issue in its 1925(a) opinion. Nonetheless, it is well established that absent a contemporaneous objection the issue is not properly preserved on appeal.") (citations omitted). In his brief to this Court, Appellant does not allege that he lodged such an objection in the trial court, let alone where in the record he lodged such an

objection, in violation of Pa.R.A.P. 2117(c) and Pa.R.A.P. 2119(e). We refuse to act as Appellant's counsel and sift through the record in an attempt to establish that Appellant preserved this issue for review.

As to the second issue Appellant presents under his second question to this Court, he argues that the trial court erred by allowing the Commonwealth to reopen its case against Appellant after Appellant had rested and requested that the court dismiss all of Appellant's charges. We observe that the trial court directed Appellant to comply with Pa.R.A.P. 1925(b). Appellant, in fact, did file a statement pursuant to this rule. Appellant, however, failed to include in this statement any issue regarding the trial court erroneously allowing the Commonwealth to reopen its case. Consequently, Appellant waived this issue. Pa.R.A.P. 1925(b)(4)(vii).

Lastly, Appellant claims that his sentence is excessive. Appellant, therefore, seeks to challenge the discretionary aspects of his sentence.

> Challenges to the discretionary aspects of sentencing do not entitle an appellant to appellate review as of right. ***Commonwealth v. Sierra***, 752 A.2d 910, 912 (Pa. Super. 2000). Prior to reaching the merits of a discretionary sentencing issue:
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> > [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. 1410 [now Rule 720]; (3) whether appellant's brief has a fatal defect; 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. Martin****,* 416 Pa.Super. 507, 611 A.2d 731, 735 (1992) (most 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, 794 (Pa. Super. 2003), *appeal denied,* 574 Pa. 759, 831 A.2d 599 (2003).
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> Additionally, 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); ***Commonwealth v. Tuladziecki****,* 513 Pa. 508, 522 A.2d 17 (1987); 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. Williams****,* 386 Pa. Super. 322, 562 A.2d 1385, 1387 (1989) (*en banc*) (emphasis in original).
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> 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 (quoting ***Commonwealth v. Brown****,* 741 A.2d 726, 736 (Pa. Super. 1999) (*en banc*), *appeal denied,* 567 Pa. 755, 790 A.2d 1013 (2001)).

Commonwealth v. Hyland, 875 A.2d 1175, 1183 (Pa. Super. 2005).

Appellant preserved his issue in the trial court, timely filed a notice of appeal, and included in his brief a statement pursuant to Pa.R.A.P. 2119(f). Thus, we need to determine whether Appellant raised a substantial question

worthy of appellate review in that statement. In his Pa.R.A.P. 2119(f) statement, Appellant merely baldly asserts that his sentence is excessive. Appellant's Brief at 7. A bald assertion that a sentence is excessive is insufficient to raise a substantial question worthy of appellate review. ***Commonwealth v. W.H.M., Jr.***, 932 A.2d 155, 164 (Pa. Super. 2007).

For these reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judge Ott concurs in the result.