

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

TIMOTHY CLAYTON LENHART

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 452 WDA 2012

Appeal from the Judgment of Sentence of January 12, 2012
In the Court of Common Pleas of Westmoreland County
Criminal Division at No(s): CP-65-CR-0002955-2010

BEFORE: GANTMAN, J., WECHT, J., and FITZGERALD, J.*

MEMORANDUM BY WECHT, J.

Filed: February 20, 2013

Timothy Clayton Lenhart ("Appellant") appeals his January 12, 2012 judgment of sentence. We affirm.

The trial court summarized the factual and procedural history:

[Appellant] was charged with Burglary and Criminal Trespass as a result of a May 3, 2010 unauthorized entry into the victim's home. After entering the residence, he emptied the contents of a fire extinguisher over the furniture, causing staining and damages in the amount of \$400.00. On December 20, 2011 [Appellant] entered a general plea of guilty to all charges and a Presentence Report was ordered.

The Presentence Report disclosed nine convictions, not including the instant case, and two grants of Protection from Abuse Petitions. The convictions, beginning in 1987 and continuing through 2010, involved offenses related to alcohol abuse. The Report also disclosed several probation violations for failing to

* Former Justice specially assigned to the Superior Court.

complete alcohol abuse programs and for failure to pay costs. Except for cases related to drunk driving charges, all of the sentences were probationary. On January 17, 2012, however, at No. 2956 C 2010, [Appellant] was sentenced by Judge Bell to 20-60 months incarceration with credit for time served for convictions of Aggravated Assault and Criminal Trespass.

On January 18, 2012 a Sentencing Hearing on the instant charges was held before [the trial court]. The Presentence Report had been reviewed by the [court] and counsel for [Appellant], who had no additions or corrections. The report contained [Appellant's] admission that he was an alcoholic. (See Presentence Report, p.16) At sentencing the [court] noted that [Appellant's] personality changed dramatically when he was intoxicated, and that he had an extremely significant substance abuse problem, often combined with violence. It was noted that previous probationary sentences did not deter [Appellant] from his continued alcohol abuse. Because of his inability to desist from substance abuse, the [court] concluded that a significant period of incarceration and supervision with extensive rehabilitation was required.

The [court] acknowledged and gave consideration to the fact that [Appellant] had pleaded guilty. It imposed a sentence of 15-20 months['] incarceration, a mitigated range, to run consecutive to Judge Bell's sentence at No. 2956 C 2010, and to pay restitution of \$400.00. It also ordered a drug and alcohol evaluation, and noted that it had no objection to [Appellant] being placed in a pre-release program which enabled him to work on his substance abuse problem. Because Judge Bell had given [Appellant] credit for time served, no further credit could be given by the [court].

Trial Court Opinion ["T.C.O."], 4/18/2012, at 1-2.

On January 24, 2012, Appellant filed post-sentence motions challenging the discretionary aspect of his sentence. On February 12, 2012,

the trial court denied those motions. On March 8, 2012, Appellant filed this appeal.¹

Appellant raises one issue for our review:

1. Whether the Honorable Debra Ann Pezze of the Court of Common Pleas of Westmoreland County abused her discretion in imposing a consecutive term of incarceration to the sentence of the Honorable Alfred B. Bell imposed at No. 2956 C 2010.

Appellant's Brief at 2.

The right to appeal the discretionary aspects of sentencing is not absolute. *Commonwealth v. Trippett*, 932 A.2d 188, 202 (Pa. Super. 2007). Before reaching the merits of Appellant's issue, we must ensure that our jurisdiction is properly invoked:

An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:

We 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. § 9781(b).

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

¹ The trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied.

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.

As to what constitutes a substantial question, this Court does not accept bald assertions of sentencing errors. An appellant must articulate the reasons the sentencing court's actions violated the sentencing code.

Commonwealth v. Moury, 992 A.2d 162, 170 (Pa. Super. 2010) (internal quotation marks and modifications omitted; citations modified).

Here, Appellant has complied with the first two parts of the test by filing a timely notice of appeal and preserving the issue in post-sentence motions. Appellant has included in his brief a statement pursuant to Pa.R.A.P. 2119(f), arguing that, while Appellant's sentence is in the mitigated range, it is nonetheless excessive because it is consecutive to another sentence. Appellant's Brief at 7. Appellant alleges his sentence violates 42 Pa.C.S.A. § 9781(c).²

² That section reads:

(c) Determination on appeal.--The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:

(1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;

(2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or

(Footnote Continued Next Page)

We must now determine whether Appellant has raised a substantial question.

The imposition of consecutive, rather than concurrent, sentences may raise a substantial question in only the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment. [*Commonwealth v. Pass*, 914 A.2d 442, 446-47 (Pa. Super. 2006)] (holding challenge to court's imposition of sentence of six (6) to twenty-three (23) months['] imprisonment and sentence of one (1) year probation running consecutive, did not present substantial question). *Compare* [*Commonwealth v. Dodge*, 957 A.2d 1198 (Pa. Super. 2008)] (holding imposition of consecutive sentences totaling 58 ½ to 124 years imprisonment for thirty-seven (37) counts of theft-related offenses presented a substantial question because total sentence was essentially life sentence for forty-two[-]year-old defendant who committed non-violent offenses with limited financial impact).

Moury, 992 A.2d at 171-72. To present a substantial question, Appellant must demonstrate that his aggregate sentence is excessive in light of the criminal conduct. *Commonwealth v. Mastromarino*, 2 A.3d 581, 587-88 (Pa. Super. 2010). If the sentence is not unreasonable or disproportionate to the conduct, no substantial question is raised. *Id.* at 589.

(Footnote Continued) _____

(3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.

In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

42 Pa.C.S.A. § 9781.

In this case, Appellant was sentenced to fifteen to thirty months' incarceration for a conviction of burglary, which was to run consecutive to Appellant's sentence at 2956 C 2010. T.C.O. at 1-2; Notes of Testimony ["N.T."], 1/18/2012, at 8. The fifteen to thirty months sentence is in the mitigated range. Appellant was sentenced at 2956 C 2010 to twenty to sixty months' incarceration for convictions of aggravated assault and criminal trespass. T.C.O. at 1. Appellant's aggregate sentence is thirty-five to ninety months. Appellant's burglary conviction is a felony conviction. Sentencing Form, 1/23/2012. Appellant had a prior record score of four, reflecting his prior driving under the influence and misdemeanor convictions. *Id.* The trial court considered Appellant's criminal history and "extremely significant substance abuse problem." N.T. at 7-8. This is not a case where the sentence is unreasonable or disproportionate to the conduct. No substantial question is raised. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed. Jurisdiction relinquished.