NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ANGELO SHIN Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 479 EDA 2011

Appeal from the Judgment of Sentence October 12, 2010
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0001430-2009

BEFORE: GANTMAN, J., DONOHUE, J., and PLATT, J.*

MEMORANDUM BY GANTMAN, J.: **FILED AUGUST 16, 2013**

Appellant, Angelo Shin, appeals from the judgment of sentence entered in the Montgomery County Court of Common Pleas, following his open guilty plea to four (4) counts of robbery, two (2) counts of criminal conspiracy, and one (1) count each of third degree murder and burglary.[1] We affirm.

The relevant facts and procedural history of this appeal are as follows.

> As known by Appellant to be their custom, Mr. [Robert] Chae and his wife, Janice Chae, rose early on the morning of January 9, 2009 to prepare for the drive to their beauty supply store in Philadelphia. The couple shared a home with their two adult children at 139 Gwynmont Drive in North Wales, Montgomery County.

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[1] 18 Pa.C.S.A. §§ 3701, 903, 2502(c), 3502, respectively.

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*Retired Senior Judge assigned to the Superior Court.

At approximately 5:10 a.m. … two men approached Mr. Chae just outside of the family's garage. A third man immediately confronted Mrs. Chae and taped her mouth and hands with duct tape. She watched helplessly as the two men grabbed her husband, struck him, pulled him back into the garage and closed the door. At least two of the men were armed with handguns. Mr. Chae fought back but the men restrained Mr. Chae with duct tape, beat him in the garage, and left him on the floor before ordering Mrs. Chae to give them all the money in the house and open the safe.

Minna Chae awoke that morning to the sound of her mother hyperventilating in the hallway outside of her bedroom. When Minna opened her bedroom door, a man confronted her with a gun to her head. After dragging her to her parents' master bedroom, the intruder asked her for the location of the safe. When she said she [did not] know, she was taken to the garage, where he told her to kneel on the floor near the feet of her dying father.

The intruders also woke and then directed the couple's son, Richard, downstairs to the basement. They told Richard to get down on the ground, and they bound him with duct tape.

Eventually Mrs. Chae opened the master bedroom safe for the intruders. Mrs. Chae believed that they took between fifteen and twenty thousand dollars ($15,000.00-$20,000.00), gold jewelry, a Korean bank account passbook and a family symbol stamp.

Ultimately, the two men returned Mrs. Chae to the basement where the third intruder held Minna and Richard captive. When the three men left the basement and went again upstairs, Mrs. Chae fled out the basement door to a neighbor's house to call 911.

At approximately 5:59 that morning, Montgomery Township Police Officers responded to a reported burglary in progress at the Chae home. Upon their arrival, the officers met a visibly distraught Janice Chae standing in the front of her neighbor's house waiting for them.

The officers forced entry into the Chae residence, and made their way to the garage area, where they found the lifeless body of the 50-year-old Decedent lying on the concrete floor in a large pool of blood. Mr. Chae's ankles were bound with duct tape, and virtually his entire head was wrapped in duct tape so that only a very small portion of his nose remained uncovered. The Decedent's arms were restrained behind his back with duct tape and a plastic Tuff-Tie. His nose was clogged with blood, which rendered Mr. Chae unable to breathe adequately.

On the floor near Mr. Chae's body, the police discovered a wood-handled folding knife, duct tape, Tuff-Tie brand plastic restraining devices, and the torn-off finger portion of a black latex glove. Officers collected these items for scientific analysis.

On January 9, 2009, Dr. Paul Hoyer, a forensic pathologist, conducted an autopsy of Mr. Chae's body and concluded that he died as a result of asphyxia. Dr. Hoyer deemed the manner of Mr. Chae's death a homicide.

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The exhaustive police investigation into this matter yielded information from confidential informants, tips from the public, and voluminous telephone records. Based on the information received, detectives meticulously combed through voluminous cellular phone, Direct Connect/Boost Mobile phone and cell tower records to develop additional leads. Through the continued analysis of the call detail records associated with the telephones, the detectives identified Appellant, the nephew of the deceased victim Robert Chae, as a person of interest. Detectives learned that the Decedent's family was staying with Appellant after the murder.

On January 28, 2009, detectives interviewed Appellant at the police station. When questioned about his previous cell phone, Appellant gave a false number and lied about his contacts with another suspect in the case, Joseph Page. The following day, the detectives interviewed Appellant a second time. After being confronted with the knowledge

> that the detectives knew his actual previous cell phone number and the extent of his contact with co-defendant Page, Appellant admitted his involvement in planning the robbery and provided the detectives with information leading to the other participants. Appellant explained that he had lived with the Chae family in his uncle's home for over a year and worked intermittently in the family business. Appellant admitted that he enjoyed bragging to friends about his uncle's wealth.
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> Appellant told detectives that he had met Page, a.k.a. "Tree Man" and "Spade," in 2008. Appellant listed Page's phone number in his cell phone contact list under "Tree Man." Appellant bragged to Page about his uncle's money and nice house. After several conversations, the talk turned to robbery and eventually Appellant told Page that his uncle kept approximately [one] hundred thousand dollars ($100,000.00) in a safe in the family's master bedroom. Appellant subsequently drove Page out to Montgomery Township to show him the Chae residence.
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> In December 2008, Appellant attended a meeting at 1762 Brill Street in Philadelphia with Page, Karre Pitts, Julius Wise, and two other men. At that meeting, Appellant and five of his co-defendants participated in a discussion regarding the proposed robbery at the Chae residence. A second meeting occurred on January 8, 2009, with the same five men. At this meeting, Appellant observed Page with a duffle bag containing black latex gloves and plastic Tuff-Tie restraints which Page had purchased in anticipation of the robbery. Appellant left the meeting and returned home to await news of the robbery scheduled for the following day. Appellant told detectives that on Friday, January 9, 2009, he received a cell phone call from Page after the robbery saying that he and the others were very angry because they had not recovered as much money as Appellant had predicted. Later that morning, Appellant met with Page in front of the house on Brill Street and received $2,000.00 as Appellant's share of the robbery proceeds.

(Trial Court Opinion, filed February 12, 2013, at 2-7) (internal footnotes and citations to the record omitted).

On September 23, 2009, the Commonwealth filed a criminal information charging Appellant with four counts of robbery, two counts of conspiracy, and one count each of third degree murder and burglary. Appellant pled guilty to all charges on September 25, 2009. Appellant's plea did not include a negotiated sentence. Following an oral colloquy, the court accepted Appellant's plea, deferred sentencing, and ordered a pre-sentence investigation ("PSI") report.

With the benefit of the PSI report, the court conducted Appellant's sentencing hearing on October 12, 2010. At the conclusion of the hearing, the court sentenced Appellant to twelve (12) to twenty-four (24) years' incarceration for third degree murder, a consecutive term of three (3) to six (6) years' incarceration for one count of robbery, a consecutive term of two and one-half (2½) to five (5) years' incarceration for a second count of robbery, and a consecutive term of two and one-half (2½) to five (5) years' incarceration for a third count of robbery. The court imposed no further punishment for the remaining convictions. Appellant's aggregate sentence was twenty (20) to forty (40) years' incarceration.

On October 20, 2010, Appellant timely filed a post-sentence motion. In it, Appellant asserted the sentencing court "abused its discretion in sentencing [Appellant] to an unduly harsh and excessive sentence by imposing a sentence that will, in effect, warehouse [Appellant] for most of

his life…in a state correctional institution." (Post-Sentence Motion, filed 10/20/10, at 1). Appellant further argued:

> [Appellant] had no prior criminal record, had very timely accepted responsibility for his criminal culpability and gave substantial assistance to the Commonwealth. Moreover, [Appellant] has an employment record and strong community and family support. Also, [Appellant] was genuinely remorseful for his involvement and for failing to prevent the crime. Duress clearly interfered with [Appellant's] failure to [do so]. These factors warranted a sentence much more lenient than the unduly harsh sentence imposed by the [c]ourt.

(***Id.*** at 3). The court denied the motion on February 2, 2011.

Appellant timely filed a notice of appeal on February 23, 2011. On February 24, 2011, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a Rule 1925(b) statement on March 15, 2011.

Appellant raises one issue for our review:

> WHETHER THE COURT ABUSED ITS DISCRETION IN SENTENCING…APPELLANT TO AN UNDULY HARSH AND EXCESSIVE SENTENCE BY IMPOSING A SENTENCE THAT IN EFFECT WAREHOUSES [APPELLANT] IN A STATE PRISON FOR THE MAJORITY OF HIS LIFE?

(Appellant's Brief at 4).

Appellant concedes the court imposed sentences that fell within the sentencing guidelines.[2] Nevertheless, Appellant asserts the sentences are

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[2] Appellant relies on ***Commonwealth v. Burdge***, 562 A.2d 864 (Pa.Super. 1989) and ***Commonwealth v. Sanchez***, 539 A.2d 840 (Pa.Super. 1988), *(Footnote Continued Next Page)*

unreasonable, because they fail to reflect the facts that Appellant had no prior criminal record, he accepted responsibility for his actions in a timely manner, and he provided substantial assistance to the Commonwealth in its prosecution of his co-defendants. Appellant also emphasizes his lengthy history of employment and the strong support he has received from the community and his family. Further, Appellant argues the court did not account for his remorsefulness. Under these circumstances, Appellant concludes the court abused its discretion in imposing an unduly harsh and manifestly excessive sentence. Appellant's challenge is to the discretionary aspects of his sentence.[3] ***See Commonwealth v. Lutes***, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing).

(Footnote Continued) ———————————

affirmed, 522 Pa. 153, 560 A.2d 148 (1989) stating: "Our courts have found the presence of a substantial question regarding the appropriateness of a sentence where the sentence imposed was almost twice as long as the applicable sentencing guideline range." (Appellant's Brief at 11). We reiterate, however, Appellant's admission that his own sentences fell within the guidelines. (***Id.*** at 10). Consequently, Appellant's reliance on ***Burdge*** and ***Sanchez*** is misplaced.

[3] "[W]hile a guilty plea which includes **sentence negotiation** ordinarily precludes a defendant from contesting the validity of his…sentence other than to argue that the sentence is illegal or that the sentencing court did not have jurisdiction, **open** plea agreements are an exception in which a defendant will not be precluded from appealing the discretionary aspects of the sentence." ***Commonwealth v. Tirado***, 870 A.2d 362, 365 n.5 (Pa.Super. 2005) (emphasis in original). "An 'open' plea agreement is one in which there is no negotiated sentence." ***Id.*** at 363 n.1. Here, Appellant's plea was "open" as to sentencing, so he can challenge the discretionary aspects of his sentence.

Challenges to the discretionary aspects of sentencing do not guarantee an appeal as of right. ***Commonwealth v. Sierra***, 752 A.2d 910, 912 (Pa.Super. 2000). An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:

> [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).

When appealing the discretionary aspects of a sentence, an appellant must invoke this Court's jurisdiction by including in his brief a separate concise statement demonstrating a substantial question as to the appropriateness of the sentence under the Sentencing Code. Pa.R.A.P. 2119(f); ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002). The concise statement must indicate "where the sentence falls in relation to the sentencing guidelines and what particular provision of the code it violates." ***Commonwealth v. Kiesel***, 854 A.2d 530, 532 (Pa.Super. 2004) (quoting ***Commonwealth v. Goggins***, 748 A.2d 721, 727 (Pa.Super. 2000), *appeal denied,* 563 Pa. 672, 759 A.2d 920 (2000)).

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 claim that a sentence is manifestly excessive might raise a substantial question if the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence imposed violates a specific provision of the Sentencing Code or the norms underlying the sentencing process. ***Mouzon, supra*** at 435, 812 A.2d at 627. Generally, "[a]n allegation that a sentencing court failed to consider or did not adequately consider certain factors does not raise a substantial question that the sentence was inappropriate." ***Commonwealth v. Cruz-Centeno***, 668 A.2d 536, 545 (Pa.Super. 1995), *appeal denied*, 544 Pa. 653, 676 A.2d 1195 (1996) (internal quotation marks omitted).

Instantly, Appellant's post-sentence motion and Rule 2119(f) statement properly preserved his claim that certain mitigating factors warranted a more lenient sentence. Nevertheless, as presented Appellant fails to raise a substantial question. ***See id.*** Moreover, the court had the benefit of a PSI report at sentencing. Therefore, we can presume it considered the relevant factors when sentencing Appellant. ***See Tirado,***

supra (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).

Additionally, the court addressed Appellant's issue as follows:

> Now, in reaching what I believe will be the appropriate sentence in this case, I have considered a great many things, including but not necessarily limited to the [PSI] report in its entirety, to include the attached victim impact statements that appear; the fact that [Appellant] has no criminal convictions; his cooperation with law enforcement in this particular case; [Appellant's] well-articulated sentencing memorandum, which includes the report of Stephen E. Samuel, Ph.D.; seven letters of support; documentation from the American Bible Academy; as indicated, the victim impact statements that were attached to the report, as well as the courageous victim impact statement made here today by Richard Chae; the well-presented arguments by counsel; and [Appellant's] allocution that he exercised here in court.
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> This is a sentence that has to balance both [Appellant's] cooperation with law enforcement authorities with the other actions in this case. His counsel presented, certainly, very eloquently and diligently advocated for his client as to what the [c]ourt should consider to be mitigating factors, as well as any positive aspects.
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> At the end of the day, I balance that with something that keeps coming back regarding this case, and that is that he had the ability to stop this from happening. That's why I mentioned, in a previous statement for the record, that he was at the meetings, knowing the night before that a robbery was going to happen. At that meeting, he observed black latex gloves, plastic restraints that were previously defined as these Tuff-Ties. And under legal principles that we recognize, he had the ability to renunciate, which means he had the ability to take an affirmative step and notify law enforcement authorities of this matter. That has to be taken into consideration with

> everything else and balanced in this case, what he could have done.
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> He made choices in this case, as he has made choices in his life. He makes choices as to the people with whom he was going to associate and what types of conduct he would engage in. As previously described, this is nothing short of a senseless, brutal, horrific event. It's unconscionable. It's incomprehensible, the violence that occurred in this case. And at the end of the day, there's one person that could have prevented this from occurring, and that was [Appellant].

(***See*** Trial Court Opinion at 16-17) (quoting N.T. Sentencing Hearing, 10/12/10, at 35-37). Here, the court properly evaluated the mitigating factors, which the court balanced against Appellant's role in facilitating the offenses against his family members. ***See Commonwealth v. Griffin***, 804 A.2d 1 (Pa.Super. 2002), *cert. denied*, 545 U.S. 1148, 125 S.Ct. 2984, 162 L.Ed.2d 902 (2005) (explaining court is required to consider particular circumstances of offense and character of defendant). Based upon the foregoing, Appellant is not entitled to relief on his challenge to the discretionary aspects of sentencing. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 8/16/2013