NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
THOMAS BURROS,	:	
Appellant	:	No. 481 EDA 2013

Appeal from the Judgment of Sentence January 11, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s).: CP-51-CR-0003775-2011

BEFORE: ALLEN, MUNDY and FITZGERALD,[*] JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED DECEMBER 20, 2013**

Appellant, Thomas Burros, appeals from the judgment of sentence following his bench convictions for aggravated assault,[1] unlawful restraint,[2] terroristic threats,[3] and recklessly endangering another person.[4] He claims his six-to-twelve year sentence of imprisonment violates the Sentencing Code. We affirm.

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[*] Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. § 2702.

[2] 18 Pa.C.S. § 2902.

[3] 18 Pa.C.S. § 2706.

[4] 18 Pa.C.S. § 2705.

We adopt the facts as set forth by the trial court's opinion. ***See*** Trial Ct. Op., 4/15/13, at 2-4. Appellant filed a post-sentence motion,[5] which the court denied on February 8, 2013, after a hearing. Appellant filed a timely appeal on February 12, 2013. On February 13, 2013, the court ordered Appellant to comply with Pa.R.A.P. 1925(b) within twenty-one days. Appellant's counsel filed an untimely Rule 1925(b) statement on March 11, 2013, five days after the March 6, 2013 deadline.[6] The trial court prepared a Rule 1925(a) decision. Because the trial court prepared a responsive decision to an untimely-filed Rule 1925(b) statement, we decline to remand for a *nunc pro tunc* filing of a Rule 1925(b) statement. ***See generally*** Pa.R.A.P. 1925(c)(3).

Appellant raises the following issues:

> Did not the sentencing court violate the requirements of 42 Pa.C.S. § 9721(b) of the Sentencing Code which states that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant, as the lower court seemed to exclusively focus on [A]ppellant's criminal conduct rather than his rehabilitative needs or mitigating circumstances?

[5] The motion is not part of the certified record. At the hearing on Appellant's post-sentence motion, Appellant challenged, *inter alia*, the discretionary aspects of his sentence. N.T., 2/8/13, at 1-7.

[6] Pa.R.A.P. 121(e), which provides for additional time after service by mail, does not apply to court orders. ***See*** Pa.R.A.P. 121(e).

> Was not the lower court's sentence violative of the precepts of the Pennsylvania Sentencing Code, and contrary to the fundamental norms underlying the sentencing process, and therefore was it not manifestly unreasonable, excessive, and an abuse of discretion?

Appellant's Brief at 4.

We summarize Appellant's arguments for both of his issues. Appellant contends that the sentencing court failed to consider his mental health, substance abuse, and dysfunctional family when sentencing him. He claims the court failed to explain how the sentence was necessary to protect the community. We hold Appellant is not entitled to relief.

This Court has stated that

> [c]hallenges to the discretionary aspects of sentencing do not entitle an appellant to appellate review as of right. Prior to reaching the merits of a discretionary sentencing issue:
>
> > 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.A. § 9781(b).
>
> 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. Evans, 901 A.2d 528, 533-34 (Pa. Super. 2006) (some citations and punctuation omitted).

> [T]he 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 (*e.g.*, the sentence is outside the guidelines and the court did not offer any reasons either on the record or in writing, or double-counted factors already considered). Similarly, the Rule 2119(f) statement must specify what fundamental norm the sentence violates and the manner in which it violates that norm (*e.g.*, the sentence is unreasonable or the result of prejudice because it is 500 percent greater than the extreme end of the aggravated range.).

Commonwealth v. Googins, 748 A.2d 721, 727 (Pa. Super. 2000) (*en banc*).

Instantly, Appellant timely appealed, preserved his issues at the post-sentence motion hearing,[7] and included a Pa.R.A.P. 2119(f) statement in his brief. ***See Evans***, 901 A.2d at 533. Appellant's Rule 2119(f) statement largely complies[8] with ***Googins***, ***supra***, as it contends his maximum sentence was disproportionate and not individualized to the circumstances, and asserts that the sentence violates 42 Pa.C.S. § 9781(2). Appellant has raised a substantial question by asserting that his sentence was contrary to

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[7] As noted above, the motion is not included in the certified record but the issues were raised at the hearing on Appellant's post-sentence motion.

[8] Appellant's Rule 2119(f) statement does not explicitly state where the sentence falls in relation to the sentencing guidelines, but because the Commonwealth does not argue waiver, we also decline to find waiver.

the fundamental norms underlying the sentencing process. ***See Googins***, ***supra***. Accordingly, we examine the merits.

> In reviewing the decision of the sentencing court, our standard of review is well-settled:
>
> > Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Bowen, 975 A.2d 1120, 1122 (Pa. Super. 2009) (citation omitted).

When a presentence investigation report exists, this Court presumes that the sentencing court "was aware of relevant information regarding [the defendant's] character and weighed those considerations along with the mitigating statutory factors." ***Commonwealth v. Fullin***, 892 A.2d 843, 849-50 (Pa. Super. 2006) (citation omitted). As our Supreme Court explained:

> A pre-sentence report constitutes the record and speaks for itself. In order to dispel any lingering doubt as to our intention of engaging in an effort of legal purification, we state clearly that sentencers are under no compulsion to employ checklists or any extended or systematic definitions of their punishment procedure. Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed. This is particularly true, we repeat, in those circumstances where it can be demonstrated that the judge had any degree of

> awareness of the sentencing considerations, and there we will presume also that the weighing process took place in a meaningful fashion. It would be foolish, indeed, to take the position that if a court is in possession of the facts, it will fail to apply them to the case at hand.

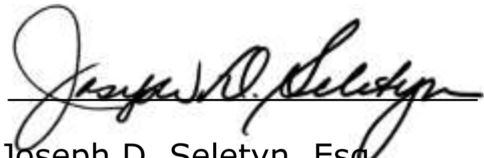
Commonwealth v. Devers, 546 A.2d 12, 18 (Pa. 1988). "The sentencing judge can satisfy the requirement that reasons for imposing sentence be placed on the record by indicating that he or she has been informed by the pre-sentencing report[,] thus properly considering and weighing all relevant factors." ***Commonwealth v. Ventura***, 975 A.2d 1128, 1135 (Pa. Super. 2009) (citation omitted).

Instantly, after careful review of the certified record, the parties' briefs, and the decision of the Honorable Donna J. Woelpper, we affirm on the basis of the trial court's opinion. ***See*** Trial Ct. Op. at 5-7 (holding court sentenced Appellant within sentencing guidelines; probationary sentence did not exceed statutory maximum; and court reviewed presentence investigation report). Because the sentencing court acknowledged reviewing the presentence investigation report, we presume it was aware of and weighed the information in the report and the mitigating statutory factors. ***See*** N.T. Sentencing, 1/11/13, at 26; ***see also Ventura***, 975 A.2d at 1135; ***Fullin***, 892 A.2d at 849-50; ***see generally Devers***, 546 A.2d at 18. Accordingly, having discerned no abuse of discretion, we affirm the judgment of sentence. ***See Bowen***, 975 A.2d at 1122.

Judgment of sentence affirmed.

J. S61033/13

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/20/2013

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL SECTION

FILED
APR 15 2013
Criminal Appeals Unit
First Judicial District of PA

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0003775-2011
vs.	:	
THOMAS BURROS	:	481 EDA 2013

CP-51-CR-0003775-2011 Comm. v. Burros, Thomas
Opinion

7010232761

OPINION

WOELPPER, DONNA, J. APRIL 15, 2013

I. OVERVIEW AND PROCEDURAL HISTORY

On November 29, 2012, this court found Thomas Burros ("Defendant") guilty of aggravated assault,[1] unlawful restraint,[2] terroristic threats,[3] and recklessly endangering another person ("REAP").[4] On January 11, 2013, prior to sentencing, Defendant moved the court for extraordinary relief in the form of an arrest of judgment, judgment of acquittal, and a new trial.[5] The court denied the motion and sentenced Defendant to six to twelve years incarceration on the aggravated assault charge; five years probation on the unlawful restraint charge; five years probation on the terroristic threats charge; and no further penalty as to the REAP charge. The probationary periods were to run consecutive to Defendant's incarceration and to one another. The court denied Defendant's motion for reconsideration on February 8, 2013.

[1] 18 Pa.C.S. § 2702.
[2] 18 Pa.C.S. § 2902.
[3] 18 Pa.C.S. § 2706(a)(1).
[4] 18 Pa.C.S. § 2705.
[5] All relief was sought only with regard to the aggravated assault charge.

Defendant filed an appeal on February 12, 2013, arguing that the court "went well beyond the period of supervision contemplated by the sentencing guidelines," by bestowing a "manifestly unreasonably and excessive" sentence. *See* Statement of Errors Complained of on Appeal ("Statement of Errors") at ¶ 2. Defendant further argues that the court only considered Defendant's "criminal conduct" and not rehabilitative or mitigating factors. *Id.* at ¶ 3. Finally, Defendant contends that the court failed to adequately state the bases for the sentence on the record. *Id.* at ¶ 4. For the reasons below, Defendant's claims should be dismissed, and the judgment of sentence should be affirmed.

II. FACTUAL BACKGROUND

Complainant Crystal Willis ("Willis") testified at trial that on March 8, 2011, Appellant (who was her live-in boyfriend at the time) violently assaulted her. She testified that Appellant received a phone call, left the apartment for approximately thirty minutes, and returned high on crack cocaine. Notes of Testimony ("N.T."), Nov. 20, 2012 at 15-16.[6] After making a phone call, Appellant left the apartment again, taking with him Willis's food stamp access card ("access card"), her cell phone, and her keys. *Id.* at 17-20. Willis had not given Appellant permission to take her things, and she was concerned, based on past experience, that he had just called to purchase drugs with her access card. *Id.* at 19. Willis pressed redial on the apartment phone from which Defendant had made the call and told the individual on the other end of the line not to accept the food stamp card from Appellant. *Id.* at 18-19. After Willis had placed this call, Appellant began repeatedly calling her from the cell phone he had taken from her apartment. *Id.* at 20. During these calls, Appellant and Willis argued about his use of the access card. *Id.*

[6] Willis testified that she concluded that Appellant was high on crack cocaine because he was acting as he had when they had been high together on crack cocaine in the past. N.T., Nov. 20, 2012 at 16.

After a while, Willis stopped answering Appellant's calls. *Id.* Because she was concerned that Appellant would be angry when he returned to the apartment, Willis called her friend Inga Jones ("Jones") to pick her up from the apartment. *Id.* at 19. While waiting for Jones to pick her up, Willis went to her neighbor Marlene Curran's ("Curran") apartment. *Id.* at 21. From Curran's apartment, the women called the police. *Id.* When an hour had passed without any response from the police, Willis and Curran decided to step outside of the apartment to look for Jones. *Id.*

Shortly after exiting Curran's apartment, Willis observed Appellant approaching the building. *Id.* at 23. He began walking toward Willis, saying that he wanted to talk with her. *Id.* When Willis said she did not want to talk, Appellant grabbed her hand, pulled her in his direction, and threw her down six concrete steps. *Id.* at 24-25. Willis landed and hit her head on a concrete parking stop. *Id.* at 25. Appellant then repeatedly punched Willis's face and sides with closed fists and kicked her in the ribs. *Id.* at 26-27. Willis could not get up, so Appellant pulled her to her feet. *Id.* at 35. He walked her around the neighborhood, at one point ducking out of view of a police vehicle, and warned her that he was "crazy" and that she had not yet seen just how crazy he could be. *Id.* at 38-39. During this encounter, Willis was sore, dizzy, and frightened. *Id.* at 37.

When they returned to the apartment, Appellant continued to tell Willis how crazy he was, and he threatened to kill her if she called the police. *Id.* at 41. Willis undressed down to her tee-shirt and underwear. *Id.* at 42-43. Then, at Appellant's prompting, she said that she would do whatever Appellant wanted her to do. *Id.* at 42. Appellant told Willis that he wanted "some pussy," and asked her, "You gonna give me some?" *Id.* Willis answered affirmatively, and they had sex. *Id.* Willis testified that after the sex, she moved to get up, but Appellant gave

her "such a nasty look to let [her] know [she] better not move." *Id.* at 44. Willis was afraid that if she did get up, Appellant would beat her again. *Id.* at 45. For the rest of the night, Willis just lay cornered between Appellant and the bedroom wall. *Id.* at 47-48. He followed her movements very carefully, even if she got up to use the bathroom. *Id.* at 48.

The next day, Willis was still in a great deal of pain. *Id.* at 50. She was bruised across her face, breast, leg, hand, and torso. *See* Exhibit C-1. Appellant's demeanor, however, had changed; he was apologetic and tried to take care of Willis. *Id.* at 49-50. Appellant stayed with Willis in the apartment all day. Although he was not making the threats he had the night before, Willis was still afraid that if she left, she might set off his temper again. *Id.* at 51. A couple of days later, Appellant told Willis that he wanted her to go to the grocery store. *Id.* at 52. Willis had not been out of the apartment since the March 8 incident. *Id.* She was still bruised and in pain, but she drove with Appellant and his uncle "Jay" to the grocery store. *Id.* at 53.[7] Appellant still had Willis's keys, but he gave her back her cell phone so that she could call him and Jay when she was finished shopping. *Id.* After Appellant and Jay picked Willis up from the store, Appellant again got high on crack cocaine. *Id.* at 54.

A few days later, when he was again high, Appellant took Willis's keys, food stamp card, and cell phone and said that he was going to the store. *Id.* at 56. Willis grew anxious while she waited for him to return. *Id.* On March 14, 2011, after approximately twenty-four hours had passed without any sign of Appellant, Willis again called the police. *Id.* at 56-57. Officers picked Willis up from her apartment and took her to the police district, where they photographed her injuries and took her statement. *Id.*

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[7] "Jay," whose full name is Jesse Jackson, testified at trial that he believes this grocery trip took place on March 10, 2011. N.T., Nov. 20, 2012 at 167.

III. DISCUSSION

Appellant argues that "the aggregate sentence of twenty-two years supervision imposed by [the trial court]...went well beyond the period of supervision contemplated by the sentencing guidelines." *See* Statement of Errors at ¶ 2. Sentencing is a discretionary matter left to the sentencing court, and but for a "manifest abuse of that discretion," the appellate court will affirm the sentence. *See Commonwealth v. Anderson*, 552 A.2d 1064, 1072 (Pa. Super. Ct. 1988), *appeal denied*, 571 A.2d 1064 (Pa. 1989) (citing *Commonwealth v. Fries*, 523 A.2d 1134 (Pa. Super. Ct. 1987)).

In fashioning its sentence, the court must consider the need to protect the public, the nature of the offense and impact on the victim, the defendant's rehabilitative needs, and the Sentencing Guidelines. *See* 42 Pa.C.S. § 9721(b); *see also Commonwealth v. Hyland*, 875 A.2d 1175, 1184 (Pa. Super. Ct. 2005) (quoting *Commonwealth v. Monahan*, 860 A.2d 180, 184 (Pa. Super. Ct. 2004)). The sentencing court also has the discretion to "impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed." *See Commonwealth v. Marts*, 889 A.2d 608, 612 (Pa. Super. Ct. 2005). Unless an appellate court considers the aggregate sentence to be "grossly disparate" to the defendant's conduct or "patently 'unreasonable,'" it will affirm the imposition of consecutive sentences. *See Commonwealth v. Mastromarino*, 2 A.3d 581, 587-888 (Pa. Super. Ct. 2010) (quoting *Commonwealth v. Gonzalez-Dejesus*, 994 A.2d 595 (Pa. Super. Ct. 2010)).

The court sentenced Appellant within the Sentencing Guidelines. Those guidelines recommend that an individual with Appellant's prior record score ("repeat felony 1 and felony 2 offender") who committed aggravated assault (offense gravity score of 10), be sentenced to a

minimum of six to seven years of incarceration, plus or minus one year. This court sentenced Appellant to six to twelve years of incarceration on the aggravated assault charge, putting his sentence squarely within the Sentencing Guidelines.

As to unlawful restraint and terroristic threats charges (offense gravity scores of 3), the Sentencing Guidelines recommend a minimum sentence of one to one-and-a-half years of confinement (boot camp eligible) on each charge, plus or minus three months. Rather than sentence Appellant to incarceration, this court ordered a five year probationary sentence on each charge. The Sentencing Guidelines do not provide recommendations for "non-confinement sentencing alternatives," such as probation. *See* 204 Pa. Code § 303.9. A probationary sentence may not exceed, however, the five-year statutory maximum applicable to each of these charges. *See Commonwealth v. Merolla*, 909 A.2d 337, 347 (Pa. Super. Ct. 2006) (noting that Sentencing Code does not provide for minimum/maximum probationary terms, but does limit the length of probation to a "maximum term for which a defendant could be confined."); 42 Pa.C.S.A. § 9754(a). Here, the sentence did not exceed that maximum.

In formulating its sentence, the court considered Appellant's rehabilitative needs and any mitigating circumstances. When a sentencing court reviews a defendant's presentence report, it is presumed that the court has considered evidence of the defendant's rehabilitative needs and mitigating factors. *See Commonwealth v. Fullin*, 892 A.2d 843, 849-50 (Pa. Super. Ct. 2006). At Appellant's sentencing, the court specifically referenced and incorporated the recommendations in Appellant's presentence report. N.T., Jan. 11, 2013 at 26. The recommendations that the court adopted included ordering Appellant to undergo substance abuse treatment, obtain his GED, receive vocational training, attend a mental health program, and, when appropriate, seek and maintain employment. *Id.* The nature of these mandates illustrates

that the court appropriately considered both Appellant's rehabilitative needs, as well as any evidence of mitigation. *See Fullin*, 892 A.2d at 849-50. In addition to stating on the record that it accounted for the needs and circumstances addressed in the presentence report, the court also considered argument of counsel and stated that in fashioning its sentence, it was considering the Sentencing Guidelines and Appellant's allocution.

IV. CONCLUSION

For all of the foregoing reasons, the court's judgment of sentence should be affirmed.

BY THE COURT

DONNA M. WOELPPER, JUDGE

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0003775-2011
vs.	:	
THOMAS BURROS	:	481 EDA 2013

PROOF OF SERVICE

I hereby certify that I am this 15th day of April, 2013, serving the foregoing Order on the persons indicated below, by first class mail:

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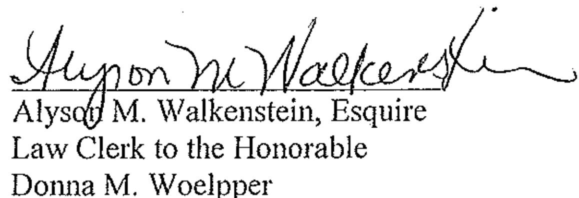

Alyson M. Walkenstein, Esquire
Law Clerk to the Honorable
Donna M. Woelpper