

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CHRISTOPHER ORTIZ,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 484 EDA 2012

Appeal from the Judgment of Sentence entered December 9, 2011
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0002653-2011

BEFORE: OLSON, WECHT and COLVILLE,* JJ.

MEMORANDUM BY OLSON, J.:

Filed: March 12, 2013

Appellant, Christopher Ortiz, appeals from the judgment of sentence following his *nolo contendere* plea to burglary.¹ We affirm.

The facts of this case, as gleaned from the plea hearing and accepted by Appellant as the factual basis for his plea, are as follows. The victim was entering her apartment building in Allentown on May 9, 2010 when she ran into Appellant. The victim and Appellant had previously engaged in consensual sex. Appellant invited himself into the victim's apartment and she refused. Later, Appellant called the victim on her cellular phone, but she did not respond. The victim took some sleeping pills and when she awoke

¹ 18 Pa.C.S.A. § 3502(c)(1).

*Retired Senior Judge assigned to the Superior Court.

the next day her window was broken, there was blood on the walls, the victim's pants were pulled down, and her vagina was sore. When police spoke with Appellant he admitted that he broke the victim's window and entered her bedroom, but denied any sexual contact on that occasion. Appellant's DNA was recovered from the victim.

The Commonwealth charged Appellant with burglary, criminal trespass, rape of an unconscious victim, sexual assault, indecent assault, and rape by forcible compulsion.² On October 24, 2011, Appellant pled *nolo contendere* to burglary. The Commonwealth agreed to withdraw the remaining charges. The trial court held a sentencing hearing on December 9, 2011. The Commonwealth recommended capping Appellant's minimum sentence at five years. The trial court, with the aid of a presentence investigation report, imposed a sentence of five to fifteen years of imprisonment. This timely appeal followed.³

On appeal, Appellant presents the following issue for our review:

² 18 Pa.C.S.A. §§ 3502, 3503, 3121, 3124.1, 3126, and 3121, respectively.

³ Appellant filed a post-sentence motion to reconsider and modify sentence on December 19, 2011. On January 4, 2012, the trial court denied relief. Appellant filed a notice of appeal on February 2, 2012. On February 3, 2012, 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 complied timely on February 24, 2012. The trial court filed an opinion pursuant to Pa.R.A.P. 1925(a) on March 1, 2012, relying upon its rationale set forth in its January 4, 2012 order denying Appellant's post-sentence motion.

- A. Whether the lower court abused its discretion in imposing a manifestly unreasonable minimum sentence that exceeded the aggravated range of the sentencing guidelines when the court used factors not legally appropriate, namely the dismissed charges, as a basis to enhance the sentence and further failed to fully review all the appropriate factors required under the sentencing code and casually dismissed any mitigating circumstances before imposing the harsh minimum sentence?

Appellant's Brief at 7 (complete capitalization and typographical error omitted).

Appellant claims that the trial court erred by failing to account for: (1) his limited IQ; (2) his prior record which consisted of a single misdemeanor for assault; and, (3) the presentence investigation report recommendation of 11½ to 23 months of imprisonment. *Id.* at 11. Further, Appellant contends the trial court impermissibly used the dismissed rape charge in fashioning the sentence. *Id.* at 12.

Our standard of review of the discretionary aspects of sentencing is deferential, and we must determine if the trial court abused its discretion. *Commonwealth v. Dodge*, 957 A.2d 1198, 1200 (Pa. Super. 2008). "Moreover, the sentencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding his crime." *Commonwealth v. Brooks*, 2013 WL 66474, at *4 (Pa. Super. 2013).

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

(1) [] appellant has filed a timely notice of appeal, **see** Pa.R.A.P. 902 and 903; (2) [] the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa.R.Crim.P. 720; (3) [consider] whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) [] 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 in a motion to modify the sentence imposed.

Commonwealth v. Moury, 992 A.2d 162, 170 (Pa. Super. 2010) (citations and brackets omitted).

Upon review, Appellant raised the issue presented here in his post-sentence motion and then filed a timely notice of appeal. Thus, he has complied with the first two requirements. Appellant has also included a Rule 2119 statement in his appellate brief wherein he claims that his sentence exceeded the aggravated range of the sentencing guidelines and violated the fundamental norms of sentencing by focusing on crimes that the Commonwealth agreed to withdraw. Thus, Appellant meets the third requirement as well. Finally, we conclude that Appellant raises a substantial question for our review. ***See Brooks*** at *4, ***citing Commonwealth v. Booze***, 953 A.2d 1263, 1278 (Pa. Super. 2008) (allegation that court failed to state adequate reasons on the record for imposing aggravated range sentence raises a substantial question for our review) and ***Commonwealth v. P.L.S.***, 894 A.2d 120, 127 (Pa. Super. 2006) (claim that court relied on

impermissible factors, such as uncharged conduct, in imposing sentence raises substantial question).

Initially, we note that while Appellant recites the standard of review, as well as the legal principles that require him to establish a substantial question, he does not cite any legal authority to support the specific challenge he raises on appeal, *i.e.*, the trial court improperly relied upon the dismissed charges in imposing sentence. Hence, we could find the issue waived. ***Commonwealth v. Andre***, 17 A.3d 951, 965 (Pa. Super. 2011). However, upon conducting independent research, we discovered the applicable legal authority and, therefore, decline to find waiver.

We have previously determined that a sentencing court may rely on evidence of prior arrests or criminal conduct, even where a conviction did not arise from that behavior. ***Brooks***, at * 4, *citing P.L.S.*, 894 A.2d at 130; ***see also Commonwealth v. Fries***, 523 A.2d 1134, 1136 (Pa. Super. 1987) (“[I]t is not improper for a court to consider a defendant's prior arrests which did not result in conviction, as long as the court recognizes the defendant has not been convicted of the charges.”).⁴

⁴ We also acknowledge our decision in ***Commonwealth v. Stewart***, 867 A.2d 589 (Pa. Super. 2005). In that case, another panel of this Court vacated judgment of sentence where the trial court specifically referenced three dismissed sexual crimes when fashioning sentence. That case is distinguishable from this case, however, because in ***Stewart*** the trial court specifically examined the guidelines and attendant sentences for the charges that were *nolle prossed* and then used them to enhance Stewart's sentence (*Footnote Continued Next Page*)

In this case, Appellant pled *nolo contendere* to burglary. "A person commits the offense of burglary if, **with the intent to commit a crime therein**, the person [] enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense any person is present." 18 Pa.C.S.A. § 3502(a) (emphasis added). Thus, intent to commit a crime is an element of the offense of burglary. Certainly, just as a sentencing court can consider prior uncharged criminal conduct, the sentencing court in this case was able to consider the circumstances surrounding Appellant's burglary, including the offense(s) Appellant intended to commit as he entered the victim's residence.

Moreover, in the case *sub judice*, the trial court had the benefit of a presentence investigation report. We have previously stated:

In imposing sentence, the trial court is required to consider the particular circumstances of the offense and the character of the defendant. The trial court should refer to the defendant's prior criminal record, age, personal characteristics, and potential for rehabilitation. However, where the sentencing judge had the benefit of a presentence investigation report, it will be presumed that he or she was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. Additionally, the sentencing court must state its reasons for the sentence on

(Footnote Continued) _____

on the remaining charge. Here, as explained *infra*, the trial court looked at the underlying criminal conduct as one of the elements of Appellant's burglary conviction.

the record. 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. Fowler, 893 A.2d 758, 766-767 (Pa. Super. 2006) (citations omitted).

As a final point, upon review of the sentencing transcript, the trial court stated its reasons on the record for imposing Appellant's sentence. "[T]he sentencing court may deviate from the guidelines, if necessary, to fashion a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offense as it relates to the impact on the life of the victim and the community, so long as it also states of record the factual basis and specific reasons which compelled it to deviate from the guideline range." ***Commonwealth v. Bowen***, 55 A.3d 1254, 1264 (Pa. Super. 2012); ***see also*** 42 Pa.C.S.A. § 9721. Before sentencing, the trial court stated "[t]he facts are horrendous" and did not constitute "your normal burglary." N.T., 12/9/2011, at 8, 10. The trial court "considered [Appellant's] limited intelligence[,] " but determined it "did not rise to any level of defense[.]" ***Id.*** at 15. The sentencing court also heard extensive testimony regarding various options for incarceration and rehabilitation. ***Id.*** at 4-10. Finally, the trial court specifically stated the factors listed at Section 9721 on the record

and that the facts of this case required deviation from the guidelines. *Id.* at 15-16. We discern no abuse of discretion.

Judgment of sentence affirmed.

Colville, J., concurs in the result.