NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MICHAEL BUTLER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 538 WDA 2012

Appeal from the Judgment of Sentence October 27, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0011981-2007

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

MEMORANDUM BY GANTMAN, J.: FILED: June 5, 2013

Appellant, Michael Butler, appeals from the judgment of sentence entered in the Allegheny County Court of Common Pleas, following his jury trial convictions for possession with intent to deliver ("PWID"), criminal conspiracy, and dealing in the proceeds of unlawful activities.[1] We affirm.

In its opinion, the trial court fully and correctly sets forth the relevant facts and procedural history of the case. Therefore, we have no reason to restate them. We add only that the court initially sentenced Appellant on February 10, 2009, to two consecutive terms of nine (9) to eighteen (18)

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[1] 35 P.S. § 780-113(a)(30); 18 Pa.C.S.A. §§ 930, 5111(a)(3), respectively.

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*Former Justice specially assigned to the Superior Court.

years' incarceration for PWID and criminal conspiracy, followed by two (2) to four (4) years' incarceration for dealing in the proceeds of unlawful activities. On April 20, 2011, this Court affirmed Appellant's convictions, vacated the judgment of sentence for conspiracy,[2] and remanded the case for re-sentencing. The Supreme Court of Pennsylvania denied Appellant's petition for allowance of appeal on September 26, 2011.

On October 27, 2011, the trial court resentenced Appellant to consecutive terms of nine (9) to eighteen (18) years' incarceration for PWID, five (5) to ten (10) years' incarceration for criminal conspiracy, and two (2) to four (4) years' incarceration for dealing in proceeds of unlawful activities. Appellant filed timely post-sentence motions on November 4, 2011, which the court denied on February 23, 2012. On March 23, 2012, Appellant timely filed a notice of appeal. The court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant complied.

Appellant raises the following issue for our review:

> DID THE [TRIAL] COURT ABUSE ITS DISCRETION IN IMPOSING AN UNREASONABLE AND MANIFESTLY EXCESSIVE SENTENCE TOTALING 16 TO 32 YEARS IMPRISONMENT BY IMPOSING CONSECUTIVE SENTENCES UPON FOCUSING EXCLUSIVELY ON THE SERIOUSNESS OF THE CRIMES, AND DID NOT CONSIDER RELEVANT

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[2] On appeal, the sentence of nine to eighteen years for conspiracy was deemed illegal because the statutory minimum and maximum sentence for that conviction was only five to ten years.

> FACTORS REQUIRED BY THE CRIMES CODE, INCLUDING [APPELLANT'S] BACKGROUND, CHARACTER, HISTORY, AND REHABILITATIVE NEEDS?

(Appellant's Brief at 5).[3]

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Commonwealth v. Sierra***, 752 A.2d 910, 912 (Pa.Super. 2000). Prior to reaching the merits of a discretionary sentencing issue:

> [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 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);

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[3] Appellant's claim challenges the discretionary aspects of his sentence. ***See Commonwealth v. Lutes***, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing).

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***, 562 A.2d 1385, 1387 (Pa.Super. 1989) (*en banc*) (emphasis in original) (internal quotation marks omitted).

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. Nevertheless, "[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) (quoting ***Commonwealth v. Urrutia***, 653 A.2d 706, 710 (Pa.Super. 1995), *appeal denied*, 541 Pa. 625, 661 A.2d 873 (1995)). ***See also Commonwealth v. Kane***, 10 A.3d 327 (Pa.Super. 2010), *appeal denied*, 612 Pa. 689, 29 A.3d 796 (2011) (stating claim that sentencing court failed to consider factors set forth in Section 9721(b) does not raise substantial question). Further, where the sentencing court had the benefit of a PSI, the law assumes the court was aware of and weighed relevant information regarding mitigating factors. ***Commonwealth v. Tirado***, 870 A.2d 362 (Pa.Super. 2005).

After a thorough review of the record, the briefs of the parties, the applicable law, and the reasoned opinion of the Honorable Edward J. Borkowski, we conclude Appellant's issue merits no relief.[4] (***See*** Trial Court

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[4] In his post-sentence motion, Appellant broadly challenged his new sentence as "unreasonable and excessive under the circumstances of the case." (***See*** Supplemental Post-Sentencing Motions, filed 11/4/11, at 2; attached as Appendix C to Appellant's Brief.) In his Rule 1925(b) statement, Appellant added: "The court abused its discretion in imposing an unreasonable and manifestly excessive sentence totaling 16 to 32 years imprisonment because it focused exclusively on the seriousness of the crimes, and did not consider all relevant factors when sentencing [Appellant], including his background, character and history, his rehabilitative needs." (***See*** Concise Statement, filed 5/14/12, at 2; attached as Appendix B to Appellant's Brief.) In his Rule 2119(f) statement on appeal, Appellant "asserts that, although his sentence is within the statutory limits, and all but one of the periods of incarceration imposed are in the standard range, the sentence imposed was manifestly excessive, unreasonable, and an abuse of discretion for the following reasons: (1) the trial court sentenced him without providing sufficient reasons for the sentence imposed, and without providing sufficient reasons for imposing an

(Footnote Continued Next Page)

Opinion, filed September 11, 2012, at 25-27) (finding: Appellant's excessiveness issue is without merit, where Appellant was convicted of three felonies; imposition of consecutive sentences was within court's discretion and does not raise substantial question in this case; record demonstrates court considered nature of Appellant's offenses, content of PSI, sentencing guidelines, impact of offenses on victims and community, Appellant's background and rehabilitative needs, and potential mitigating factors; therefore, record belies Appellant's claim). Accordingly, we affirm on the basis of the trial court's opinion.

Judgment of sentence affirmed.

(Footnote Continued) ———————————

aggravated range sentence for [PWID] (2) the trial court failed to give careful consideration to all relevant Sentencing Code factors, (3) the sentences were imposed consecutive to one another and the maximum sentence of 16 to 32 [years] imposed was excessive." (***See*** Appellant's Brief at 21.) Appellant waived his claim regarding the sufficiency of the court's reasons for the sentence imposed because Appellant raised it for the first time on appeal. ***See Evans, supra***.

Judgment Entered.

Nicholas V. Cosetti

Deputy Prothonotary

Date: June 5, 2013

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE

v.

MICHAEL BUTLER,
APPELLANT

CC No: 200711981

538 WDA 2012

CORRECTED OPINION

FILED BY:
THE HONORABLE
EDWARD J. BORKOWSKI

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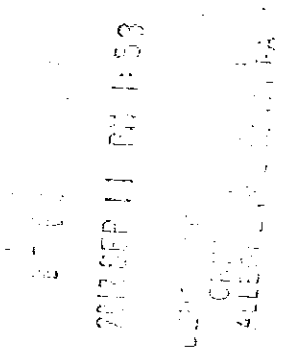

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE

CC No: 200711981

538 WDA 2012

v.

MICHAEL BUTLER,
APPELLANT

OPINION

BORKOWSKI, J.

PROCEDURAL HISTORY

On November 9, 2007, Appellant was charged with one count each of: Criminal Conspiracy (Intent to Deliver), 18 Pa.C.S. § 903(a)(1); Dealing in Proceeds of Unlawful Activities, 18 Pa.C.S. § 5111(a)(3); Persons Not to Possess Firearms, 18 Pa.C.S. § 6105(a); Possession of a Controlled Substance with Intent to Deliver, 35 P.S. § 780-113(a)(30); and Possession of Drug Paraphernalia, 35 P.S. § 780-114(a)(32). A suppression hearing was held on July 31, 2008, after which the motion to suppress was denied.

Appellant proceeded to a jury trial on November 5-10, 2008. On November 10, 2008 Appellant was convicted of one count of Possession of a Controlled Substance with Intent to Deliver, 35 P.S. § 780-113(a)(30), one count of Criminal Conspiracy, 18 Pa.C.S. § 903(a) (Intent to Deliver), and

one count of Dealing in Proceeds of Unlawful Activities, 18 Pa.C.S. § 5111(a)(3). Appellant was acquitted of the other two counts.

The Trial Court ordered a presentence report and on February 10, 2009, following a sentencing hearing, this Court imposed consecutive sentences of nine to eighteen years imprisonment for the convictions of Possession with Intent to Deliver and Criminal Conspiracy, and two to four years for Dealing in Proceeds of Unlawful Activities. The aggregate sentence imposed was twenty to forty years imprisonment.

On February 13, 2009 Appellant filed post-sentence motions, seeking judgment of acquittal, a new trial, or modification of his sentence. Appellant's post-sentence motion was subsequently denied on March 30, 2009. Appellant filed a timely Notice of Appeal to the Superior Court of Pennsylvania on April 24, 2009. On April 20, 2011, the Superior Court issued its' Opinion in this matter whereby that Court vacated the sentence for Conspiracy to Possess with Intent to Deliver (cocaine). On May 20, 2011, Appellant filed a Petition of Allowance of Appeal to the Supreme Court. On September 26, 2011, the Supreme Court denied Appellant's Petition. On October 27, 2011, Appellant was re-sentenced by the Trial Court.

This timely appeal follows.

MATTERS COMPLAINED OF ON APPEAL

Appellant raises the following error on appeal set forth exactly as Appellant states them:

> 1. The court abused its discretion in imposing an unreasonable and manifestly excessive sentence totaling 16 to 32 years because it focused exclusively on the seriousness of the crimes, and did not consider all relevant facts when sentencing Mr. Butler, including his background, character and history, his rehabilitative needs.

FACTS

In 2006, Jason Mikelonis, a detective with the Allegheny County Police Department assigned to the narcotics, vice, and intelligence unit, began an investigation of Appellant, Michael Butler. See Trial Transcript dated November 5-10, 2008 at page 66 (hereafter, "T.T."). Law enforcement suspected Appellant of being a multi-kilo cocaine trafficker within the City of Pittsburgh and Allegheny County. (T.T. 66). Detective Mikelonis conducted physical surveillance of Appellant. (T.T. 67). Detective Mikelonis never observed Appellant entering a place of employment nor was he aware that Appellant was self-employed. (T.T. 70, 162).

His partner, Detective Jonathan Love, was also involved in the investigation of Appellant and participated in the surveillance of Appellant on at least two occasions, as well as doing occasional drive-bys of Appellant's residences. (T.T. 174-75, 214).

Appellant resided in the Garfield section of the City of Pittsburgh, maintaining separate residences at 5204 Dearborn Street and 5365 Hillcrest Street, with the Hillcrest Street address serving as the base for his drug trafficking. (T.T. 67, 84). While under surveillance Appellant was observed frequently operating a gold Honda Odyssey minivan. (T.T. 69-71).

On September 21, 2006 Detective Mikelonis and Sergeant [Lee] Yingling stopped Appellant while he was driving that vehicle because Appellant was wanted on an active warrant from the City of Pittsburgh police. (T.T. 70-71, 73). Appellant was taken into custody for the active warrant and at that time Appellant gave his verbal consent to the officers to a search of the vehicle. (T.T. 71-72). The vehicle was searched in a parking lot adjacent to the street where Appellant was stopped. (T.T. 72). As part of the search Detective Mikelonis lifted the tailgate and observed sealant or a coating that was covering the back area of the vehicle where the carpet met the opening for the hatch. (T.T. 73, 163). Detective Mikelonis recognized this as an after-market alteration typical of a hidden compartment used to store and transport drugs. (T.T. 73, 81, 163). The vehicle was subsequently released from the parking lot to Appellant's mother, Karen Brown, and Detective Mikelonis did not see the Honda Odyssey van after September 21, 2006. (T.T. 72-73).

On September 24, 2006, approximately five miles east of the city of North Platt, Nebraska, Ryan Hayes, a Nebraska State Trooper, stopped

Appellant for speeding in the gold Honda Odyssey. (T.T. 48-49, 54-55, 89). The passenger in the vehicle, Rondel Gilmore, was arrested on an active felony warrant from Pennsylvania. (T.T. 50).

After Mr. Gilmore was arrested, Trooper Hayes requested consent from Appellant to search his van, and Appellant consented to the search both verbally and in writing. (T.T. 51, 59). Trooper Hayes summoned a canine officer to the scene. (T.T. 51, 59, 63). The canine performed an exterior sniff of the van and alerted to the odor of narcotics in the area of the right, rear passenger side. (T.T. 51-52, 59, 61-63). A subsequent search of the van revealed United States currency in the amount of $105,000. (T.T. 51, 57). The currency was found in an after-market compartment that was located in the rear of the van near the third-row seats. (T.T. 51, 52, 55). No narcotics were recovered, but the currency and the van were seized; Appellant was neither arrested nor charged with any crime. (T.T. 52, 59-60).

At the time of the stop the Nebraska State Police seized a cell phone with phone number (412) 513-1649. (T.T. 136,145). This phone was registered to Tony Butler, at 5300 Dearborn Street in the Garfield section of the City of Pittsburgh, an address that did not exist. (T.T. 136-37, 145). On September 24, 2006, prior to the seizure of this phone, one outgoing call was made to "Sonny" at (347) 983-6312, and two inbound calls from "Sonny Tejada" were received on the phone. (T.T. 145). On September 25, 2006

Appellant flew from Omaha, Nebraska to Pittsburgh, Pennsylvania via Midway Airport In Chicago, Illinois. (T.T. 205-06). The records also show that a ticket was booked for Sonny Tejada on September 27, 2006 for a September 28 departure date from LAX Airport in Los Angeles, California to Pittsburgh, Pennsylvania via Midway Airport. (T.T. 206-08). This ticket was canceled on September 28, 2006, four days after the stop and seizure in Nebraska of the van and the $105,000. (T.T. 207, 209).

Following his arrest in Nebraska, Rondel Gilmore was transported to the State Correctional Institution at Greensburg, Pennsylvania (hereafter, "S.C.I. Greensburg"). (T.T. 75). Since the initiation of the investigation of Appellant, Rondel Gilmore was known by Allegheny County Police to be an associate of Appellant. (T.T. 74). Detective Mikelonis contacted the prison captain at S.C.I. Greensburg and asked him to monitor Rondel Gilmore's outgoing phone calls to Appellant's phone number. (T.T. 75). Subsequently, Detective Mikelonis received a compact disc (CD) from the prison containing numerous recorded phone calls between Appellant and Rondel Gilmore. (T.T. 76). Detective Mikelonis listened to a phone call on the CD that was recorded on October 14, 2006 approximately thirty times. (T.T. 77). Prior to the receipt of the CD Detective Mikelonis spoke to Appellant once, and subsequent to receiving the CD he spoke to Appellant face-to-face four times. (T.T. 76). In addition, he monitored seventy to eighty of Appellant's phone calls while Appellant was incarcerated. (T.T. 76-

77). Consequently, Detective Mikelonis was able to identify the voices on the CD as belonging to Appellant and Rondel Gilmore and a transcript of the October 14, 2006 phone call was created. (T.T. 77-78).

Pennsylvania State Trooper Michael C. Warfield testified for the Commonwealth as a coded language expert. (T.T. 373). Trooper Warfield was a 15-year veteran of the Pennsylvania State Police, and was assigned to the DEA task force since June of 2004. (T.T. 372). He listened to a tape of the October 14, 2006 phone call made by Rondel Gilmore from S.C.I. Greensburg to Appellant, and reviewed a transcript of that call. (T.T. 385-92). He interpreted the apparently innocuous telephone conversation between Appellant and Gilmore as a discussion of how Appellant could recover from the loss of the $105,000 seized in Nebraska. (T.T. 384-92).

Within a month of the Odyssey van being seized in Nebraska, Detective Mikelonis observed Appellant driving a white Subaru Outback station wagon with the license plate GDM-7199. (T.T. 79). Detective Mikelonis observed Appellant driving the Subaru between fifty and sixty times. (T.T. 79) He also observed the Subaru parked at various locations, including: 5204 Dearborn Street, 5202 Dearborn Street, 7508 Ellesmere Street, 5365 Hillcrest Street, and on Elora Way, which is next to the 5365 Hillcrest Street address. (T.T. 83-84). Through May 26, 2007 Appellant was the only individual Detective Mikelonis observed driving the Subaru. (T.T. 79).

Appellant's mother, Karen Brown, had purchased the 1999 Subaru Outback station wagon from Dominic Motors on August 30, 2006, and was the registered owner. (T.T. 83, 234, 237, 238). Appellant was present when his mother purchased the vehicle, and when the Subaru was sold to Ms. Brown there was no gray epoxy sealant around the bumper area of the car. (T.T. 237, 239).

On March 8, 2007 Detective Mikelonis stopped Appellant when he was driving the Subaru as he was wanted on an active bench warrant out of the Allegheny County Sheriff's Office. (T.T. 80). Two cellular phones and $1,500 in cash were retrieved from Appellant. (T.T. 81). The Subaru Outback was towed to Allegheny County Police headquarters. (T.T. 81). Detective Mikelonis observed that the Subaru had some sort of epoxy, sealant or undercoating underneath where the rear bumper wrapped around the car, and that it appeared to be an after-market application. (T.T. 81-83, 164). As with the Odyssey mini-van, this indicated to Detective Mikelonis that there was a hidden trap or compartment located in the rear area of the vehicle. (T.T. 81, 164).

Sergeant Daniel Theme, of the Duquesne Police Department, was called to bring his canine partner to perform an exterior sniff of the Subaru. (T.T. 82, 165). The canine indicated, by biting the vehicle's bumper, that the odor of narcotics was present in the area of the rear bumper of the car. (T.T. 82, 165). The area where the canine alerted was directly above the

undercoating, which was consistent with where a trap or hidden compartment would be located. (T.T. 83). The interior of the vehicle was not searched that day. (T.T. 81).

However, pursuant to a court order, Stewart Fromm, of the Pennsylvania State Police Department, installed a GPS (Global Positioning System) mobile tracking device within the engine of the Subaru on March 8, 2007. (T.T. 82, 285). GPS data may be viewed live as it is occurring and it can also be stored and downloaded to a computer. (T.T. 286-87). The vehicle was subsequently released to the registered owner, Karen Brown. (T.T. 83).

The investigation continued and Detective Mikelonis was the individual who primarily monitored the GPS device through the use of a laptop computer. (T.T. 85). Detective Mikelonis used the information he received from the GPS to confirm the location of the vehicle by personal observation of the same. (T.T. 86). On May 16, 2007 the GPS placed the Subaru traveling westbound on Interstate 80 very near the Pennsylvania/Ohio border. (T.T. 291-92).

Between May 16 and May 26, 2007 Detective Mikelonis attempted to conduct physical surveillance and to locate the Subaru but he was not able to locate it in the Pittsburgh area. (T.T. 86). However it was subsequently determined from F.B.I. records that Appellant traveled to and from California during this period. Specifically, those records placed Appellant's Subaru in

Cedar City, Utah on May 18, 2007. (T.T. 88-89, 148). Electronic data recovered from Appellant's cell phone placed Appellant (viz. his cell phone) in the following locations between May 16 and May 19, 2007: (1) the states of Ohio, Indiana, Illinois, and Iowa on May 16, 2007; (2) Nebraska and Colorado on May 17, 2007; (3) Utah, Arizona, and Nevada on May 18, 2007; and, (4) Norwalk, California on May 19, 2007. (T.T. 147-48). Various banking transactions conducted by Appellant, placed him in California between May 20-24, 2007. (T.T. 255-57). A receipt from Western Union dated May 21, 2007 established that Appellant's girlfriend, Twila Edmonson, wired $1800 from Pittsburgh to Appellant in Long Beach, California. (T.T. 153-54, 201). Finally, business records from Southwest Airlines showed a ticket and itinerary in Appellant's name for travel May 23-24, 2007 for both a flight from LAX Airport, Los Angeles, California to Pittsburgh, Pennsylvania; and, a flight from LAX to Pittsburgh, via Las Vegas, Nevada. (T.T. 209-10). Check-ins were recorded for both of those flights. (T.T. 210).

On May 26, 2007, based on data received from the GPS device, Detective Mikelonis learned that the Subaru re-entered Pennsylvania, traveling eastbound on the Pennsylvania Turnpike toward Allegheny County. (T.T. 86, 292-94). On that date Detective Mikelonis, working with the Pennsylvania Attorney General's Office and agents from Ohio, set up surveillance on Interstate 79 (I-79) in Allegheny County to monitor the Subaru's movements as it neared Pittsburgh. (T.T. 90). A search warrant

was obtained for the Subaru and any of its occupants to search for and seize any cocaine present. (T.T. 93, 95). The Subaru crossed into Pennsylvania between 3:30 and 4:30 p.m. on that date. (T.T. 90). Allegheny County Police Officer DeSimone, from the patrol division, stopped the Subaru on I-79 in the Franklin Park section of Allegheny County, which is ten to fifteen miles from the City of Pittsburgh. (T.T. 91-92). The driver of the Subaru was identified by his New York state driver's license, a passport, and a gym ID, as Sonny Tejada, whose home address was in New York. (T.T. 91, 93). Sonny Tejada was detained and transported to Allegheny County Police Headquarters and the Subaru was towed to a garage at the County police headquarters. (T.T. 93-94).

Pursuant to the issued search warrant, the rear bumper cover of the vehicle was removed, revealing a concealed metal box that was welded onto the vehicle. (T.T. 95). The box was twelve inches deep and ran the full length of the back of the vehicle (T.T. 95, 100). It had a small metal face plate on the front that was attached with one screw. (T.T. 95, 99). A Phillips head screwdriver was found inside the vehicle that matched the screw head on the face plate of the trap and was used to remove it. (T.T. 95-96, 98). A socket wrench found in the vehicle matched the bolts that were removed from the trap. (T.T. 96, 98). Plastic bolts found in a bag inside the vehicle were exactly the same kind as those removed from the bumper. (T.T. 96, 98).

Two separately packaged kilos of cocaine were recovered from the concealed compartment. (T.T. 99-100, 111-12). Both kilos tested positive for cocaine hydrochloride or powder cocaine, a Schedule II controlled substance, and the respective weights were 988.7 grams and 990.4 grams. (T.T. 321-22, 324).

Both kilos were identically wrapped in five layers of packaging, the third layer consisting of silver duct tape. (T.T. 99-100, 111-12, 321, 324, 332-33, 337-38, 342-43). The duct tape that was used to wrap the packages of cocaine was tested for fingerprints and latent prints were found on the overlapping seams of the tape. (T.T. 330, 338, 343). The latent prints were compared to a set of known, inked fingerprints belonging to Appellant, and a total of ten latent fingerprints identified from the duct tape were positively matched to the known, inked fingerprints of Appellant. (T.T. 346-47, 353-57).

The following items were also removed from the Subaru: (1) a Western Union receipt showing a wire transfer of $900 from Appellant in Pittsburgh to Sonny Tejada in New York; (2) a cellular phone, (917) 569-9841, belonging to Sonny Tejada; (3) a PEP Boys receipt in the amount of $839.67 for work done May 11, 2007; (4) a Dominic Motors vehicle sales agreement for the Subaru Outback between Dominic Motors and Karen Brown, dated August 30, 2007; (5) CitiFinancial payment receipt made out to Appellant; and, (6) a settlement statement between Appellant

and Connie Hollinger, dated May 4, 2007, for the sale of a piece of property. (T.T. 100-03, 107-13, 124).

Sonny Tejada's cellular phone, (917) 569-9841, was recovered from the front passenger seat of the Subaru, and was operational while Mr. Tejada was in custody. (T.T. 100-01, 113-14, 124, 149-50). The phone was in the possession of Detective Mikelonis during this period of time and was repeatedly being called and texted by the same number. (T.T. 113-14, 123). Specifically, thirty-one calls were made and four text messages were sent from Appellant's phone, (412) 513-4233, to Tejada's phone. (T.T. 149). The first three text messages sent on May 26, 2007 were as follows: (1) 7:53 p.m., "please call"; (2) 10:27 p.m., "please call"; and, (3) 10:47 p.m., "what the fuck is up, you didn't call all day. You need to get at me." (T.T. 151-52). The final text message sent on May 26, 2007 read, "I hope you're okay and nothing funny is up." (T.T. 152).

After Tejada was taken into custody a search warrant for 5365 Hillcrest Street in Garfield was obtained. (T.T. 124). The house at 5365 Hillcrest was originally a single family home that was remodeled into five apartments. (T.T. 310). Appellant first rented Apartment 4, the second floor apartment, in February of 2003, under the name of Anthony Williams. (T.T. 299-300). The owner and landlord of 5365 Hillcrest, Rodney McCoy, identified Appellant as his tenant, "Tony" Williams. (T.T. 297).

One of the references used by Appellant when he rented his apartment was his cousin, Derek Williams. (T.T. 301). Derek Williams was the tenant in Apartment 2 of the Hillcrest residence in February of 2003. (T.T. 302, 305-06). Beginning in May 2005, Appellant took over Apartment 2 from Derek Williams and began paying the rent on it. (T.T. 307, 311-12). Appellant moved from Apartment 4 to Apartment 5 in November of 2006, and paid the rent on both Apartment 2 and Apartment 5 until May 2007. (T.T. 304, 306-07). He always paid the rent in cash, had keys for both apartments, and only Appellant and the landlord had access to Apartment 2. (T.T. 308, 314). Appellant always used the back entrance to the house and the vehicles he used while living at 5365 Hillcrest were a Subaru station wagon and a newer Audi. (T.T. 308-09).

Detective Mikelonis, assisted by Detective Love and Lieutenant Harold Cline, commanding officer of the Allegheny County Police Narcotics Unit, executed the search warrant at 5365 Hillcrest Street. (T.T. 174, 221-22). Entry was made from Elora Way through the rear door of the house, which led directly into Apartment 2, and access to the rest of the house from the rear entrance was only available through Apartment 2. (T.T. 125, 176, 178, 181-82, 222, 308).

After entering Apartment 2, some of the detectives proceeded upstairs to Apartment 5, which was an attic residence and was the only apartment on the third floor. (T.T. 125, 183, 303). Appellant answered the door and was

taken into custody, and he was the only person in the apartment.[1] (T.T. 125, 153, 166-67, 183-84, 190). The apartment was small, and contained a bed, a television, a little stand with items on it, and clothing. (T.T. 184).

Three cycle cell telephones, with charging cords, were retrieved from the end of the bed in Apartment 5. (T.T. 126, 137-38, 143, 147, 150). Two of those phones were Boost Mobile I415 Motorola phones, which are prepaid cell phones that can be purchased without providing information of identity, and the third was a T-Mobile phone. (T.T. 127-29, 131-32, 138, 143).

A search warrant was obtained to search the electronic data in the cell phones. (T.T. 131). The phone number for the T-Mobile phone that was recovered from Appellant's apartment was (412) 726-4427. (T.T. 131-32, 138, 143). This phone number was registered to Appellant at his mother's residence, 5202 Dearborn Street, and the phone that had been seized by the Nebraska State Police on September 24, 2006 had that number. (T.T. 138, 143). However despite the seizure of the phone, the number was not canceled; it was switched over to another T-Mobile phone, which was one of the three cell phones subsequently seized from Appellant's apartment at 5365 Hillcrest Street. (T.T. 138, 143). One of the contacts stored in the phone's address book was "SONNY," whose number was (347) 983-6312. (T.T. 143). Beginning on May 16, 2007 no outbound calls were made from

[1] The only one other person encountered at the time the search warrant was executed at 5365 Hillcrest was a black male in his mid-forties, who "poked his head out" of one of the second floor apartments. (T.T. 166-67, 169). He was instructed to go back inside his apartment. (T.T. 167). He was not identified, was not questioned and did not make a statement. (T.T. 167-69).

T-Mobile phone (412) 726-4427. (T.T. 143). Between May 16 and May 23, 2007 repeated calls were made to this phone to check voice mail remotely. (T.T. 143-44). During this time period, the phone remained in the Pittsburgh area, and on May 24, 2007 outbound calls from this phone resumed. (T.T. 144). This coincided with Appellant's return to Pittsburgh from California. (T.T. 145).

The second cellular phone recovered from Appellant's apartment was a Spring/Nextel Boost phone and had the number (412) 224-3084. (T.T. 131, 137, 146). It was registered to a fictitious name, Tom Green, at the address 5362 Hillcrest Street. (T.T. 137, 146). This address was across the street from Appellant's residence at 5365 Hillcrest, and no one named Tom Green lived at 5362 Hillcrest Street. (T.T. 137, 146). One of the contacts listed in the phone's address book was "Sun," with a corresponding telephone number of (917) 569-9841, and this number was known to be Sonny Tejada's phone number. (T.T. 146). Between May 2 and May 16, 2007 there were a total of forty-one (41) calls made to and from these two phones. (T.T. 146). Only inbound calls were received on (412) 224-3084 between those two dates, and during this time period the phone remained in the Pittsburgh area. (T.T. 146). Outbound calls from the phone resumed on May 24, 2007, the date Appellant returned to Pittsburgh from the state of California. (T.T. 146).

The third cellular phone seized from Appellant's apartment, the Nextel Boost phone with a SIM card number that matched the packaging found in Apartment 2, had telephone number (412) 513-4233. (T.T. 128-131, 147). This was a prepaid phone and was registered to a Tom Johnson, P.O. Box 55026, Irving, California, 92619-5026. (T.T. 137, 147). Similar to the second cell phone, one of the contacts listed in this phone's address book was "Sun," with a corresponding telephone number of (917) 569-9841. (T.T. 147). There was also a contact in the address book for "Sonny" at the same number, and this number was known to be Sonny Tejada's phone number. (T.T. 147). Between May 16 and May 26, 2007 there were seventy-four calls made to and received from Sonny Tejada's phone. (T.T. 147).

This cellular phone, with the number (412) 513-4233, traveled from Pittsburgh to California, and back to Pittsburgh between May 16 and May 24, 2007. (T.T. 147). Specifically, this phone was physically present in the following locations: (1) the states of Ohio, Indiana, Illinois, and Iowa on May 16, 2007; (2) Nebraska and Colorado on May 17, 2007; (3) Utah, Arizona, and Nevada on May 18, 2007; and, (4) Norwalk, California on May 19, 2007. (T.T. 147-48). This information corresponded with FBI records that placed Appellant's Subaru Outback in Cedar State County, a boro of Utah, on May 18, 2007. (T.T. 148). The cell phone with number (412) 513-4233 was physically present in the vicinity of LAX Airport, Los Angeles,

California, at 3:35 p.m., May 23, 2007, and in Nevada at 5:01 p.m. on that same date. (T.T. 148-49). It was in the vicinity of Pittsburgh International Airport at 1:11 a.m. on May 24, 2007. (T.T. 149).

In addition to the cell phones, Appellant's wallet, containing eight Dollar Bank transaction receipts, a card for a California taxi service, and a receipt for shoes, was recovered from Apartment 5 at 5365 Hillcrest Street. (T.T. 185, 190-91). Regarding the Dollar Bank receipts, all of them pertained to the same account, with the last four digits of 5269. (T.T. 191-92). Account 5269 was opened by Appellant at Dollar Bank with $50 on May 3, 2007. (T.T. 251, 253-54). On May 4, 2007, at the East Liberty branch, Appellant deposited a check in the amount of $37,009.40 into that account. (T.T. 246, 255, 263). The check was a Sebring and Associates company check drawn on Dollar Bank and made payable to Michael Butler. (T.T. 244, 246). On May 4, 2007 Sebring handled a closing for the sale of the property at 5204 Dearborn Street from Michael Butler to Connie Hollinger. (T.T. 243, 246).

On May 8, 2007 Appellant withdrew $5000 from Account 5269. (T.T. 255, 258-59, 263). On May 11, 2007, in two separate transactions, he withdrew from the same account $1225, as well as $8500, of which $5000 was received in cash and $3500 in a check made payable to CitiFinancial. (T.T. 255, 258-60, 263). On May 14, 2007 Appellant made the following withdrawals from Dollar Bank Account 5269: (1) $5000 from the Penn Hills

branch; (2) $5000 from the Braddock Hills branch; (3) $5000 from the Squirrel Hill branch; and, (4) $5000 from the East Liberty branch. (T.T. 255-56, 258, 260-62, 263, 265). Each of the Dollar Bank branches from which Appellant made his withdrawals on May 14, 2007 would have had sufficient cash on-hand to cover a single withdrawal of $20,000, i.e., the Squirrel Hill branch had slightly over $148,000; the Braddock branch had more than $200,000; the Penn Hills branch had $245,000; and, the East Liberty branch had slightly more than $70,000. (T.T. 265-66).

Per banking regulations, Dollar Bank was required to report to the government all cash transactions in excess of $10,000, whether they are cash deposits or cash withdrawals. (T.T. 264). All cash transactions under the same taxpayer identification number within a twenty-four hour period are automatically aggregated, regardless of in which branch offices those transactions occur. (T.T. 264-65).

Several smaller withdrawals were made from Account 5269 during May of 2007 as follows: (1) a point of sale purchase on May 11 in the amount of $240.73 to T-Mobile in Monroeville; (2) an ATM withdrawal of $301.50 in California on May 20; (3) two debit card purchases of $80.19 each at Best Western Hotels in Norwalk, California on May 22; (4) an ATM withdrawal of $301.57 in Long Beach, California on May 23; (5) a $59.39 transaction in Norwalk, California on May 24; and, (6) a $361.20 transaction in Texas on

May 25. (T.T. 255-57). Dollar Bank did not receive any report from Appellant that his debit card for Account 5269 was stolen. (T.T. 265).

Two sets of keys were recovered from Appellant's bed, including a key to the front door of the residence, the key to Apartment 5, keys that opened the interior and exterior doors of Apartment 2, and a safety deposit box key. (T.T. 157, 185, 192-93). Regarding the key to the safety deposit box, a search warrant was served on Allegheny Valley Bank, Lawrenceville, on May 23, 2007 to confirm that Appellant rented a safety deposit box there. (T.T. 155-56). The safety deposit box contract established that the box was rented by Appellant, and that Appellant's mother, Karen Brown, was the only other person authorized to access the box. (T.T. 271, 273-74). Vault access records provided by the bank established that the last entry into the safety deposit box was made by Appellant on May 16, 2007 at 11:03 a.m. (T.T. 277-78).

A search warrant for the contents of the safety deposit box was subsequently served on the bank on May 29, 2007. (T.T. 156-57). The box was "plugged" by bank officials so no one could access it while the bank reviewed the search warrant. (T.T. 157, 282). The safety deposit box was opened on May 30, 2007 and it contained only an empty Giant Eagle plastic bag. (T.T. 157-58).

A box of .45 caliber Winchester ammunition was seized from Appellant's apartment. (T.T. 185, 218, 225). Nine bullets were missing

from this box of ammunition. (T.T. 220, 225-26). The firearm recovered from Apartment 2 was loaded with .45 caliber Winchester ammunition. (T.T. 218, 225-26). Eight bullets were recovered from the firearm. (T.T. 220, 223).

An Audi was parked outside the Hillcrest residence on Elora Way and Appellant had been observed driving this vehicle on several occasions. (T.T. 185, 188, 309). The registration and an insurance card for the Audi, indicating that Michael Butler was the owner of the vehicle, were recovered from Appellant's apartment. (T.T. 185, 188).

Several documents related to the Subaru Outback owned by Appellant's mother were found in Appellant's apartment. (T.T. 185-86). These documents included: (1) a work order from PEP Boys Automotive in Monroeville for work done on the Subaru; (2) a work order for replacement of the windshield on the Subaru; and, (3) an emission inspection report for the Subaru. (T.T. 185-86). The front windshield of the Subaru had a crack in it when Detective Mikelonis stopped Appellant on March 8, 2007. (T.T. 80-81).

Lieutenant Cline and Detective Love collected evidence from the first floor of the house at 5365 Hillcrest, which is Apartment 2. (T.T. 222-23). Apartment 2 consisted of a small kitchen with a table, a living room with a couch or love seat and a small end table, and a bathroom. (T.T. 195, 222). Recovered from Apartment 2 were two cellular phones, and four tires

with stock Audi rims. (T.T. 198, 212). Additional evidence collected from the living room area of the apartment included: (1) a loaded high point .45 caliber semi-automatic hand gun with seven rounds of .45 caliber Winchester ammunition in the magazine and one round in the chamber; (2) a box of Remington 9 mm handgun ammunition; and, (3) a box of Federal .40 caliber handgun ammunition. (T.T. 197-98, 216, 218, 223-27).

The evidence collected from the kitchen of Apartment 2 included: (1) two pyrex pots, one of which had white residue on the bottom of it; (2) one pot lid; (3) a Salter digital scale with white residue on it; (4) a 100 gram weight standard; (5) an open box of baking soda; (6) an open box of baking powder; and, (7) a folded U-Haul packing box with two handwritten phone numbers on the box. (T.T. 195, 198, 217, 228-32). Detective Love found the folded U-Haul packing box on the kitchen table, and one of the numbers written on the box belonged to the cell phone that Sonny Tejada had when he was arrested with the two kilos of cocaine in the Subaru Outback. (T.T. 195-98). The other number written on the box was a number recovered from one of the cell phones found in Apartment 5. (T.T. 196, 198). This number was listed on the cell phone contact list under "Son" or "Sonny N." (T.T. 196, 198).

Detective Mikelonis recovered the packaging material for a Boost Mobile I415 Motorola phone in Apartment 2, which was one of the phones that he found in Apartment 5. (T.T. 127-28). The SIM card number on this

packaging matched the number of the SIM card recovered with the phone in Apartment 5. (T.T. 128-29). A cellular phone cannot function without the SIM card. (T.T. 130).

During the course of the investigation, Appellant made several transactions through Western Union. (T.T. 199-200). On seven separate occasions between December 2006 and May 2007, Appellant wired money totaling $6899 to Sonny Tejada via Western Union, including $900 he sent to him in New York on May 14, 2007. (T.T. 201). On May 8, 2007 Appellant sent $2000 to Luis Bocanegra in Norwalk, California. (T.T. 201). In addition, on May 21, 2007 Appellant's girlfriend, Twila Edmonson, sent $1800 via Western Union in Pittsburgh to Appellant in Long Beach, California. (T.T. 153-54, 201). This transaction was confirmed by a Western Union receipt recovered pursuant to the execution of a document search warrant on June 7, 2007 at Ms. Edmondson's residence. (T.T. 153-55).

Trooper Warfield testified as an expert witness in the areas of narcotics trafficking, narcotics paraphernalia, drug traffickers, and as a coded language expert. (T.T. 372-73). Trooper Warfield opined as follows: (1) California is one of several areas where individuals go to pick up cocaine because it can be purchased more cheaply there; (2) it is significant that after-market hidden compartments were installed in two vehicles owned/driven by Appellant to avoid detection of cocaine or currency by law

enforcement; (3) in California a kilo of cocaine sells for $14,000-$16,000, but can be sold in the Pittsburgh area for $30,000; and individuals travel to California because they have a connection there from whom they can purchase the cocaine; (4) the person who bought the plane ticket to go to or from California is the person that knew the contact; (5) a third party is used so that law enforcement cannot connect the Pittsburgh dealer with the California contact; (6) a lot of dealers use Boost Mobile cell phones because law enforcement cannot determine who is communicating back and forth; (7) pyrex glasses are used in the process to convert hydrochloride, which is street cocaine or base crack cocaine, into powder cocaine; baking soda is used to cut the cocaine to increase its quantity, and scales are used to weigh the powder cocaine for distribution; (8) a firearm is kept for protection from theft of the cocaine or the money realized from its sale; (9) the street value of two kilos of cocaine in Pittsburgh could be as much as $72,000; and, (10) the items recovered from the apartment are consistent with the intent to distribute cocaine in order to maximize profits. (T.T. 375-84).

DISCUSSION

I.

Appellant's sole issue following his re-sentencing is that the Trial Court abused its discretion in imposing an unreasonable and manifestly excessive aggregate sentence of 16-32 years and did not consider all relevant factors in sentencing. Appellant's claim is without merit.

By stating that the Trial Court abused its discretion in sentencing Appellant to an aggregate term of 16-32 years where Appellant was convicted of three felonies, Appellant has not raised a substantial question that entitles him to review. *See Commonwealth v. Evans*, 901 A.2d 528, 533 (Pa. Super. 2006) appeal denied 909 A.2d 303 (2006) (to challenge the discretionary aspects of sentencing Appellant must, *inter alia*, raise a substantial question that the sentence appealed from is not appropriate under the sentencing code). A substantial question exists, "only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a special provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process". *Commonwealth v. Sierra*, 752 A.2d 910, 912-913 (Pa.Super. 2000).

Appellant has not presented a reviewable claim by merely stating that by imposing consecutive sentences that the Trial Court abused its discretion. *See Commonwealth v. Marts*, 889 A.2d 608, 611-612 (Pa. Super. 2005) (trial court's exercise of discretion in imposing consecutive as opposed concurrent sentences is not viewed as raising a substantial question).

Appellant's claim is without merit.[2]

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[2] Should the Superior Court find that Appellant does raise a substantial question, the record clearly demonstrates that the Trial Court, consistent with its sentencing obligation, took into account: (1) the nature of the offense; (2) the contents of the presentence report; (3) the sentencing guidelines; (4) the impact of the offense on the victims and community; (5) Appellant's background and rehabilitative needs; and (6) potential mitigating factors offered by or on Appellant's behalf. S.T. at 2-4. The letters "S.T." followed by numerals refer to pages of the Sentencing Transcript dated October 27, 2011. *See Commonwealth v. Moury*,

CONCLUSION

For the aforementioned reasons, the judgment of the sentence imposed by the Trial Court should be affirmed.

By the Court,

9-11-12
Date

Edward J. Borkowski

992 A.2d 162, 171 (Pa. Super. 2010)(when imposing a sentence court is required to consider the particular circumstances of the offense and the character of the defendant, making reference to defendant's prior criminal records, his age, personal characteristics and his potential for rehabilitation).