NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
EDWARD L. SNOW,	:	
	:	
Appellant	:	No. 570 WDA 2013

Appeal from the PCRA Order Entered February 28, 2013,
In the Court of Common Pleas of Mercer County,
Criminal Division, at No. CP-43-CR-0000562-2010.

BEFORE: FORD ELLIOTT, P.J.E., GANTMAN and SHOGAN, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED DECEMBER 4, 2013**

Appellant, Edward L. Snow, appeals from the denial of his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541–9546. We affirm.

On September 13, 2011, Appellant pled guilty to one count of possession with intent to deliver oxycodone[1] and one count of delivery of oxycodone in exchange for the Commonwealth's amendment and agreement to *nol pros* two other charged counts. N.T. (Guilty Plea), 9/13/11, at 7–8. On December 2, 2011, the trial court sentenced Appellant to consecutive terms of imprisonment of twenty-four to sixty months each, followed by

[1] The Commonwealth agreed to amend the count, reducing it from possession of 9,972 tablets of oxycodone to twenty tablets, thereby reducing the mandatory minimum sentence for the count from five to two years of imprisonment. 18 Pa.C.S.A. § 7508(a)(2)(i) and (ii).

sixty months of probation on each count, resulting in an aggregate sentence of forty-eight to 120 months of incarceration followed by 120 months of probation. The trial court also ordered that Appellant successfully complete the Drug and Alcohol Therapeutic Community.

Appellant filed a *pro se* PCRA petition on October 15, 2012, and the PCRA court appointed counsel. Following a January 31, 2013 hearing, the PCRA court denied relief. This appeal followed. The PCRA court directed Appellant to file a concise statement of matters complained of on appeal within twenty-one days of April 5, 2013. Counsel filed the statement on May 14, 2013.

In reviewing the propriety of the PCRA court's dismissal of Appellant's petition, we are limited to determining whether the court's findings are supported by the record and whether the order in question is free of legal error. ***Commonwealth v. Ragan***, 923 A.2d 1169, 1170 (Pa. 2007). "Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record." ***Commonwealth v. Boyd***, 923 A.2d 513, 515 (Pa. Super. 2007).

Preliminarily, we address the late filing of the Rule 1925(b) statement. As noted previously, the PCRA court ordered the statement's filing within twenty-one days of April 5, 2013, or by April 26, 2013, but it was not filed until May 14, 2013. This Court repeatedly has held that the failure to file a

Rule 1925 statement constitutes *per se* ineffective assistance of counsel. ***See Commonwealth v. McBride***, 957 A.2d 752 (Pa. Super. 2008) (holding that failure of defense counsel to file concise statement of errors complained of on appeal constituted *per se* ineffectiveness); ***Commonwealth v. Scott***, 952 A.2d 1190 (Pa. Super. 2008) (holding counsel's failure to file concise statement is *per se* ineffectiveness). We have reached the same result when presented with an untimely filing. ***Commonwealth v. Burton***, 973 A.2d 428 (Pa. Super. 2009); ***Commonwealth v. Thompson***, 39 A.3d 335 (Pa. Super. 2012). However, when counsel has filed an untimely Rule 1925(b) statement and the trial court has addressed those issues, we need not remand and may address the merits of the issues. ***Thompson***, 39 A.3d at 340; ***Burton***, 973 A.2d at 433.

In the present case, in its February 28, 2013 opinion, the PCRA court addressed the issue outlined in the late Rule 1925(b) statement, which was: "[T]he sentence of the Court is manifestly excessive in length, because it is not specifically tailored to the nature of the offense, the ends of justice and society and the rehabilitative needs of the Defendant," [2] Statement of Errors

[2] The PCRA court considered the five issues Appellant identified in his PCRA petition, listed below, as "impliedly abandoned" during the PCRA hearing on January 31, 2013:

> (a.) [Appellant] was denied effective assistance of counsel "when trial counsel induced a guilty plea that carries a greater penalty than the guidelines for twenty (20) dosage units."

Complained of on Appeal, 5/14/13, at 1. Thus, we need not remand pursuant to Pa.R.A.P. 1925(c)(3), and we will consider the issue raised therein. ***See Thompson***, 39 A.3d at 340 ("When counsel has filed an untimely Rule 1925(b) statement and the trial court has addressed those issues[,] we need not remand and may address the merits of the issues presented.").

Curiously, however, Appellant raises different issues in his brief to this Court, although he incorporates the issue delineated in his Rule 1925(b) statement in his discussion. To complicate matters, the brief Appellant has

---

> (b.) [Appellant] was denied effective assistance of counsel "when trial counsel conducted no investigation to present character witnesses where [Appellant] has no prior criminal record, is elderly and in ailing health, and where he received an aggravated range sentence without such evidence being presented."
>
> (c.) [Appellant] was denied effective assistance of counsel "in that counsel did not appear to know the pertinent law that applied to his client in regard to the sentencing ranges, for twenty (20) dosage units as charged."
>
> (d.) [Appellant] was denied effective assistance of counsel because trial counsel failed to raise these issues (a.), (b.), and (c.) in a post-sentence motion.
>
> (e.) [Appellant] was denied effective assistance of counsel because trial counsel "provided [Appellant] with incorrect advice and information concerning the timely filing of appeal."

Rule 1925(b) Opinion, 5/14/13, at 2; PCRA Petition, 10/15/12, at ¶ 13. Regardless, the PCRA court had previously addressed each issue raised by Appellant, both in his PCRA petition and at his PCRA hearing, in the PCRA opinion filed on February 28, 2013.

filed omits page four, the page identified in the index as the statement of the question involved. Counsel who filed the brief has withdrawn, however, and has left his prior employment; thus, we cannot obtain the missing page from the brief.[3] It has long been held that Pennsylvania appellate courts will not consider issues that have not been set forth in or suggested by the statement of questions involved. ***Eiser v. Brown & Williamson Tobacco Corp.***, 938 A.2d 417, 429 (Pa. 2007); ***see also Krebs v. United Refining Co. of Pennsylvania****,* 893 A.2d 776, 797 *(*Pa. Super. 2006) (holding that the Superior Court will not consider any issue if it has not been set forth in or suggested by the statement of questions involved). Thus, we could deem the issues waived.

Here, the argument section of the brief lists two issues, which are as follows:

> I. The plea agreement that defendant entered into was illegal and it was not entered into know[i]ngly, willingly or intelligently.
>
> II. [Appellant's] trial counsel was ineffective for failing to object to the Commonwealth's plea terms.

Appellant's Brief at 7, 8 (full capitalization omitted). Thus, while Appellant purports to raise issues concerning the plea agreement and the ineffectiveness of trial counsel in his brief to this Court, he raised a sentencing issue in his Pa.R.A.P. 1925(b) statement. These two additional

[3] New counsel has been appointed for Appellant.

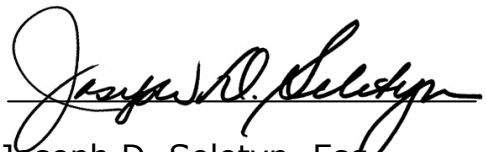
issues were discussed, however, at the PCRA hearing and also were addressed by the PCRA court in its February 28, 2013 opinion.

Considering all of the procedural irregularities of this case, in light of the fact that counsel withdrew after filing his brief, due most significantly to the fact that the PCRA court addressed all of the issues Appellant sought to raise, and in light of judicial economy, we will not find waiver herein. Rather, upon review of the record, the parties' briefs, and the applicable legal authority, we discern no abuse of discretion and conclude that the PCRA court accurately addressed and disposed of all of Appellant's issues. Accordingly, we affirm the PCRA court's order, and we do so on the basis of the court's thorough and comprehensive February 28, 2013 opinion supplemented by its May 14, 2013 opinion filed pursuant to Pa.R.A.P. 1925.[4]

Order affirmed.

GANTMAN, J., Concurs in the Result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013

[4] The parties are directed to attach copies of those opinions in the event of further proceedings in this matter.

J-S55039-13

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 562 Criminal 2010
	:	
EDWARD L. SNOW,	:	
Petitioner/Defendant	:	

OPINION AND ORDER

Procedural History

This matter comes before this Court on Petitioner's *pro se* "Petition filed under the Pennsylvania Post Conviction Relief Act" (*PCRA Petition*), 42 Pa. C.S. §§ 9541-9546, filed on October 15, 2012. On October 16, 2012, this Court appointed the Mercer County Public Defender to represent Petitioner in pursuing his *PCRA Petition*. On or about October 23, 2012, Petitioner filed a *pro se* "Motion to Appoint Substitute-Conflict Counsel" alleging that the Mercer County Public Defender had represented him in the initial stages of his criminal proceedings and therefore had a conflict of interest. By an Order entered on November 8, 2012, the Mercer County Public Defender was removed as Petitioner's PCRA counsel and Tedd Nesbit, Esq. was appointed as substitute PCRA counsel. On January 31, 2013, a PCRA hearing was held at which time the testimonies of Petitioner and his trial counsel, Randall Hetrick, Esq. were presented.

Facts of the Case

The Background. Petitioner was originally charged with having committed the offenses of:

Count 1 – Acquiring or Obtaining Possession of Controlled Substances by Misrepresentation, 35 P.S. § 780-113(a)(12), an ungraded

felony, involving 9,972 dosage units of Oxycodone, a Schedule I controlled substance;

Count 2 – Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver a Controlled Substance, 35 P.S. § 780-113(a)(30), an ungraded felony, involving 9,972 dosage units of Oxycodone, a Schedule II controlled substance;

Count 3 – Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver a Controlled Substance, 35 P.S. § 780-113(a)(30), an ungraded felony, involving 20 dosage units of Oxycodone (2.5 gms), a Schedule II controlled substance; and,

Count 4 – Criminal Use of a Communication Facility, 18 Pa. C.S.A. § 7512(a), a felony of the third degree.

The Guilty Plea. When Petitioner's trial was to start on September 13, 2011, he changed his mind and decided to enter a guilty plea. Prior to the plea colloquy, Assistant District Attorney Brevetta introduced the case and explained the terms of the plea agreement, to wit.—if Petitioner plead guilty to Count 3 and an amended Count 2, the Commonwealth would nolle pros Counts 1 and 4. The amendment to Count 2 would involve a reduction 9,972 tablets to 20 tablets of Oxycodone weighing 2.5 grams.[1] During the plea colloquy, the following exchange occurred:

The Court:	Did you see the guilty plea rights videotape in the hallway?[2]
The Defendant:	Yes.
The Court:	Did you understand what was explained to you about your rights?
The Defendant:	Yes, sir.
The Court:	Do you have any questions about your rights?
The Defendant:	No, sir.
The Court:	Have you discussed your proposed plea with your attorney?
The Defendant:	Yes.

[1] The import of the Commonwealth's concession was to reduce the mandatory minimum sentence for Count 2 from 5 years to 2 years. *See* 18 Pa. C.S.A. § 7508(a)(2)(iii).

[2] The guilty plea videotape portrays the Honorable Christopher J. St. John explaining the trial procedure and rights afforded to criminal defendants. The text of that videotape is set forth in p. 2–6 of the September 13, 2011 Plea Transcript.

The Court:	Have you received any promises from your attorney or anyone else in exchange for your pleas other than that described by the assistant district attorney this afternoon?
The Defendant:	No.
The Court:	Are you satisfied with the services of your attorney?
The Defendant:	Yes.

(Plea Transcript, p. 9–10).

The Court then proceeded to explain the elements of the offenses to Petitioner after which the following exchange occurred:

The Court	…Do you understand what I have explained to you there, sir?
The Defendant:	Yes, sir.
The Court:	Now, for this offense you may be sentenced to pay a fine no greater than $250,000. However, this is a mandatory minimum fine of $5,000. In addition, you may be sentenced to be incarcerated for a period no greater than 15 years, although there is a mandatory minimum period of incarceration of two years. Do you understand that?
The Defendant:	Yes, sir.
The Court:	Now, you are being charged with two virtually identical offenses, although they are [at] different times. So everything I have explained to you for the one offense also equally applies to the other offense. Do you understand that?
[The Defendant]:	Yes, sir.
The Court:	If you were to be sentenced to consecutive sentences, your mandatory – you could be sentenced to a period of incarceration – I'm sorry, you could be sentenced to pay a fine no greater than half a million dollars; however, a mandatory minimum fine of $10,000. Also, you could be sentenced to be incarcerated for a period no greater than 30 years; however, the mandatory minimum period of incarceration would be four years. Do you understand that?
The Defendant:	Yes, sir.
The Court:	Do you have any questions concerning anything that I have explained to you?
The Defendant:	No, sir.
The Court:	Do you still wish to plead guilty to these offenses?
The Defendant:	Yes, sir.

(Plea Transcript, p. 11–12; emphasis added).

Subsequently, Petitioner's trial counsel, Attorney Hetrick, established a factual basis for the guilty plea:

Mr. Hetrick:	Mr. Snow, first, I will deal with count three in the Information. I want to turn your attention to November 4, 2009. On that date, were you in possession of 20 Oxycodone tablets that weighed approximately two and a half grams?
The Defendant:	Yes.
Mr. Hetrick:	And did you deliver those tablets to an individual at 350 South Hermitage Road in the City of Hermitage?
The Defendant:	Yes.
Mr. Hetrick:	And you later learned that that person was a confidential informant?
The Defendant:	Yes.
Mr. Hetrick:	And you are not licensed to have or deliver those substances to that individual, is that correct?
The Defendant:	Yes.
Mr. Hetrick:	Now, I will also turn your attention to – I will give you a wide span of dates, between April 1st, 2008, through December 23rd, 2009, and this would be exclusive of that November 4th date but during those other dates, do you agree that you were also in possession of 20 Oxycodone tablets that weighed approximately two and a half grams?
The Defendant:	Yes.
Mr. Hetrick:	And those 20 that you were in possession, you either delivered or possessed with the intent to deliver?
The Defendant:	Yes.
Mr. Hetrick:	And once again, you were not licensed or privileged to do so?
The Defendant:	No.

(Plea Transcript, p. 12–13).

Following this guilty plea colloquy, Petitioner signed the plea agreement and this Court entered a confirmatory Order consistent with the plea agreement. (Plea Transcript, p. 14–15).

The Sentencing. Petitioner was sentenced on December 2, 2011. During the sentencing hearing, this Court explained to Petitioner:

> After I impose your sentence, you have right to file either a Post-Sentence Motion with this Court or file an appeal to the Superior Court of Pennsylvania. All calculations of time start tomorrow, so tomorrow is day one.
>
> You have ten days to file a written Post-Sentence Motion with this Court. Your Post-Sentence Motion must state the reasons for your request with specificity and particularity. A Pots-Sentence Motion may include:
>
> (a) a Motion to modify your sentence,
>
> (b) a Motion challenging the validity of your guilty plea or your plea of no-contest or nolo contendere.

(Sentencing Transcript, p. 3–4).

> Everyone has the option to simply bypass this Court by not filing any Post-Sentence Motions with this Court, and instead filing a direct appeal with the Superior Court. If you choose not to file any Post-Sentence Motions with this Court, then you must file a "Notice of Appeal" to the Superior Court within 30 days of today's date.

(Sentencing Transcript, p. 5–6).

Assistant District Attorney Brevetta, then introduced Petitioner's case:

> Mr. Brevetta: Your Honor, this is case 562 Criminal 2010. Mr. Snow is present along with his attorney, Attorney Hetrick. We are here for sentencing on two counts. Count two, manufacturing, delivery, or possession with intent to manufacture or deliver a controlled substance as amended with the 2.5 grams, and count three, which is manufacture, delivery, or possession with intent to manufacture, also 2.5 grams.
>
> Your Honor, my understanding is that both these sentences carry a mandatory term of incarceration for two years. The Commonwealth would be requesting that the time be run consecutive based upon the amount of dosages that Mr. Snow was able to sell during his time while he was being investigated.
>
> Although the charges were amended, there were records that indicate that during the period of a little bit over a year, Mr. Snow was able to acquire and sell

> 9,972 unit dosages of Oxycodone, a schedule two controlled substance. One particular time he was caught selling 20 Oxycodone tablets to a confidential informant. That supports the Commonwealth's contention that the Oxycodone was not for personal use.

(Sentencing Transcript, p. 15–16).

This Court then proceeded to review the Sentencing Guidelines with the Assistant District Attorney and Petitioner's trial counsel.

The Court:	On the possession with the intent to deliver, this would be 22 [sic] pills, I have an offense gravity score of eight, prior record score of one. I have a standard range of 12 to 18, but you're saying that there is a mandatory?
Mr. Brevetta:	Yes, Your Honor.
Mr. Hetrick:	Your Honor, I had a prior record score of zero. It appears that his only prior record is a 1975 simple assault.
The Court:	Yeah, I counted that as a –
Mr. Hetrick:	I mean, there is a DUI, also, but it appears to be on the same date. It doesn't indicate whether that is consecutive or concurrent. So, I think that would count as one misdemeanor for prior record purposes.
The Court:	It looks like they are basically two separate offenses. One was with the Mercer State Police. He was sentenced to six months to one year on that. And then the other was a simple assault. And the second one was a DUI offense, which was Sharon Police Department. Twelve months probation there. It looks like two separate cases, but perhaps the same date. I guess without anything more, we have to count it as one misdemeanor.
Mr. Hetrick:	And we do agree, Your Honor, that we were aware of the two year mandatory, so I believe regardless of which guideline range the Court uses, especially on that charge, it is still going to be less than what the mandatory would be and we are aware of the mandatory.
The Court:	And what is the mandatory?
Mr. Brevetta:	Under 18 Pa. C.S.A. Section 7508(a)(2)(i), Mr. Snow is looking at a two year mandatory and a fine of 5,000 [sic], or such larger amount as sufficient to exhaust the assets utilized in the proceeds of the illegal activity.
The Court:	And that would be a two-year mandatory in both cases?

Mr. Brevetta: Correct, Your Honor.
Mr. Hetrick: And we agree with that, Your Honor.

(Sentencing Transcript, p. 17–18).

The following exchange then occurred between the Court and Petitioner:

The Court: And did you hear the sentence rights and instructions I read earlier?
The Defendant: Yes, sir.
The Court: Did you understand those rights and instructions?
The Defendant: Yes, sir.
The Court: Do you have any questions about those rights and instructions?
The Defendant: No, sir.

(Sentencing Transcript, p. 19).

After referring to three letters that the Court received from Petitioner's daughter Angela Guthrie, his son-in-law Shaun Guthrie, and his granddaughter Candice McGhee, the Court noted:

The Court: I have also received the pulmonary progress notes on you and, obviously, basically, it mentions that you are suffering from COPD[3] and being treated by Dr. Shannon,[4] is that correct?
The Defendant: Yes, sir.

(Sentencing Transcript, p. 19).

The Pre-Sentence Investigation Report (PSI) quoted Petitioner as stating that he became addicted to pain medication following a shoulder injury in 1996, that he was now being prescribed non-narcotic pain medication, and that he had cancer in 2000 resulting in the removal of a portion of his colon and chemotherapy, the cancer apparently being in remission. The PSI also indicated that Petitioner only had a 9th grade education, resided

[3] COPD is the abbreviation for chronic obstructive pulmonary disease in which the airways in the lungs narrow over time, thus limiting airflow to and from the lungs, causing shortness of breath.
[4] Dr. Shannon is an orthopedic surgeon who was treating Petitioner for cervical stenosis, the treatment regimen consisting of Advil and Prednisone medication management.

with his wife and her son, was last employed in 2009, and was now receiving Social Security Disability benefits. The PSI also described Petitioner as being in exceptionally poor health due to his COPD and Emphysema.[5] As explained by Petitioner's trial counsel at the sentencing hearing:

> Mr. Hetrick: May it please the Court, Your Honor, initially I would just point out that Mr. Snow started in 1996 on different types of pain medications and has been on those ever since. If there is any blessing that came out of this case for him, he is now on non-narcotic pain medication and management. And although maybe not as effective as the narcotic, he is able to get by with that and in the long run, it is probably better for his health that he has now been able to get off of these pills.
>
> But as I stated, he did start on the medications in 1996, became addicted to the medications, a very severe addiction. He does have exceptionally poor health as the presentence [sic] report states. He does require oxygen to breathe. He suffers from, among other things, emphysema and COPD.
>
> * * *
>
> It is hard to tell how long Mr. Snow will be in this world. I mean, he is not good. That is his main concern is hopefully getting to see his family again.
>
> We would also ask the Court, and I am not sure if recommendations from the Court will do any good to the Department of Corrections, but we would at least ask the Court to consider a recommendation of some type of a state hospital far as his sentence. Obviously, they will make that determination with Diagnostic.[6] I am not sure if he would be a candidate for general population with the oxygen anyways. So that is probably going to be something that the Department of Corrections will take a look at.
>
> So, we would ask the Court to consider running these two sentences concurrent. As I stated, he is 57 years of age. Other than the simple assault and the DUI

[5] Emphysema is a form of COPD involving long-term, progressive disease of the lungs that primarily causes shortness of breath.

[6] "Diagnostic" refers to the Department of Corrections Diagnostic and Classification Process. *See* DOC pamphlet entitled *Diagnostic and Classification Process*, April 2006.

> in 1975, he has no prior record. He has been a law-abiding citizen.
>
> When Mr. Brevetta talks about 9,000 doses, we don't deny the fact that he did get approximately 9,000 plus doses. We would point out that it appears half of those were legally prescribed for him. So, you know, I always hear this number 9,000. But 4,500 of them were legal. They were for his actual prescription. What he did was he went to another doctor and got a second prescription.
>
> It has always been his position from the beginning, he is not minimizing what he did but for the most part, he took those pills himself. He was in great pain and, basically, ate these pills like candy for quite a few years. And like I said, it is actually a blessing, if anything, this case now has him off of those pills. So, hopefully, he will get proper care in the state system and be returned to his family some day. And we would ask the Court to consider running them concurrent and giving him a two-year minimum.

(Sentencing Transcript, p. 21–23).

This Court indicated that it had reviewed the PSI as well as the evidence of the circumstances surrounding the offenses and Petitioner's medical condition. (Sentencing Transcript, p. 24).

This Court then proceeded to impose a sentence of two consecutive terms of incarceration of not less than 24 months nor more than 60 months, followed by 60 months probation, effectively imposing a sentence of incarceration of not less than 48 months nor more than 120 months, followed by 120 months probation. Petitioner's Recidivism Risk Reduction Incentive program (RRRI) was set at 40 months [7] and Petitioner was given credit for 2 days previously served in confinement. As set forth in the sentencing order, it was also the Court's recommendation to the Department of Corrections that Petitioner "participate in and satisfactorily complete the Drug and Alcohol Therapeutic Community

[7] Five-sixths of 48 months is 40 months.

and any other education and rehabilitation programs recommended by the Department of Corrections." Specifically, this Court stated during the imposition of the sentences:

> The Court: The sentences imposed herein shall be served concurrent with each other.
>
> If incarcerated in a State Correctional Institution, the Defendant is eligible to participate in a Recidivism Risk Reduction Incentive program for which the minimum sentence is 18 months.[8]
>
> All periods of incarceration shall be served in a State Correctional Institution, it is the recommendation of this Court that the Defendant participate in and satisfactorily complete the Drug and Alcohol Therapeutic Community and any other education and rehabilitation programs recommended by the Department of Corrections.
>
> Mr. Brevetta: Your Honor—
>
> The Court: Wait. Go ahead. I am sorry. I have to make a couple of corrections here.
>
> Mr. Brevetta: The Commonwealth believes—
>
> The Court: Do you want me to make the corrections first?
>
> Mr. Brevetta: Yes.
>
> The Court: The difficulty with that sentence is I can't get him into the Therapeutic Community. I am going to change that and say that they will run consecutive to each other. I am changing that. They will be run consecutive to each other. And then the RRRI would be 40 months.
>
> Mr. Hetrick: Your Honor, will he qualify for RRRI with mandatories?
>
> Mr. Brevetta: I don't believe that he does, Your Honor. I don't believe with a mandatory sentence—
>
> Mr. Hetrick: That he qualifies.
>
> The Court: I think he does.
>
> Mr. Hetrick: He would?
>
> The Court: Unfortunately, much to my chagrin, the Superior Court has said yes.[9] Unless it is a crime of violence, they don't even consider mandatories anymore. Now, for local sentences I can, but not for state. I am sorry, but the 40 months, no, that's going to get him through that program.[10]

---

[8] The RRRI minimum sentence is three-fourths of 24 months is 18 months.

[9] See *Commonwealth v. Main*, 6 A.3d 1026 (Pa. Super. Ct. 2010); *Commonwealth v. Robinson*, 7 A.3d 868 (Pa. Super. Ct. 2010); and *Commonwealth v. Hansley*, 994 A.2d 1150 (Pa. Super. Ct. 2010) [subsequently affirmed by the Pennsylvania Supreme Court at 47 A.3d 1180 (2012)].

[10] The RRRI minimum sentence is five-sixths of 48 months is 40 months.

Now Mr. Brevetta, do you want to say something?

Mr. Brevetta: No, it was about the RRRI eligibility.

(Sentencing Transcript, p. 25–27).

The PCRA Issues. In paragraph 13 of his *PCRA Petition*, Petitioner raises the following issues:

(a.) Petitioner was denied effective assistance of counsel "when trial counsel induced a guilty plea that carries a greater penalty than the guidelines for twenty (20) dosage units."

(b.) Petitioner was denied effective assistance of counsel "when trial counsel conducted no investigation to present character witnesses where Petitioner has no prior criminal record, is elderly and in ailing health, and where he received an aggravated range sentence without such evidence being presented."

(c.) Petitioner was denied effective assistance of counsel "in that counsel did not appear to know the pertinent law that applied to his client in regard to the sentencing ranges for twenty (20) dosage units as charged."

(d.) Petitioner was denied effective assistance of counsel because trial counsel failed to raise these issues [(a.), (b.), and (c.)] in a post-sentence motion.

(e.) Petitioner was denied effective assistance of counsel because trial counsel "provided Petitioner with incorrect advice and information concerning the timely filing of appeal."

At his PCRA hearing on January 31, 2013, Petitioner testified that in addition to his COPD and Emphysema, he now suffers from neuropathy of the feet [11] and osteoporosis [12] for which he is prescribed medications. As a result of his deteriorating physical condition, he testified that he is not now a suitable candidate for the Department of Correction's (DOC) Drug and Alcohol Therapeutic Community program recommended by

[11] Neuropathy is a collection of disorders that occurs when nerves of the peripheral nervous system (the part of the nervous system outside of the brain and spinal cord) are damaged. The condition is generally referred to as peripheral neuropathy, and it is most commonly due to damage to nerve axons. Neuropathy usually causes pain and numbness in the hands and feet. It can result from traumatic injuries, infections, metabolic disorders, and exposure to toxins. One of the most common causes of neuropathy is diabetes.

[12] Osteoporosis is a disorder that causes bones to become weak and brittle — so brittle that a fall or even mild stresses like bending over or coughing can cause a fracture. Osteoporosis-related fractures most commonly occur in the hip, wrist or spine. Bone is living tissue, which is constantly being absorbed and replaced. Osteoporosis occurs when the creation of new bone doesn't keep up with the removal of old bone. Treatment consists of medications, dietary supplements, and weight-bearing exercise to strengthen bones.

the Court, and further that the DOC has required that he attend classes and complete his GED degree.[13] Because of his age, Petitioner believes that any DOC rehabilitation programs are a waste of time and his incarceration has caused him a financial hardship and caused his wife to leave him. (PCRA Transcript, p. 9–10; 22). In addition, Petitioner believes that there was no factual basis for his guilty plea ("no proof of what I did"[14]) and that his sentence was unduly harsh when compared to fellow inmates serving sentences for similar offenses. Therefore, Petitioner impliedly asserts as additional grounds for PCRA relief:

> (f.) Petitioner was denied effective assistance of counsel when trial counsel failed to file post-sentence motions in the nature of a Motion to Modify Sentence for the reasons that the Court abused its discretion by imposing:
>
> (1) Consecutive sentences so that Petitioner could qualify for the DOC Drug and Alcohol Therapeutic Community program when it was later determined that he is unable to participate in that rehabilitation program due to his physical limitations; and,
>
> (2) by imposing an unduly harsh sentence upon Petitioner.

Discussion

Petitioner's PCRA issues, as described above, will be discussed *ad seriatim*.

(a.) Whether Petitioner was denied effective assistance of counsel "when trial counsel induced a guilty plea that carries a greater penalty than the guidelines for twenty (20) dosage units."

18 Pa. C.S.A. § 7508(a)(2)(i) provides that, for an offense of Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver a Controlled Substance, 35 P.S. § 780-113(a)(30), involving at least 2.0 grams of a Schedule II drug, such as Oxycodone, the mandatory minimum sentence is two years incarceration and a fine of

[13] A GED degree is a Graduate Education Development degree awarded to individuals who have not completed a high school education but have passed a high school equivalency test.

[14] At his PCRA hearing, Petitioner admitted that, prior to his entering his guilty plea; he had listened to the audiotape recording documenting the transaction when he sold 20 tablets of Oxycodone to a confidential informant.

$5,000 "or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activities." Consistent with this provision, Petitioner was sentenced to two separate offenses, (a) one for Possessing with Intent to Deliver 2.0 grams of Oxycodone, a Schedule II controlled substance, and (b) the other for Delivery of 2.0 grams of Oxycodone, a Schedule II controlled substance. Therefore, a two-year mandatory minimum sentence multiplied by two separate offenses equals a four-year mandatory minimum sentence if consecutive sentences were imposed. There is no merit to Petitioner's claim because there is no evidence that trial counsel "induced" Petitioner to plead guilty or that the Commonwealth was willing to accept a guilty plea involving no mandatory minimum sentence (or some mandatory minimum sentence of less than two years [15]).

Likewise, there is no indication that the Sentencing Guidelines were incorrectly calculated. Petitioner appears to believe that if the offense gravity score and prior record score recommend a certain range for a minimum sentence, the Sentencing Guidelines' recommendation supersedes any statutory mandatory minimum sentence, such as found in 18 Pa. C.S.A. § 7508. This argument demonstrates a lack of understanding of the inter-relationship between Sentencing Guidelines and mandatory minimum sentences. Contrary to Petitioner's belief, mandatory minimum sentences supersede the Sentencing Guidelines' recommendations.[16]

Therefore, there is no merit to this issue.

---

[15] There are no mandatory minimum sentences for Delivery of or Possessing with the Intent to Deliver under 2 grams of Oxycodone, a Schedule II controlled substance. *See* 18 Pa. C.S.A. § 7508(a)(2).

[16] *See* 204 Pa. Code § 303.9(h) – "When the guideline range is lower than that required by a mandatory sentencing statute, the mandatory minimum requirement supersedes the sentence recommendation."

(b.) Whether Petitioner was denied effective assistance of counsel "when trial counsel conducted no investigation to present character witnesses where Petitioner has no prior criminal record, is elderly and in ailing health, and where he received an aggravated range sentence without such evidence being presented."

Petitioner's factual assertions in this issue are incorrect. As demonstrated in the Sentence Transcript, he had prior convictions for simple assault and for DUI in 1996, and this Court was provided with his medical records relative to his pulmonary and orthopedic diseases. Facing two mandatory minimum sentences of two years each, Petitioner was not sentenced in the aggravated range. Thus, Petitioner's only complaint is whether concurrent or consecutive sentences should have been imposed. As reflected in the Sentencing Transcript, this Court did review several letters that had been submitted by his trial counsel. Petitioner has failed to offer the names of any individuals whom trial counsel should have summoned to testify at his sentencing hearing or how their testimony could have changed the sentence imposed.

Therefore, there is no merit to this second issue, and it will be dismissed.

(c.) Whether Petitioner was denied effective assistance of counsel "in that counsel did not appear to know the pertinent law that applied to his client in regard to the sentencing ranges for twenty (20) dosage units as charged."

Petitioner failed to produce any evidence that his trial counsel did not understand or comprehend the sentencing ranges for 20 tablets of Oxycodone. Indeed, the opposite is true—trial counsel was struggling to arrange a plea for an offense carrying a two-year rather than a five-year mandatory minimum sentence. (PCRA Transcript, p. 24-25). Again, Petitioner erroneously assumes that the sentencing ranges set forth in the Sentencing Guidelines supersede the statutory mandatory minimum sentences. As observed *supra*, mandatory minimum sentences supersede the recommended sentencing

ranges of the Sentencing Guidelines. Since there is no merit to this issue, it will be dismissed.

(d.) Whether Petitioner was denied effective assistance of counsel because trial counsel failed to raise the above issues (a.), (b.), and (c.) in a post-sentence motion.

This assertion assumes that there is merit to issues (a.), (b.), or (c.), *supra*. There is none. Therefore, there is no merit to this issue and it will be dismissed.

(e.) Whether Petitioner was denied effective assistance of counsel because trial counsel "provided Petitioner with incorrect advice and information concerning the timely filing of appeal."

A review of the Sentencing Transcript reveals that, immediately prior to sentencing Petitioner, this Court informed Petitioner of his right to file Post-Sentence Motions and to file an appeal to the Superior Court and the time limits for doing so. The issue is not whether trial counsel failed to so inform Petitioner—the issue is whether Petitioner was aware of his post-sentence rights, regardless of whether explained to him by his trial counsel or by the sentencing judge. There is no evidence that Petitioner ever requested his trial counsel to file either a Post-Sentence Motion or an appeal. Therefore, this meritless issue will be dismissed.

(f.) Whether Petitioner was denied effective assistance of counsel when trial counsel failed to file post-sentence motions in the nature of a Motion to Modify Sentence for the reasons that this Court abused its discretion by imposing:

(1) Consecutive sentences so that Petitioner could qualify for the DOC Drug and Alcohol Therapeutic Community program when it was later determined that he is unable to participate in that rehabilitation program due to his physical condition; and,

(2) by imposing an unduly harsh sentence upon Petitioner.

The DOC has many therapeutic programs and, in the past, this Court has found these programs to be extremely beneficial for many individuals.[17] As testified to at his sentencing, the Petitioner has serious drug addiction problems. Therefore, in order to address the Petitioner's rehabilitative needs, as a condition of the Petitioner's incarceration, this Court ***recommended*** "that the Petitioner participate in and satisfactorily complete the Drug and Alcohol Therapeutic Community Program, and any other programs recommended by the Department of Corrections."

According to DOC, "[t]reatment within a [Drug and Alcohol] Therapeutic Community typically lasts six to twelve months," this being consistent with this court's experience.[18] However, this treatment program is preceded by the DOC one-month to two-month Diagnostic and Classification Process and the nine-month to twelve-month waiting list.[19] Therefore, in order for an inmate to have a sufficient time in a State Correctional Institution within which to complete the program, a minimum sentence of at least 26 months is required.[20] Thus, if the Petitioner were only sentenced to a 24-month concurrent sentence, he would be eligible for early parole under RRRI after having only served 18 months, this being an insufficient time within which to complete the Therapeutic Community program.

---

[17] Although not appearing in the record, in the past six years or so, several individuals who have completed their state sentences and graduated from the DOC D & A TC have returned to my chambers and personally thanked me for recommending that they complete the DOC D & A TC, that they have remained "clean" following their release, and that it was the best thing that ever happened to them—it saved their lives!

[18] *See* DOC pamphlet entitled *Alcohol and Other Drugs Abuse Treatment*, April 2006.

[19] The Therapeutic Community program is a very successful rehabilitation program; however, it takes six to twelve months to complete this program, depending upon the inmate's diagnostic evaluation and compliance with and cooperation in the program. It has been this Court's experience that due to the program's popularity, there is a long waiting list of 9-months to 12-months before an inmate can actually begin the program.

[20] Two months in Diagnostic and Classification, 12 months on a waiting list, and 12 months in the Therapeutic Community program

If, however, the Petitioner were sentenced to a consecutive sentence lasting 48 months, he would be eligible for early parole under RRRI after having served 40 months, an ample period of time for the Petitioner to have served the 26 months required to complete the Therapeutic Community program.

Petitioner suggests that due to his health issues that have grown progressively worse since his incarceration, he is no longer a viable candidate for the DOC's D & A Therapeutic Community program. Therefore, Petitioner suggests by implication that this Court is omniscient and should have anticipated that he would not qualify as a candidate for the DOC's D & A Therapeutic Community program or that his health would decline to the degree that he would not be a viable candidate for that program—thus this Court erred in recommending that he participate in the D & A Therapeutic Community program and tailoring a sentence of sufficient length for Petitioner to complete that program.

"Pennsylvania judges retain broad discretion to sentence up to and including the maximum sentence authorized by statute; the only line that a sentence may not cross is the statutory maximum sentence." *Commonwealth v. Gordon*, 942 A.2d 174, 182 (Pa. 2007).

> The standard of review in assessing whether a trial court has erred in fashioning a sentence is well-settled. Imposition of sentence is vested in the discretion of the sentencing court and will not be disturbed by an appellate court absent a manifest abuse of discretion. ... An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. ... To constitute an abuse of discretion, a sentence must either exceed the statutory limits or be ... manifestly excessive. ... It is well-settled that if the court sentences within the guidelines' suggested ranges, there is no need for the sentencing court to otherwise manifest on the record that it considered the guidelines. In such a case,

> consideration of the guidelines is presumed to be evidenced by the actual sentence imposed.

Commonwealth v. Hunzer, 868 A.2d 498, 514 (Pa. Super. Ct. 2005).

> [An appellant who] claims that his sentence is excessive, ... does not challenge its legality; rather, he challenges its discretionary aspects. Pennsylvania law mandates that an appellant cannot appeal as of right from the discretionary aspects of a sentence. ... Rather, [an] appellant must meet two requirements before [the Superior Court] will review his challenge on the merits. ... First, appellant must set forth in his brief a concise statement of reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. ... Second, appellant must show that there is a substantial question that the sentence imposed is not appropriate under this chapter. ... An appellant raises a substantial question with 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.

Commonwealth v. Pennington, 751 A.2d 212, 215–216 (Pa. Super. Ct. 2000).

It is undisputed that this Court had the choice of imposing concurrent sentences or consecutive sentences. This Court chose to impose consecutive sentences of incarceration which, when added together, means that Petitioner will be incarcerated for not less than 48 months (24 months plus 24 months). These consecutive sentences appear to be the Petitioner's claim of errors by this Court.

However, "the imposition of consecutive as opposed to concurrent sentences is solely within the discretion of the trial court, and does not in and of itself even rise to the level of a substantial question." *Commonwealth v. Johnson*, 873 A.2d 704, 709 n.2 (Pa. Super. Ct. 2005); *see also* 42 Pa. C.S.A. § 9721(a)(4) ("[i]n determining the sentence to be imposed the court shall ... consider and select one or more of the following alternatives, and may impose them consecutively or concurrently: ... [t]otal confinement.")

Consequently, the fact that the sentences were consecutive rather than concurrent does not supply Petitioner with a basis for attacking his sentence as "excessive in length."

Alternatively, assuming that this Court did not err in imposing consecutive sentences, Petitioner submits that the 24-month minimum sentence for Possession with the Intent to Deliver 20 tablets/2.5 grams of Oxycodone and a consecutive 24-month minimum sentence for Delivery of 20 tablets/2.5 grams of Oxycodone (combined 48-months) was "manifestly excessive," "unfairly oppressive," and "exceedingly harsh." Rather, the Petitioner suggests that a concurrent 24-month minimum sentence would have been appropriate. Petitioner's suggested position would establish a RRRI minimum sentence of 18 months because the Petitioner would be parole eligible at that time.[21] However, what the Petitioner fails to realize or acknowledge is that it will take at least 22 and one-half months for him to qualify for and complete the DOC's Drug and Alcohol Therapeutic Community program and that a lesser sentence, such as an 18-month RRRI sentence could possibly prevent him from availing himself of his needed rehabilitation

Therefore, the Petitioner's sentence was not was "manifestly excessive," "unfairly oppressive," or "exceedingly harsh;" rather it was specifically tailored to meet his rehabilitative needs. Subsequent events, such as a downward turn in Petitioner's health or his reluctance to participate in recommended DOC programs, do not cause a sentence to be "manifestly excessive," "unfairly oppressive," or "exceedingly harsh." According, there is no merit to Petitioner's claim that he was denied effective assistance of trial counsel.

---

[21] Mandatory minimum sentences are not applicable to RRRI sentences. *See Commonwealth v. Main*, 6 A.3d 1026 (Pa. Super. Ct. 2010); *Commonwealth v. Robinson*, 7 A.3d 868 (Pa. Super. Ct. 2010); and *Commonwealth v. Hansley*, 994 A.2d 1150 (Pa. Super. Ct. 2010) [subsequently affirmed by the Pennsylvania Supreme Court at 47 A.3d 1180 (2012)].

Conclusion

The sentences imposed were mandatory minimum sentences that supersede the Sentencing Guidelines. The Therapeutic Community program is a very successful rehabilitation program; however, it takes a considerable amount of time of incarceration to satisfactorily complete that program. If concurrent sentences were imposed, the Petitioner would have had insufficient time within which to complete the program—thus, for this reason alone, consecutive sentences were appropriate and there is no evidence of any ineffective assistance of trial counsel.

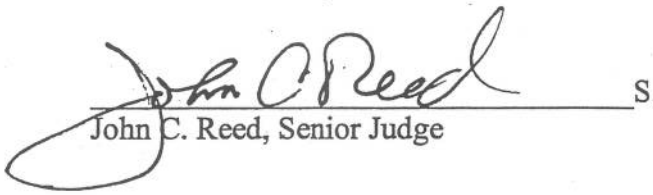
For the reasons set forth above, there is no merit to the Petitioner's PCRA claims, and as such, this Court will deny Petitioner's claims for relief and dismiss his PCRA Petition.

HENCE THIS ORDER:

ORDER

AND NOW, this 28th day of February 2013, for the reasons set forth in the foregoing Decision, IT IS HEREBY ORDERED that the Petitioner's *pro se* "Petition filed under the Pennsylvania Post Conviction Relief Act" is DENIED and DISMISSED.

BY THE COURT,



S.J.

John C. Reed, Senior Judge

J-S55039-13

5-15-13
C-DA(c)
Atty Nacht

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 562 Criminal 2010
	:	
EDWARD L. SNOW, Petitioner/Defendant	:	

Pa.R.A.P. Rule 1925(b) OPINION

This case involves an appeal from this Court's Opinion and Order dated February 28, 2013 denying the Petitioner's *pro se* "Petition filed under the Pennsylvania Post Conviction Relief Act" ("PCRA Petition"). Following the Petitioner's timely appeal, this *Opinion* is written pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure.

On September 13, 2011, the Petitioner pleaded guilty to the offenses of:

Count 2 – Possession with Intent to Manufacture or Deliver a Controlled Substance, 35 P.S. § 780-113(a)(30), an ungraded felony, involving 20 tablets (2.5 grams) of Oxycodone, a Schedule II controlled substance; and,

Count 3 – Delivery of a Controlled Substance, 35 P.S. § 780-113(a)(30), an ungraded felony, involving 22 tablets (2.5 grams) of Oxycodone, a Schedule II controlled substance.

On December 2, 2011, this Court sentenced the Petitioner to two consecutive terms of incarceration of not less than 24 months nor more than 60 months each, followed by 60 months probation each, effectively imposing a sentence of incarceration of not less than 48 months nor more than 120 months, followed by 120 months probation. Petitioner's

38

Recidivism Risk Reduction Incentive program (RRRI) was set at 40 months [1] and Petitioner was given credit for 2 days previously served in confinement. As set forth in the sentencing order, it was also the Court's recommendation to the Department of Corrections that Petitioner "participate in and satisfactorily complete the Drug and Alcohol Therapeutic Community."

In paragraph 13 of his *PCRA Petition*, Petitioner raised the following issues:

(a.) That Petitioner was denied effective assistance of counsel "when trial counsel induced a guilty plea that carries a greater penalty than the guidelines for twenty (20) dosage units."

(b.) That petitioner was denied effective assistance of counsel "when trial counsel conducted no investigation to present character witnesses where Petitioner has no prior criminal record, is elderly and in ailing health, and where he received an aggravated range sentence without such evidence being presented."

(c.) That Petitioner was denied effective assistance of counsel "in that counsel did not appear to know the pertinent law that applied to his client in regard to the sentencing ranges for twenty (20) dosage units as charged."

(d.) That Petitioner was denied effective assistance of counsel because trial counsel failed to raise these issues [(a.), (b.), and (c.)] in a post-sentence motion.

(e.) That Petitioner was denied effective assistance of counsel because trial counsel "provided Petitioner with incorrect advice and information concerning the timely filing of appeal."

At his PCRA hearing on January 31, 2013, Petitioner was the only witness to testify, and based upon his testimony, Petitioner impliedly abandoned the issues alleged in his PCRA Petition and asserted as additional grounds for PCRA relief:

(f.) That Petitioner was denied effective assistance of counsel when trial counsel failed to file post-sentence motions in the nature of a Motion to Modify Sentence for the reasons that the Court abused its discretion by imposing:

[1] Five-sixths of 48 months is 40 months.

(1) Consecutive sentences so that Petitioner could qualify for the DOC Drug and Alcohol Therapeutic Community program when it was later determined that he is unable to participate in that rehabilitation program due to his physical limitations; and,

(2) by imposing an unduly harsh sentence upon Petitioner.

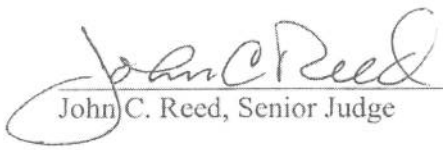
On February 28, 2013, this Court filed an extensive Opinion reviewing and discussing each issue raised by Petitioner, both in his PCRA Petition and at his PCRA hearing. As to the whether this Court abused its discretion by imposing consecutive sentenced, this Court concluded that it did not abuse its discretion and that the sentences were specifically tailored to meet the Petitioner's rehabilitative needs.

On April 1, 2013, Petitioner filed his Notice of Appeal to the Pennsylvania Superior Court and a Post-appeal Conference was held on May 14, 2013. In his Statement of Errors Complained of on Appeal, Petitioner claims, as his sole grounds for appeal:

> **[T]he sentence of the Court is manifestly excessive in length, because it is not specifically tailored to the nature of the offense, the ends of justice and society and the rehabilitative needs of the Defendant.**

This issue was previously discussed extensively by this Court, and therefore this Court directs the Appellate Court to this Court's Opinion dated February 28, 2013, a copy of which is attached hereto and incorporated herein.

BY THE COURT,



_____, S.J.
John C. Reed, Senior Judge

Date: May 14, 2013