

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF
		PENNSYLVANIA
Appellee		
v.		
MATTHEW ONDREAKO		
Appellant		No. 712 WDA 2013

Appeal from the Judgment of Sentence entered November 1, 2012,
in the Court of Common Pleas of Erie County,
Criminal Division, at No(s): CP-25-CR-0003062-2011.

BEFORE: BOWES, ALLEN, and LAZARUS, J.

MEMORANDUM BY ALLEN, J.:

FILED DECEMBER 4, 2013

Matthew Ondreako, ("Appellant"), appeals *nunc pro tunc* from the judgment of sentence imposed after a jury convicted him of aggravated indecent assault of a child, endangering the welfare of children, corruption of minors, and indecent assault.¹

The charges against Appellant arose after the victim told to her mother that Appellant had sexually assaulted her nearly every day when the victim was between the ages of 8 and 11. Appellant was the ex-boyfriend of the victim's mother and had been living in her home. Appellant was arrested and charged with the aforementioned crimes and a jury trial commenced on May 14, 2012. On May 15, 2012, the jury returned its guilty verdicts.

¹ 18 Pa.C.S.A. §§ 3125(b), 4304(a), 6301(a)(1) and 3126(a)(7).

A sexually violent predator hearing was conducted on November 1, 2012, at the conclusion of which Appellant was found to be a sexually violent predator. That same day, following a sentencing hearing, the trial court sentenced Appellant to 6 to 12 years of imprisonment for aggravated indecent assault of a child, a consecutive 15 months to 2½ years for endangering the welfare of children, and a consecutive 9 months to 1½ years for corruption of minors, for an aggregate sentence of 8 to 16 years of imprisonment. The crime of indecent assault merged for sentencing purposes.

No post-sentence motions were filed. On March 18, 2013, Appellant filed a *pro se* PCRA Petition arguing that because of trial counsel's refusal to file a direct appeal, Appellant was denied effective assistance of counsel. Accordingly, Appellant sought to have his direct appeal rights reinstated *nunc pro tunc*. Counsel was not appointed to represent Appellant. On March 21, 2013, the trial court entered an order reinstating Appellant's direct appeal rights and appointing counsel to represent Appellant on direct appeal. On March 25, 2013, Appellant filed a *pro se* "motion to modify and reduce sentence *nunc pro tunc*." The trial court did not rule on Appellant's "motion to modify and reduce sentence *nunc pro tunc*" but instead forwarded it to Appellant's counsel. Appellant's counsel then filed a notice of appeal *nunc pro tunc* on April 22, 2013. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant presents a single issue for our review:

1. Whether the trial court abused its discretion and committed legal error by sentencing [Appellant] beyond the aggravated range and [imposing a] sentence [that] was excessive in that it exceeded the guidelines promulgated by the sentencing commission?

Appellant's Brief at 4.

Appellant raises a challenge to the discretionary aspects of his sentence. Specifically, Appellant claims that the trial court erred in sentencing him in the aggravated range of the sentencing guidelines without placing adequate reasons on the record for the sentence. Appellant's Brief at 8-9.

Before we can address a discretionary challenge, an appellant must comply with the following requirements:

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

Commonwealth v. Allen, 24 A.3d 1058, 1064 (Pa. Super. 2011).

Appellant's trial counsel failed to file a direct appeal. The record indicates that trial counsel did not preserve Appellants' direct appeal rights because he believed that there were no meritorious issues for appellate review. See Letter from Public Defender, 1/28/13, at 1. However, the trial

court granted Appellant's *pro se* PCRA petition seeking reinstatement of his direct appeal rights *nunc pro tunc*, and Appellant thereafter filed a timely notice of appeal.

Next, we must determine whether Appellant preserved his discretionary claim in a post-sentence motion. The record reveals that although Appellant's direct appeal rights were reinstated *nunc pro tunc*, in his *pro se* PCRA petition, Appellant did not request reinstatement of his right to file a post-sentence motion *nunc pro tunc*. The trial court subsequently reinstated Appellant's right to file a direct appeal, but did not reinstate Appellant's right to file a post-sentence motion *nunc pro tunc*.²

In ***Commonwealth v. Corley***, 31 A.3d 293 (Pa. Super. 2011), we explained that where the appellant was denied counsel entirely throughout the post-sentence and direct appeal period when he was constitutionally entitled to counsel, reinstatement of his appellate rights *nunc pro tunc*

² The trial court did not appoint counsel to represent Appellant to litigate his PCRA petition. ***See Commonwealth v. Robinson***, 970 A.2d 455, 457 (Pa. Super. 2009). "Pursuant to the rules of criminal procedure and interpretive case law, a criminal defendant has a right to representation of counsel for purposes of litigating a first PCRA petition through the entire appellate process." Thus, in this case, no amended PCRA petition was filed with the assistance of counsel seeking reinstatement of Appellant's post-sentence rights in addition his direct appeal rights. Although the trial court did appoint counsel after reinstating Appellant's direct appeal rights, appellate counsel did not file any motions to preserve Appellant's post-sentence rights. As noted above, after counsel was appointed, Appellant filed a *pro se* "motion to modify and reduce sentence *nunc pro tunc*." The trial court did not rule on this motion, but instead forwarded it to Appellant's newly-appointed counsel who took no further action.

should have included the right to file a post-sentence motion *nunc pro tunc*, because the appellant was without counsel at the time the post-sentence motion was due. Accordingly, we determined in **Corley** that the appellant did not waive his discretionary challenge to his sentence on direct appeal *nunc pro tunc*, even though his post-sentence rights were not reinstated *nunc pro tunc*. **Corley**, 31 A.3d at 297, *distinguishing Commonwealth v. Liston (Liston II)*, 602 Pa. 10, 977 A.2d 1089 (2009) (the reinstatement of an appellant's direct appeal rights *nunc pro tunc* did not include the automatic reinstatement of his right to file post-sentence motions *nunc pro tunc* in which petitioner could then raise 'other' claims of counsel ineffectiveness).

Here, as in **Corley**, Appellant's direct appeal rights were reinstated on the basis that he had been denied the right to counsel in pursuing his appellate rights. The record indicates that trial counsel did not preserve Appellant's direct appeal rights because he believed that there were no meritorious issues for appellate review. See Letter from Public Defender, 1/28/13 at 1. **See also Commonwealth v. Baker**, 880 A.2d 654, 657 (Pa. Super. 2005). ("[t]he public defender's refusal to file an appeal deprive[s] appellant of his right to counsel under the United States and Pennsylvania Constitutions"). As in **Corley**, Appellant's PCRA claim was based on denial of counsel, and appellant raises no 'other' claims of trial counsel ineffectiveness in his direct appeal. In reliance on **Corley**, we decline to find

waiver of Appellant's sole discretionary sentencing claim on the basis that Appellant failed to preserve it in a post-sentence motion.

We next consider whether Appellant has filed a concise statement of reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f). He has not. However, the Commonwealth has not objected to the statement's absence. Therefore, we decline to find waiver on this basis. ***See Commonwealth v. Kiesel***, 854 A.2d 530, 533 (Pa. Super. 2004) ("when the appellant has not included a Rule 2119(f) statement and the appellee has not objected, this Court may ignore the omission and determine if there is a substantial question that the sentence imposed was not appropriate...."). We therefore proceed to determine whether Appellant has raised a substantial question for our review.

Appellant argues that the trial court's sentence in the aggravated range of the guidelines was excessive, contrary to the fundamental norms underlying the sentencing process, and constituted an abuse of discretion. Appellant's Brief at 8-9. In particular, Appellant argues that the trial court failed to provide adequate reasons for its sentence, and expressed a lack of understanding of the sentencing guidelines. *Id.* Such a claim appears to present a substantial question for our review. ***See Commonwealth v. Booze***, 953 A.2d 1263, 1278 (Pa. Super. 2008) (allegation that court failed to state adequate reasons on the record for imposing aggravated range sentence raises a substantial question for our review). However, our review

of the record indicates that Appellant's sentences did not fall in the aggravated range of the sentencing guidelines, as Appellant asserts.

For Appellant's conviction of aggravated indecent assault of a child, the guidelines recommended a sentence of 5 years in the mitigated range, 6 to 7½ years in the standard range, and 8½ years in the aggravated range. The statutory maximum sentence was 20 years. Appellant received a sentence of 6 to 12 years, a sentence within the standard range of the guidelines. **See Commonwealth v. Boyer**, 856 A.2d 149, 153 (Pa. Super. 2004) ("the sentencing guidelines provide for minimum and not maximum sentences").

For Appellant's conviction of endangering the welfare of children, the guidelines recommended a sentence of 9 months in the mitigated range, 15 to 21 months in the standard range, and 27 months in the aggravated range. The statutory maximum sentence was 7 years. Appellant received a sentence of 15-30 months of imprisonment, within the standard range of the guidelines.

For Appellant's conviction of corruption of minors, the guidelines recommended a sentence of 6 months in the mitigated range, 9 to 18 months in the standard range, and 19 months in the aggravated range. The statutory maximum sentence was 5 years. Appellant received a sentence of 9-18 months, within the standard range of the sentencing guidelines.

Thus, all of Appellant's sentences fell within the standard range of the sentencing guidelines and did not exceed the statutory maximums. **See Commonwealth v. Kimbrough**, 872 A.2d 1244, 1263 (Pa. Super. 2005) (citations omitted) ("When the sentence is within the range prescribed by statute, a challenge to the maximum sentence imposed does not set forth a substantial question as to the appropriateness of the sentence under the guidelines."). To the extent that Appellant argues that the trial court's imposition of consecutive sentences resulting in an aggregate sentence of 8 to 16 years of imprisonment rendered his sentence excessive, this does not present a substantial question for our review under the facts of this case. **See Commonwealth v. Dodge**, --- A.3d ----, 2013 WL 4829286 at 3 (Pa. Super. 2013) ("a defendant may raise a substantial question where he receives consecutive sentences within the guideline ranges if the case involves circumstances where the application of the guidelines would be clearly unreasonable, resulting in an excessive sentence; however, a bald claim of excessiveness due to the consecutive nature of a sentence will not raise a substantial question").

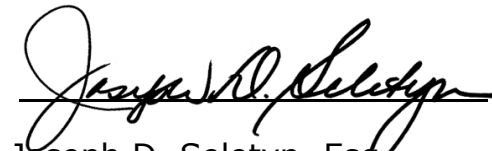
Moreover, at the sentencing hearing, the trial court stated on the record that it had considered the pre-sentence investigation report, and that it had considered Appellant's drug and alcohol problems, his rehabilitative potential, his criminal record, the impact of the crime on the victim, as well as the sentencing guidelines, in fashioning its sentence. N.T., 11/1/12, at

55-57. The record indicates that the trial court properly considered the relevant sentencing factors, and placed adequate reasons on the record for its sentencing determination. In view of the fact that the trial court complied with applicable law and the requirements of the Sentencing Code, and provided adequate reasons for its sentence on the record, we find no abuse of discretion.

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013