

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

CYNTHIA MCKEE

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 770 WDA 2013

Appeal from the Judgment of Sentence of March 27, 2013  
In the Court of Common Pleas of Allegheny County  
Criminal Division at No.: CP-02-CR-0004699-2012

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and WECHT, J.

MEMORANDUM BY WECHT, J. FILED: December 4, 2013

Cynthia McKee ("Appellant") appeals from her March 27, 2013 judgment of sentence. Appellant challenges the discretionary aspects of her sentence. We affirm.

The trial court aptly summarized the factual and procedural history of this case as follows:

The instant case arises from the death of [Appellant's] 11-year-old son, Donovan, at the hands of her live-in boyfriend, Anthony Bush. Up until the time of his death, Donovan was the victim of numerous beatings by [Anthony Bush] with wooden and metal sticks and a belt. [Appellant] never obtained medical care for the injuries Donovan sustained as a result of the beatings, nor did she ever attempt to stop Bush's abuse of her son. On the evening of February 11, 2012, Bush called [Appellant] at work and asked where he could find a needle and thread. [Appellant] left work and arrived home at approximately 10:00 p.m., where she found Donovan, naked, barely conscious, bloody, cold and unable to speak. Despite his obviously critical condition, [Appellant] acquiesced to Anthony Bush's wishes and did not call

911 until 11:41 p.m. When the emergency personnel arrived, blood spatters were found on the walls and ceiling in his bedroom, his sheets were bloody and a bloody belt was found in the room. Donovan's younger brother, Vincere, then five years old, told the police that Bush had beaten Donovan that night and had done so regularly in the past. Donovan was taken to Children's Hospital, where he was pronounced dead at 2:45 a.m. Dr. Abdulrezak Shakir, who performed the autopsy, opined that had Donovan received medical care earlier, even at 10:00 p.m., he would have survived.

[Appellant] was charged with Involuntary Manslaughter<sup>1</sup> and Endangering the Welfare of a Child.<sup>2</sup> On January 24, 2013, pursuant to a plea agreement with the Commonwealth, the Endangering the Welfare of a Child charge was withdrawn and [Appellant] pled guilty to the Involuntary Manslaughter charge. [Appellant] again appeared before this Court on March 27, 2013, at which time she was sentenced to a term of imprisonment of five (5) to ten (10) years. Timely Post-Sentence Motions were filed and were denied on April 4, 2013. This Appeal follows.

<sup>1</sup> 18 Pa.C.S. § 2504(a).

<sup>2</sup> 18 Pa.C.S. § 4304.

Trial Court Opinion ("T.C.O."), 7/11/2013, at 1-5.

On May 8, 2013, Appellant filed a timely notice of appeal. On May 9, 2013, the trial court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). On May 28, 2013, Appellant filed her concise statement of errors complained of on appeal. On July 11, 2013, the trial court then issued its above-quoted opinion pursuant to Pa R.A.P. 1925(a).

Appellant raises one issue on appeal: "Did the Sentencing Court abuse its discretion when it sentenced [Appellant] above the aggravated range of the guidelines, without consideration for all statutory factors and in a

response to bias against [Appellant]?” Brief for Appellant at 3. Appellant’s issue implicates the discretionary aspects of her sentence. **See Commonwealth v. Mouzon**, 812 A.2d 617, 625-26 (Pa. 2002) (holding that excessiveness implicates discretionary aspects of sentence); **Commonwealth v. Bromley**, 862 A.2d 598, 604 (Pa. Super. 2004) (same); **Commonwealth v. Hanson**, 856 A.2d 1254, 1257 (Pa. Super. 2004) (holding that sentence outside the guidelines implicates discretionary aspects of sentence). Appellant is not entitled to review of the discretionary aspects of his sentence as of right:

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

We conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, **see** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa.R.Crim.P. 720; (3) whether appellant’s brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S. § 9781(b).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. 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.

As to what constitutes a substantial question, this Court does not accept bald assertions of sentencing errors. An appellant must articulate the reasons the sentencing court’s actions violated the sentencing code.

***Commonwealth v. Moury***, 992 A.2d 162, 170 (Pa. Super. 2010) (internal quotation marks, citations, and modifications omitted).

To that end: Before a challenge to the sentence will be heard on the merits, an appellant, in order to invoke the Court's jurisdiction, must set forth in his brief a separate and concise statement of reasons relied upon in support of his appeal. **See** Pa.R.A.P. 2119(f); **see also *Commonwealth v. Ladamus***, 896 A.2d 592, 595 (Pa. Super. 2006).

Rule 2119(f) states:

An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

***Commonwealth v. Gould***, 912 A.2d 869, 872 (Pa. Super. 2006).

In this case, Appellant filed a timely notice of appeal, and properly preserved this issue in her post-sentence motion. In addition, Appellant's brief contains the required Rule 2119(f) statement. Therefore, Appellant has satisfied the technical requirements for a challenge to the discretionary aspects of the sentence. We now must determine whether Appellant has set forth a substantial question justifying this Court's review of the merits of her sentencing claim.

In her Rule 2119(f) statement, Appellant alleges that the trial court misapplied the law and exercised manifestly unreasonable judgment when it sentenced her to the statutory maximum sentence without due or meaningful consideration of the statutory factors established in 42 Pa.C.S.

§§ 9721(b) and 9781(d). Brief for Appellant at 13. Specifically, Appellant contends that the sentence was unreasonable because the trial court imposed a sentence based upon bias and because the sentence is manifestly excessive, without sufficient legal justification for the penalty. Brief for Appellant at 14.

Under the Sentencing Code, the sentencing court:

shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.

42 Pa.C.S. § 9721(b).

This Court has held that “an allegation of bias in sentencing implicates the fundamental norms underlying sentencing and hence, . . . raises a substantial question.” **Commonwealth v. Corley**, 31 A.3d 293, 297 (Pa. Super. 2011). This Court has also held that an appellant’s joint allegations that his sentence was manifestly excessive and that the trial court’s failure to examine adequately any mitigating factors constitutes a substantial question. **Commonwealth v. Perry**, 883 A.2d 559, 602 (Pa. Super. 2005). Therefore, we will consider the merits of her challenge to the trial court’s exercise of its sentencing discretion.

In reviewing sentencing decisions, we apply an abuse of discretion standard:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse

of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

**Commonwealth v. Zurburg**, 937 A.2d 1131, 1135 (Pa. Super. 2007) (quoting **Commonwealth v. Rodda**, 723 A.2d 212, 214 (Pa. Super. 1999) (*en banc*)).

Even though Appellant raises only one issue in her questions presented, she divides her argument into four sub-arguments in her brief. Because Appellant makes very similar arguments, we will address Appellant's first two sub-arguments together. Appellant argues that the trial court abused its discretion when it imposed the statutory maximum sentence based solely upon the nature of the offense while failing to consider the other relevant sentencing factors such as Appellant's age, personal characteristics, and potential for rehabilitation. Brief for Appellant at 16, 20-21.

It is well established that a sentencing court enjoys considerable latitude in sentencing:

Traditionally, the trial court is afforded broad discretion in sentencing criminal defendants because of the perception that the trial court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it. Under Pennsylvania's Sentencing Code, 42 Pa.C.S.A §§ 9701, *et seq.*, a trial court must "follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." **Id.** § 9721(b). The court

must also consider the statutory Sentencing Guidelines, which were promulgated in order to address the problems associated with disparity in sentencing. **See id.; see also** 42 Pa.C.S.A. §§ 2151-55 (governing creation and adoption of the Sentencing Guidelines); 204 Pa. Code §§ 303.1-303.18 (Pennsylvania Sentencing Guidelines).

The Sentencing Guidelines enumerate aggravating and mitigating circumstances, assign scores based on a defendant's criminal record and based on the seriousness of the crime, and specify a range of punishments for each crime. "In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed." 42 Pa.C.S.A. § 9721(b); **see** 204 Pa. Code § 303.1(d). The Sentencing Guidelines are not mandatory, however, so trial courts retain broad discretion in sentencing matters, and therefore, may sentence defendants outside the Guidelines. **See** 42 Pa.C.S.A. § 9721(b); **Commonwealth v. Ellis**, 700 A.2d 948, 958 (Pa. Super. 1997). If a court departs from the sentencing recommendations contained in the Sentencing Guidelines, it must "provide a contemporaneous written statement of the reason or reasons for the deviation." 42 Pa.C.S.A. § 9721(b); **see** 204 Pa. Code § 303.1(d).

**Mouzon**, 812 A.2d at 620-21 (footnotes omitted; some citations omitted or modified for clarity).

Further, where the sentencing judge had the benefit of a presentence investigation report, we presume that he or she was aware of the relevant information regarding the defendant's character, and weighed those considerations along with mitigating statutory factors. **Commonwealth v. Tirado**, 870 A.2d 362, 368 (Pa. Super. 2005); **Commonwealth v. Burns**, 765 A.2d 1144, 1150-51 (Pa. Super. 2000). Here, the trial court had the benefit of the presentence report and thus presumably was aware of all the

relevant sentencing factors including any pertinent mitigating information. The trial court stated that the offense gravity score for involuntary manslaughter is eight and Appellant had a prior record score of zero. Notes of Testimony ("N.T."), 3/27/2013, at 3; 204 Pa. Code § 303.15. Accordingly, the recommended standard statutory range for Appellant's crime was nine to sixteen months' imprisonment in the standard range, and eighteen to twenty-five months in the aggravated range. ***Id.***

Despite the recommend range, the trial court sentenced Appellant to five to ten years for involuntary manslaughter, the statutory maximum. N.T. at 60. However, the five to ten-year sentence was not in excess of the statutory maximum and therefore did not exceed the trial court's discretion. Prior to sentencing, the trial court listened to and considered the testimony of Appellant's probation officer, drug counselor, employer and forensic psychologist Dr. Alice Applegate. The trial court heard and considered the testimony of these individuals in conjunction with the pre-sentence report in fashioning the sentence. The trial court balanced this information against the aggravated nature of the crime and determined that the statutory maximum sentence was appropriate under these circumstances. Although this sentence significantly exceeded the sentencing guidelines, the trial court, having considered all of the pertinent aggravating and mitigating information, did not abuse its discretion. ***See Commonwealth v. Rossetti***, 863 A.2d 1185, 1194-95 (Pa. Super. 2004) (affirming a statutory maximum sentence for involuntary manslaughter imposed after the trial court



considered and balanced all of the relevant mitigating and aggravating facts). Thus, Appellant's argument to the contrary lacks merit.

Appellant next claims that the statements made by the trial court following the imposition of Appellant's sentence demonstrated that the sentencing court did not properly weigh all the statutory factors. Appellant specifically cites the following statements that the trial judge made at sentencing:

I don't say this very often because I sit through a number of cases that I considered horrific, and in this case and in the case against Anthony Bush, the court has struggled to maintain its composure because of what happened to Donovan. . . .

I have a letter here from Vincere that is absolutely heartbreaking, but he is not the first child that has either been the subject of abuse or been around abuse. No matter what anyone says I saw the pictures of Donovan. He was clearly, clearly beaten over a number of years. He had scars that had healed all over his little body. You had to know what was going on, you had to know. He died after being beaten for eight hours with anything that your paramour could pick up. He actually sewed Donovan together with a needle and thread. This is a child who was living there, who was living when you got home. He was pronounced at the hospital. The time that you waited may have cost him his life. But you chose Mr. Bush over Donovan, and that's a decision that you are going to live with. . . .

Nothing in this case matters to me except what that poor child went through and what he would never, ever have been able to recover even if he had lived perhaps. I don't know.

N.T. at 59-60.

However, the trial judge did, in fact, state that she had received many letters on Appellant's behalf and understood that Appellant had done many

good things since Donovan's murder, but that she was balancing that with the years of abuse to Donovan. N.T. at 63-64. In addition, as stated above, where the sentencing judge had the benefit of a presentence investigation report, we presume that he or she was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. **Burns**, 765 A.2d at 1144, 1150-1151. Notably, Appellant cites no case law to the contrary. Appellant's argument is meritless.

Appellant last argues that the sentence imposed upon her was the result of the trial court's bias and prejudice against her. Appellant specifically argues that the trial judge's statements prove bias and prejudice against her. In addition to the above excerpted comments, Appellant notes the following statements by the trial court:

There are two sets of photographs that I can't get out of my mind. One was about 30 years ago, my first homicide that occurred was Western Penn, and the second one is [Donovon]. . . . I think about it all the time.

N.T. at 59-60, 62.

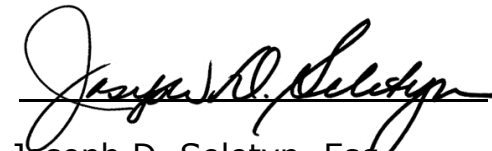
Appellant's claims are unfounded. Appellant cites case law that is not applicable to this case. The trial court did not lodge personal attacks against Appellant, as was the case in **Commonwealth v. Williams**, 69 A.3d 735, 748-49 (Pa. Super. 2013), nor did the trial court give personal opinions to the media about the case, as in **Commonwealth v. Druce**, 848 A.2d 104, 107 (Pa. 2004). The trial court, while not expressly reciting all of or tailoring

its comments to the statutory factors in its sentencing statements, listened to and considered the testimony of the forensic psychologist, Appellant's probation officer, her drug counselor, and her employer before making its decision. The trial court also had a pre-sentence report to guide its decision. Therefore, the trial court imposed a permissible sentence based upon the evidence presented at the sentencing hearing, and Appellant has failed to establish that the sentence was based upon bias and prejudice.

Because the sentence did not exceed the statutory maximum and the trial court considered mitigating factors without discernible bias or prejudice, the trial court did not abuse its discretion in imposing Appellant's sentence.

Judgment of sentence affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/4/2013