

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

FRANCIS J. NOTORO

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 897 WDA 2013

Appeal from the Judgment of Sentence April 26, 2013  
In the Court of Common Pleas of Warren County  
Criminal Division at No(s): CP-62-CR-0000381-2012

BEFORE: BOWES, J., ALLEN, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.

FILED: December 23, 2013

Francis Notoro appeals from the judgment of sentence imposed by the Court of Common Pleas of Warren County after a jury found him guilty of simple assault<sup>1</sup> and endangering the welfare of a child.<sup>2</sup> On April 26, 2013, the trial court sentenced Notoro to 44 to 88 months in a state prison, and ordered him to undergo a sexual offender's evaluation and to complete any recommendations for treatment. After careful review, we affirm on the basis of the trial court opinion.

On July 15, 2012, Notoro brought his two-month-old son to the emergency room due to injuries the child sustained while in his care.

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<sup>1</sup> 18 Pa.C.S.A. § 2701(a)(1).

<sup>2</sup> 18 Pa.C.S.A. § 4304(a)(1).

Specifically, the child suffered from bruising around his penis, navel, and nipples, as well as a fractured left tibia. The opinion of the emergency room physician was that the infant had been sexually abused. During a lengthy interview with Detective Anthony Chimenti of the Warren City Police and Corporeal Brian Zeybel of the Pennsylvania State Police Polygraph Unit on July 18, 2012, Notoro initially stated that the injuries were accidental, but later recanted admitting that he had sexually abused his son and caused the injuries.<sup>3</sup> At trial, Notoro testified that he caused the injuries accidentally by pounding his fist on the bed where his son was laying and striking his son. The jury found Notoro not guilty of the most serious offenses stemming from the incident, but still found him guilty of simple assault and endangering the welfare of children. Each of these charges involved some type of sexual conduct with the victim.

On May 21, 2013, Notoro filed a post-sentence motion requesting his case be remanded for resentencing on the charge of simple assault and that the requirement of a sex offender evaluation and treatment be stricken from his sentence. The trial court denied Notoro's motion, and this timely appeal followed.

On appeal, Notoro raises the following issues for our review:

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<sup>3</sup> The trial court denied Notoro's motion to suppress the statements he made during the interview on January 15, 2013.

1. Did Judge Hammond abuse his discretion [. . .] by sentencing [Notoro] to the maximum sentence allowable by law, above the standard and even the aggravated range, for the charge of [si]mple [a]ssault?
2. Did Judge Hammond abuse his discretion in sentencing [Notoro] to have a sexual offender evaluation and to complete any recommendations for treatment given that he was found not guilty on the sex offenses and the jury evidently accepted his testimony that he did not sexually abuse his child?

Appellant's Brief, at 6.

Notoro's claims challenge the discretionary aspects of his sentence. When the discretionary aspects of a sentence are questioned, an appeal is not guaranteed as of right. **Commonwealth v. Moore**, 617 A.2d 8, 11 (Pa. Super. 1992). Rather, two criteria must be met before an appeal may be taken. First, the appellant must "set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of the sentence," Pa.R.A.P. 2119(f); second, an appeal will only be granted when a "substantial question" has been presented. 42 Pa.C.S.A. § 9781(b). Our standard of review of a sentencing claim is well-settled:

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. Glass**, 50 A.3d 720, 727 (Pa. Super. 2011).

Here, Notoro asserts that his sentence was excessive. A claim that a sentence is manifestly excessive such that it constitutes too severe a punishment raises a substantial question. **See Commonwealth v. Mouzon**, 812 A.2d 617, 624 (Pa. 2002). Accordingly, we will review Notoro's claim.

Having reviewed the transcripts, the briefs, the relevant law and the record as a whole, this Court concludes that the well-reasoned opinion of the Honorable Gregory J. Hammond thoroughly discusses, and correctly resolves, the issues on appeal.

At sentencing, the court notified Notoro that his sentence would be outside of the sentencing guidelines and provided seven reasons for the deviation pursuant to section 9721(b) of the Sentencing Code. **See** 42 Pa.C.S.A. § 9721(b); N.T. Sentencing, 4/26/13, at 10-16. The trial court further noted that it had the opportunity to observe Notoro on numerous occasions, and felt that he failed to take responsibility, or show remorse, for his actions. Trial Court Opinion, 6/26/13, at 5. For these reasons, the court sentenced Notoro to the maximum sentence permissible. As Judge Hammond correctly notes in his opinion, the Sentencing Guidelines are purely advisory in nature and are merely one factor among many that the court must consider in imposing a sentence. **See Commonwealth v. Yuhasz**, 923 A.2d 1111, 1114-19 (Pa. 2007). Accordingly, Notoro's sentence was consistent with the protection of the public, the gravity of his offense as it relates to the impact on the life of the victim and the

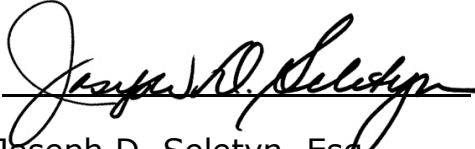
community, and his rehabilitative needs. **See** 42 Pa.C.S.A. § 9721(b). Therefore, we agree with the trial court's conclusion that the sentencing court appropriately exercised its discretion when it imposed Notoro's sentence.

Judge Hammond also correctly concluded that the sentencing court did not abuse its discretion when it directed Notoro to undergo a sexual offender's evaluation and complete all recommendations for treatment. The sentencing court imposed these conditions due to the nature of the victim's injuries. Furthermore, despite the jury acquitting Notoro of the alleged sexual offenses, we cannot overlook the fact that Notoro admitted to engaging in oral sex with his son during his interview with Detective Chimenti and Corporal Zeybel. Appellant's Brief, at 5; Affidavit of Probable Cause, 7/19/12, at 2. Due to the nature of the victim's injuries and Notoro's own admission of sexual abuse, we agree that a sexual offender's evaluation is appropriate. **See** 42 Pa. C.S.A. § 9718.1(a)(2) (person incarcerated in state institution for endangering welfare of children shall participate in Department of Corrections program of counseling/therapy designed for sex offenders if the offense involved sexual contact with victim).

As Judge Hammond correctly concludes in his opinion, the court did not abuse its discretion when it sentenced Notoro. Accordingly, we affirm based on Judge Hammond's opinion. Counsel is directed to attach a copy of that opinion in the event of further proceedings in the matter.

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: 12/23/2013

Appendix B

IN THE COURT OF COMMON PLEAS  
OF THE 37<sup>th</sup> JUDICIAL DISTRICT OF PENNSYLVANIA  
WARREN COUNTY BRANCH  
CRIMINAL

WARREN COUNTY  
PROTHONOTARY/  
CLERK OF COURTS

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FILED

COMMONWEALTH OF PENNSYLVANIA

vs.

CR 381 of 2012

FRANCIS JOSEPH NOTORO

OPINION PURSUANT TO Pa.R.A.P. 1925(a)

Appellant appeals this Court's April 26, 2013, Sentence. On appeal, Appellant complains of the following errors: (1) The Court abused its discretion by sentencing Appellant above the standard range and above the aggravated range of the sentencing guidelines; and (2) The Court abused its discretion when it sentenced Appellant to undergo a sexual offender's evaluation and to complete all recommendations for treatment.

Pertinent Procedural and Factual Summary

Appellant signed a Waiver of Counsel, and the Waiver of Counsel was filed on August 1, 2012. On August 14, 2012, the Commonwealth filed an Information, charging Appellant with Count 1: Involuntary Deviate Sexual Intercourse with a Child pursuant to 18 Pa.C.S.A. § 3123(b), Count 2: Indecent Assault pursuant to 18 Pa.C.S.A. § 3126(a)(7), Count 3: Simple Assault pursuant to 18 Pa.C.S.A. § 2701(a)(1), Count 4: Endangering Welfare of a Child pursuant to 18 Pa.C.S.A. § 4304(a)(1), Count 5: Rape of a Child pursuant to 18 Pa.C.S.A. § 3121(c), and Count 6: Incest pursuant to 18 Pa.C.S.A. § 4302(b)(1).

On October 23, 2012, Appellant filed a Motion for Psychiatric Examination in order to determine if Appellant was mentally ill at the time of the commission of the alleged acts and to determine if Appellant was competent to represent himself. The Court ordered that a forensic psychiatric evaluation be conducted on Appellant. On November 16, 2012, the parties filed a Stipulation to the Report of Robert M. Dowling, Ph.D. ("Stipulation"). After reviewing the Stipulation, the Court scheduled a hearing on Appellant's Waiver of Right to Counsel. The hearing occurred on November 20, 2012, and following the hearing, the Court determined that Appellant was competent to stand trial and was competent to represent himself.

Jury selection was on February 11, 2013, and a jury trial occurred on April 9, 2013. The jury found Appellant guilty of Count 3: Simple Assault and Count 4: Endangering Welfare of a Child and not guilty of the remaining counts. On April 26, 2013, Appellant appeared before the Court for sentencing<sup>1</sup>. At Count 3: Simple Assault, the Court sentenced Appellant to a State Correctional Institution for a minimum period of 30 months to a maximum period of 60 months; to pay the cost of prosecution, a \$1,000 fine, a \$125 central booking fee, and a \$250 administrative fee to the Warren County Probation Department; to undergo a sexual offender's evaluation and to complete any recommendations for treatment; to undergo a comprehensive mental health evaluation and to complete all recommendations for treatment; and to have no contact or communication with the Victim. The Court ordered this sentence to run consecutive to the sentence imposed at criminal docket number 44 of 2013. At Count 4: Endangering Welfare of a Child, the Court sentenced Appellant to a State Correctional Institution for a minimum period of 14 months to a maximum period of 28 months; to pay a \$500 fine and a \$250 administrative fee to the Warren County Probation Department; and to have no contact or communication with the Victim. The Court ordered this sentence to run consecutive to the sentence entered at Count 3: Simple Assault. Thus, for this criminal docket number, the Court sentenced Appellant to an aggregate period of incarceration in a State Correctional Institution for a minimum period of 44 months to a maximum period of 88 months. Appellant received credit for time served.

On April 29, 2013, Appellant filed a Motion for Reduction in Sentence ("Motion"). The Court scheduled argument on Appellant's Motion for May 2, 2013. After argument, the Court denied Appellant's Motion. On May 13, 2013, Assistant Public Defender Alan M. Conn, Esquire, filed an Entry of Appearance on Appellant's behalf. On May 21, 2013, Appellant filed a Notice of Appeal, a Motion to Proceed In Forma Pauperis, and a Notice to Court Reporter. On the same date, the Court granted Appellant's Motion to Proceed In Forma Pauperis. On May 23, 2013, the Court directed Appellant to file of record and serve on the trial court a concise statement of the errors complained of on the appeal within 21 days. On June 11, 2013, Appellant filed a Statement of Matters Complained of on Appeal Pursuant to Pa.R.App.R. 1925(b) ("Statement").

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<sup>1</sup> The Court informed Appellant that these offenses do not merge for sentencing purposes. See *Commonwealth v. Coppedge*, 984 A.2d 562 (Pa. Super. 2009). Appellant did not raise this issue on appeal.



### Conclusions of Law

Before addressing Appellant's errors complained of on appeal, the Court notes that Appellant failed to timely serve the Court with his Statement. The Court's May 23, 2013, Order gave Appellant 21 days to file of record and serve on the trial court a concise statement. Twenty-one (21) days from May 23, 2013, was June 13, 2013. Appellant filed his Statement on June 11, 2013, and served the Court on June 17, 2013. Thus, Appellant did not comply with the Court's May 23, 2013, Order.

In the interest of judicial economy, the Court addresses the issues raised in Appellant's Statement. Appellant's first error complained of on appeal is that the Court sentenced him above the standard range and above the aggravated range of the sentencing guidelines. Specifically, Appellant asserts that the reasons stated by the Court for Appellant's sentence were factually inaccurate.<sup>2</sup> On appeal, the appellate court assesses the sentencing court's sentence to determine "whether the sentencing court imposed a sentence that is 'unreasonable.'" *Commonwealth v. Walls*, 926 A.2d 957, 963 (Pa. 2007) (citing 42 Pa.C.S.A. § 9781(c)). The appellate court reviews the record for the following:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
- (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
- (3) The findings upon which the sentence was based.
- (4) The guidelines promulgated by the commission.

42 Pa.C.S.A. § 9781(d)(1)-(4). "It is well established that the Sentencing Guidelines are purely advisory in nature. . . . The guidelines are merely one factor among many that the court must consider in imposing a sentence." *Commonwealth v. Yuhasz*, 923 A.2d 1111, 1118-19 (Pa. 2007) (citing *Commonwealth v. Sessoms*, 532 A.2d 775 (Pa. 1987)). When sentencing a defendant to confinement, the sentence should be "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

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<sup>2</sup> Appellant challenges only some of the Court's reasons for sentence. He claims the following reasons were factually inaccurate: (1) The assault demonstrated extreme cruelty; (2) Appellant did not seek immediate medical attention for the Victim and withheld the nature of the Victim's injuries from medical providers; (3) Appellant did not show any real remorse for his actions; and (4) Appellant failed to take responsibility for his actions. Appellant does not challenge that the Victim was two (2) months old and extremely vulnerable; the Victim was in the exclusive care and custody of Appellant, the Victim's father; and the Victim suffered significant injuries.

rehabilitative needs of the defendant.” 42 Pa.C.S.A. 9721(b). “In every case where the court imposes a sentence. . . outside the guidelines . . . , the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines to the commission. . . .” 42 Pa.C.S.A. § 9721(b).

At sentencing, the Court notified Appellant that his sentence would be outside of the sentencing guideline range and provided seven reasons on the record and in the Sentence for his decision. *See* Transcript of Proceedings Taken at Time of Sentence 4/26/2013 (“Transcript”); *see also* Sentence 4/26/2013 (“Sentence”) at 1-2. The first reason was the vulnerability of the Victim due to the Victim’s age. Transcript at 11; Sentence at 1. At the time of incident, the Victim was only two (2) months old. Transcript at 11. The second reason was that the Victim was in the exclusive care and custody of Appellant. Transcript at 12; Sentence at 1. Appellant is the father of the Victim, and at the time of the incident, Appellant was caring for the Victim in the family residence. Transcript at 12. The third reason was that the assault demonstrated extreme cruelty. Transcript at 12; Sentence at 1. For this reason, the Court summarized Appellant’s testimony at Appellant’s jury trial. “You took your fist (Indicating), you punched a two month old child twice. The first time . . . you grazed his pelvis. The second one you corrected your aim, struck him directly on his genitals . . . forcibly. . . .” Transcript at 13. The fourth reason is the Victim sustained serious injuries. Transcript at 13; Sentence at 1. Appellant’s actions caused the Victim to suffer red swollen genitals, abrasions to his penis, and marks around his nipples and navel. Transcript at 13. These injuries required Emergency Room treatment and hospitalization. *Id.* The fifth reason was that Appellant failed to seek immediate medical attention for the Victim and that Appellant withheld the nature of the Victim’s injuries from medical providers. Transcript at 13-14; Sentence at 2. Again, the Court referred to Appellant’s testimony at Appellant’s jury trial. After inflicting the Victim’s injuries, Appellant put an ice pack on the Victim’s penis and took a nap. Transcript at 14. Also, when the Victim was admitted to the Emergency Room, Appellant was not honest with the medical providers regarding the nature of the Victim’s injuries, and this dishonesty prevented the Victim from receiving appropriate medical treatment. *Id.* The sixth reason is that Appellant did not show any real remorse for his conduct and that Appellant is a poor candidate for rehabilitation. Transcript at 14; Sentence at 2. Throughout the criminal proceedings, Appellant showed anger towards the Warren County District Attorney for prosecuting him on these charges. Transcript at 14-15. In addition, Appellant failed to disclose

the cause of the Victim's injuries to medical providers, law enforcement personnel, and the Court. Transcript at 15, 16. Furthermore, Appellant's behavior while incarcerated at the Warren County Prison was abysmal. The reports submitted by the Warren County Prison, which are part of the record, indicate that Appellant had several misconducts. Based on these observations, the Court concluded that Appellant failed to show remorse for his actions and was a poor candidate for rehabilitation. *Id.* The seventh reason was that Appellant did not take responsibility for his actions. Transcript at 16; Sentence at 2. As mentioned above, Appellant withheld information from medical providers, law enforcement personnel, and the Court. Transcript at 15, 16. Appellant told law enforcement personnel several untruthful causes of the Victim's injuries, including that an innocent four-year-old child caused the Victim's injuries. Moreover, at trial, Appellant blamed his wife's housekeeping skills, his loss of employment, and his mental health conditions for his actions. The first time Appellant acknowledged what he had done was at his jury trial. *Id.* at 15. Otherwise, Appellant failed to take responsibility for his actions. Accordingly, the Court sentenced Appellant outside of the sentence guideline and to the maximum sentence permissible, and Appellant's sentence 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.

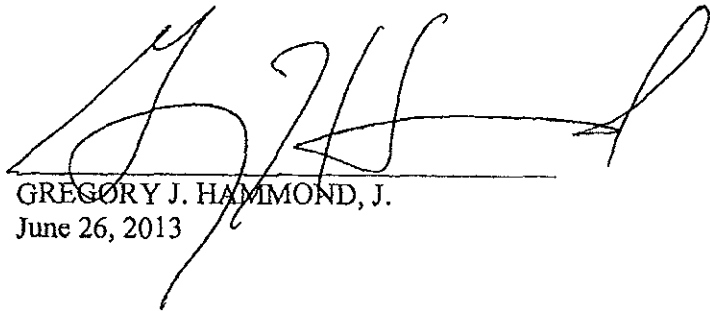
It should be noted that the Court had the opportunity to observe Appellant on numerous occasions. The Court presided over hearings on Appellant's pre-trial motions, jury selection, Appellant's trial, and Appellant's sentencing.

Appellant's second error on appeal is that the Court abused its discretion when it sentenced Appellant to undergo a sexual offender's evaluation and to complete all recommendations for treatment. For Count 3: Simple Assault, the "to wit" of the Information states, "the [Appellant] did engage in oral sex with a 2 month old child, D.N., while he was in his care and custody causing bruising and swelling of the infant's penis, pelvic area, nipples and naval. The infant also sustained a fractured left tibia while in the [Appellant's] care." Information 8/14/2012, at 1. The Court's fourth reason for sentencing Appellant outside of the sentencing guidelines was that the Victim sustained serious injuries. Transcript at 13; Sentence at 1. In particular, the Court emphasized that the Victim's injuries included swollen genitals, abrasions on the penis, swelling of the penis, and marks around the Victim's nipples and navel. Transcript at 13. Based on the Victim's injuries and the "to wit" language of Count 3, the Court ordered

Appellant to undergo a sexual offender's evaluation to determine if the injuries involved a sexual component. Transcript at 18; Sentence at 2. Even giving deference to the jury's verdict, based on Appellant's testimony that he physically struck the Victim in the genitals, the Court was within its discretion to order Appellant to undergo a sexual offender's evaluation to determine if the injuries involved a sexual component. Therefore, the Court did not abuse its discretion.

No further opinion shall issue.

BY THE COURT



GREGORY J. HAMMOND, J.  
June 26, 2013

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