

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JAMES RICHARD BRADLEY,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 928 WDA 2013

Appeal from the PCRA Order entered May 10, 2013
In the Court of Common Pleas of Erie County
Criminal Division at No(s): CP-25-CR-0002927-2010.

BEFORE: FORD ELLIOTT, P.J.E, WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY STRASSBURGER, J.:

FILED DECEMBER 13, 2013

James Richard Bradley (Appellant) appeals from the order entered November 13, 2012, denying his petition under the Post Conviction Relief Act (PCRA).¹ We affirm.

On October 7, 2010, Appellant was involved in a serious single-car automobile accident, which rendered his passenger, David Brady (the victim), quadriplegic. It was determined that, at the time of the accident, Appellant's blood alcohol content was .23 percent.

¹ 42 Pa.C.S. §§ 9541-9546.

*Retired Senior Judge assigned to the Superior Court.

On March 4, 2011, Appellant pleaded guilty to driving under the influence (DUI) of a controlled substance - highest rate of alcohol, and to aggravated assault by vehicle while DUI.² On April 16, 2011, Appellant was sentenced to a term of 40 to 80 months' incarceration at the aggravated assault charge and a concurrent three to six months' incarceration for the DUI. The court also ordered Appellant to pay restitution in the amount of \$743,881.94 for the victim's medical expenses. This sentence was to run consecutively to a state sentence Appellant already was serving. Appellant filed a timely direct appeal alleging that his convictions should merge for the purposes of sentencing. This Court agreed, and on July 31, 2012, we issued an order correcting Appellant's judgment of sentence. ***Commonwealth v. Bradley***, 2015 WDA 2011, unpublished judgment order (Pa. Super. filed July 31, 2012).³

On February 26, 2013, Appellant filed a *pro se* motion to vacate illegal sentence. The trial court treated the filing as a timely PCRA petition and appointed counsel who filed a supplemental petition on April 15, 2013. On April 18, 2013, the PCRA court issued its notice of intent to dismiss

² 75 Pa.C.S. §§ 3802(c) and 3735.1(a), respectively.

³ Specifically, this Court vacated Appellant's DUI sentence, but affirmed his 40-to-80 month sentence for aggravated assault. Following this correction, the trial court issued an order adjusting Appellant's credit for time served. Order, 2/11/2013.

Appellant's petition without a hearing pursuant to Pa.R.Crim.P. 907. On May 10, 2013, the PCRA court issued an order denying Appellant's petition. This timely appeal followed.⁴

Appellant raises two issues for our review.

1. Whether the PCRA Court erred in failing to find that the [40-to-80] month sentence was illegal?
2. Whether the PCRA Court erred in failing to find that the imposition of a restitution order in the amount of \$743,881.94 was illegal?

Appellant's Brief at 2.⁵

"This Court's standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error." *Commonwealth v. Ortiz*, 17 A.3d 417, 420 (Pa. Super. 2011) (citations omitted). We must accord great deference to the findings of the PCRA court,

⁴ The PCRA court did not order Appellant to file a Pa.R.A.P. 1925(b) statement and none was filed.

⁵ We note our agreement that Appellant's "motion to vacate illegal sentence," which was filed nearly 6 months after this Court affirmed his judgment of sentence, should be treated as a timely PCRA petition. *See Commonwealth v. Taylor*, 65 A.3d 462 (Pa. Super. 2013) (distinguishing *Commonwealth v. Glunt*, 61 A.3d 228 (Pa. Super 2012), and reaffirming that a collateral petition that raises an issue that the PCRA statute could remedy is to be considered a PCRA petition). It is well-settled that issues concerning the legality of sentence, which Appellant raised in his motion, are cognizable under the PCRA. *Commonwealth v. Beck*, 848 A.2d 987, 989 (Pa. Super. 2004).

and such findings will not be disturbed unless they have no support in the record. ***Commonwealth v. Wilson***, 824 A.2d 331 (Pa. Super. 2003).

In his first issue, Appellant contends that “he has been subject to an illegal sentence in respect to the miscalculation and consequently the misapplication of the sentencing guidelines” with respect to his aggravated assault charge, arguing that the trial court erred in assessing him a prior record score (PRS) of 4 when he should be a zero and posits that the calculation of his sentencing guideline range was in error. Appellant’s Brief at 4.

This Court has long held that “a ‘challenge to the calculation of the Sentencing Guidelines raises a question of the discretionary aspects of a defendant’s sentence.’” ***Commonwealth v. O’Bidos***, 849 A.2d 243, 253 (Pa. Super. 2004). ***See also Commonwealth v. Medley***, 725 A.2d 1225, 1228 (Pa. Super. 1999) (holding that a claim that the lower court erred when calculating his prior record score presents a substantial question that the lower court abused its discretion at the time of sentencing). Challenges to the discretionary aspects of sentencing are not cognizable under the PCRA. ***See*** 42 Pa.C.S. § 9543(a)(2)(vii); ***Commonwealth v. Fowler***, 930 A.2d 586, 593 (Pa. Super. 2007). Thus, we conclude that there was no error in the PCRA court’s dismissal of this claim.

Appellant’s next issue challenges his restitution order, which he argues is “not supported by a sufficient factual and legal record.” Appellant’s Brief

at 4. Specifically, Appellant claims that the Commonwealth failed to provide adequate proof of the \$743,881.94 restitution amount. Moreover, Appellant argues that the sentencing court failed to take into consideration Appellant's ability to pay such a high amount, or the "marked physical improvement" of the victim. *Id.* at 5.

"Challenges to the appropriateness of a sentence of restitution are generally considered challenges to the legality of the sentence." *Commonwealth v. Langston*, 904 A.2d 917, 921 (Pa. Super. 2006) (citation omitted). Instantly, the trial court imposed restitution as part of Appellant's direct sentence. Restitution as a direct sentence is governed by 18 Pa.C.S. § 1106, which provides:

(a) **General rule.** --Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.

* * *

(c) Mandatory restitution.--

(1) The court shall order full restitution:

(i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss. The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim's Compensation Board or other governmental agency but shall order the defendant to pay any restitution ordered for loss previously compensated by the

board to the Crime Victim's Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board. The court shall not reduce a restitution award by any amount that the victim has received from an insurance company but shall order the defendant to pay any restitution ordered for loss previously compensated by an insurance company to the insurance company.

18 Pa.C.S. § 1106(a), (c)(1)(i). Additionally, "at the time of sentencing the court shall specify the amount and method of restitution. In determining the amount and method of restitution, the court ... shall consider the extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney." *Id.* at § 1106(c)(2)(i).

Our review of the record indicates that the imposed restitution order was a legal sentence, and accordingly, Appellant's claim of error is meritless. The notes of testimony reflect that counsel, the court, and Appellant were all made aware of the outstanding restitution amount prior to sentencing via the pre-sentence investigation report and attached documentation from the victim. *See* County of Erie Adult Probation Presentence Investigation, 4/5/11, at 1 (unnumbered) (noting "Restitution amounts ongoing - attached bills totaling \$743,881.94".) Sentencing counsel did not object to the amount of restitution. The court, as required by section 1106(c), acknowledged the victim's substantial injuries and sentenced Appellant to pay the full amount of restitution as it was calculated in the documents provided by the Commonwealth. Thus, Appellant had ample notice of and

detailed information regarding the losses suffered by the victim. Moreover, Appellant knowingly and intelligently entered into an agreement under which the repayment of restitution was part of the bargain. This Court has held that we must we must honor such mutual agreements in the context of plea proceedings. ***See Commonwealth v. Ortiz***, 854 A.2d 1280, 1284 (Pa. Super. 2004) (*en banc*) (honoring restitution order that was part of the negotiated sentence, the terms of which certainly induced the defendant to enter the plea). Finally, there was no uncertainty regarding the amount to be repaid, nor is Appellant's ability to pay a consideration under the statute.⁶ Accordingly, we find no error with the PCRA court's determination that Appellant's issue is without merit.

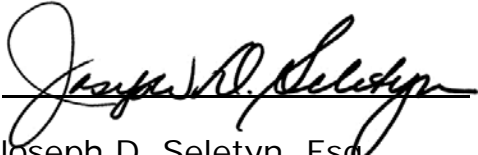
As we have determined that Appellant's issues lack merit, we affirm the order of the PCRA court denying Appellant relief.

Order affirmed.

⁶ Appellant has provided this court with no documentation to support his argument his order of restitution should be modified due to alleged "improvements" in the quadriplegic victim's condition.

J-S60041-13

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: 12/13/2013