

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
CLIFTON CONROY CLARKE,	:	
	:	
Appellant	:	No. 960 MDA 2012

Appeal from the Judgment of Sentence entered January 13, 2012, in the Court of Common Pleas of Dauphin County, Criminal Division, at Nos. CP-22-CR-0000352-2011 and CP-22-CR-0005583-2010.

BEFORE: MUNDY, OTT, and STRASSBURGER\*, JJ.

MEMORANDUM BY STRASSBURGER, J.:

Filed: January 31, 2013

Clifton Conroy Clarke (Appellant) appeals from the judgment of sentence entered January 13, 2012 at CP-22-CR-0000352-2011, following his convictions, by a jury, of statutory sexual assault, indecent assault with a person less than sixteen years of age, corruption of minors, and unlawful contact with a minor.<sup>1</sup> He further appeals his judgment of sentence entered the same date at CP-22-CR-0005583-2010, following his entry of guilty pleas to the offenses of escape, resisting arrest, criminal mischief, and unlawful possession of a controlled substance.<sup>2</sup> We affirm.

The pertinent factual and procedural history of these actions is summarized as follows. On October 25, 2010, a criminal complaint was filed

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<sup>1</sup> 18 Pa.C.S. §§ 3122.1, 3126(a)(8), 6301 (a)(1), and 6318, respectively.

\* Retired Senior Judge assigned to the Superior Court.

against Appellant (CP-22-CR-0000352-2011) charging him with multiple offenses stemming from Appellant's sexual abuse of a fifteen-year-old female victim. As a result of this abuse, the victim became impregnated and gave birth to a child. An arrest warrant was issued for Appellant at the above case number. During execution of the warrant on October 28, 2010, Appellant incurred additional charges of resisting arrest, two counts of criminal mischief (damage to property), escape, and unlawful possession of a controlled substance. These charges were filed at a separate case number, CP-22-CR-0005583-2010.

On September 2, 2011, a jury found Appellant guilty, at CP-22-CR-0000352-2011, of statutory sexual assault, indecent assault (age related), corruption of minors, and unlawful contact with a minor. Subsequently, an evaluation was performed that determined Appellant not to be a sexually violent predator. On January 13, 2012, Appellant pled guilty, at CP-22-CR-0005583-2010, to the charges of resisting arrest, criminal mischief, escape, and unlawful possession of a controlled substance. On that same date, Appellant was sentenced at both cases to an aggregate term of 33 months to 14 years of imprisonment. On January 23, 2012, Appellant filed a post-sentence motion, which was denied by order dated May 14, 2012. This

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<sup>2</sup> 18 Pa.C.S. §§ 5121(d)(1), 5104, 3304(b), and 35 P.S. § 780-113(a)(16), respectively.

timely appeal followed. Both Appellant and the trial court have complied with the directives of Pa.R.A.P. 1925.

On appeal, Appellant presents for our consideration the sole issue of

[w]hether the trial court abused its discretion in sentencing Appellant to an aggregate term of thirty-three (33) months to fourteen (14) years where there was nothing on the record to support the imposition of an aggravated range sentence, and where the sentencing court failed to take into consideration the rehabilitative need of Appellant when imposing sentence?

Appellant's Brief at 5 (capitalization and underlining omitted). This claim challenges the discretionary aspects of Appellant's sentence.

Our standard of review in such cases is one of abuse of discretion. 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. ***Commonwealth v. Shugars***, 895 A.2d 1270, 1275 (Pa. Super. 2006).

Where an appellant challenges the discretionary aspects of a sentence there is no automatic right to appeal, and an appellant's appeal should be considered to be a petition for allowance of appeal. ***Commonwealth v. W.H.M.***, 932 A.2d 155, 162 (Pa. Super. 2007). As we observed in ***Commonwealth v. Moury***, 992 A.2d 162 (Pa. Super. 2010):

[a]n appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:

[W]e 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.A. § 9781(b).

*Id.* at 170 (citing *Commonwealth v. Evans*, 901 A.2d 528 (Pa. Super. 2006)). Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or in a motion to modify the sentence imposed. *Id.* (citing *Commonwealth v. Mann*, 820 A.2d 788 (Pa. Super. 2003)).

Because Appellant filed a timely appeal, Appellant has met the first prong of the discretionary aspects of sentence test. The second and third prongs of the test are additionally satisfied as Appellant has properly preserved his claim for review in a post-sentence motion, and has included in his brief a statement pursuant to Pa.R.A.P. 2119(f). We may therefore proceed to determine whether Appellant has raised a substantial question for our review, to satisfy the fourth requirement of the test.

A substantial question will be found where the defendant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing process. *Commonwealth v. Ventura*, 975 A.2d 1128, 1133 (Pa. Super. 2009) (citation omitted). In this instance, Appellant claims that the sentence imposed was unreasonable because the

sentencing court, under the circumstances of his case, failed to consider adequately all relevant factors as set forth in section 9721(b) of the Sentencing Code.<sup>3</sup> Specifically, Appellant argues that the trial court, given the criteria that the court must follow in fashioning a sentence of total confinement,<sup>4</sup> improperly sentenced Appellant to a term of one and one-half years to 10 years of imprisonment for the offense of statutory sexual assault

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<sup>3</sup> Section 9721(b) provides in relevant part:

(b) *General Standards.* – In selecting from the alternatives set forth in subsection (a) [the type of sentence imposed], the 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).

<sup>4</sup> Section 9725 of the Sentencing Code provides:

The court shall impose a sentence of total confinement if, having regard to the nature and circumstances of the crime and the history, character, and condition of the defendant, it is of the opinion that the total confinement of the defendant is necessary because:

(1) there is undue risk that during a period of probation or partial confinement the defendant will commit another crime;

(2) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(3) a lesser sentence will depreciate the seriousness of the crime of the defendant.

“where there was nothing on the record to support the imposition of an aggravated range sentence, and where the sentencing court failed to take into consideration the rehabilitative need of Appellant when imposing the sentence.” Appellant’s Brief at 10. The essence of Appellant’s argument is that “the sentencing court considered only the age differential between the victim and Appellant in charging Appellant in the aggravated range of the sentencing guidelines, a factor which is an impermissible aggravating factor given its status [as] an element of the underlying crime.” *Id.* Appellant contends that the court “failed to take into consideration the nature and circumstances of the offense and the history and the characteristics of [Appellant],” including that he “has no criminal history of prior sexual crimes of any nature and no reports of inappropriate sexual misconduct prior to these charges.” *Id.* at 13. In so doing, Appellant posits that the sentence “far exceeds what would be necessary to rehabilitate [him] and prevent him from committing similar crimes to those with which he was convicted.” *Id.* at 12-13. Thus, Appellant concludes, the sentence was manifestly excessive and an abuse of the court’s discretion. *Id.*

Appellant’s claim that the court’s imposition of sentence violates a specific section of the sentencing code and that confinement is too extreme of a punishment where Appellant’s criminal behavior could be corrected by a lesser rehabilitation program, raises a substantial question. **See**

***Commonwealth v. Mouzon***, 812 A.2d 617 (Pa. 2002) (plurality) (claim that sentence imposed by trial judge violates a specific provision of the sentencing code raises a substantial question); ***Commonwealth v. Kelly***, 33 A.3d 638 (Pa. Super. 2011) (a claim that a sentence is manifestly excessive such that it constitutes too severe a punishment raises a substantial question as to whether the trial court abused its discretion in sentencing); ***Commonwealth v. Stewart***, 867 A.2d 589, 592 (Pa. Super. 2005) (finding substantial question raised when appellant alleged that sentencing court considered improper factors when sentencing in aggravated range). Having determined that Appellant has met the requirements for allowance of appeal, we address the merits of his claim.

The trial court set forth the following rationale for the imposition of sentence as follows:

Initially, this [c]ourt notes that there was a presentence investigation conducted in this case, and the [c]ourt thoroughly considered the report in determining [Appellant's] sentence. Moreover, at the sentencing hearing, the Commonwealth submitted a victim impact statement, which was read to the [c]ourt. The victim reveals that [Appellant's] actions had completely changed her life. As a result, she gave birth to a baby boy nine months after the sexual assault. [Appellant] fathered this child. When first confronted, [Appellant] denied paternity; it was later determined through testing that he is indeed the father. The victim is 16 years old, repeating her sophomore year in high school, and working as many hours as the law permits. Consequently, she has no time for activities of a typical high school student. Her emotional state impacts her daily and she continues to feel fear, shame, guilt and distrust. The child is an everyday reminder of the monumental effect [Appellant's] crimes have had on the victim's life. The Commonwealth noted that the victim had just turned fifteen (15)

when the initial crime was committed, and [Appellant] was thirty-nine (39) years old.

The victim's mother also made comments at the hearing. She said that [Appellant] was a friend of the family, and that she helped him and his daughter, and treated him like a brother. She trusted him. She said [s]he helped him take care of his kids while he was hurting her child, and [he] had the nerve after all of that to come to her house every day, eat, drink, and bring family there. She asked that he be punished to the full extent of the law so that he does not molest another child.

In fashioning a sentence, the [c]ourt noted its responsibility to impose a sentence that reflects the finding of the jury. Specifically, the [c]ourt stated:

In considering the jury's finding of the specific charges, then comparing it to the guidelines that exist, trying to keep my sentence within what I believe is to be the intentions shared with the [c]ourt in both the jury and legislature, I do see the statutory sexual assault something more than given the age differential. I see a concern for a lengthier supervision in this particular case in light of the circumstances that took place as the finders of fact have made.

Trial Court Opinion, 8/15/2012, at 3-5 (citations to notes of testimony omitted).

Review of the certified record on appeal, including the sentencing transcript, supports the trial court's rationale asserted, and its decision conforms to the applicable law.<sup>5</sup> "A sentencing court may consider any

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<sup>5</sup> Section 9781(d) provides:

(d) **Review of record.** – In reviewing the record the appellate court shall have regard for:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant.

legal factor in determining that a sentence in the aggravated range should be imposed.'" **Commonwealth v. Bowen**, 975 A.2d 1120, 1122 (Pa. Super. 2009) (quoting **Stewart**, 867 A.2d at 592-93). While the court indicated its sentence was based in some part on the discrepancy in age of Appellant and his victim, the court further noted the need for a lengthier sentence due to the nature and circumstances of the crime in this instance. The court balanced the rehabilitative needs of Appellant, his potential for recidivism, and the needs of the community. As the court noted at the sentencing hearing, testimony was taken from the victim's mother and the victim impact statement which explained the daily effect that this statutory sexual assault has had upon the victim. While it is true, as Appellant suggests, that the guidelines takes into account the age discrepancy as a factor of the crime, the court in this case acknowledged the individual circumstances of this case, in that a child was conceived by a child victim as a result of the sexual contact, and the victim experienced a high risk pregnancy, requiring extensive hospitalization, which heightened and aggravated the nature and circumstances of the crime substantiating the challenged aggravated

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(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. § 9781(d).

sentence. Based on this information, the trial court imposed a term of one and one-half years to ten years' imprisonment for the offense of statutory sexual assault. The sentence itself was not outside the statutory limitations.<sup>6</sup> Thus, we do not find Appellant's sentence in this regard unreasonable despite the statutory sexual assault sentence falling within the aggravated range,<sup>7</sup> nor do we find that the trial/sentencing court abused its discretion in rendering such sentence, as the court has set forth sufficient individualized aggravating circumstances to support the sentence. **See Walls, supra** (holding that sentencing court, in imposing statutory maximum sentences in excess of sentencing guidelines, for rape of victim less than 13 years old, and involuntary deviate sexual intercourse with victim less than 13 years old, and standard range sentence for incest, made sentencing decision that was individualized, notwithstanding general comments about those who sexually victimize young children, when court considered a number of factors specific to defendant).

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<sup>6</sup> The standard sentencing guideline range for statutory sexual assault (18 Pa.C.S. § 3122.1, graded as a felony of the second degree), considering Appellant's prior record score of 0 and offense gravity score of 7, is 6 to 14 months, with a deviation of 6 months. The statutory maximum for a felony of the second degree is 10 years. **See** 18 Pa.C.S. § 106.

<sup>7</sup> "[U]nder the Sentencing Code an appellate court is to exercise its judgment in reviewing a sentence outside the sentencing guidelines to assess 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. § 9781(c)). In making this reasonableness inquiry the

Moreover, to the extent Appellant claims the court failed to properly weigh the mitigating factors present in this case, we note that the trial/sentencing court had the benefit of a pre-sentence report. N.T., 1/13/2012, at 18. Our Supreme Court has stated that “[w]here pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of the relevant information regarding the defendant’s character and weighed those considerations along with mitigating statutory factors.” *Walls*, 926 A.2d at 967 n. 7 (quoting *Commonwealth v. Devers*, 546 A.2d 12, 18 (Pa. 1988)). Thus, as we find that the court properly considered all factors regarding Appellant’s charges, including the impact of the crime on the victim, the protection of the community and Appellant’s treatment needs, we find no abuse of discretion on the part of the sentencing court. Thus, Appellant’s issue does not entitle him to relief. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

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appellate courts shall have regard for the factors set forth in 42 Pa.C.S. § 9781(d), *supra. Id.*