

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

RASHAD BRYSON

Appellant

No. 1964 EDA 2013

Appeal from the Judgment of Sentence February 22, 2013  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0002854-2012;  
CP-51-CR-0002856-2012; CP-51-CR-0002858-2012;  
CP-51-CR-0002860-2012; CP-51-CR-0002862-2012;  
CP-51-CR-0002864-2012; CP-51-CR-0002866-2012;  
CP-51-CR-0002868-2012

BEFORE: GANTMAN, P.J., PANELLA, J., and STABILE, J.

MEMORANDUM BY GANTMAN, P.J.:

**FILED JULY 28, 2014**

Appellant, Rashad Bryson, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his open guilty plea to eight (8) counts of robbery and eight (8) counts of conspiracy.<sup>1</sup> We affirm.

The trial court set forth the relevant facts and procedural history of this case as follows:

Between November 15 and November 21, 2011, [Appellant] and a co-conspirator engaged in a crime spree, committing eight gun-point robberies. ...

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<sup>1</sup> 18 Pa.C.S.A. §§ 3701(a)(1)(ii), 903, respectively.

On June 25, 2012, [Appellant] entered into a guilty plea before the Honorable Ramy Djerassi of the Philadelphia Court of Common Pleas. Sentencing was delayed until October 11, 2012, as the court awaited the results of a pre-sentence investigation [PSI], drug and alcohol screening, and mental health evaluation. On October 11, 2012, [Appellant] moved to withdraw his guilty plea. On November 8, 2012, Judge Djerassi granted [Appellant's] motion and the case was reassigned to this [c]ourt.

On June 19, 2012, co-conspirator Clifford M. Chevalier entered into a non-negotiated guilty plea before the Honorable Ramy Djerassi of the Philadelphia Court of Common Pleas. Sentencing was deferred until August 10, 2012, where the court imposed a term of three to seven [years'] imprisonment followed by three [years'] probation.

On February 22, 2013, [Appellant] appeared before this [c]ourt and entered an open guilty plea to eight counts of first-degree robbery and eight counts of conspiracy. For the eight robberies, this [c]ourt imposed eight concurrent terms of 10 to 20 years to be served at a state correction[al] institution. For the eight conspiracy convictions, this [c]ourt imposed eight concurrent terms of 10 [years'] reporting probation, to run consecutively to the robbery incarceration.

On March 1, 2013, [Appellant] filed a post-sentence motion, asking this [c]ourt to reconsider the sentence. This [c]ourt denied that motion on June 28, 2013.

On July 3, 2013, [Appellant] filed a timely notice of appeal followed by a requested [concise statement] of [errors] complained of on appeal [pursuant to Pa.R.A.P. 1925(b)].

(Trial Court Opinion, filed December 9, 2013, at 1-2).

Appellant raises the following issue for our review:

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED APPELLANT TO THE MAXIMUM CONCURRENT SENTENCE WITHOUT EXPLAINING ITS

REASONS FOR SENTENCING OUTSIDE THE GUIDELINES  
AND IMPOSING AN UNREASONABLE SENTENCE IN  
VIOLATION OF 42 PA.C.S.A. § 9781(D).

(Appellant's Brief at 4).

Appellant argues the court imposed a sentence above the aggravated range in the Deadly Weapon Enhancement/Possessed Matrix. Appellant contends the sentencing court did not provide adequate reasons for Appellant's enhanced sentence, demonstrate an understanding of the guidelines, or set forth the permissible range of sentences on the record. Appellant further claims he unjustifiably received a harsher sentence than his co-conspirator, who was the mastermind behind the robbery spree. Appellant asserts the sentencing court gave too much weight to the gravity of Appellant's offenses and failed to give due consideration to multiple factors, such as Appellant's mental health issues, remorse, instant cooperation with police, and clean record. Appellant maintains he received a vastly more severe sentence than his co-conspirator received, despite evidence showing the co-conspirator was more at fault for the robberies and Appellant is not prone to repeat the offenses. Appellant concludes the sentencing court abused its discretion when it imposed Appellant's sentence. As presented, Appellant's challenge is to the discretionary aspects of his sentence. ***See Commonwealth v. Hyland***, 875 A.2d 1175 (Pa.Super. 2005), *appeal denied*, 586 Pa. 723, 890 A.2d 1057 (2005) (stating claim that sentencing court failed to consider mitigating factors challenges

discretionary aspects of sentencing); ***Commonwealth v. Davis***, 737 A.2d 792 (Pa.Super. 1999) (stating claim that court imposed sentence outside of guidelines without placing sufficient explanation on record implicates discretionary aspects of sentencing); ***Commonwealth v. Cleveland***, 703 A.2d 1046 (Pa.Super. 1997) (stating claim that court imposed disparate sentences on co-defendants without articulating reasons challenges discretionary aspects of sentencing).<sup>2</sup>

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Commonwealth v. Sierra***, 752 A.2d 910 (Pa.Super. 2000). Prior to reaching the merits of a discretionary sentencing issue:

[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).

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<sup>2</sup> “[W]hile a...plea which includes **sentence negotiation** ordinarily precludes a defendant from contesting the validity of his...sentence other than to argue that the sentence is illegal or that the sentencing court did not have jurisdiction, **open** plea agreements are an exception in which a defendant will not be precluded from appealing the discretionary aspects of the sentence.” ***Commonwealth v. Tirado***, 870 A.2d 362, 365 n.5 (Pa.Super. 2005) (emphasis in original). “An ‘open’ plea agreement is one in which there is no negotiated sentence.” ***Id.*** at 363 n.1. Here, Appellant’s plea was “open” as to sentencing, so a challenge to the discretionary aspects of his sentence is available.

***Commonwealth v. Evans***, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted). 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. ***Commonwealth v. Mann***, 820 A.2d 788 (Pa.Super. 2003), *appeal denied*, 574 Pa. 759, 831 A.2d 599 (2003).

When appealing the discretionary aspects of a sentence, an appellant must also invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal 'furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to **exceptional** cases.'" ***Commonwealth v. Phillips***, 946 A.2d 103, 112 (Pa.Super. 2008), *cert. denied*, 556 U.S. 1264, 129 S.Ct. 2450, 174 L.Ed.2d 240 (2009) (quoting ***Commonwealth v. Williams***, 562 A.2d 1385, 1387 (Pa.Super. 1989) (*en banc*) (emphasis in original)).

"The determination of what constitutes a substantial question must be evaluated on a case-by-case basis." ***Commonwealth v. Anderson***, 830 A.2d 1013, 1018 (Pa.Super. 2003). 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." **Sierra, supra** at 912-13 (quoting **Commonwealth v. Brown**, 741 A.2d 726, 735 (Pa.Super. 1999) (*en banc*), *appeal denied*, 567 Pa. 755, 790 A.2d 1013 (2001)). A claim that the sentencing court imposed an unreasonable sentence by sentencing outside the guidelines raises a substantial question. **Commonwealth v. Davis**, 737 A.2d 792 (Pa.Super.1999). An allegation that the sentencing court provided inadequate reasons on the record for imposing a sentence outside the guidelines also constitutes a substantial question. **Commonwealth v. Goggins**, 748 A.2d 721 (Pa.Super. 2000) (*en banc*), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000). Furthermore, an appellant raises a substantial question by claiming the court erred by imposing an aggravated range sentence without consideration of mitigating circumstances. **Commonwealth v. Felmlee**, 828 A.2d 1105 (Pa.Super. 2003) (*en banc*).

Sentencing is a matter vested in the sound discretion of the sentencing court. **Commonwealth v. Lee**, 876 A.2d 408, 413 (Pa.Super. 2005). On appeal, this Court will not disturb the judgment of the sentencing court absent an abuse of discretion. **Commonwealth v. Fullin**, 892 A.2d 843, 847 (Pa.Super. 2006). When imposing a sentence, the sentencing court is required to consider the sentence ranges set forth in the Sentencing

Guidelines, but is not bound by them. ***Commonwealth v. Yuhasz***, 592 Pa. 120, 132, 923 A.2d 1111, 1118 (2007) (noting guidelines are “purely advisory in nature”). The guidelines are merely “advisory guideposts” which recommend rather than require a given sentence. ***Commonwealth v. Eby***, 784 A.2d 204, 206 (Pa.Super. 2001). A sentencing court need not recite the specific range of permissible sentences under the guidelines, so long as it demonstrates awareness of the guidelines and details the reasons for deviating upward from the guidelines on the record. ***Commonwealth v. Rodda***, 723 A.2d 212 (Pa.Super. 1999) (*en banc*). **See also *Commonwealth v. Garcia-Rivera***, 983 A.2d 777, 780 (Pa.Super. 2009) (stating sentencing court must demonstrate that it understands guideline ranges and place on record its reasons for deviating from guidelines). Such reasons include the need to protect the public, the rehabilitative needs of the defendant, and the gravity of the particular offense as it relates to the impact on the life of the victim and the community. ***Commonwealth v. Sheller***, 961 A.2d 187, 190 (Pa.Super. 2008), *appeal denied*, 602 Pa. 666, 980 A.2d 607 (2009). Additionally:

A sentencing court is not required to impose the same sentence on all participants in a crime. Moreover, when a defendant’s accomplice is tried, or pleads guilty, in a separate proceeding, and is sentenced by a different judge, the sentencing court is not required to explain a disparity between the defendant’s sentence and that of the accomplice.

***Commonwealth v. Myers***, 536 A.2d 428 (Pa.Super. 1988).

Instantly, Appellant did not object to his sentence at the time of imposition. In his post-sentence motion, Appellant claimed: (1) the sentence “shocked the conscience” because Appellant is a mentally disabled adult with no prior record and showed remorse for his crimes, yet he received a sentence three times longer than his co-conspirator; (2) the court failed to articulate the reasons for the disparity between the sentences of Appellant and his co-conspirator; and (3) the court did not consider the sentencing guidelines and explain the reasons for deviating from the guidelines.

In his Rule 2119(f) statement, Appellant does not restate his claims that the court erred by sentencing Appellant to a longer prison term than Appellant’s co-conspirator and by failing to explain its decision to impose a disparate sentence. Consequently, those claims are waived. ***See Evans, supra.*** Moreover, Appellant’s co-conspirator was sentenced by a different judge following a separate proceeding. Thus, the court had no obligation to explain the disparity between the sentences. ***See Myers, supra.*** Further, in its Rule 1925(a) opinion, the court justified its decision to sentence Appellant to a lengthier term:

In the summer of 2012, the Honorable Ramy Djerassi of the Philadelphia Court of Common Pleas presided over a SMART<sup>2</sup> court room, a court room whose mission is to negotiate potential pre-trial dispositions of criminal cases. Generally, the plea bargain offered by the Commonwealth during a SMART room proceeding is the most generous offer a defendant can hope to receive. During co-



conspirator's SMART room proceedings before Judge Djerassi on August 10, 2012, co-conspirator entered into a non-negotiated guilty plea. Sentencing was deferred until August 10, 2012 when co-conspirator received a sentence of three to seven years['] imprisonment, followed by three years['] probation, for his involvement in the eight gun-point robberies.

<sup>2</sup> The acronym SMART stands for Strategic Management, ARC, Readiness, Trial.

The record reflects that on June 25, 2012, [Appellant] entered a guilty plea. However, he subsequently reconsidered this decision and withdrew this plea. Therefore, when he tendered an open guilty plea before this [c]ourt on February 22, 2013, he did so without a promise of a certain sentence. [Appellant's] decision to tempt fate resulted in a harsher sentence than his co-conspirator. [A] review of the record reveals that this [c]ourt articulated factors that were sufficient to support [Appellant's] sentence.

(Trial Court Opinion, filed December 9, 2013, at 8-10). Thus, even if properly preserved, Appellant's disparate sentence claims would merit no relief.

Appellant properly preserved his claim that the court failed to consider certain mitigating factors in imposing a sentence above the aggravated range of the Sentencing Guidelines. This claim raises a substantial question. **See *Felmlee, supra***. Likewise, Appellant preserved his claims that the court failed to consider the sentencing guidelines and explain the reasons for deviating from the guidelines. These claims also appear to present a substantial question. **See *Goggins, supra; Davis, supra***. Nevertheless, the record indicates the court considered the Sentencing Guidelines and

relevant mitigating factors, and provided an adequate statement of reasons for the sentence on the record. The court determined that Appellant had a prior record score of zero (0) and an offense gravity score of ten (10). The sentencing transcript also reveals that the court considered application of the deadly weapon (possessed) enhancement. The court further determined, however, that a mandatory minimum sentence of five (5) years also applied to each of the robbery convictions because the robberies were carried out at gunpoint.<sup>3</sup> The mandatory minimum term exceeded the high

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<sup>3</sup> We are mindful of the United States Supreme Court's recent decision in **Alleyne v. United States**, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), in which the Court expressly held that any fact increasing the mandatory minimum sentence for a crime is considered an element of the crime to be submitted to the fact-finder and found beyond a reasonable doubt. Here, following entry of Appellant's guilty plea, the court determined that a mandatory minimum sentence applied to each robbery conviction. **See** 42 Pa.C.S.A. § 9712 (mandating minimum five (5) year sentence for robbery conviction where defendant visibly possessed firearm or replica of firearm that placed victim in reasonable fear of death or serious bodily injury). Under Section 9712(b), the court determines applicability of the mandatory minimum at sentencing by a preponderance of the evidence (arguably in violation of **Alleyne**). In the present case, however, Appellant pled guilty to robbery by means of threatening another with or intentionally putting another in fear of immediate serious bodily injury. **See** 18 Pa.C.S.A. § 3701(a)(1)(ii). During his plea colloquy, Appellant specifically admitted using a firearm during the commission of the robberies. Appellant's admissions of guilt constituted convictions beyond a reasonable doubt. Therefore, we see nothing to implicate the legality of Appellant's sentence. **See Commonwealth v. Edrington**, 780 A.2d 721 (Pa.Super. 2001) (explaining challenge to application of mandatory minimum sentence is non-waivable challenge to legality of sentence which, assuming proper jurisdiction, this Court can raise *sua sponte*).

end of the otherwise applicable aggravated range sentence.<sup>4</sup> Thus, the court had to impose a sentence that exceeded the aggravated range. **See** 204 Pa.Code § 303.9(h) (stating: “When the guideline range is lower than that required by a mandatory sentencing statute, the mandatory minimum requirement supersedes the sentence recommendation”).

Moreover, the court had the benefit of a PSI report at sentencing. Therefore, we can presume Appellant’s sentence was reasonable and the court considered the relevant information regarding mitigating circumstances. **See *Tirado, supra*** (stating where sentencing court had benefit of PSI, law presumes court was aware of and weighed relevant information regarding defendant’s character and mitigating factors).

Additionally, after listening to the sentencing recommendations of both Appellant and the Commonwealth, the court reasoned at the hearing as follows:

The [c]ourt takes into consideration that [Appellant] has acknowledged his role in this. And has on different occasions expressed remorse, not only to the [c]ourt and to his family, but also to the victims. ...

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<sup>4</sup> Under the Deadly Weapon Enhancement/Possessed Matrix, the aggravated sentence range is forty-three (43) to fifty-seven (57) months for an offense gravity score of ten (10) and a prior record score of zero (0). **See** 204 Pa.Code § 303.17a. Therefore, the highest minimum term of confinement under the DWE matrix was fifty-seven (57) months, which is less than the mandatory minimum of sixty (60) months. Therefore, the five (5) year mandatory minimum superseded the DWE matrix guideline sentence.

In imposing the sentence, I have considered that [Appellant] has accepted responsibility for his crimes. I'm very mindful [of the] nature of the underlying crimes. This was, in effect, a [reign] of terror on Asian residents in the Northwest part of the city.

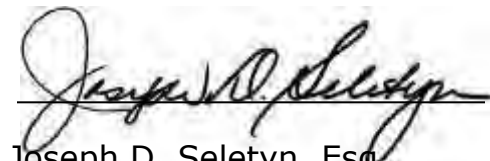
I relied upon consideration of the PSI. The victim impact statement. The effect this has had or will have on [Appellant's] family.

I'm mindful of the threat of public safety [Appellant] has posed. I am concerned about recidivism because of his decision[-]making history.

(N.T. Guilty Plea Hearing, 2/22/13, at 47). Thus, the record demonstrates the court was aware of the sentencing guidelines, gave appropriate consideration to relevant mitigating factors, and adequately detailed its reasons for imposing a sentence outside the guidelines and in excess of the mandatory minimum. **See *Yuhasz, supra*; *Rodda, supra***. Based upon the foregoing, Appellant is not entitled to relief on his challenge to the discretionary aspects of his sentence. Accordingly, we affirm.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.  
Prothonotary

Date: 7/28/2014