NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. RAYSHAWN EDWARDS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1036 WDA 2012

Appeal from the Judgment of Sentence June 12, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0008553-2011

BEFORE: PANELLA, J., ALLEN, J., and STRASSBURGER, J.*

MEMORANDUM BY PANELLA, J.: **FILED JULY 29, 2014**

Appellant, Rayshawn Edwards, appeals from the judgment of sentence entered on June 12, 2012, in the Court of Common Pleas of Allegheny County. After careful review, we affirm.

Following a bench trial, Edwards was convicted of third degree murder, aggravated assault, and recklessly endangering another person. Subsequent thereto, the trial court sentenced Edwards to an aggregate period of 20 to 40 years' imprisonment. Post-sentence motions were denied and this timely appeal followed.

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

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* Retired Senior Judge assigned to the Superior Court.

A. UNDER PENNSYLVANIA LAW, DOES THE COMMONWEALTH SURVIVE A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE WHEN A [SIC] APPELLANT, WHO PRESENTS FOUR ALIBI WITNESSES AT TRIAL WHO TESTIFY THAT THE APPELLANT WAS NOT AND COULD NOT HAVE BEEN THE PERPETRATOR OF THE CRIME, IS NEVERTHELESS CONVICTED OF [SIC] CRIME, WITHOUT ANY PHYSICAL EVIDENCE LINKING THE CITIZEN TO THE CRIME, BUT BASED SOLELY ON THE TESTIMONY OF AN EYEWITNESS, WHO IDENTIFIES THE CITIZEN AS THE PERPETRATOR OF A CRIME BY ONLY IDENTIFYING HIS LIMP, NEVER SEEING THE CITIZENS FACE, MADE THE IDENTIFICATION AT NIGHT, WITH ONLY A SPLIT SECOND VIEWING OF THE CITIZENS PROFILE, WITHOUT THE BENEFIT OF HER EYEGLASSES, WHICH RENDERED HER EYESIGHT BLURRY, WAS ADMITTEDLY UNSURE OF HER IDENTIFICATION AND MADE SUCH IDENTIFICATION WITH SUCH IMPEDIMENTS ALL WHILE BEING ADMITTEDLY HIGHLY INTOXICATED?

B. UNDER PENNSYLVANIA LAW, DOES THE COMMONWEALTH SURVIVE A CHALLENGE CONTENDING THAT THE VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE WHEN THE TESTIMONY LINKING THE APPELLANT TO THE CRIME COMES FROM AN ADMITTEDLY INTOXICATED, UNRELIABLY EYEWITNESS DEVOID ANY SHRED OF PHYSICAL EVIDENCE LINKING THE APPELLANT TO THE CRIME?

C. UNDER PENNSYLVANIA LAW, DID THE TRIAL COURT ABUSE ITS DISCRETION BY SENTENCING THE APPELLANT BASED ON SPECULATIVE EVIDENCE AND INFORMATION ALREADY FACTORED INTO THE SENTENCING GUIDELINES?

Appellant's Brief, at 5.

Edwards first challenges the sufficiency of the identification testimony presented by the Commonwealth. Specifically, Edwards avers that the Commonwealth's case was based upon the eyewitness testimony of Claire Coleman as she testified that she believed the shooter to be Edwards based solely on the shooter's limp and hairstyle. ***See*** Appellant's Brief, at 17.

Edwards believes that Coleman's identification testimony is unreliable as she "was intoxicated after consuming six, 16 ounce cans of malt liquor and she was not wearing her prescription eyeglasses." ***Id***.

"Proof beyond a reasonable doubt of the identity of the accused as the person who committed the crime is *essential* to a conviction." ***Commonwealth v. Grahame***, 482 A.2d 255, 259 (Pa. Super. 1984) (citations omitted). The evidence of identification need not be positive and certain in order to convict. ***See id***. Any uncertainty in an eyewitness's identification of a defendant is a question of the weight of the evidence, not its sufficiency. ***Commonwealth v. Cain***, 906 A.2d 1242, 1245 (Pa. Super. 2006). As such, Edwards' argument that the evidence at trial was insufficient to sustain his convictions based upon identification is, in actuality, best classified as a weight of the evidence claim.

Our standard of review for a weight of the evidence claim is as follows:

> Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Commonwealth v. Johnson, 910 A.2d 60, 64 (Pa. Super. 2006) (internal citations and quotations omitted). "The weight of the evidence is exclusively

for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact." ***Commonwealth v. Champney***, 832 A.2d 403, 408 (Pa. 2003) (citation omitted).

A weight challenge must be raised with the trial court in a motion for a new trial, made orally on the record or in writing any time before sentencing or in a written post-sentence motion. ***See*** Pa.R.Crim.P. 607(A)(1)-(3). In his post-sentence motion Edwards sets forth the following challenge to the weight of the evidence:

> 15. In the case *sub judice*, the defendant specifically avers that, when considering all the evidence presented by the Commonwealth, and ignoring the fact that the Defendant was convicted solely on the inconsistent and inherently unreliable eyewitness testimony from a single witness, without any other physical evidence, a clear denial of justice has occurred that Rule *607(A)(3)* and *Rule 720 (B)(1)(a)(iv)* of the *Pennsylvania Rules of Criminal Procedure* were designed to remedy.

Post-Sentence Motion, 6/15/12, at ¶ 15. Edwards' Rule 1925(b) statement mirrors that same claim:

> 3. The verdict was contrary to the weight of the evidence when considering the following evidence
>
> a. The purported eyewitness witness, Ms. Claire Coleman, failed to identify the Defendant as the perpetrator of the crimes;
>
> b. The purported eyewitness, Ms. Claire Coleman, failed to make a positive, in-court identification of the Defendant as the person who committed the crimes;
>
> c. The Commonwealth failed to produce any credible evidence of positively identifying the Defendant as the perpetrator of the crimes charged.

> d. The purported eyewitness witness, Ms. Claire Coleman, continually professed her inability to positively identify the Defendant as the perpetrator by stating that the perpetrator "looked like" the Defendant but she was "not sure" and "not 100% positive."

Statement of Matters Complained of Pursuant to Pa.R.A.P. 1925(b), at 3-4.

Edwards "weight" claim is thus akin to his "sufficiency" claim both of which request a new trial on the grounds of an alleged uncertainty in the eyewitness's identification of Edwards.

Claire Coleman testified that on Father's Day in June, 2011, she was sitting on a bench outside of 1711 Belleau Drive "getting drunk" on malt liquor with Christina Matthews and Tonya Jackson. N.T., Non-Jury Trial, 3/19/12, at 89. 92. Ms. Coleman testified that "when the first shot went off, [she] happened to look" and observe the shooter, a "young male" "standing on the side. A little bit behind [her]." ***Id***., at 95-96, 102. The person Ms. Coleman saw was, "a dark-skinned male" a "bit stocky" wearing "saggy "or loose-fitting dark clothes. ***Id***., at 97, 102. The shooter was wearing a "hoodie over his head" so Ms. Coleman "couldn't hardly see [his] face." ***Id***., at 98. Ms. Coleman also observed the shooter holding a "gun up in the air" which "looked like a revolver." ***Id***., at 103. Upon observing the gun, Ms. Coleman dropped to the ground and hid near a dumpster after which she heard "maybe about four or five" more shots being fired. ***Id***., at 105.

Ms. Coleman testified that the shooter, who "looked like [Edwards] ran down [the] steps and right past [her]" still shooting. ***Id***., at 107. Ms. Coleman knew Edwards from the Belleau housing unit. According to Ms.

Coleman, she knew Edwards since he was little as Edwards used to live with his father in Belleau; however he moved to a bordering housing unit, Sandusky Court. ***Id***., at 99-100. Ms. Coleman testified that when Edwards was "little" maybe ten-years-old, "he had some kind of accident so he had a limp in his step." ***Id***., at 111. What triggered Ms. Coleman into identifying the shooter as Edwards was the shooter's height and build as well as the "limp in his step" she observed close-up as the shooter was running down the stairs past her. ***Id***. As soon as Edwards left the area, Ms. Coleman went to help her girlfriends whom had been shot. ***Id***., at 112. While talking with Christina Matthews in the ambulance, Ms. Matthews asked Ms. Coleman if the shooter looked "like Rayshawn" to which Ms. Coleman answered "[y]eah, it looked like him." ***Id***., at 115. Additionally, at the police station, Ms. Coleman identified Edwards from the photo array. ***Id***., at 120.

Edwards attempts to challenge the weight of Ms. Coleman's testimony on the grounds that she was highly intoxicated and not wearing her reading eyeglasses at the time. ***See*** Appellant's Brief, at 15-23. Edwards, however, fails to recognize that the weight of the evidence was exclusively for the judge, sitting as the fact finder, who was free to believe all, part or none of the evidence presented and to assess the credibility of all the witnesses. ***See Champney***, 832 A.2d at 408. We cannot substitute our judgment for that of the judge as finder of fact. The judge obviously accepted the testimony of Ms. Coleman. We can find no basis upon which to conclude that the trial court erred or abused its discretion in denying Edwards' request for a new

trial based on the weight of the evidence identifying Edwards as the perpetrator. Because the verdict was not contrary to the evidence as to shock one's sense of justice, Edwards' weight of the evidence claim fails.

In his last issue presented on appeal, Edwards argues that the trial court abused its discretion in imposing a manifestly excessive sentence, which failed to take into account the particular circumstances of this case. ***See*** Appellant's Brief, at 27-28. This claim raises a challenge to the discretionary aspects of a sentence and must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. ***See Commonwealth v. Shugars***, 895 A.2d 1270, 1273-1274 (Pa. Super. 2006). "Absent such efforts, an objection to a discretionary aspect of a sentence is waived." ***Id***. at 1274.

The certified record reveals that in his post-sentence motion, Edwards alleged that the trial court's sentence of 20 to 40 years is excessive. ***See*** Post-Sentence Motion, 6/15/12, at 6. As this motion adequately preserved Edwards challenge to the discretionary aspects of his sentence, we will proceed to address his arguments on appeal.

We begin our review by noting that, "[a] challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute." ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa. Super. 2004). When challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question as to the appropriateness of the

sentence. ***See Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa. Super. 2005). "Two requirements must be met before we will review this challenge on its merits." ***McAfee***, 849 A.2d at 274. "First, an 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 a sentence." ***Id***. "Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code." ***Id***. That is, "the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process." ***Tirado***, 870 A.2d at 365. We examine an appellant's Rule 2119(f) statement to determine whether a substantial question exists. ***See id***. "Our inquiry must focus on the *reasons* for which the appeal is sought, in contrast to the *facts* underlying the appeal, which are necessary only to decide the appeal on the merits." ***Id***.

In the present case, Edwards' appellate brief contains the requisite Rule 2119(f) concise statement, and, as such, is in technical compliance with the requirements to challenge the discretionary aspects of a sentence. Therefore, we proceed to determine whether Edwards has presented a substantial question that the sentence appealed from is not appropriate under the Sentencing Code. ***See McAfee***, 849 A.2d at 274.

Edwards asserts that his appeal presents a substantial question on the basis that the trial court abused its discretion by imposing a consecutive

sentence. ***See*** Appellant's Brief at 27. With regard to such claims, this Court has previously stated:

> Under 42 Pa.C.S.A. § 9721, the court has discretion to impose sentences consecutively or concurrently and, ordinarily, a challenge to this exercise of discretion does not raise a substantial question. ***Commonwealth v. Pass***, 914 A.2d 442, 446-47 (Pa. Super. 2006). The imposition of consecutive, rather than concurrent, sentences may raise a substantial question in only the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment. ***Id***. (holding challenge to court's imposition of sentence of six (6) to twenty-three (23) months[`] imprisonment and sentence of one (1) year probation running consecutive, did not present substantial question). ***Compare [Commonwealth v. Dodge*** 957 A.2d 1198 (Pa. Super. 2008), *appeal denied*, 980 A.2d 605 (Pa. 2009)] (holding imposition of consecutive sentences totaling 58 ½ to 124 years[`] imprisonment for thirty-seven (37) counts of theft-related offenses presented a substantial question because total sentence was essentially life sentence for forty-two-year-old defendant who committed non-violent offenses with limited financial impact).

See Commonwealth v. Moury, 992 A.2d 162, 169 (Pa. Super. 2010).

Following our decision in ***Dodge***, we have made clear that a challenge to the consecutive nature of standard sentences does not always raise a substantial question. ***See Commonwealth v. Gonzalez-Dejesus***, 994 A.2d 595, 598 (Pa. Super. 2010). ***See also Commonwealth v. Austin***, 66 A.3d 798, 808-809 (Pa. Super. 2013). Instead, we examine such claims on a case-by-case basis. ***See Gonzalez-Dejesus***, 994 A.2d at 598. This Court has determined that "the key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the

aggregate sentence to, what appears on its face to be, an excessive level in light of the criminal conduct at issue in the case." ***Id***. at 598-599.

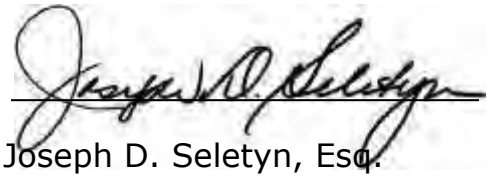
Upon review of the record, we agree with the trial court's assessment that Edwards' criminal conduct justified a consecutive sentence. As the trial court aptly stated relative to just the third degree murder conviction, "this [c]ourt could have imposed a sentence of imprisonment of not less than 20 years nor more than 40 years." Trial Court Opinion, 1/18/13, at 25. Instead, the court imposed sentence of not less than 15 nor more than 30 years relative to the third-degree murder conviction and invoked the five year mandatory minimum pursuant to 42 PA.CONS.STAT.ANN. § 9172 on the aggravated assault. The trial court had no discretion to impose a lesser sentence under § 9712(c) and, as such, imposed a sentence of 5 to 10 years on the aggravated assault. The circumstances of the offenses, as summarized at the time of sentence and set forth at the time of trial, clearly warranted the individual sentences imposed by the trial court at each count. The trial court clearly accounted for the nature of Edwards conduct in the imposition of its consecutive sentence, *i.e.*, that he came from behind a building with "the gun ablaze" and that anybody in his path was a potential victim, including children playing at a Father's Day picnic. ***Id***., ***see also***, N.T., Sentencing, 6/12/12, at 15-22. The trial court further noted that Edwards' conduct was in total disregard for the safety of anyone near him. ***Id***.

Moreover, where, as here, "the sentencing court had the benefit of a pre-sentence investigation report ("PSI"), we can assume the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." ***Moury***, 992 A.2d at 171 (citations omitted).

Accordingly, in light of Edwards' criminal conduct, his aggregate sentence of 20 to 40 years' is not excessive. Thus, Edwards has not raised a substantial question regarding the consecutive nature of his sentence and we are constrained to deny Edwards' petition for review of the discretionary aspects of his sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/29/2014