

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JESUS GUILLERMO RIVERA,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 718 MDA 2015

Appeal from the Judgment of Sentence February 17, 2015
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0002176-2013

BEFORE: PANELLA, J., MUNDY, J., and STEVENS, P.J.E.*

MEMORANDUM BY STEVENS, P.J.E.:

FILED FEBRUARY 01, 2016

Jesus Guillermo Rivera (hereinafter "Appellant") appeals from the judgment of sentence entered in the Court of Common Pleas of Berks County by the Honorable Thomas G. Parisi on February 17, 2015. Upon our review of the record, we affirm.

This matter arises following Appellant's entry of an open guilty plea on February 17, 2015, to one count each of Criminal Conspiracy to Commit Criminal Homicide classified as Murder of the Third Degree, Aggravated Assault, Riot and Simple Assault.¹ In the course of entering his plea, Appellant admitted to the following facts:

¹18 Pa.C.S. §§ 2502(c); 903(a)(1); 2702(a)(1); 5505; 2701(a)(1), respectively.

*Former Justice specially assigned to the Superior Court.

[O]n late December 31, 2012, into the early morning hours of January 1st, 2013, in the 100 block of South 3rd Street, Reading, Berks County, Pennsylvania, [Appellant] and Jose Garcia-Perez got into an argument in the hallway of an apartment building at 123 South 3rd Street. That argument became physical and [Appellant] was thrown out of the building by Mr. Garcia-Perez and others.

[Appellant] then called a family member of Mr. Garcia-Perez and told this family member that [Appellant] had a problem with his family and that he would "Do what he had to do."

Within 30 minutes of the initial fight with Garcia-Perez, [Appellant] returned to the area of 100 block of South 3rd Street with eight to ten other individuals with the knowledge, or that he should have known, one or more of them were armed.

[Appellant] with these eight to ten other individuals instigated a second fight with Garcia-Perez who was at this time outside of the apartment building. [Appellant] and his conspirators engaged in that fight which included at least six to seven individuals physically beating Luis Medina who ultimately joined Mr. Garcia-Perez outside when he heard the fight break out.

Shortly thereafter Victor Cheeseman and Theresa Solorio exited the apartment building and went into the street to see what was happening to Mr. Medina. Neither Mr. Medina, Victor Cheeseman, Theresa Solorio, or Jose Garcia-Perez were armed. Medina and Cheeseman attempted to remove Garcia-Perez from [Appellant] and conspirators he was acting with. The, [] second fight lasted approximately five minutes in the street in traffic. Punches and kicks were thrown. At least three shots were fired, although [Appellant] was not the shooter.

Luis Medina was struck once in the chest killing him instantly. Cheeseman was struck in the abdomen leading to serious bodily injury. And Miss Solorio was struck by [Appellant]. In short, [Appellant] acting with malice agreed with one or more unknown actors that he or one of them would attack Garcia-Perez in a purposeful intentional act.

These are unjustified acts which created an extremely high risk he or his conspirators would lead to serious bodily injury or death, which they did in this case. He put into motion these events that lead to the shooting death of Luis Medina, serious bodily injury to Mr. Cheeseman, and bodily injury to Theresa Solorio. These are the facts, Your Honor.

N.T., 2/17/15, at 8-11.

After Appellant entered his guilty plea, the trial court proceeded directly to sentencing at which time the Commonwealth recommended that any sentence imposed be within the standard range but applied consecutively rather than concurrently so that the harm to each individual victim would be recognized. In response, defense counsel urged the trial court to consider that the crimes occurred on New Year's Eve when Appellant, age twenty-five at the time, and his cohorts had been drinking and, consequently, their "emotions were running high." He further stressed that Appellant had no prior record, was unarmed, had been involved only in the "fight portion" of the fray, did not intend that anyone be killed and felt great remorse for his behavior. In addition, defense counsel noted Appellant is the father of three children, all of whom are under age seven, and has the support of his family. N.T., 2/17/15, at 22-25.

Prior to rendering its sentence, the sentencing court considered the nature of Appellant's crimes and his background as follows:

THE COURT: Very well. The sentences in these matters are based upon all of the information and testimony that has been presented at this hearing including the Presentence Investigation Report, the testimony of each of the witnesses and statement on behalf of [Appellant]. I have taken into consideration the mitigating circumstances that defense has set forth, the defendant's age, lack of any prior record, and the nature and circumstances of the case as well as the fact that defendant was not the direct actor in bringing about the death and injuries in these matters.

Nevertheless there were serious consequences, and in particular Mr. Medina passing away as a result of the actions of

the defendant, both direct and indirect, and that has to be taken into consideration.

N.T., 2/17/15, at 26.

Thereafter, the sentencing court imposed a sentence of fourteen years to thirty years in prison for Criminal Conspiracy to Commit Criminal Homicide as Murder of the Third Degree along with a consecutive sentence of three years to ten years in prison on the Aggravated Assault charge with a credit of seven hundred and sixty-two days for time served. Appellant also received a term of five years' probation on the Riot count to run consecutively to his prison sentences and a term of two years of probation on the Simple Assault count to run consecutively to his other probationary term.

On February 26, 2015, Appellant filed a timely Motion for Reconsideration of Sentence. Following a hearing held on March 23, 2015, the sentencing court denied the motion on April 1, 2015. Appellant filed a timely notice of appeal on April 23, 2015, and on May 21, 2015, he filed his Concise Statement of Matters Complained of on Appeal Pursuant to 1925(b) wherein he argued his sentence was excessive and that the trial court had erred in denying his post-sentence motion to withdraw his guilty plea. In his brief, Appellant raises one issue for our review as follows:

1. Whether the sentence imposed in this matter is excessive and was an abuse of discretion as the judge failed to give weight to the mitigating circumstances despite evidence of the fact the plea was based only on accomplice liability, the shooting was occurred [sic]

during a group fight and Appellant was NOT the shooter, he was the only person of a group of ten who was charged, his lack of prior record, his remorse, the fact that he took responsibility and as a result, the family of the deceased was not required to testify at trial as fact witnesses and was instead based merely on the nature of the offense and the testimony of sympathetic grieving family without regard to the individualized circumstances and rehabilitative needs of the defendant.

Brief for Appellant at 7.

This issue challenges the discretionary aspects of Appellant's sentence, and his guilty plea does not bar a discretionary sentencing challenge because there was no agreement as to the sentence Appellant would receive. **See Commonwealth v. Ritchey**, 779 A.2d 1183, 1185 (Pa. Super. 2001) (acknowledging precedent that where there are no sentencing restrictions in the plea agreement, the entry of a guilty plea will not preclude a subsequent challenge to the discretionary aspects of sentencing). However, Appellant does not have an automatic right to appeal the discretionary aspects of his sentence. **See** 42 Pa.C.S. § 9781(b). To the contrary, Appellant must petition this Court for permission to appeal the discretionary aspects of his sentence. **Id.**

As this Court has explained:

To reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, 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).

Commonwealth v. Trinidad, 96 A.3d 1031, 1039 (Pa.Super. 2014), *appeal denied*, 99 A.3d 925 (Pa. 2014) (internal alteration and citation omitted).

Herein, Appellant filed his Post Sentence Motion wherein he argued, *inter alia*, that his sentence should be modified to one at the bottom of the standard range as he was not the shooter, had no prior criminal record and accepted responsibility for his involvement in the crimes. **See** Appellant's Post Sentence Motion at ¶13. Also, Appellant's appellate brief contains the requisite Rule 2119(f) concise statement. As such, he is in technical compliance with the requirements to challenge the discretionary aspects of his sentence, and we must examine whether his issue presents a substantial question for our review.

This Court previously has determined that a sentencing court's failure to consider mitigating factors raises a substantial question. **See *Commonwealth v. Felmlee***, 828 A.2d 1105, 1107 (Pa.Super. 2003). Notwithstanding, a sentencing court generally has discretion to impose multiple sentences concurrently or consecutively, and a challenge to the exercise of that discretion does not ordinarily raise a substantial question, as an appellant is not entitled to a "volume discount" in the form of a concurrent sentence for his crimes. ***Commonwealth v. Pass***, 914 A.2d 442, 446-47 (Pa.Super. 2006); ***Commonwealth v. Hoag***, 665 A.2d 1212, 1214 (1995). Indeed, "the key to resolving the preliminary substantial

question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case.” ***Commonwealth v. Mastromarino***, 2 A.3d 581, 587 (Pa.Super. 2010), ***appeal denied***, 609 Pa. 685 (Pa. 2011). This Court has stated an appellant asserting an excessiveness claim raises a substantial question when he sufficiently articulates the manner in which the sentence violates either a specific provision of the Sentencing Code or a particular fundamental norm underlying the sentencing process. Further, we have held that an excessive sentence claim taken together with an assertion that the sentencing court failed to consider mitigating factors raises a substantial question. ***Commonwealth v. Perry***, 883 A.2d 599, 602 (Pa. Super. 2005).

Applying the aforementioned to the case at bar, we interpret Appellant’s claim as raising a substantial question, and we will proceed to consider the merits of his claim applying the following standard of review:

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. Gonzalez, 109 A.3d 711, 731 (Pa. Super. 2015) (citation omitted), ***appeal denied***, --- A.3d ---- (Pa. Sept. 29, 2015).

Moreover, this Court’s review of the discretionary aspects of a sentence is

governed by the statutory mandates of 42 Pa.C.S. §§ 9781(c) and (d).

Subsection 9781(c) provides:

The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:

- (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
- (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
- (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.

In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

42 Pa.C.S. § 9781(c). Also, Subsection 9781(d) requires that in reviewing the record, we must consider: (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; and (4) the guidelines promulgated by the commission. 42 Pa.C.S. § 9781(d).

Appellant's sentence falls within the parameters of the sentencing guidelines; therefore, he must demonstrate that the sentencing court's application of those guidelines clearly was unreasonable. In his brief, Appellant contends that the sentencing court based its sentence purely upon the nature of the offenses and victim impact testimony while disregarding the individualized circumstances and rehabilitative needs of Appellant. Specifically, Appellant stresses he was twenty-five years old and had been

drinking at the time of the crimes, he had no prior record and was culpable only as an accomplice. He further claims that the combined length of his prison sentence is merely three years short of the statutory maximum for third-degree murder, although the Commonwealth dismissed such a charge following Appellant's guilty pleas, which results in his having been sentenced as if he were the shooter or as if he possessed a specific intent to kill Mr. Medina and to injure Mr. Cheeseman and Ms. Solorio. Brief for Appellant at 15.

The sentencing court indicated on the record prior to imposing Appellant's sentence that it had the benefit of a presentence investigation report and had reviewed all of the information contained therein. Such statements reveal the court clearly was aware of Appellant's background and belie his claims that it failed to consider any mitigating circumstances. In addition, at the sentencing hearing defense counsel alerted the sentencing court to the presence of Appellant's mother in the courtroom and articulated a cogent argument stressing Appellant's mitigating history and characteristics.

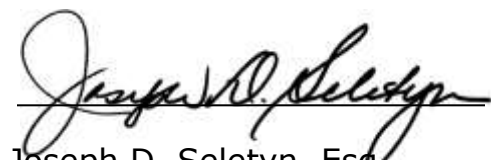
In light of all of this evidence, the sentencing court imposed consecutive standard range sentences for each offense to which Appellant had pled guilty. In doing so, the court specifically indicated it had taken into consideration the mitigating circumstances the defense presented, Appellant's age, his lack of any prior criminal record, the nature and

circumstances of the case and the fact that Appellant was not the direct actor in perpetrating the death and injuries of the respective victims. Nevertheless, the sentencing court stated Appellant's direct and indirect actions resulted in serious consequences which were foreseeable herein and needed to be taken into consideration in rendering a sentence. N.T., 2/17/15, at 26, 29.

Upon our review of the record, we find ample support for the sentencing court's reasoning and that its decision to impose consecutive standard range sentences for each offense comports with the applicable law. The sentence imposed for each of Appellant's offenses was within the standard range of the sentencing guidelines, and the record reflects that the court carefully considered all of the relevant factors presented at the sentencing hearing before imposing such sentence. As such, we discern no abuse of discretion and find that Appellant's challenge to the imposition of the consecutive sentences as excessive merits no relief. **See Gonzalez**, 109 A.3d at 732. Accordingly, we affirm the judgment of sentence.

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: 2/1/2016