

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOSE MORALES,	:	
	:	
Appellant	:	No. 907 MDA 2013

Appeal from the Judgment of Sentence entered on May 14, 2010
in the Court of Common Pleas of Berks County,
Criminal Division, No. CP-06-CR-0005374-2009

BEFORE: GANTMAN, P.J., OTT and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED APRIL 23, 2014

Jose Morales (“Morales”) appeals from the judgment of sentence imposed following his guilty plea to criminal trespass.¹ We vacate the judgment of sentence and remand for resentencing.

On February 16, 2010, Morales, using a false identity, pled guilty to criminal trespass, a second-degree felony.² The sentencing court sentenced Morales to two years of probation pursuant to a negotiated plea agreement. The Commonwealth subsequently discovered that Morales had misrepresented his identity.

¹ **See** 18 Pa.C.S.A. § 3503(a)(1)(ii).

² Morales stole the identity of another individual, Luis O. DeJesus-Ortiz (“DeJesus-Ortiz”), and represented himself as being DeJesus-Ortiz throughout the course of his arrest, plea negotiation and sentencing.

Based on the discovery of Morales's deception regarding his identity, the Commonwealth filed a Motion to Modify or Vacate Sentence. Morales did not object to the Commonwealth's Motion or to resentencing, and the sentencing court granted the Motion. Prior to resentencing, charges were filed against Morales for perjury and false swearing before the sentencing court. Additionally, after these new charges were filed, Morales committed a traffic violation and provided the police officer with two aliases, resulting in the filing of additional charges against Morales for identity theft.

On May 14, 2010, the sentencing court resentedenced Morales to the statutory maximum of five to ten years in prison for his guilty plea to criminal trespass.³ Morales filed a timely Post-Sentence Motion to modify his sentence and withdraw his guilty plea. Morales later withdrew his Post-Sentence Motion as it pertained to the withdrawal of his guilty plea. On September 16, 2010, following a hearing, the sentencing court denied Morales's Post-Sentence Motion to modify his sentence. Morales filed a timely Notice of Appeal.⁴

On appeal, Morales raises the following questions for our review:

³ The sentence imposed on Morales is more than three times as long as the standard range sentence of nine months to sixteen months in prison for the offense of criminal trespass.

⁴ Morales had filed a prior appeal, which was dismissed by this Court for failure to file a brief. Following a procedural history not relevant herein, Morales's appeal rights were reinstated, resulting in the instant appeal.

1. [Whether t]he [t]rial [c]ourt erred in not invalidating the entire negotiated plea agreement, along with the sentence, *sua sponte*, rather than granting the Commonwealth's request to only vacate the sentencing portion of the plea after it learned that [Morales] falsely identified himself from the time of the arrest to the time after being sentenced[?]
2. [Whether t]he [t]rial [c]ourt failed to reveal facts that support a sentence to the statutory maximum and did not adequately take into account the requirements for sentencing as defined by 42 []Pa.C.S.A. § 9721(b)[?]
3. [Whether t]he [t]rial [c]ourt's imposition of the sentence of five (5) to ten (10) years['] incarceration upon Morales was grossly disparate when compared to the sentences imposed on similarly situated defendants convicted of criminal trespass in Pennsylvania and was "manifestly excessive" and "contrary to the fundamental norms underlying the sentencing process[?]"
4. [Whether, a]ssuming that [the t]rial [c]ourt had the authority to sentence [Morales] outside the terms of the negotiated plea, [] the sentence was unreasonable because it was outside the sentencing guideline range, which presents a substantial question for appellate review[?]
5. [Whether t]he [t]rial [c]ourt erred in failing to set forth proper and sufficient reasons in imposing a sentence outside the recommended standard sentencing guideline range and contrary to the negotiated plea agreement[?]

Brief for Appellant at 4 (some capitalization omitted, issues renumbered for ease of disposition).⁵

⁵ Morales also raises the question of whether his trial counsel was ineffective in withdrawing his Post-Sentence Motion to withdraw his guilty plea. However, Morales concedes that he may not raise this issue on direct appeal and, instead, must await final disposition of this appeal before raising the issue through a collateral attack of the judgment of sentence. Brief for Appellant at 4 n.2, 15; **see also Commonwealth v. Grant**, 813 A.2d 726, 738 (Pa. 2002).

In his first claim, Morales contends that, when he was resentenced, no one advised him that he could withdraw his guilty plea and “[n]o one questioned [him] concerning whether he still was willing to give up his constitutional rights to a trial.” Brief for Appellant at 10, 13. Morales points out that, after he was resentenced, he orally moved the sentencing court to withdraw his guilty plea, and thereafter filed a Post-Sentence Motion to withdraw his guilty plea. *Id.* However, Morales claims, his counsel “unfortunately” withdrew his Motion to withdraw his guilty plea. *Id.* at 13-14. Morales further claims that, after the sentencing court vacated the original probationary sentence, it should have required, *sua sponte*, the withdrawal of Morales’s guilty plea. *Id.* at 14. Alternatively, Morales contends, the sentencing court should have explained to him that it could resentence him to the maximum penalty allowed by law. *Id.* at 14-15.

A defendant wishing to challenge the voluntariness of a guilty plea on direct appeal must either object during the plea colloquy or file a motion to withdraw the plea within ten days of sentencing. Pa.R.Crim.P. 720(A)(1), (B)(1)(a)(i). Failure to employ either measure results in waiver. ***Commonwealth v. Lincoln***, 72 A.3d 606, 609-10 (Pa. Super. 2013).

Here, Morales, through his counsel, orally withdrew his Post-Sentence Motion to withdraw his guilty plea. N.T., 9/16/10, at 4. Accordingly, the sentencing court did not address or rule upon the merits of Morales’s Post-Sentence Motion to withdraw his guilty plea. We therefore conclude that

Morales has waived this issue on appeal. **See** Pa.R.A.P. 302(a) (stating that issues not raised in the trial court are waived and cannot be raised for the first time on appeal).

The remainder of Morales's claims challenge the discretionary aspects of his sentence. "Challenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right." **Commonwealth v. Moury**, 992 A.2d 162, 170 (Pa. Super. 2010). Rather, a challenge to the discretionary aspects of a sentence must be considered as a petition for permission to appeal. **Commonwealth v. Hoch**, 936 A.2d 515, 518 (Pa. Super. 2007). Prior to reaching the merits of a discretionary sentencing issue,

[this Court conducts] 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, [**see**] 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, [**see**] 42 Pa.C.S.A. § 9781(b).

Moury, 992 A.2d at 170 (citation omitted).

Here, Morales timely filed a Post-Sentence Motion to modify his sentence. He filed a timely Notice of Appeal, and included in his brief a Statement of the reasons relied upon for allowance of appeal, pursuant to Pa.R.A.P. 2119(f). Further, Morales has raised a substantial question based on his claims that (1) the sentencing court relied on impermissible factors in

sentencing him, **see Commonwealth v. Bromley**, 862 A.2d 598, 605 (Pa. Super. 2004); (2) the sentencing court failed to place adequate reasons on the record for imposition of the maximum statutory sentence, **see id.** at 604; (3) the sentencing court failed to place adequate reasons on the record for imposing a sentence outside the sentencing guidelines, **see Commonwealth v. Martin**, 611 A.2d 731, 736 (Pa. Super. 1992); (4) the sentencing court failed to adequately take into account the requirements for sentencing, including 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 Morales's individual rehabilitative needs, **see Commonwealth v. Clark**, 70 A.3d 1281, 1287 (Pa. Super. 2013); and (5) the sentencing court imposed a sentence that was "manifestly excessive" and "contrary to the fundamental norms underlying the sentencing process," **see Commonwealth v. Mouzon**, 812 A.2d 617, 625 (Pa. 2002) (plurality). Brief for Appellant at 8.⁶

Thus, we will review Morales's sentence.

⁶ Morales also claims that the trial court erred by imposing a sentence that was contrary to the negotiated plea agreement. However, this claim lacks merit because Morales did not object to the Commonwealth's Motion to Modify or Vacate Sentence, which sought to vacate Morales's plea-bargained probationary sentence. Morales also failed to object to the Commonwealth's Motion to resentence him. **See** N.T., 5/14/10, at 3 (wherein Morales's counsel conceded that vacating the negotiated plea and resentencing Morales was "appropriate under the law and the facts"). Accordingly, Morales cannot now claim on appeal that the trial court should not have resentedenced him, or should have resentedenced him in accordance with his negotiated plea. **See** Pa.R.A.P 302(a).

In reviewing a challenge to the discretionary aspects of sentencing, we evaluate the sentencing court's decision under an abuse of discretion standard. **See Commonwealth v. Stokes**, 38 A.3d 846, 858 (Pa. Super. 2011). In order to show an abuse of discretion, 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. **See Commonwealth v. Rodda**, 723 A.2d 212, 214 (Pa. Super. 1999) (*en banc*); **see also Commonwealth v. Walls**, 926 A.2d 957, 961 (Pa. 2007) (stating that an abuse of discretion requires such lack of support so as to be clearly erroneous).

Morales contends that, when resentencing him to the maximum penalty allowable by law, the sentencing court primarily considered his perjury and fraudulent acts in defrauding the court system, rather than on the elements of criminal trespass. Brief for Appellant at 9, 11. Similarly, Morales claims that the sentencing court failed to set forth proper and sufficient reasons for imposing a sentence outside the recommended standard sentencing guideline range, and failed to cite facts related to the criminal conduct at issue that supported a maximum sentence. **Id.** at 12. In particular, Morales claims that the sentencing court did not adequately consider the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and the community, and Morales's

individual rehabilitation needs, consistent with 42 Pa.C.S.A. § 9721(b). Brief for Appellant at 12. Finally, Morales contends that his sentence is unreasonable because it was outside the sentencing guideline range. **Id.** at 13.

The sentencing court is not required to parrot the words of the Sentencing Code or state every factor that must be considered under section 9721(b). **See Commonwealth v. Feucht**, 955 A.2d 377, 383 (Pa. Super. 2008). Section 9721(b) requires only that the sentencing court state on the record its reasons for the imposition of sentence; it does not bear on the legal adequacy or correctness of the reasons stated. **Commonwealth v. Coulverson**, 34 A.3d 135, 143 (Pa. Super. 2011). Consequently, any statement of reasons would appear to comply with the letter of section 9721(b), and cannot be deemed reviewable *as of right*. **Id.**

Nevertheless, the sentencing court's discretion is not unfettered. When imposing a sentence, the sentencing court must consider the factors set out in section 9721(b), that is, the protection of the public, gravity of the offense in relation to the impact on the victim and the community, the rehabilitative needs of the defendant, and the sentencing guidelines. **Coulverson**, 34 A.3d at 144. Additionally, the record as a whole must reflect due consideration by the sentencing court of the statutory considerations enunciated in that section. **See Feucht**, 955 A.2d at 383; **see also Coulverson**, 34 A.3d at 147 (stating that, in determining whether

a sentence is unreasonable, we must consider the defendant's background and characteristics as well as the particular circumstances of the offense involved, the sentencing court's opportunity to observe the defendant, the presentence investigation report, if any, the sentencing guidelines, and the findings upon which the sentencing court based its sentence).

Under certain circumstances, sentencing court may consider a defendant's perjury as a factor at sentencing. **See *United States v. Grayson***, 438 U.S. 41, 55 (1978) (stating that "[a] defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitude towards society and prospects for rehabilitation and hence relevant to sentencing."). However, the right of a sentencing court to consider false testimony when sentencing is not unlimited. **See *Commonwealth v. Thurmond***, 407 A.2d 1357, 1359-60 (Pa. Super. 1979) (establishing a six-factor test for use of perjury as a

sentencing factor).⁷ Even when a defendant's perjury may properly be considered by the sentencing court, the false testimony may not be the *only* factor considered by the sentencing court when sentencing the defendant. **See id.** at 1360 (noting that the sentencing court may consider the defendant's lying only as one fact among many bearing on sentence); **see also Commonwealth v. Bowersox**, 690 A.2d 279, 284 (Pa. Super. 1997) (vacating a sentence premised exclusively on the appellant's false trial testimony).

Here, the sentencing court's stated reasons for its sentence are minimal:

I have reviewed the [presentence investigation report ("PSI")], most of which contains false and fraudulent information according to what has subsequently been discovered, but I have reviewed that portion of it which is, I believe, considered to be correct information about [Morales's] prior criminal record. I have taken into account the provisions of the sentencing

⁷ In **Thurmond**, a panel of this Court, following **Grayson**, held that, in order for a sentencing court to rely upon a defendant's false testimony in fashioning a sentence, six requirements must be satisfied: (1) the misstatement must be willful; (2) the misstatement must be material; (3) the finder of fact must have determined, beyond a reasonable doubt, that the testimony was willfully false; (4) the verdict of guilt must be supported by sufficient credible evidence; (5) the sentencing court, if not acting as the trier of fact, must observe the allegedly false testimony so as to determine whether the defendant's testimony demonstrated a character not likely susceptible to rehabilitation; and (6) the sentencing court may consider the defendant's lying only as one fact among many bearing on sentencing. **Thurmond**, 407 A.2d at 1359-60. Our review of the record reveals no indication that the sentencing court considered the **Thurmond** factors. Had the sentencing court applied the **Thurmond** factors to this case, it might have determined that the first five **Thurmond** factors had been satisfied. However, as discussed *infra*, we conclude that the sixth **Thurmond** factor has not been satisfied.

guidelines. I have taken into account the conduct that has occurred during the course of this case. I have to say that in - - let's see. In 34 years in this business, [] including the five years that I have occupied in this particular chair, I have never personally seen a greater fraud perpetrated in person, in court, than that which occurred here.

Now, it is true, [] that with respect to the criminal aspects of [] Morales'[s] behavior on [the] day [of his initial sentencing], that is left for another time and another judge to deal with[;] however, it is not correct to say that I must ignore what happened there in reimposing [*sic*] sentence in this case because mendacity has always been a factor that a sentencing judge may consider, and given what can only be characterized charitably as the multiple acts of perjury that occurred as well as the false swearing for the written documents which led the Commonwealth and the [sentencing c]ourt to believe that a probationary sentence was appropriate, is egregious.

Mr. Morales, you have been gaming the system for some time now. You've used multiple aliases, multiple identities, and you have successfully gamed the system up until this day, but the game is over now. It is vitally important that the integrity of the information that we receive for these matters must be accurate. A defendant comes here and feigns contrition for acts, and then it turns out, of course, that virtually everything that he said and every representation that was made on his behalf [was false]. . . [t]his is conduct that under no circumstances can be tolerated and must be punished severely, and I intend to do just that.

N.T., 5/14/10, at 12-13. The sentencing court then imposed the sentence at issue herein. ***Id.*** at 13.

In light of these statements by the sentencing court, and in the absence of any other reasons justifying the sentence imposed, we conclude that Morales's acts of perjury and deception were the *sole* basis upon which the court fashioned the instant sentence. Significantly, at Morales's sentencing hearing, the court offered no discussion of the sentencing

guidelines except that they had been “taken into account.” N.T., 5/14/10, at 12. Although the sentencing court acknowledged the PSI report, it did so only as a perfunctory exercise and focused its consideration entirely on Morales’s acts of perjury and deception. **See id.** at 12-13. Its discussion evinced no consideration of the substantial period of time since Morales’s last conviction, his attempts at reclaiming a productive role in society, or whether he might succeed at rehabilitation after serving a sentence in the standard or aggravated range. **See id.** Moreover, the sentencing court provided no discussion of the underlying circumstances of Morales’s criminal trespass, or explained why the particular circumstances of that offense merited the statutory maximum.⁸

We are troubled by the sentencing court’s cursory treatment of so weighty a matter as the imposition of a five to ten year prison sentence without consideration of the relevant sentencing factors. **See Coulverson**, 34 A.3d at 146 (stating that the sentencing court may not impose a maximum sentence merely to achieve extended incarceration if the totality

⁸ We note that, at the hearing on Morales’s Post-Sentence Motion, the sentencing court acknowledged the particular circumstances of the criminal trespass and Morales’s lengthy, but distant, criminal record. **See** N.T. 9/16/10, at 16-17. However, these statements do not change the clear implication of the above-quoted statements that the new sentence was premised solely upon Morales’s acts of perjury and deception. **See Bowersox**, 690 A.2d at 283-84 (stating that an appellate court must be concerned only with those sentencing factors that the sentencing court actually relied upon, rather than those factors which the court could have relied upon, had it chosen to do so).

of the sentencing factors involved has not been *considered and acknowledged*). Indeed, a sentencing court may not place excessive emphasis on private retribution or judicial policy-making at the expense of other statutorily mandated considerations, such as the nature and circumstances of the offense and the history and characteristics of the defendant. **See** 42 Pa.C.S. §§ 9781(d)(1); **see also Coulverson**, 34 A.3d at 148-50 (vacating a manifestly excessive sentence imposed by a sentencing judge who relied exclusively on his impulse for retribution and victim impact statements when determining that the defendant should spend as much of his life in prison as the court could order); **Commonwealth v. Dodge**, 957 A.2d 1198, 1202 (Pa. Super. 2008) (describing the sentence imposed as being irrational and clearly unreasonable, and remanding for imposition of an individualized sentence shorn of the trial judge's evident retribution agenda).

Certainly, Morales's multiple acts of perjury and deception are intolerable crimes that are deserving of punishment.⁹ **See Coulverson, supra; Dodge, supra.** Nevertheless, those crimes do not obviate the legal and social imperative that a defendant's punishment must fit not only the crime he committed, but also must account for the factors identified in sections 9721(b) and 9781(d). **See Coulverson**, 34 A.3d at 148. Thus,

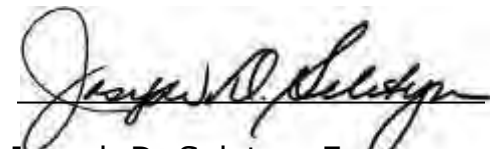
⁹ We note that the record indicates that Morales was due to be sentenced by a different judge on the perjury and false swearing charges on September 16, 2010.

while a defendant's mendacity continues to be a significant element of a sentencing judge's consideration, the sentencing court may not ignore the continuum of circumstances underlying a defendant's criminal conduct, society's need for rehabilitation, or the statutory factors enunciated in our Sentencing Code on the way to imposing a statutory maximum sentence. **See id.** at 150.

Based on the foregoing, the sentence imposed was clearly unreasonable as the sentencing court's consideration of relevant sentencing factors was plainly inadequate, its explanation scant, and the resulting maximum sentence manifestly excessive. **See Coulverson**, 34 A.3d at 150; **see also Dodge**, 957 A.2d at 1202. Consequently, we are constrained to vacate the judgment of sentence and remand this matter for resentencing in accordance with the precepts of this Memorandum.

Judgment of sentence vacated; case remanded for resentencing; jurisdiction relinquished.

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: 4/23/2014