J. S16044/14

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KEVIN G. CORTAZAR, Appellant	: : : : : : : : : : :	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1441 MDA 2013

Appeal from the Judgment of Sentence September 25, 2012,
in the Court of Common Pleas of Lackawanna County,
Criminal Division at No(s): CP-35-CR-0000425-2012
and CP-35-CR-0001247-2012

BEFORE: BENDER, P.J.E., DONOHUE, and STRASSBURGER*, JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED APRIL 15, 2014**

Kevin G. Cortazar (Appellant) appeals from the judgment of sentence of an aggregate term of 30 to 84 months' incarceration, after pleading guilty to driving under the influence (DUI) - highest rate of alcohol and theft by unlawful taking, entered on September 25, 2012.[1] Upon review, we affirm.

The factual background underlying this case can be summarized as follows. On November 15, 2011, Officer Michael Fredericks of the Dickson City Police Department observed a vehicle swerving in its lane. Officer Fredericks initiated a traffic stop and noticed the driver of the car, later

[1] 75 Pa.C.S. § 3802(c) and 18 Pa.C.S. § 3921(a), respectively.

* Retired Senior Judge assigned to the Superior Court.

identified as Appellant, exhibiting signs of intoxication. Appellant was taken into custody, and his blood alcohol content (BAC) was calculated at .227 percent. Consequently, Appellant was charged, at criminal information CP-35-CR-0000425-2012, with several offenses related to this incident. Appellant was released on bail. On March 30, 2012, Appellant pleaded guilty before the Honorable Michael J. Barrasse to DUI - highest rate of alcohol. Appellant was ordered to undergo drug and alcohol treatment and participate in home monitoring pending sentencing.

In May 2012, while on bail and after having pleaded guilty in the DUI case, Appellant was charged with theft by unlawful taking and receiving stolen property at criminal information CP-35-CR-0001247-2012.[2] Those charges were related to incidents of stolen women's jewelry, which occurred toward the end of April 2012. On July 13, 2012, Appellant pleaded guilty, before the Honorable Vito Geroulo, to theft by unlawful taking.

Appellant was sentenced by Judge Barrasse for both cases on September 25, 2012. The sentencing court pointed out that Appellant tested positive for alcohol the day before sentencing, which violated the terms of his bail. N.T., 9/25/2012, at 4. The court sentenced Appellant to 21 to 60 months' incarceration for the DUI, and a consecutive 9 to 24 months' incarceration for the theft.

[2] 18 Pa.C.S. §§ 3921(a) and 3925(a), respectively.

Appellant timely filed post-sentence motions, which were denied by operation of law on July 11, 2013. Appellant timely filed a notice of appeal. Both Appellant and the sentencing court complied with Pa.R.A.P. 1925.

On appeal, Appellant sets forth four issues for our review.

> (A) Whether the [sentencing] court imposed an illegal sentence of twenty-one (21) to sixty (60) months in a state correctional institution on the DUI offense when the statutory maximum is six (6) months?
>
> (B) Whether the lower court failed to give the appropriate weight and consideration to the circumstances of the offense, the Appellant's background and the Appellant's significant cooperation with authorities when imposing its sentences?
>
> (C) Whether the sentences imposed were excessive in nature?
>
> (D) Whether the sentences imposed were appropriate under the guidelines and whether they failed to conform to the fundamental norms that underlie sentencing?

Appellant's Brief at 4 (suggested answers omitted).

First, Appellant contends that his sentence in the DUI case is illegal. Appellant's Brief at 9-10.[3] He argues that, pursuant to this Court's holding in ***Commonwealth v. Musau***, 69 A.3d 754 (Pa. Super. 2013), the maximum available sentence for his DUI conviction was six months' incarceration. We disagree.

[3] We recognize that Appellant did not raise this issue before the sentencing court. However, as this claim implicates the legality of Appellant's sentence, it is nonwaivable. ***See Commonwealth v. Karns***, 50 A.3d 158, 166 (Pa. Super. 2012) ("A challenge to the legality of the sentence may be raised as a matter of right, is nonwaivable, and may be entertained so long as the reviewing court has jurisdiction.").

Musau is inapplicable to this case. He was convicted of violating 75 Pa.C.S. § 3802(a)(1) (general impairment). Because he had no more than one prior offense, his sentence was limited to six months' incarceration plus a fine. 75 Pa.C.S. § 3803(a)(1).

By contrast, Appellant was convicted of DUI - highest rate of alcohol under subsection 3802(c) ("An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is 0.16% or higher within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle."). In considering the sentencing provisions outlined in section 3803, the trial court took into consideration the fact that Appellant had a prior DUI conviction. As such, Appellant was sentenced under subsection 3803(b)(4) ("An individual who violates … section 3802(c) or (d) and who has one or more prior offenses commits a misdemeanor of the first degree."). Because the maximum available sentence for a misdemeanor of the first degree is five years' incarceration, Appellant's sentence of 21 to 60 months' incarceration is legal, and he is not entitled to relief on this basis.

We now turn to Appellant's final three issues on appeal, all of which implicate the discretionary aspects of sentencing. Before we may reach the merits of a challenge to the discretionary aspects of sentencing, we must be

satisfied that: (1) the appeal is timely; (2) the appellant has preserved his issues; and (3) the appellant has included in his brief a Pa.R.A.P. 2119(f) concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence. ***Commonwealth v. Corley***, 31 A.3d 293, 295-96 (Pa. Super. 2011). Furthermore, this statement must raise a substantial question that the sentence is inappropriate under the sentencing code. ***Id.*** at 296.

Instantly, the record reveals that this appeal was filed timely and that Appellant preserved his claim in his motion for reconsideration of sentence. Appellant has also included a Rule 2119(f) statement in his brief. Appellant's Brief at 8-9. We now consider whether Appellant has raised a substantial question.

We consider this issue mindful of the following. "The determination of what constitutes a substantial question must be evaluated on a case-by-case basis." ***Commonwealth v. Moury***, 992 A.2d 162, 170 (Pa. Super. 2010). "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." ***Id***.

> To make it clear, a defendant **may** raise a substantial question where he receives consecutive sentences within the guideline ranges if the case involves circumstances where the application of the guidelines would be clearly unreasonable, resulting in an excessive sentence; however, a bald claim of

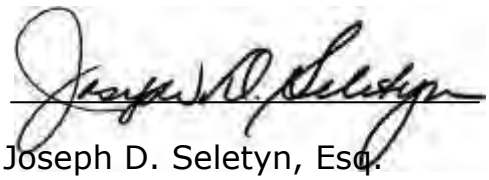
> excessiveness due to the consecutive nature of a sentence will not raise a substantial question.
>
> ***
>
> In determining whether a substantial question exists, this Court does not examine the merits of whether the sentence is actually excessive. Rather, we look to whether the appellant has forwarded a plausible argument that the sentence, when it is within the guideline ranges, is clearly unreasonable. Concomitantly, the substantial question determination does not require the court to decide the merits of whether the sentence is clearly unreasonable.

Commonwealth v. Dodge, 77 A.3d 1263, 1270 (Pa. Super. 2013) (emphasis in original; citations omitted).

Appellant argues that he has raised a substantial question because "the circumstances of his case were not so egregious to justify the harsh and excessive aggregate sentences imposed." Appellant's Brief at 9. This argument amounts to nothing more than "a bald claim of excessiveness due to the consecutive nature of a sentence" which does not raise a substantial question. ***Dodge***, ***supra***. Accordingly, we hold that Appellant has failed to raise a substantial question, and we affirm his judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014