

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOSHUA ALBERT BOYD,	:	
	:	
Appellant	:	No. 1496 WDA 2012

Appeal from the Judgment of Sentence March 29, 2010 in the Court of Common Pleas of Clearfield County, Criminal Division, at No: CP-17-CR-0000898-2009.

BEFORE: SHOGAN, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: FILED: May 23, 2013

Joshua Albert Boyd (Appellant) appeals from the judgment of sentence entered March 29, 2010, after he pled guilty to two counts each of robbery (with threat to cause serious bodily injury), robbery (with threat to cause bodily injury), conspiracy to commit robbery (agreement to commit the robbery), and conspiracy to commit robbery (agreement to aid in the commission of the robbery), as well as one count each of burglary, conspiracy to commit burglary, and possessing instruments of crime.¹ We vacate and remand for resentencing.

Appellant and a co-conspirator entered the home of the victims, Edward and Gladys Aughenbaugh, around midnight on September 27, 2009. Mr. Aughenbaugh was awakened by a noise in his home, and he turned on a

¹ 18 Pa.C.S. §§ 3701(a)(1)(ii), 3701(a)(1)(iv), 903(a)(1), 903(a)(2), 3502(a)(1), 903(a)(2), and 907(b), respectively.

* Retired Senior Judge assigned to the Superior Court.

light near his bed. Mr. Aughenbaugh then saw Appellant, who demanded that he turn off the light, and who threatened him with a handgun.² Mr. Aughenbaugh also noticed that another male was going through the safe under his bed. Mr. Aughenbaugh complied and turned off the light. Both males then fled. Appellant and his co-conspirator stole “approximately \$22 worth of gold dollars and president dollars.” N.T., 2/11/13, at 3-4.

On February 11, 2010, Appellant signed a “Negotiated Plea Agreement and Guilty Plea Colloquy” listing the aforementioned charges. The only term contained in the agreement was that Appellant would receive a minimum sentence of five years’ incarceration with all other terms left to the trial court’s discretion. That same day, Appellant pled guilty to these charges. The trial court sentenced Appellant to an aggregate term of five to 20 years’ imprisonment. No post-sentence motions were filed, and no direct appeal was filed.

On February 9, 2011, Appellant filed a *pro se* petition pursuant to the Post-Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Counsel was appointed, and an amended PCRA petition was filed on September 12, 2011. A PCRA hearing took place on May 23, 2012. On August 8, 2012, the trial court issued an opinion and order, finding Appellant’s plea counsel ineffective for failing to consult with him about a possible appeal, and reinstating Appellant’s right to file post-sentence motions *nunc pro tunc*. **See**

² Based on the affidavits of probable cause contained in the certified record, it appears that this weapon may have been a realistic-looking BB gun.

Trial Court Opinion, 8/8/2012, at 1-6. Appellant filed a post-sentence motion on August 20, 2012, in which he requested that the trial court reconsider his sentence. This motion was denied on August 28, 2012. A timely notice of appeal followed on September 27, 2012. The trial court ordered Appellant to file a statement pursuant to Pa.R.A.P. 1925 and Appellant complied. The trial court then issued a statement indicating that it would not file an opinion.

Appellant raises the following issue on appeal:

- I. Whether the lower court abused its discretion by imposing a sentence that is excessive, clearly unreasonable and disproportionate to the severity of the offenses committed because it: failed to account the rehabilitative need of Appellant; failed to consider the amount of confinement that is consistent with the protection of the public, and merely focused on the serious nature of the crimes committed by Appellant?

Appellant's Brief at 5 (capitalization omitted).

As Appellant challenges the discretionary aspects of his sentence,³ we address Appellant's question mindful of the following.

³ If a criminal defendant enters into a negotiated plea that includes the terms of the sentence, he or she may not challenge on appeal the discretionary aspects of that sentence. ***Commonwealth v. Brown***, 982 A.2d 1017, 1019 (Pa. Super. 2009) (citing ***Commonwealth v. Dalberto***, 648 A.2d 16, 20 (Pa. Super. 1994)). Conversely, an open plea agreement, in which an agreement is reached as to the charges but not as to the specific penalty to be imposed, does not preclude a challenge to the discretionary aspects of sentencing. ***Id.*** In Appellant's case, we are presented with a hybrid plea that provided for a minimum sentence but did not include a specific maximum term of imprisonment. A hybrid plea agreement does not preclude appellate review of those discretionary aspects of the sentence that were not agreed upon in the negotiation process. ***Id.***

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. Two requirements must be met before we will review this challenge on its merits. 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. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. In order to establish a substantial question, the appellant must show actions by the trial court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.

Commonwealth v. Bowen, 55 A.3d 1254, 1262-1263 (Pa. Super. 2012) (quoting ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa. Super. 2004)).

If an appellant convinces us that a claim presents a substantial question, then we will permit the appeal and will proceed to evaluate the merits of the sentencing claim. When we do so, our standard of review is clear: Sentencing is vested in the sound discretion of the court and will not be disturbed absent an abuse of that discretion. Moreover, an abuse of discretion is not merely an error in judgment. Instead, it involves bias, partiality, prejudice, ill-will, or manifest unreasonableness.

Commonwealth v. Kalichak, 943 A.2d 285, 290 (Pa. Super. 2008) (citations omitted).

Appellant's brief includes a statement of reasons relied upon for allowance of appeal, in which he argues that "[t]he sentencing court failed to satisfy the requirements of the Sentencing Code by not providing adequate reasons for imposition of its sentence," and that Appellant's sentence is unreasonable and excessive "because the lower court only focused on the

serious nature of the crimes committed, and failed to fully consider the amount of confinement that protects the public, the gravity of the offenses as they relate to the impact on the life of the victims and the rehabilitative needs” of Appellant. Appellant’s Brief at 11-12.

We conclude that Appellant’s claim presents a substantial question. **See Commonwealth v. Dunphy**, 20 A.3d 1215, 1222 (Pa. Super. 2011) (“An allegation that a judge failed to offer specific reasons for [a] sentence does raise a substantial question.”) (internal quotations and citations omitted); **Commonwealth v. Downing**, 990 A.2d 788, 793 (Pa. Super. 2010) (holding claim that the trial court failed to consider Downing’s rehabilitative needs and the protection of society in fashioning his sentence raised a substantial question). Therefore, we grant permission to appeal.

“When imposing a sentence, the sentencing court must consider the factors set out in 42 Pa.C.S. § 9721(b).” **Commonwealth v. Coulverson**, 34 A.3d 135, 144 (Pa. Super. 2011) (quoting **Commonwealth v. Fullin**, 892 A.2d 843, 847 (Pa. Super. 2006). Section 9721(b) provides, in relevant part, as follows:

(b) General standards.--In selecting from the alternatives set forth in subsection (a),^[4] the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the 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 the rehabilitative needs of the defendant. The court shall also consider any guidelines for

⁴ Subsection (a) of Section 9721 discusses various sentencing alternatives, such as fines, probation, and confinement.

sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing and taking effect under section 2155 (relating to publication of guidelines for sentencing, resentencing and parole and recommitment ranges following revocation). In every case in which the court imposes a sentence for a felony or misdemeanor . . . **the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed.**

42 Pa.C.S. § 9721(b) (emphasis added).

We note that “[t]he court is not required to parrot the words of the Sentencing Code, stating every factor that must be considered under Section 9721(b). However, the record as a whole must reflect due consideration by the court of the statutory considerations [enunciated in that section].” **Coulverson**, 34 A.3d at 145 (quoting **Commonwealth v. Feucht**, 955 A.2d 377, 383 (Pa. Super. 2008)).

Instantly, prior to the sentencing, the trial court listened to a victim impact statement from the victims’ daughter, as well as argument from both Appellant’s counsel and the Commonwealth. N.T., 3/23/2010, at 3-7. Appellant was then given an opportunity to speak, and he apologized for his actions. **Id.** at 8. The trial court then sentenced Appellant without discussing, **in any way**, what it considered or why it imposed the sentence that it did. **Id.** at 8-10. Specifically, the trial court sentenced Appellant as follows:

Now this 23rd day of March, 2010, [Appellant] having entered pleas of guilty to robbery, two counts, felonies of the first degree; criminal conspiracy to commit robbery, two counts, felonies of the first degree, and possessing instruments of crime,

misdemeanor of the first degree; he being fully and competently represented by counsel and the [trial c]ourt being satisfied he has knowingly, voluntarily and intelligently entered said pleas, it is the sentence of this Court that on the charge of robbery he pay for the benefit of Clearfield County the sum of \$1, plus costs of prosecution on each count; that he be incarcerated at the Western Diagnostic and Classification Center in Pittsburgh, Pennsylvania, for a term the minimum shall be five years and the maximum which shall be 20 to be served concurrent to each count

Effective immediately, he shall refrain from the possession or use of alcoholic beverages and controlled substances. Upon parole, he shall attend and successfully complete any such counseling and/or treatment as may be recommended by his supervising parole officer plus any follow-up recommendations and shall be responsible for all costs associated therewith.

He shall submit to DNA testing and shall pay costs in the amount of \$250. He shall contact the Clearfield County Department of Probation Services, Collection Division, within ten days from the date of parole to establish a monthly payment plan.

He shall have absolutely no contact in any manner with the victims, Edward and Gladys Aughenbaugh; that he shall pay restitution in the amount of Nine Dollars and Forty-three Cents (\$9.43) to Edward and Gladys Aughenbaugh.

On the charge of criminal conspiracy to commit robbery, two counts, \$1 fine plus costs of prosecution on each count, 5 to 20 years at the Western Diagnostic and Classification Center in Pittsburgh, Pennsylvania, to be served concurrent to each count and concurrent to the above sentence and under the same terms and conditions.

On the charge of possessing instruments of crime, \$1 fine plus costs, two years['] probation, under the supervision and control of the Pennsylvania Board of Probation and Parole, with said period to be served concurrent to the above sentence and under the same terms and conditions.

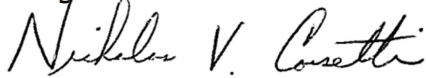
The [trial c]ourt hereby makes the determination that the [Appellant] is not eligible to participate in the RRRRI program. By the [trial c]ourt.

N.T., 3/23/13, at 8-10.⁵

Not only did the trial court not provide any sort of rationale for the sentence it imposed, the trial court also failed, we note with disapproval, to file an opinion explaining this sentence pursuant to Pa.R.A.P. 1925. This was a clear abuse of discretion on the part of the trial court.⁶ Accordingly, we vacate Appellant's judgment of sentence and remand for resentencing.

Judgment of sentence vacated. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.



Deputy Prothonotary

Date: May 23, 2013

⁵ The trial court did not sentence Appellant on his burglary and conspiracy to commit burglary charges, as well as two of his four robbery charges and two of his four conspiracy to commit robbery charges. Nor did the trial court note that there would be no further penalty on those counts, or whether these charges merged.

⁶ The Commonwealth contends that "it was not necessary for the lower court to state the reasons for its sentence on the record" on the basis that the trial court could have, theoretically, given Appellant a much harsher sentence. Commonwealth's Brief at 8. Tellingly, the Commonwealth provides no citation to authority that supports this proposition.

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