

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ANDRE DAVIS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1741 WDA 2012

Appeal from the Judgment of Sentence July 16, 2009
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0015820-2007

BEFORE: BOWES, JENKINS, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.:

FILED APRIL 15, 2014

We reject the challenge of Andre Davis to the discretionary aspects of the six to twelve years term of imprisonment followed by five years probation. Sentence was imposed after Appellant entered an open guilty plea to robbery, reckless endangerment, theft, and conspiracy. We affirm.

We summarize the facts that supported entry of Appellant's April 16, 2009 guilty plea. At approximately 10:30 pm on August 9, 2007, police responded to a broadcast about a robbery near the Get Go gas station on Washington Avenue, Scott Township. The victim, Justin Bishop, reported that he was approached by a male, who was later identified as Appellant. Appellant asked to use Mr. Bishop's cell phone. As Appellant was using the

* Former Justice specially assigned to the Superior Court.

cell phone, he was joined by another man. After Appellant was finished using the device, he returned it to the victim, who began to walk away. At that point, Appellant grabbed Mr. Bishop's shoulder. When the victim turned, Appellant pointed a gun at the victim's head and demanded the phone and money. Mr. Bishop complied with Appellant's demands, and Appellant left the vicinity. The victim ran into the Get Go station and telephoned police.

A clerk at the gas station suggested that the perpetrators may have captured on videotape surveillance from the store. Mr. Bishop viewed tape from the pertinent period and identified two people on the video as his attackers. Police then compiled a photographic array, and Mr. Bishop identified a picture of Appellant as the man who robbed him with a gun.

Following entry of his plea, Appellant waived the preparation of a presentence report and proceeded to sentencing on July 26, 2009. The Commonwealth indicated that a mandatory minimum sentence was applicable due to the fact that Appellant committed the offense with a firearm. Appellant and his counsel addressed the court and asked for lenity given that Appellant pled guilty. Counsel reported indicated that Appellant was serving a five to ten year sentence for a robbery that he committed with a replica of a gun and suggested that the weapon used herein, which was not recovered, also might have been a replica.

The Commonwealth established that Appellant had a prior record score of five, and, under the applicable guidelines, the standard range called for a sentence of sixty to seventy-two months imprisonment. After considering Appellant's statement and counsel's argument, the court imposed a standard range term of six to twelve years in jail. The sentence at issue herein was ordered to be served concurrently with the other term of incarceration Appellant was then serving for the other robbery.

After the July 16, 2009 sentence was imposed, Appellant filed an untimely *pro se* motion seeking a downward modification of his sentence to five to ten years imprisonment and credit for time served. On October 16, 2009, counsel filed a post-sentence motion reiterating these grounds for relief. Without addressing the issue of whether the counseled motion was timely, the trial court conducted a hearing. On December 10, 2009, the trial court granted Appellant credit for time served but denied his request to reduce the sentence of incarceration to five to ten years.

Appellant then appealed from the December 10, 2009 order partially denying his counseled post-sentence motion. On appeal, we affirmed. After analysis, we specifically decided that the appeal was from the untimely counseled post-sentence motion, and we treated that untimely post-sentence motion as a PCRA petition. ***Commonwealth v. Davis***, 32 A.3d 283 (Pa.Super. 2011) (unpublished memorandum), *appeal denied*, 46 A.3d 715 (Pa. 2012) (***Davis I***). We first noted that Appellant's *pro se* post-

sentence motion was a nullity since he was represented by counsel when he filed it, and we then observed that the counseled motion was presented outside the ten day window for filing a post-sentence motion as well as the thirty day time period required to file an appeal from judgment of sentence. We therefore concluded that the counseled post-sentence motion should be considered a post-conviction petition. ***Id.*** at 13, 17. We addressed the merits of the sole issue raised therein, which was as follows: “Whether the sentence was excessive insofar as the Court of Common Pleas focused solely upon the serious nature of the crime and failed to consider all of the factors contained in 42 Pa.C.S. §§ 9721(b) and 9781(d)?” ***Id.*** at 5. We concluded that “Appellant’s discretionary aspect of sentencing claim is without merit.” ***Id.*** at 18. We noted that the sentence fell within the standard range and that a five year mandatory sentence was applicable due to Appellant’s use of a firearm during commission of the robbery. Therefore, we found that “Appellant’s sentence of six to twelve years incarceration was reasonable.” ***Id.***

While ***Davis I*** was pending, Appellant filed a petition for PCRA relief on January 15, 2010, within one year of imposition of the July 16, 2009 sentence. He sought reinstatement of his direct appeal rights. The PCRA court purported to grant that petition by reinstating Appellant’s appellate rights on March 2, 2011. In a prior appeal, we vacated the order granting the January 15, 2010 petition and concluded that the trial court lacked

jurisdiction to entertain the PCRA petition because **Davis I** was still pending before our Supreme Court. **Commonwealth v. Davis**, 38 A.3d 928 (Pa.Super. 2011) (unpublished memorandum) ("**Davis II**"). Thus, the January 15, 2010 PCRA petition remained unresolved.

After our Supreme Court denied allowance of appeal in **Davis I**, Appellant filed an amended PCRA petition on June 15, 2012. The June 15, 2012 petition amended the January 15, 2010 PCRA petition. He reasserted his desire for reinstatement of his appellate rights. That petition was granted, Appellant was permitted to file both a *nunc pro tunc* post-sentence motion and the present appeal *nunc pro tunc*.¹ Appellant raises this position on appeal: "Did the trial court err in denying Appellant's post sentencing motion since the trial court erred in sentencing Appellant since it focused solely on the seriousness of the crime of robbery, and failed to consider all of the factors contained at 42 Pa.C.S. §§ 9721(b) & 9781(d) and imposed an excessive sentence?" Appellant's brief at 3.

¹ We recognize the anomaly presented by this case. Appellant's appeal in **Davis I** was treated as one denying a timely PCRA petition whereas the present appeal is Appellant's direct appeal. Nevertheless, the January 15, 2010 PCRA petition was a timely one, it was unresolved when it was amended on June 15, 2012, and, in the amended PCRA petition, Appellant sought reinstatement of his appellate rights. The January 15, 2010 petition was pending when amended on June 15, 2012 because in **Davis II**, we vacated the March 2, 2011 order that purported to dispose of the January 15, 2010 PCRA petition. Thus, the court had jurisdiction to grant relief pursuant to the amended PCRA petition. Additionally, the Commonwealth has not objected to the trial court's decision.

Before we are permitted to examine the merits of a contention relating to the discretionary aspects of his sentence, the issue must be properly preserved, the defendant's brief must contain a statement of reasons for allowance of appeal from the discretionary aspects of that sentence, and that statement must demonstrate the existence of a substantial question. ***Commonwealth v. Griffin***, 65 A.3d 932 (Pa.Super. 2013). Preservation exists in this matter, and the brief contains the appropriate statement. Appellant's brief at 12. We now examine whether the statement raises a substantial question.

Appellant posits that, when imposing sentence, the court focused solely on the seriousness of the crime and failed to consider Appellant's history and characteristics. A position that the court failed to weigh pertinent sentencing factors raises a substantial question. ***Commonwealth v. Bricker***, 41 A.3d 872, 875 (Pa.Super. 2012). Therefore, we will review the merits of Appellant's sentencing arguments.

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. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Id. at 875.

Additionally, if a defendant is sentenced within the guidelines, as in the present case, we may reverse solely when application of the guidelines was

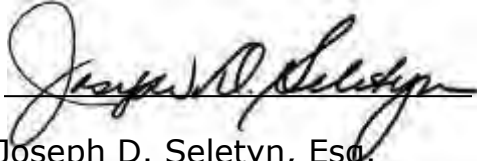
clearly unreasonable, which is a term that means that the sentence must either be irrational or not guided by sound judgment, or if the sentencing court neglected to consider sentencing factors outlined in § 9721(b) of the Sentencing Code. ***Commonwealth v. Walls***, 926 A.2d 957 (Pa. 2007). That statutory provision states in pertinent part, “[T]he 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.” 42 Pa.C.S.A. § 9721(b).

Herein, the record refutes Appellant’s position that the court did not weigh the pertinent sentencing factors outlined in § 9721(b). . . . When imposing sentence, the court articulated, “I have considered all the factors taken into account. I have considered the sentencing guidelines. I have considered [defense counsel’s] statements. I have considered [Appellant’s] statement to the Court, your age, your prior criminal history. . . . I have considered all other factors that I may take into account.” N.T. Sentencing, 7/16/09, at 8. Additionally, the sentence court explained that it imposed a six year rather than five years minimum sentence because Appellant had committed another robbery. Nevertheless, lenity was exercised by the court since the sentence herein was imposed concurrently to that other sentence. Given that the present sentence was within the standard range of the guidelines and was imposed concurrently to Appellant’s other sentence, we

reject Appellant's position that it was excessive. We also cannot find that the standard-range sentence herein was not guided by sound judgment or was irrational. Hence, we must affirm.

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: 4/15/2014