NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. BENJAMIN FRANK GOTTSHALL Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1634 WDA 2014

Appeal from the Judgment of Sentence entered August 1, 2014
In the Court of Common Pleas of Bedford County
Criminal Division at No: CP-05-CR-0000530-2013

BEFORE: BENDER, P.J.E., STABILE, and PLATT,* JJ.

MEMORANDUM BY STABILE, J.: **FILED JULY 31, 2015**

Appellant, Benjamin Frank Gottshall, appeals from the August 1, 2014 judgment of sentence entered in the Court of Common Pleas of Bedford County following entry of his *nolo contendere* plea to one count of unlawful use of a computer, 18 Pa.C.S.A. § 7611(a)(2). Appellant contends the trial court abused its discretion by imposing a sentence disproportionate to the crime. Appellant further contends the trial court erred by failing to disclose judicial campaign contributions received in 2011 from the parents of a co-owner of Bun Air Corporation, the victim of Appellant's crime. Following review, we affirm.

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* Retired Senior Judge assigned to the Superior Court.

In its Rule 1925(a) opinion, the trial court summarized the procedural history as follows:

> [Appellant] was charged with, *inter alia*, fifty-four counts of Unlawful Use of a Computer. On June 23, 2014, [Appellant] pled no contest to one count of Unlawful Use of a Computer, with sentencing open to our discretion. On August 1, 2014, we sentenced [Appellant] to six to twenty-three months in the Bedford County Jail, followed by three years[’] county probation, which was the bottom end of the standard range of the sentencing guidelines. Subsequent to sentencing, [Appellant] filed Post-Sentence Motions which we denied. This appeal follows.

Trial Court Rule 1925(a) Opinion, 11/26/14, at 1.[1]

In this timely appeal from his judgment of sentence, Appellant presents two issues for our consideration:

> I. Did the sentencing [c]ourt abuse its discretion in violation of the general sentencing principles set forth in 42

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[1] Our review of the record discloses that Appellant was employed as the Director of Operations for the victim, Bun Air Corporation, until his termination on July 26, 2013. Following his termination, during the period from July 27 through August 18, 2013, Appellant continued logging into Bun Air’s computer systems and altered and erased data. On July 29, 2013, a Bun Air employee received a telephone call from a client who wanted to confirm the itinerary of a flight booked into the Bedford County Airport. The victim discovered that Appellant had logged into Bun Air’s system on July 28, 2013 and cancelled the flight. An investigation revealed that Appellant made other changes, including changing information to show inflated flight times and pricing. He also changed the address, email address and telephone number of the victim’s business and in some instances provided his own contact information. Appellant was noted as logging into the victim’s computers on at least 54 occasions. In an interview with law enforcement, Appellant admitted logging into the victim’s computers after he was terminated.

> Pa.C.S.A. § 9721(b), when the sentencing [c]ourt imposed a sentence of six (6) months to twenty-three (23) months incarceration followed by three (3) years' probation, and a maximum fine of Fifteen Thousand ($15,000) Dollars, which sentence was grossly disproportionate to the Appellant's conduct in relation to his No Contest plea to one (1) count of Unlawful Use of Computer[,] 18 Pa.C.S.A. § 7615(a)(3)?[2]
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> II. Did the sentencing [c]ourt err by its failure to disclose the [c]ourt's relationship to the parents of the victim to [Appellant], in order to provide [Appellant] an opportunity to request the sentencing [j]udge's recusal, to avoid the appearance of impropriety and bias in favor of the victim.

Appellant's Brief at 4.

In his first issue, Appellant contends the trial court abused its discretion by imposing a sentence grossly disproportionate to the one count of unlawful use of a computer to which he pled no contest. As this Court has explained, we do not review discretionary aspects of sentence as a matter of right. ***Commonwealth v. Tejada***, 107 A.3d 788, 797 (Pa. Super. 2015). "An appellant must satisfy a four-part test to invoke this Court's jurisdiction when challenging the discretionary aspects of a sentence." ***Id.*** (quoting

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[2] The statutory provision cited by Appellant is the provision dealing with computer trespass, and specifically with altering or erasing computer data, a felony of the third degree. Appellant was charged with 54 counts of computer trespass in addition to the 54 counts of unlawful use of a computer. He pled to, and was sentenced on, one count of unlawful use of a computer, 18 Pa.C.S.A. § 7611(a)(2). Although Appellant erroneously cites the computer trespass provision in his statement of questions presented, he does properly refer to unlawful use of a computer in the argument section of his brief.

Commonwealth v. Buterbaugh, 91 A.3d 1247, 1265 (Pa. Super. 2014) (*en banc*). The four-part test requires proof that:

> (1) the appellant preserved the issue either by raising it at the time of sentencing or in a post[-]sentence motion; (2) the appellant filed a timely notice of appeal; (3) the appellant set forth a concise statement of reasons relied upon for the allowance of his appeal pursuant to Pa.R.A.P. 2119(f); and (4) the appellant raises a substantial question for our review.

Id. at 797-98 (quoting ***Commonwealth v. Baker***, 72 A.3d 652, 662 (Pa. Super. 2013) (citation omitted), *appeal denied*, 86 A.3d 231 (Pa. 2014)).

Appellant preserved the sentencing issue in his post-sentence motion and filed a timely notice of appeal. Therefore, he has satisfied the first two required elements. Appellant has failed to provide a concise statement of reasons relied upon for his allowance of appeal and, therefore, has not met the third requirement. However, because the Commonwealth has not complained of the defect, we may overlook the failure to include a concise statement. ***Commonwealth v. W.H.M., Jr.***, 932 A.2d 155, 163 (Pa. Super. 2007) (citing ***Commonwealth v Krum***, 533 A.2d 134, 138 (Pa. Super. 1987) (*en banc*)). Therefore, we shall consider whether Appellant has satisfied the fourth requirement, *i.e.*, whether he has raised a substantial question.

> Whether an issue raises a substantial question is a determination that must be made on a case-by-case basis; however, in order to establish a substantial question, the appellant generally must establish that the sentencing court's actions either were inconsistent with a specific provision of the Sentencing Code or contrary to the fundamental norms which underlie the sentencing process. Absent a finding that the court manifestly

> abused its discretion, this Court will not substitute its judgment for that of the trial court.

Id. (citations omitted).

As the Commonwealth correctly recognizes, "[a]n excessive sentencing claim will not always raise a substantial question." Commonwealth's Brief at 7 (quoting ***Commonwealth v. Dodge***, 77 A.3d 1263, 1271 (Pa. Super. 2013)). However, this Court determined a substantial question was presented in ***Commonwealth v. Parlante***, 823 A.2d 927 (Pa. Super. 2003), where the appellant argued "the trial court imposed a sentence that is grossly disproportionate to her crimes and failed to consider her background or nature of offenses and provide adequate reasons on the record for the sentence." ***Id.*** at 929. This Court concluded the appellant proffered plausible arguments that her sentence was "contrary to the fundamental norms" underlying the sentencing process and, consequently, reviewed the merits of her claim. ***Id.*** at 929-30; ***see also Commonwealth v. Raven***, 97 A.3d 1244, 1253 (Pa. Super. 2014), *appeal denied*, 105 A.3d 736 (Pa. 2014) ("[A]n excessive sentence claim—in conjunction with an assertion that the court failed to consider mitigating factors—raises a substantial question"); ***Commonwealth v. Malovich***, 903 A.2d 1247, 1253 (Pa. Super. 2006) ("[C]laims that a penalty is excessive and/or disproportionate to the offense can raise substantial questions.").

We conclude that Appellant's claim of a grossly disproportionate sentence raises a substantial question. Therefore, we turn to the merits of his claim. As this Court has explained,

> The proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not 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. . . . An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

Commonwealth v. Provenzano, 50 A.3d 148, 154 (Pa. Super. 2012) (citations and brackets omitted).

Appellant contends the trial court abused its discretion in violation of the sentencing principles set forth in Section 9721(b), which provides, in pertinent part:

> **b) General standards.—**. . . [T]he 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.

42 Pa.C.S.A. § 9721(b).

While Appellant concedes the trial court properly considered a perceived lack of remorse on Appellant's part, he contends remorse is but one factor to be considered. However, our review of the sentencing transcript, as well as the transcript of the reconsideration proceedings, belies

Appellant's assertion that the trial court failed to consider other factors as mandated by Section 9721(b).

As the trial court explained in its Rule 1925(a) opinion:

> [Appellant] first claims that we abused our discretion in imposing sentence. We note that, prior to the sentencing hearing, we carefully reviewed a Pre-Sentence Investigation. And, as we stated at the sentencing hearing, we spent a substantial amount of time considering the appropriate sentence.
>
> [Appellant] primarily claims that we failed to "give due consideration to the mitigating factors in this case." *See Statement of Matters Complained of on Appeal*.[3] This contention is unsupported by the record. We specifically referenced several factors at sentencing that weighed in [Appellant's] favor, including his family, lack of any prior record, and his work history. In fact, we stated on several occasions that, had [Appellant] shown genuine remorse for his actions, a mitigated range sentence would have been appropriate. However, [Appellant's] letter, which was attached to the Pre-Sentence Investigation, demonstrated a lack of remorse and shifted blame to the victims. This lack of remorse, combined with the obvious damaging effect to the public's perception of safety at the victim's airport made a mitigated range sentence inappropriate. Additionally, we imposed the maximum fine because we believed [Appellant] benefitted economically to the detriment of the victims, especially since no restitution was requested.

Trial Court Rule 1925(a) Opinion, 11/26/14, at 2-3 (citations to sentencing and reconsideration transcripts omitted).

The trial court recognized its obligation to base its sentence on "the protection of the public, the gravity of the offense, and [Appellant's]

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[3] We remind counsel for Appellant that a copy of the Rule 1925(b) statement of errors complained of on appeal is to be included in an appellant's brief. Pa.R.A.P. 2111(a)(11) and 2111(d).

rehabilitative needs." N.T. Sentencing Hearing, 8/1/14, at 19. However, as clearly articulated in the above excerpt from the trial court's Rule 1925(a) opinion, the lack of remorse on Appellant's part, coupled with the damaging impact on the public's perception of safety at the airport, warranted the sentence imposed.

Our review leads us to conclude that the trial court considered the sentencing factors included in Section 9721(b). The record does not support a finding that the sentence was manifestly unreasonable or the result of partiality, prejudice, bias, or ill-will. Appellant's first issue fails for lack of merit.

In his second issue, Appellant contends the sentencing court "erred" by failing to disclose the trial court's relationship to Mr. and Mrs. Paul Detwiler, parents of Bun Air co-owner Jenny DeLong. Appellant argues the trial court should have disclosed the fact the Detwilers made contributions approaching $2,500 to the trial judge's 2011 judicial campaign and should have disqualified himself from the proceedings in compliance with Rule 2.11 of the Pennsylvania Code of Judicial Conduct.[4] Had the campaign

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[4] Pennsylvania's Judicial Code of Conduct does not vest substantive rights in litigants and may be enforced only by our Supreme Court under Article 5, § 10 of the Constitution of this Commonwealth, which vests the Supreme Court with "supervisory administrative authority" over the courts of Pennsylvania, PA CONST., art. V, § 10(a). However, litigants do have a substantive right to request recusal when a litigant has reason to question the impartiality of a jurist. ***Goodheart v. Casey***, 565 A.2d 757, 762 (Pa.
(Footnote Continued Next Page)

contributions been disclosed, Appellant asserts, he would have been afforded the opportunity to request recusal of the trial judge prior to sentencing.

The issue of the Detwilers' contributions was first raised in Appellant's motion for reconsideration of his sentence. At hearing on the motion, Appellant's counsel explained that Appellant's wife received an email on August 4, 2014 from a woman who was present in the courtroom during Appellant's August 1 sentencing hearing. The email apparently referred to the Detwilers' 2011 judicial contributions, contributions Appellant did not know of prior to that time. N.T. Reconsideration Hearing, 9/4/14, at 14-15.

Before considering whether the trial judge properly declined to recuse from this matter, we need first to address the timing of Appellant's request for recusal. Even though recusal requests call into consideration a court's ability to mediate fairly and raise important public concerns, when a recusal request is made for the first time after a verdict, in post-trial motions, or in arguments or briefs before the appellate courts, the matter is to be treated under the same standard applicable to after-acquired evidence. ***Reilly***, 489 A.2d at 1301. In those instances a proponent must show "that: 1) the evidence could not have been brought [prior to verdict] to the attention of the trial court in the exercise of due diligence, and 2) the existence of the evidence would have compelled a different result in the case." ***Id.***

(Footnote Continued) ———————————

1989); ***Reilly v. Southeastern Pennsylvania Transp. Auth.***, 489 A.2d 1291, 1298 (Pa. 1985).

Under the after-acquired evidence standard we conclude, without having to address whether due diligence was exercised, that Appellant has not demonstrated that disclosure of the existence of the Detwiler contributions before sentencing would have compelled a different result in this case. "The party who asserts a trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal, and the 'decision by a judge against whom a plea of prejudice is made will not be disturbed except for an abuse of discretion.'" ***Commonwealth v. Kearney***, 92 A.3d 51, 60 (Pa. Super. 2014), *appeal denied*, 101 A.3d 102 (Pa. 2014) (quoting ***Commonwealth v. Druce***, 848 A.2d 104, 108 (Pa. 2004), in turn quoting ***Commonwealth v. Darush***, 459 A.2d 727, 731 (Pa. 1983)).

Appellant acknowledges that the Detwilers were not parties to the action and did not have a legal interest in the outcome of the proceeding. Appellant's Brief at 17. However, without citation to any record evidence or case authority, Appellant simply concludes, "it is not a leap of logic to summize [*sic*] that the disposition of the Gottshall case was a matter of importance and concern to Mr. and Mrs. Detwiler, in the context of their daughter's financial interest in the Bun Air Corporation." ***Id.*** The trial judge stated he would have disclosed the contributions if he "felt that it would affect [his] decision in any way, . . . but it did not." N.T. Reconsideration Hearing, 9/4/14, at 8. The trial judge explained that even if he had

disclosed the contributions, he would not have recused himself. ***Id.*** at 11. "So, . . . I don't think you're prejudiced in any way because I wouldn't have recused myself. Now whether you want to disagree with that, that's fine. That's your prerogative. But I wouldn't have recused myself because I don't think it's required." ***Id.***

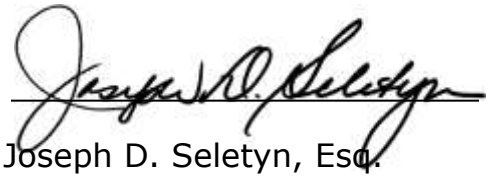
The trial court's statements indicate that the trial judge felt he did not harbor any personal bias or interest that would preclude an impartial sentencing in this matter. Certainly, Appellant's claim would not have affected his *nolo contendere* plea, as he entered into his plea without any court involvement. As to Appellant's sentence, the trial court explained that its sentence was at the bottom end of the standard range of the guidelines and took into account all of the mitigating factors Appellant highlights in his appeal. Trial Court 1925(a) Opinion, 11/26/14, at 3 n.3. Of particular note was the trial court's statement that Appellant demonstrated no lack of remorse and shifted blame to his victims. ***Id.*** at 3. The lack of remorse together with the public's perception of safety at the victim's airport made a mitigated range sentence inappropriate. ***Id.*** The maximum fine also was imposed because the trial court believed Appellant benefitted financially to the detriment of his victims, and no restitution was requested. ***Id.*** Given the trial court's explanation of the subject campaign contributions and the manner in which Appellant's standard range sentence was determined, it is clear Appellant has not demonstrated that the sentence imposed by the trial

court evinces any bias, prejudice or disproportionality that would suggest any improper influence by the fact of the Detwiler contributions to the trial judge's 2011 election campaign. Appellant has not met his burden of demonstrating that the existence of the subject contributions prior to sentencing would have affected the outcome of his sentence.[5]

Accordingly, we conclude the trial court did not abuse its discretion in imposing its sentence on Appellant and did not err in failing to disclose 2011 campaign contributions from the parents of one of the owners of the corporation that Appellant victimized. Therefore, we affirm the August 1, 2014 judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015

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[5] In fact, Appellant's counsel acknowledged recusal was not required, but Appellant should have been given the opportunity to request it. N.T. Reconsideration Hearing, 9/4/14, at 8.