

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

ZAKERY RUSSELL

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1433 EDA 2013

Appeal from the Judgment of Sentence February 1, 2013
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-002276-2012

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY LAZARUS, J.:

FILED JULY 25, 2014

Zakery Russell appeals from the judgment of sentence imposed by the Court of Common Pleas of Chester County on February 1, 2013, after he pled guilty to simple assault,¹ resisting arrest² and false identification to law enforcement officers.³ After careful review, we affirm.

In the fall of 2011 Russell and Michael Giovinco, Jr. were freshman roommates at West Chester University. After a semester in which the two men grew increasingly fed up with each other, Giovinco, citing Russell's drug

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S. § 2701(a)(1).

² 18 Pa.C.S. § 5104.

³ 18 Pa.C.S. § 4914(a).

and alcohol problems, convinced the University to assign him a new roommate. The two parties signed a "no contact" order requiring that they stay away from each other.

On April 16, 2012, Russell, while under the influence of alcohol, found Giovinco watching television in a dormitory lounge, and proceeded to throw an empty plastic bottle at him. When Giovinco began walking away from the situation, Russell responded, "Are you going to tell the R.A. as usual?" Affidavit of Probable Cause, 4/17/12. He followed and then sucker punched Giovinco, knocking him to the floor. Once Giovinco was on the ground, Russell punched him in the face. The record is unclear whether or not bystanders pulled Russell off the victim, or he fled on his own. Campus police apprehended Russell outside of the dormitory and had to use force to overcome his resistance.

On February 1, 2013, the court sentenced Russell to a term of three to twenty-three months' incarceration for simple assault, plus two years' probation for resisting arrest. The sentence was scheduled to begin seven days after the end of the semester, and the court made Russell eligible for work release after thirty days. Russell filed a motion for reconsideration of sentence that the court denied on April 15, 2013.

Russell filed a timely notice of appeal, and on June 7, 2013, filed a court-ordered statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). The trial court filed its Rule 1925(a) opinion on July 11, 2013.

Russell raises the following issue for our review:

Should [Russell] be remanded to the Court of Common Pleas for a new sentencing hearing where the sentence was imposed in the aggravated range on a single count of simple assault and where said sentence was manifestly excessive and an abuse of discretion on the part of the sentencing judge, who demonstrated bias towards [Russell] and [Russell's] case?

Brief of Appellant, at 3.

On appeal, Russell claims that his sentence was unreasonable because it was manifestly excessive, and the judge did not include on the record his reasons for imposing a sentence of total confinement.

Challenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right. An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test: (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, 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, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Allen, 24 A.3d 1058, 1064 (Pa. Super. 2011) (citations omitted).

Here, Russell filed a post sentence motion to reconsider and a timely notice of appeal. There are no fatal defects in Russell's brief. He raises several issues arguing that there is a substantial question for this court to evaluate pursuant to Rule 2119(f). Russell first argues that the trial court did not provide the reasoning for its sentence. This court in **Commonwealth v. McNabb**, 819 A.2d 54, 56 (Pa. Super. 2003), stated

that “[a]ppellant . . . raise[s] a substantial question by alleging that the sentencing court did not sufficiently state its reasons for the sentence.” Russell also raises a substantial question with his allegation that “the sentence imposed was unreasonable . . . because the Sentencing Court was biased and prejudiced against the [him] and [his] case.” Appellant’s Brief at 9. Allegations that a trial court used impermissible factors at sentencing raise a substantial question for review. **McNabb**, 819 A.2d at 56-7. Accordingly, this Court will review the discretionary aspects of Russell’s sentence.

This Court reviews discretionary aspects of sentencing based on an abuse of discretion standard.

[T]he proper standard of review when considering whether to affirm the sentencing court’s determination is an abuse of discretion [A]n 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 The rationale behind such broad discretion and the concomitantly deferential standard of appellate review is that the sentencing court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it.

Allen, supra at 1064 (citing **Commonwealth v. Walls**, 926 A.2d 957, 961 (Pa. 2007)).

Russell raises two sub-issues within his discretionary aspects of sentencing claim. The first is that the trial court sentenced him in the aggravated range for simple assault and did not sentence him to probation. The second is that the trial judge showed bias towards him and sentenced him harshly because he was a West Chester University student convicted of a crime involving alcohol.

Simple assault is a second-degree misdemeanor with an offense gravity score of three.⁴ Because Russell has zero prior offenses, the correct sentencing level is RS-1. RS-1 provides a minimum sentence of one month, plus or minus three months' incarceration for mitigating or aggravating circumstances. ***Id.*** The sentence of three to twenty-three months' incarceration lies within the aggravated range of the sentencing guidelines.

Russell contends that the sentence of a minimum of three months was manifestly excessive. "Traditionally, the trial court is afforded broad discretion in sentencing criminal defendants because of the perception that the trial court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." ***Commonwealth v. Mouzon***, 812 A.2d 617, 620 (Pa. 2002) citing ***Commonwealth v. Ward***, 568 A.2d 1242, 1243 (Pa. 1990). It was

⁴ 204 Pa.Code § 303.16

within the trial court's discretion to sentence Russell to three to twenty-three months' incarceration.

Russell next argues that the trial judge displayed bias towards him at sentencing. He claims that the judge's commentary about rampant alcohol abuse amongst West Chester University students is evidence that he could not be impartial and that the judge's sentence displayed his bias. Although there is evidence that the judge commented on aspects of West Chester University that were not pertinent to the case, the record shows that bias did not affect Russell's sentence. Not only is the sentence within the guidelines for the offense, but the judge also provided a detailed basis for his sentence in his Rule 1925(a) opinion. His grounds for the aggravated range sentence were:

- (1) [Russell] was subject to a University imposed "no contact" order;
- (2) The "no contact" order was alcohol related;
- (3) [Russell] was under court supervision for an alcohol related offense;
- (4) [Russell] sought out the victim;
- (5) [Russell] was highly intoxicated;
- (6) The assault took place in the *de facto* living room of [the victim's] dormitory;
- (7) The victim tried to avoid the situation;
- (8) The victim was rendered defenseless by the first punch but [Russell] continued to attack; and
- (9) [Russell] resisted the police, and force was required to subdue him.

Trial Court Opinion, 7/11/13, at 10-11.

At sentencing, the trial court indicated that a pre-sentence investigation had been prepared. N.T. Sentencing Hearing, 2/1/13, at 3. As our Supreme Court noted ***Commonwealth v. Walls***, 926 A.2d 957 (Pa. 2007) (citing ***Commonwealth v. Devers***, 546 A.2d 12, 18 (Pa. 1988)):

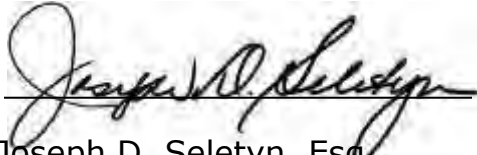
Where pre-sentence reports exist, we . . . presume that the sentencing judge was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.

Walls, supra at 967 n.7.

Furthermore, the trial court held a hearing on Russell's motion for reconsideration of sentence on April 15, 2013, following which it denied relief. Russell filed a notice of appeal on May 14, 2013, erroneously seeking to appeal the April 15, 2013 order. However, he did not file a request for a transcript of the April 15, 2013 hearing, and none is included in the record. In his Rule 1925(a) opinion, Judge Gavin states, "I assume defense counsel will provide a transcript of the [April 15, 2013 motion for reconsideration] proceedings which I am confident will reveal that I considered the factors herein stated." Trial Court Opinion, 7/11/14, at 12. Clearly, Russell, as the appellant, did not fulfill his "responsibility to ensure that a complete record is produced for appellate review." ***Weissberger v. Myers***, 90 A.3d 730, 734 n.8 (Pa. Super. 2014). Accordingly, he cannot establish that the trial court failed to set forth its reasons for imposing the sentence at the reconsideration proceeding.

Judgment of sentence affirmed.⁵

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: 7/25/2014

⁵ We grant Russell's fifth request for extension of time in which to file a brief.