NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RICHARD ADDARIO, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1370 EDA 2013

Appeal from the Judgment of Sentence April 4, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0013567-2012

BEFORE: BOWES, DONOHUE, and MUNDY, JJ.

MEMORANDUM BY BOWES, J.: **FILED JULY 23, 2014**

Richard Addario appeals from the aggregate judgment of sentence of three to six years incarceration followed by two years probation imposed by the trial court after he pled guilty to driving under the influence ("DUI"), simple assault, driving with a suspended license, and two counts each of criminal mischief and recklessly endangering another person ("REAP"). We affirm.

The facts supporting Appellant's plea were outlined by the trial court as follows.

> On April 8, 2012 at approximately 9:20 p.m., the complainants, Darryl McRae ("McRae") and Rosemarie Green ("Green") were both driving in separate vehicles around the 1800 block of Cottman Avenue in the City and County of Philadelphia. Green was followed by McRae, who was followed by Defendant. Green stopped because the car in front of her was attempting to parallel park. McRae came to a stop behind Green. Defendant

> did not stop and struck McRae from behind at a high rate of speed, forcing McRae's vehicle into Green's vehicle and causing over $500 in damage to both complainants' vehicles. McRae got out of his car and saw Defendant who had exited his vehicle. Defendant was staggering with unsteady balance, appeared to be disoriented, and was combative with McRae. When police arrived, they observed that Defendant had blood shot eyes and that his clothing was disarrayed. There was a strong odor of alcohol emanating from Defendant. He was boisterous, unruly, sarcastic and incoherent. Defendant's speech was slurred, he was wobbling and he was unable to stand up without assistance. Defendant was arrested for suspicion of DUI and transported for a blood draw. Blood was drawn by an A.I.D. officer and the results of the test were a BAC of .372. At the time of the collision, Defendant's license to operate a vehicle was suspended due to a prior DUI.

Trial Court Opinion, 10/11/13, at 3 (internal citations omitted); ***see also*** N.T., 1/23/13, at 6-7. Indeed, this was Appellant's third DUI conviction within the past ten years. Appellant also had prior DUIs beyond the ten-year look-back period for determining the number of statutory DUI convictions for purposes of mandatory sentencing. Following Appellant's plea, the court ordered a presentence investigation report. The court conducted a sentencing hearing on April 4, 2013. Prior to sentencing, the Commonwealth submitted but did not file a sentencing memorandum. Appellant filed a motion objecting to the trial court's consideration of that sentencing memorandum. The sentencing court set forth that it considered relevant parts of that memorandum.

The Commonwealth argued at the sentencing hearing that Appellant had DUI convictions stemming back more than ten years. It also attempted to introduce testimony from a preliminary hearing of a *nolle prossed*

aggravated assault charge, but the court sustained an objection to that evidence. Further, the Commonwealth played for the court prison tapes from Appellant to his wife and argued that these calls demonstrated a lack of remorse. The tapes showed that Appellant claimed that he was going to "beat this whole thing" and instructed his wife not to tell the court that he had received treatment for his alcohol problem. Further, Appellant repeatedly threatened his wife, including threatening to kill her, and blamed her for his being in jail. Defense counsel objected that the tapes were irrelevant, a marital conversation, and contended that playing only parts of the tape was more prejudicial than probative.

The Commonwealth also noted that Appellant had seven DUI convictions, although several occurred beyond the ten-year look-back period for the DUI statute, and that his license had been suspended since 1992. Appellant did not object to this information being argued, and his conviction history was included in the presentence report.

The court sentenced Appellant to one and one-half to three years imprisonment for the DUI count, and consecutive terms of six to twelve months incarceration for the REAP charges and driving with a suspended license. In addition, the court subjected Appellant to one year of probation for each criminal mischief count. These sentences were within the sentencing guideline ranges. The court did not impose a sentence for the simple assault charge.

Appellant timely filed a post-sentence motion, alleging that the court impermissibly relied on his telephone calls to his wife in imposing his sentence. The court denied Appellant's motion. This timely appeal ensued and the court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied and the court authored its Rule 1925(a) opinion. The matter is now ready for our review. Appellant presents one issue for this Court's consideration.

> Did not the lower court err and abuse its discretion by considering improper factors set forth in the Commonwealth's sentencing memorandum and argument, including statistics regarding deaths from driving under the influence, nolle prossed charges, driving under the influence cases from outside the statutory look back period, and appellant's alleged, inappropriate behavior towards his wife, where these were not factors to be considered in individualized sentencing, were irrelevant, were more prejudicial than probative, and violated appellant's right to due process of law?

Appellant's brief at 3.

Appellant's claim is a challenge to the discretionary aspects of his sentence. To adequately preserve a discretionary sentencing claim, the defendant must present the issue in either a post-sentence motion or raise the claim during the sentencing proceedings. ***Commonwealth v. Cartrette***, 83 A.3d 1030, 1042 (Pa.Super. 2013) (*en banc*). Further, the defendant must "preserve the issue in a court-ordered Pa.R.A.P. 1925(b) concise statement and a Pa.R.A.P. 2119(f) statement." ***Id***.

Importantly, "There is no absolute right to appeal when challenging the discretionary aspect of a sentence." ***Id***. "[A]n appeal is permitted only

after this Court determines that there is a substantial question that the sentence was not appropriate under the sentencing code." ***Id.*** In determining whether an appellant presents a substantial question for our review, "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).

Instantly, Appellant filed a post-sentence motion that raised the trial court's consideration of his conversations with his wife. Appellant did not contest consideration of his DUI arrests or his convictions outside the ten-year look-back period, or object to the Commonwealth's reference to DUI statistics contained in its sentencing memorandum. However, Appellant did file a motion to bar consideration of the Commonwealth's sentencing letter. Therein, Appellant objected to the sentencing court's consideration of general DUI statistics, the prison tapes, and his prior arrests, "including two cases in which he was found not guilty and four cases that were either withdrawn or dismissed." Motion to Bar Commonwealth's Improper Sentencing Letter, 3/28/13, at 2.

The Commonwealth argues that Appellant only preserved his challenge to the court's alleged consideration of the prison tapes since Appellant did

not maintain the other positions in his post-sentence motion. We decline to find waiver since Appellant challenged any reliance on the additional factors in his motion to bar the Commonwealth's sentencing letter, which is the equivalent of raising the issue at sentencing. Further, a sentencing court's reliance on improper sentencing factors to increase a sentence does raise a substantial question for our review. ***Commonwealth v. Rhodes***, 990 A.2d 732, 745 (Pa.Super. 2009).[1] We therefore find that Appellant's claim presents a substantial question for this Court's consideration.

Appellant argues, incorrectly, that his sentence was significantly higher than the guideline ranges. He does so because he only considers the guidelines for DUI. In this respect, Appellant maintains that the sentencing guidelines "called for a sentence of twelve to eighteen months, plus or minus three months." Appellant's brief at 10. While this range applies to Appellant's DUI, since he had a prior record score of a five, it does not factor in the sentencing guidelines for Appellant's remaining offenses and a court's ability to sentence consecutively. When considering each offense, the court

---

[1] The Commonwealth alleges that Appellant's failure to specify where the sentences fell within the sentencing guideline ranges precludes this Court from reviewing Appellant's contentions. In making this argument, it cites to a case that defeats its very position, ***Commonwealth v. Felix***, 539 A.2d 371 (Pa.Super. 1990). ***Felix*** was a Commonwealth appeal in which this Court included the Pa.R.A.P. 2119(f) statement from the Commonwealth in our opinion. Nowhere did that statement cite the guideline ranges; however, we agreed that despite the poor Rule 2119(f) statement, the Commonwealth raised a substantial question for our review. We decline to hold Appellant to a higher standard than that of the Commonwealth.

sentenced Appellant within the standard guidelines. Even Appellant's one-and-one-half-to-three-year sentence for the DUI was within the guideline range for Appellant's DUI offense. Since each of Appellant's sentences was within the guidelines, as noted previously, he must show that his sentence is clearly unreasonable. ***See Dodge***, ***supra***.

Appellant relies on ***Rhodes***, ***supra***, ***Commonwealth v. Chase***, 530 A.2d 458 (Pa.Super. 1987), and ***Commonwealth v. Sypin***, 491 A.2d 1371 (Pa.Super. 1985), to argue that the sentencing court erred. In ***Rhodes***, an eighteen-year-old woman pled guilty to voluntary manslaughter after she delivered a baby in her apartment while attending college and placed the baby in a trash bag and left it in the bathtub to die. The Commonwealth therein stated that it did not object to a mitigated or standard range sentence.

However, the court relied on police reports that it obtained *ex parte* and without counsel's knowledge. The sentencing court "drew factual inferences directly from those reports on the basis of which he imposed a sentence almost five times that recommended by the Commonwealth and only one to two years shy of the statutory maximum for Voluntary Manslaughter." ***Rhodes***, ***supra*** at 745. In addition, the court based its sentence on its own finding that Rhodes had committed a "calculated, premeditated killing," despite Rhodes not having pled to first-degree murder. ***Id***. The court therein also demonstrated such hostility toward defense

counsel, and even the Commonwealth, that his actions so called into question his impartiality that we found that he erred in not recusing himself and remanded for a new judge to conduct re-sentencing.

In ***Chase***, the defendant was found guilty by a jury of three counts of terroristic threats. Following the trial, the jury foreperson reported to the court that she had received a threatening message. Although the court indicated that it was not accusing Chase of placing the call, it nevertheless insinuated such occurred and appeared to rely on this information in sentencing the defendant to consecutive sentences of eleven and one-half to twenty-three months incarceration. This, despite Chase being incarcerated and only able to place collect telephone calls. The ***Chase*** Court opined, "We are persuaded from our reading of the trial court's remarks prior to sentencing that the court may have considered the phone call in determining the sentence. In fact the entire discussion of the evidence concerning the phone call was brought up by the court *sua sponte* immediately before sentence was imposed." ***Chase***, ***supra*** at 461.

Chase relied on ***Sypin***, ***supra***. In ***Sypin***, the defendant pled guilty to involuntary deviate sexual intercourse and corruption of minors based on his sexual abuse of a nine-year-old boy. In sentencing the defendant, the trial court referenced that thousands of kids disappear and are sometimes found dead or not found at all. The ***Sypin*** Court concluded that because the defendant was not charged with the disappearance or killing of a child, that

the court should not have considered these factors in sentencing the defendant to twelve and one-half to twenty-five years imprisonment.

We begin by noting that it is improper to consider items *dehors* the record. ***Commonwealth v. Manahan***, 45 A.3d 413, 417 (Pa.Super. 2012). Thus, the Commonwealth should have filed its sentencing memorandum or made it part of the certified record. Nonetheless, while consideration of the memorandum was improper, the relevant facts from that memorandum were introduced at the sentencing hearing and/or were part of the presentence report. Hence, reliance on that memorandum was harmless. ***See Commonwealth v. Arrington***, 86 A.3d 831, 847-848 (Pa. 2014) (any reliance on recorded telephone conversation harmless where it was cumulative of other properly admitted evidence).

To the extent Appellant relies on ***Rhodes***, that case is easily distinguishable. Instantly, the court did not sentence Appellant outside the guideline ranges. Moreover, as mentioned, virtually all of the information that was included in the unfiled Commonwealth sentencing letter herein was introduced at the sentencing hearing or was part of the presentence report.[2] Further, we do not find that ***Chase*** compels reversal. There the court *sua sponte* raised conduct that was not charged in fashioning the defendant's sentence. In the present case, the court considered the information that the

---

[2] The information that was not elicited at the sentencing hearing related to DUI statistics.

Commonwealth presented, and did not *sua sponte* raise and consider outside information. Nor does ***Sypin*** warrant a different conclusion. The record in this matter does not sustain a finding that the court used unrelated facts to aggravate Appellant's sentence.

Additionally, we are aware that the prison calls in this matter involved marital communications which are generally privileged under 42 Pa.C.S. § 5914. ***See also*** 42 Pa.C.S. § 5913. Appellant, nonetheless, does not maintain this position on appeal and it is therefore waived. Moreover, the sentencing court did not indicate at sentencing or in its opinion that it relied on those tapes in fashioning Appellant's sentence.

Unlike in ***Rhodes***, the sentence imposed herein was not in the aggravated range and there is no evidence from the record that the court increased Appellant's sentence based on consideration of the tapes. In addition, Appellant's prior DUI convictions outside the ten-year look-back period were already factored into Appellant's prior record score. While it would have been error to sentence Appellant in the aggravated range or outside the guidelines solely based on such convictions, ***see Commonwealth v. Simpson***, 829 A.2d 334, 339 (Pa.Super. 2003), that did not occur. Further, we discern no error in consideration of arrests in fashioning a sentence. Arrests are not uncharged conduct or included within a prior record score, but can be part of the presentence report. Although a person is not adjudged guilty based on an arrest, this goes to the weight to

be afforded such a factor. ***Commonwealth v. Fries***, 523 A.2d 1134, 1136 (Pa.Super. 1987); ***Commonwealth v. Johnson***, 481 A.2d 1212, 1214 (Pa.Super. 1984) ("it is not improper for a court to consider a defendant's prior arrests which did not result in conviction, as long as the court recognizes the defendant has not been convicted of the charges")).

As it relates to acquittals, we agree that increasing a sentence based on an acquittal is improper. ***But compare Commonwealth v. Bowers***, 25 A.3d 349 (Pa.Super. 2011) (DUI mandatory sentence increased by admission into ARD despite later acquittal). However, Appellant's sentence was well within the guideline ranges and the court did not set forth that it relied on acquittals in fashioning its sentence. The trial court explained its reasons for its sentence by stating,

> The Court has considered the defendant did not go to trial either at the [Municipal Court] trial, at the Common Pleas or request or demand a jury trial; and his addiction to alcohol, no prior treatment I think can cut both ways as a mitigating and an aggravating because he could have done it on his own without requiring the Court to order him to do it. His commitment to Alcoholics Anonymous for the 7 months. I considered defendant's mental health and defendant's physical health, and the support from his family. I don't know, I'm not sure if Mr. Addario is sincere about his responsibility for his actions; consider that he's a danger to society by continuing driving on a suspended license; that the defendant injured victims that he's a poor candidate for rehabilitation, and I believe that a lesser sentence would be inappropriate.

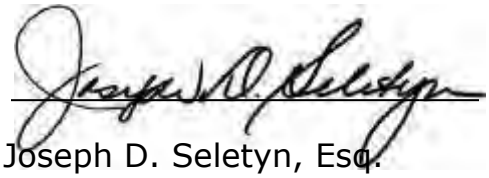
N.T., 4/4/13, at 37-38.

In light of Appellant's egregious DUI history, the fact that he caused property damage and bodily injury, and had an outrageously high BAC of

.372, we find the court's sentence was more than reasonable. Appellant is a danger to society and has demonstrated no ability to refrain from drinking and driving.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/23/2014