

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ALEXANDER MURILLO

Appellant

No. 2731 EDA 2012

Appeal from the Judgment of Sentence August 17, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0008406-2009
CP-51-CR-0008407-2009

BEFORE: GANTMAN, P.J., ALLEN, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, P.J.:

FILED JULY 23, 2014

Appellant, Alexander Murillo, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his guilty plea to criminal attempt—first degree murder, aggravated assault, criminal conspiracy—murder, simple assault, firearms not to be carried without a license, carrying firearms on public streets in Philadelphia, possessing an instrument of crime, and recklessly endangering another person.¹ We affirm.

¹ 18 Pa.C.S.A. §§ 901(a), 2702(a), 903(a)(1), 2701(a), 6106(a)(1), 6108, 907(a), and 2705, respectively.

*Former Justice specially assigned to the Superior Court.

In the early morning hours of January 1, 2009, a bouncer expelled Appellant and his girlfriend from a bar during a brawl. Approximately ten people from the bar chased Appellant and his girlfriend down the street until they reached Appellant's parked vehicle. From his vehicle, Appellant retrieved an assault-style rifle, and the individuals chasing Appellant began to flee. Appellant opened fire on the retreating individuals but missed his targets. Appellant and his girlfriend got into Appellant's vehicle and drove to the front of the bar. When Appellant spotted several individuals from the bar fight, he fired several more shots into the crowded bar, striking one individual in the foot, and another in the back, hip, and thigh. Neither victim had been involved in the bar fight. Appellant and his girlfriend fled the scene. Appellant turned himself into the police several hours later. Appellant entered an open guilty plea on May 24, 2012. The court sentenced Appellant to twelve and one half (12½) to twenty-five (25) years' imprisonment on August 17, 2012. On September 14, 2012, Appellant timely filed a notice of appeal. The court ordered Appellant on August 16, 2013, to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). A review of the record does not reveal a filed Rule 1925(b) statement.

Appellant raises the following issue for our review:

WHETHER THE COURT ABUSED ITS DISCRETION BY
IMPOSING A SENTENCE OF 12.5 TO 25 YEARS?

(Appellant's Brief at 1).

Appellant argues his sentence of twelve and one half (12½) to twenty-five (25) years' imprisonment is manifestly excessive. Appellant claims the sentencing court applied an incorrect offense gravity score ("OGS") for attempted murder. Specifically, Appellant alleges the sentencing court applied an OGS of fourteen (14), but that the correct OGS for this offense is thirteen (13). Applying an OGS of thirteen (13), Appellant contends the sentencing guidelines indicate he should have been sentenced to only 78 to 96 months' imprisonment. Appellant concludes the sentencing court abused its discretion, and this Court should remand this matter for re-sentencing. Appellant challenges the discretionary aspects of his sentence.² **See Commonwealth v. Lutes**, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. **Commonwealth v. Sierra**, 752 A.2d

² "[W]hile a...plea which includes **sentence negotiation** ordinarily precludes a defendant from contesting the validity of his...sentence other than to argue that the sentence is illegal or that the sentencing court did not have jurisdiction, **open** plea agreements are an exception in which a defendant will not be precluded from appealing the discretionary aspects of the sentence." **Commonwealth v. Tirado**, 870 A.2d 362, 365 n.5 (Pa.Super. 2005) (emphasis in original). "An 'open' plea agreement is one in which there is no negotiated sentence." **Id.** at 363 n.1. Here, Appellant's plea was "open" as to sentencing, so a challenge to the discretionary aspects of his sentence is available.

910 (Pa.Super. 2000). Prior to reaching the merits of a discretionary sentencing issue:

[W]e conduct a four-part analysis to determine: (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. Evans, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). The concise statement must indicate "where the sentence falls in relation to the sentencing guidelines and what particular provision of the code it violates." ***Commonwealth v. Kiesel***, 854 A.2d 530, 532 (Pa.Super. 2004) (quoting ***Commonwealth v. Goggins***, 748 A.2d 721, 727 (Pa.Super. 2000), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000)).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830

A.2d 1013 (Pa.Super. 2003). A substantial question exists “only when the appellant advances a colorable argument that the sentencing judge’s actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.” **Sierra, supra** at 912-13. A claim that a sentence is manifestly excessive might raise a substantial question if the appellant’s Rule 2119(f) statement sufficiently articulates the manner in which the sentence imposed violates a specific provision of the Sentencing Code or the norms underlying the sentencing process. **Mouzon, supra** at 435, 812 A.2d at 627.

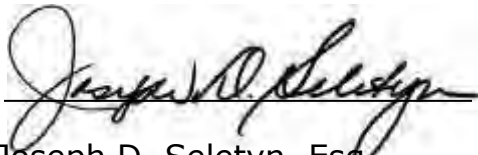
Preliminarily, we observe Appellant did not object at sentencing, or file any post-sentence motions. **See Commonwealth v. Mann**, 820 A.2d 788 (Pa.Super. 2003) (stating issues that challenge discretionary aspects of sentencing are generally waived if they are not raised during sentencing proceedings or in post-sentence motion). Thus, Appellant waived his sentencing issue.

Moreover, even if Appellant had properly preserved his discretionary aspects of sentencing issue, this claim would merit no relief. A review of the record reflects the court sentenced Appellant in accordance with the sentencing guidelines. Furthermore, the standard range for attempted murder is 72 to 240 months; therefore, Appellant’s minimum sentence of 150 months’ imprisonment falls in the middle of the standard range. (**See**

Trial Court Opinion, filed September 27, 2013, at 2.) The record also indicates the court considered the severity of Appellant's crimes, the effects of those crimes, and Appellant's character and remorse. The sentencing court specifically referenced each mitigating factor before it imposed Appellant's sentences, which the court ordered to run concurrently to each other and to a related federal sentence. Accordingly, we affirm the judgment of sentence. ***See generally In re K.L.S.***, 594 Pa. 194, 197 n.3, 934 A.2d 1244, 1246 n.3 (2007) (stating where issues are waived on appeal, we should affirm rather than quash appeal).

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: 7/23/2014