NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MICHAEL CLAIR STYERS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1999 WDA 2014

Appeal from the Judgment of Sentence entered June 18, 2014
In the Court of Common Pleas of Clearfield County
Criminal Division at No: CP-17-CR-0000889-2008

BEFORE: LAZARUS, STABILE, and JENKINS, JJ.

MEMORANDUM BY STABILE, J.: **FILED AUGUST 21, 2015**

Appellant, Michael Clair Styers, appeals *nunc pro tunc* from the judgment of sentence entered following his conviction of numerous crimes related to drug trafficking. In a prior appeal, we vacated Appellant's sentence as illegal under ***Alleyne***,[1] and remanded for resentencing. ***See Commonwealth v. Styers***, 97 A.3d 803 (Pa. Super. 2014) (unpublished memorandum). On remand, the trial court imposed the same aggregate sentence of imprisonment. Appellant now challenges the discretionary aspects of his resentence. For multiple reasons, however, we find he has waived appellate review. Therefore, we affirm.

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[1] ***Alleyne v. United States***, 133 S. Ct. 2151 (2013).

On September 25, 2008, a statewide investigating grand jury issued a presentment finding that Appellant was the head of a cocaine distribution ring in Clearfield County between 2005 and 2007. The Office of Attorney General consequently filed charges against Appellant and 13 others, and the cases were consolidated for trial.[2] During the eight-day trial, 24 witnesses testified that Appellant repeatedly sold or traded cocaine, heroin, OxyContin, Dilaudid, methadone, and Fentanyl. A *petit* jury convicted Appellant of twelve counts of possession with intent to deliver a controlled substance (PWID),[3] one count of conspiracy to commit PWID, one count of corrupt organizations, one count of conspiracy to commit corrupt organizations, two counts of dealing in proceeds of unlawful activities, and one count of criminal use of a communications facility.[4] Following a post-trial evidentiary hearing, the trial court imposed an aggregate sentence of 22 to 44 years in prison, which included several mandatory minimum sentences based on the weight

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[2] Before trial, the trial court precluded the Commonwealth from calling certain witnesses because of discovery violations. The Commonwealth appealed, and we reversed and remanded for trial. ***See Commonwealth v. Hemmingway***, 13 A.3d 491 (Pa. Super. 2011). On remand, only Appellant and two codefendants proceeded to trial, as the other defendants pled guilty.

[3] Controlled Substance, Drug Device and Cosmetic Act, Act of Apr. 14, 1972, P.L. 233, No. 64, § 13(a)(30), *as amended*, 35 P.S. § 780-113(a)(30).

[4] 18 Pa.C.S.A. §§ 903(a), 911(b)(3), 911(b)(4), 5111(a)(1), and 7512(a), respectively.

of drugs involved.[5] Appellant appealed to this Court. We rejected his assignments of error but found *sua sponte* that his sentence violated ***Alleyne***, because the trial court imposed the mandatory sentences based on facts it found by a preponderance of the evidence. The ***Alleyne*** Court held the Sixth Amendment requires that facts triggering a mandatory minimum sentence be found by a jury beyond a reasonable doubt. ***Alleyne***, 133 S. Ct. at 2156. Therefore, Appellant's original sentence was illegal, and we remanded for resentencing.

On remand, the trial court imposed the exact same sentence of imprisonment as before—22 to 44 years—but without the mandatory minimum sentences. It did so by restructuring Appellant's sentence to make the sentences on several counts consecutive instead of concurrent.[6] Appellant filed a post-sentence motion contending that the new sentence was unreasonable in light of an unspecified health condition. The trial court denied the motion, and later granted Appellant leave to appeal *nunc pro tunc*.

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[5] ***See*** 18 Pa.C.S.A. § 7508 (providing mandatory minimum sentences for drug trafficking crimes based on prior offenses and weight of controlled substances involved), *held unconstitutional by*, ***Commonwealth v. Cardwell***, 105 A.3d 748 (Pa. Super. 2014).

[6] The trial court also reduced $90,000.00 in fines to $10.00.

On appeal, Appellant challenges only the discretionary aspects of his resentence:

> Whether the trial court abused its discretion where it resentenced [Appellant] to the same aggregate term of incarceration as was originally imposed via illegal mandatory minimum sentences.

Appellant's Brief at 4. In response, the Commonwealth contends Appellant has waived appellate review for several reasons.

We review challenges to the discretionary aspects of a sentence for an abuse of discretion. ***Commonwealth v. Buterbaugh***, 91 A.3d 1247, 1265 (Pa. Super. 2014) (*en banc*). A sentencing court abuses its discretion by ignoring or misapplying the law; exercising its judgment for reasons of partiality, prejudice, bias, or ill will; or arriving at a manifestly unreasonable decision. ***See Commonwealth v. Caldwell***, 2015 PA Super 128, 2015 WL 3444594, at *4, 2015 Pa. Super. LEXIS 307, at *10-11 (filed May 29, 2015) (*en banc*).

An appellant must petition for allowance of appeal to challenge the discretionary aspects of a sentence. ***See*** 42 Pa.C.S.A. § 9781(b). We conduct a four-part analysis to determine whether we may reach the merits of such a challenge. ***Buterbaugh***, 91 A.3d at 1265. First, the appellant must preserve the issue in the trial court by raising it at sentencing or in a post-sentence motion. ***Id.*** Second, the appellant must timely appeal. ***Id.*** Third, the appellant must set forth in his brief an adequate concise statement of reasons relied on for allowance of appeal under Pa.R.A.P.

2119(f). ***Buterbaugh***, 91 A.3d at 1265. Fourth, the appellant must raise a substantial question that the sentence is inappropriate under the Sentencing Code. ***Id.***; ***see*** 42 Pa.C.S.A. § 9781(b).

Before we consider whether Appellant meets the above four-part test, we must address whether he has preserved appellate review of his sentencing claim. Appellant's concise statement of errors complained of on appeal states:

> The lower court erred, or otherwise abused its discretion, by resentencing [Appellant] to the same aggregate term of twenty-two (22) to forty-four (44) years of incarceration as originally imposed by the illegal, vacated sentence.

Appellant's Concise Statement, 1/30/15, ¶ 1.

A concise statement must "concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge," though citation of authorities is not required. Pa.R.A.P. 1925(b)(4)(ii). The comment to Rule 1925 explains, "the Statement should be sufficiently specific to allow the judge to draft the opinion required under 1925(a)[.]" Pa.R.A.P. 1925 *Comment*. "In other words, a [c]oncise [s]tatement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no [c]oncise [s]tatement at all." ***Commonwealth v. Dowling***, 778 A.2d 683, 686-87 (Pa. Super. 2001).

We are constrained to agree with the Commonwealth's contention that Appellant has waived appellate review because his concise statement is too

vague. In fact, the concise statement meets Rule 1925's definition of vagueness: so general and non-specific that the trial court has to guess at the arguments raised on appeal. Here, the trial court wrote, "[t]his [c]ourt is somewhat unclear as to what error or abuse of discretion [Appellant] is referencing in his [s]tatement of [m]atters [c]omplained of on [a]ppeal." Trial Court Pa.R.A.P. 1925(a) Opinion, 2/4/15, at 4. Therefore, we are required by Rule 1925(b)(4) to find Appellant's appellate issue waived.

Appellant also has waived review for failing to preserve the issue in the trial court. In his post-sentence motion, Appellant raised only the following ground challenging the discretionary aspects of his sentence:

> 3. Due to [Appellant's] health, [Appellant] feels said sentence is unreasonable.
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> 4. At the time of a [h]earing, [Appellant] intends to prove to th[e trial c]ourt his qualifications under 42 Pa.C.S.A. § 9777.

Post-Sentence Motion, 6/30/14, ¶¶ 3-4.[7]

An appellant cannot raise an issue for the first time on appeal. Pa.R.A.P. 302(a). Issue preservation generally precludes a litigant from

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[7] 42 Pa.C.S.A. § 9777 allows a defendant serving a state-prison sentence to petition for a transfer to a hospital, long-term nursing home, or hospice care. Among other requirements, the defendant must show—by clear and convincing proof—that he "is seriously ill and is expected by a treating physician to not live for more than one year." ***Id.*** § 9777(a)(1)(iii). Appellant's post-sentence motion and his brief do not specify his health issues. On the record at resentencing, Appellant's counsel stated Appellant has liver failure. ***See*** N.T. Resentencing, 6/18/14, at 16. Contrary to the averments of his post-sentence motion, Appellant did not prove how he is eligible for a medical transfer under § 9777.

raising new legal theories on appeal. For example, in ***Commonwealth v. Tejada***, 107 A.3d 788, 798-99 (Pa. Super. 2015), Tejada's post-sentence motion challenged only the purported excessiveness of his sentence. We held that he waived other challenges to his sentence: claims that the sentencing court erroneously applied the Sentencing Guidelines, was dismissive of his apology at sentence, failed to weigh properly mitigating factors, and erred in applying the deadly weapon enhancement. ***Id.*** at 798 & n.9. "As Tejada preserved none of the arguments in support of his discretionary aspects of sentencing claim at sentencing or in his post-sentence motion, they [were] not subject to our review." ***Id.*** at 799; ***see also Commonwealth v. Rush***, 959 A.2d 945, 949 (Pa. Super. 2008) ("[F]or any claim that was required to be preserved, this Court cannot review a legal theory in support of that claim unless that particular legal theory was presented to the trial court.").

In his post-sentence motion, Appellant limited his sentencing challenge in the trial court to excessiveness based on his poor health. He did not challenge the consecutive nature of his sentence. He did not challenge the re-imposition of the same sentence. Comparing Appellant's question presented on appeal with the relevant portion of his post-sentence motion, ***supra***, leads us to conclude that Appellant raises his "re-imposition" argument for the first time on appeal. The procedural history here is indistinguishable from the procedural history in ***Tejada***: an attempt to raise

arguments for the first time on appeal. Appellant's failure to preserve his issue precludes us from reviewing it on appeal.

Additionally, assuming, *arguendo*, that Appellant raises a substantial question, his inadequate briefing also precludes review. Appellant failed to explain the nature of his medical condition, leaving this Court to scour the record to discover that "health issues" actually means "liver failure."[8] ***See supra***, note 7. Appellant does not connect this condition to why he should have received a more lenient sentence. A sentencing court may transfer a terminally ill state-prison inmate to a medical facility or hospice care. 42 Pa.C.S.A. § 9777. Section 9777 does not provide grounds to mitigate a sentence.

Appellant argues—without citation—that ***Alleyne*** prohibited that trial court from considering at all the weight or amount of drugs he possessed and sold, which somehow means that his offenses were not as severe. ***See*** Appellant's Brief at 17-18. This argument is both incorrect and illogical. ***Alleyne*** holds only that judicial fact-finding cannot support **mandatory minimum** sentences. As the ***Alleyne*** Court explained, "[o]ur ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion,

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[8] The record contains 43 separate transcripts and 4 bound parts. We remind Appellant that he must direct this Court to the portions of the record that support his argument. ***See*** Pa.R.A.P. 2119(c).

informed by judicial factfinding, does not violate the Sixth Amendment." ***Alleyne***, 133 S. Ct. at 2163; ***see also Apprendi v. New Jersey***, 530 U.S. 466, 481 (2000) ("We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence **within statutory limits** in the individual case.") (emphasis in original).

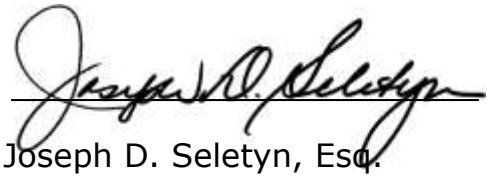
The argument that a sentencing court must treat all drug traffickers equally—whether they sell half an ounce of marijuana or a kilo of cocaine—is untenable. The trial court certainly could consider the amount of drugs Appellant repeatedly sold in fashioning a sentence within the statutory limits. ***Alleyne*** does not ameliorate the severity of Appellant's criminal conduct. His claim that ***Alleyne*** makes him less criminally responsible is incorrect.

Finally, Appellant suggests that his resentence is vindictive, another claim he never raised before the trial court. Again, he does not develop his vindictiveness claim in any meaningful fashion. Notably, he does not inform this Court how the trial court restructured its sentence, and how that restructuring constitutes vindictiveness. Appellant fails to cite portions of the record supporting his argument. He does not explain how the imposition of consecutive sentences was excessive in light of the circumstances of his case. Finally, although Appellant mentions in passing his "health," he does not explain how the trial court failed to take that, or other potentially mitigating factors, into account in resentencing him. In sum, Appellant's inadequate briefing precludes appellate review.

Issue-preservation requirements are not mere makeweights. They are prerequisites that, when neglected, foreclose appellate review. Here, Appellant repeatedly has waived review of his claim that the trial court abused its discretion in sentencing him to 22 to 44 years in prison. We have no choice but to affirm.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/21/2015