NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JASON LLOYD SHIRK, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2173 MDA 2014

Appeal from the Judgment of Sentence October 28, 2014
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s):
CP-36-CR-0002267-2005
CP-36-CR-0002569-2014
CP-36-CR-0003312-2013

BEFORE: BOWES, WECHT, AND FITZGERALD * JJ.

MEMORANDUM BY BOWES, J: **FILED AUGUST 03, 2015**

Jason Lloyd Shirk challenges the discretionary aspects of the sentence that he received on October 28, 2014 at three underlying actions. We affirm.

At criminal action number 2267-2005, Appellant pled guilty on July 27, 2005, to burglary and theft after he entered a home on 5 Sunflower Drive Ephrata, Lancaster, on May 4, 2005, and stole a bicycle. A neighbor observed Appellant steal the item and contacted police. Thereafter, Appellant was sentenced to three to twenty-three months incarceration followed by two years probation, was found in violation of that probation a number of times, and remained under supervision until 2014.

* Former Justice specially assigned to the Superior Court.

On August 13, 2013, at criminal action number 3312-2013, Appellant pled guilty to possession of an instrument of crime and criminal attempt. On June 11, 2003, a witness called police after observing Appellant enter a van that did not belong to him. The vehicle was located in a mobile home park at the 2000 block of West Main Street, Clay Township. Appellant was found hiding and admitted to police he tried to steal the vehicle by breaking the ignition with a hammer and screwdriver in order to hot-wire the car. Sentencing was deferred in that matter until Appellant successfully completed a drug court program. Appellant failed to complete and was discharged from that program.

On May 27, 2014, a violation hearing was held at both docket numbers 2267 of 2005 and 3312 of 2013. Appellant was found in violation of probation at 2267 of 2005, and his supervision was revoked at 3312 of 2013. The court ordered a presentence report.

On October 28, 2014, a proceeding was held wherein Appellant was both sentenced for his violation at 2267 of 2005 and for the crimes committed at 3312 of 2013. At that time, Appellant also entered a negotiated guilty plea at criminal action number 2569 of 2014. In return for a sentence of one to five years of incarceration followed by one year probation, Appellant pled guilty at that docket number to two counts of corruption of a minor and one count of furnishing liquor to a minor. Appellant admitted committing the following acts. On March 27, 2014, then

thirty-three year old Appellant picked up a sixteen-year-old girl from her high school. Appellant was supposed to take her to an after-school treatment facility. Instead, he gave her alcohol and took her to a wildlife preserve, where they performed oral sex on each other.

The court imposed the negotiated sentence at 2569 of 2014. It then revoked Appellant's supervision with the drug court at 3312 of 2013 and sentenced Appellant to sixteen months to five years in jail. That sentence was made concurrent to the one to five year term of imprisonment imposed at 2569 of 2014. At 2267 of 2005, Appellant's probation was revoked, and he received a sentence of one to two years incarceration that was made consecutive to the sentence imposed at the other two action numbers.

Appellant was correctly informed about his post-sentencing rights. Specifically, he was told that he could either file a post-sentence motion within ten days or a direct appeal within thirty days at 2569 of 2014 and 3312 of 2013. The court then delineated, "With regard to the sentence on Docket No. 2569 and on Docket No. 3312, if you file post-sentence motions," the thirty day appeal period does not "start to run until after I have disposed of those post-sentence motions." N.T. Guilty Plea/Sentencing, 10/28/14, at 18. It also correctly informed Appellant that, "With regard to Docket No. 2267," the thirty day appeal period "starts to run today, regardless of whether or not you file post-sentence motions." ***Id***.

Appellant filed a motion to modify his sentence on November 7, 2014; that motion was denied on November 20, 2014. Appellant filed the present appeal, referencing all three docket numbers, on December 18, 2014. He raises this position: "Was an aggregate sentence of twenty [-four] months to seven years incarceration, followed by one year probation, manifestly excessive and an abuse of the court's discretion?" Appellant's brief at 5.

This allegation relates to the discretionary aspects of the sentence imposed. Initially, we address procedural issues. As Appellant was expressly informed by the trial court, a post-sentence motion does not toll the appeal period for a sentence imposed as a result of a violation of the terms of probation. ***Commonwealth v. Burks***, 102 A.3d 500 (Pa.Super. 2014) (a defendant whose revocation of probation sentence has been imposed has 30 days to appeal the revocation sentence, regardless of whether a post-sentence motion is filed); Pa.R.Crim.P. 708(E) ("A motion to modify a sentence imposed after a revocation shall be filed within 10 days of the date of imposition. The filing of a motion to modify sentence will not toll the 30–day appeal period.") ***accord Commonwealth v. Parlante***, 823 A.2d 927 (Pa.Super. 2003). Therefore, if a defendant files a motion to modify his revocation sentence, he does not receive an additional thirty days to file an appeal from the date the motion is denied. Hence, this appeal is untimely as to the sentence imposed at 2267 of 2005.

Moreover, Appellant entered a negotiated guilty plea at 2569 of 2014, and the negotiated sentence was imposed therein. A defendant may not appeal from the discretionary aspects of a sentence where the sentence was entered in accordance with the outlined terms of a negotiated guilty plea. As we observed in ***Commonwealth v. Byrne***, A.2d 729, 735 (Pa.Super. 2003),

> where the guilty plea agreement between the Commonwealth and a defendant contains a negotiated sentence, as is the case herein, and where that negotiated sentence is accepted and imposed by the court, a defendant is not allowed to challenge the discretionary aspects of the sentence. ***Commonwealth v. Reichle,*** 404 Pa.Super. 1, 589 A.2d 1140 (1991). We stated, "If either party to a negotiated plea agreement believed the other side could, at any time following entry of sentence, approach the judge and have the sentence unilaterally altered, neither the Commonwealth nor any defendant would be willing to enter into such an agreement." ***Id.*** at 1141 (quoting ***Commonwealth v. Coles,*** 365 Pa.Super. 562, 530 A.2d 453, 458 (1987)).

Thus, Appellant is not permitted to raise a complaint about the sentence imposed at 2569 of 2014.

Consequently, the only reviewable sentence is the sixteen month to five year term imposed at 3312 of 2013 and made concurrent with the negotiated sentence imposed at 2569 of 2014. We observe that

> A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute. Two requirements must be met before we will review this challenge on its merits. First, an appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. Second, the appellant must show that there is a substantial question that the sentence

> imposed is not appropriate under the Sentencing Code. The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. In order to establish a substantial question, the appellant must show actions by the trial court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.

Commonwealth v. Treadway, 104 A.3d 597, 599 (Pa.Super. 2014) (citations omitted).

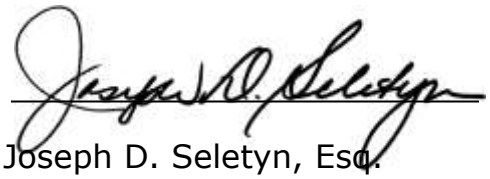
In this case, Appellant's brief contains the concise statement. In it, he raises an excessiveness claim. It is established that a bald claim of excessiveness does not raise a substantial question. ***Commonwealth v. Trippett***, 932 A.2d 188 (Pa.Super. 2007); ***Commonwealth v. Bromley***, 862 A.2d 598 (Pa.Super. 2004). Thus, unless the defendant establishes how his purportedly excessive sentence violates either a specific provision of the Sentencing Code or a particular fundamental norm underlying the sentencing process, it will not be reviewed. ***Trippett***, ***supra***; ***Bromley***, ***supra***.

Appellant's excessiveness position rests solely upon the fact that he received a cumulative sentence in that the one imposed at 2267 of 2005 was consecutive to that imposed at 2569 of 2014. Appellant's brief at 9, 13. Thus, his averments on appeal do not actually relate to the sixteen months to five years that he received at 3312 of 2013 because that sentence was fully concurrent with the other two sentences and did not actually increase the term of his incarceration. As noted, Appellant is not permitted to challenge either the sentence imposed at 2569 of 2014, since that sentence

was a negotiated one, or the one imposed at 2267 of 2005, since his appeal is untimely as to that sentence. Appellant's excessiveness position, to the extent it can apply to the sentence imposed at 3312 of 2013, does not raise a substantial question. Hence, we are compelled to affirm.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/3/2015