

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
HAROLD JOSEPH MOSER,	:	
	:	
Appellant	:	No. 970 EDA 2012

Appeal from the Judgment of Sentence February 3, 2012
 In the Court of Common Pleas of Northampton County
 Criminal Division No(s): CP-48-CR-0002998-2011
 CP-48-CR-0002999-2011

BEFORE: DONOHUE, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED MAY 22, 2013**

Appellant, Harold Joseph Moser, appeals from the judgment of sentence¹ entered in the Northampton County Court of Common Pleas. He alleges that the sentencing court abused its discretion in failing to state legitimate aggravating circumstances upon the record to justify an aggravated range sentence, considering information that he was a repeat

* Former Justice specially assigned to the Superior Court.

¹ Appellant purported to appeal from the orders denying his post sentence motions and motions for reconsideration of sentence. "However, when timely post-sentence motions are filed, an appeal properly lies from the judgment of sentence made final by the denial of post-sentence motions." **Commonwealth v. Kuykendall**, 2 A.3d 559, 560 n.1 (Pa. Super. 2010).

J. S70034/12

offender, and failing to consider the fact that he has cancer. Appellant also avers the sentence is manifestly unreasonable, excessive, and based upon the seriousness of the offense. We affirm.

The trial court summarized the facts and procedural history of this case as follows:

On November 10, 2011, [Appellant] entered a negotiated guilty plea to nine (9) counts of Sexual Abuse of Children (F3), one (1) count of Indecent Assault (M1), and one (1) count of Indecent Exposure (M3), in case number 2999-1011. [Appellant] simultaneously pled guilty to one (1) count of Tampering with Physical Evidence, and one (1) count of Resisting Arrest, in case number 2998-2011. Per the negotiated plea, the Commonwealth withdrew the remaining counts in both cases.

The factual predicate for the plea was a series of incidents in which [Appellant], the nine-year-old Victim's uncle, touched the Victim inappropriately, and took pictures of her in suggestive poses and clothing. The Victim's father died a short time before these incidents occurred. In addition, [Appellant] resisted arrest and attempted to destroy evidence when the police executed their search warrant.

After it accepted the plea, the Court remanded the matter to the prosecutor for presentation to the Sexual Offender Assessment board ("SOAB") for a hearing on whether [Appellant] was a sexually violent predator ("SVP"). The hearing took place on January 31, 2012, and the SOAB determined that [Appellant] was a SVP.

The court sentenced [Appellant] on February 3, 2012. Counsel for [Appellant] argued that [Appellant] did not have a formal criminal history, and noted that prior charges for sexual misconduct had been dropped. In addition, he noted that [Appellant] had recently been diagnosed with thyroid cancer. [Appellant] also exercised his right of allocution, asking the Court for leniency and a chance to make something positive out of his life.

The Commonwealth [] began [its] side of the case with a reference to [Appellant's] SVP designation. [P.S.² ,] the Victim's mother (and [Appellant's] sister, . . .) described the impact of the sexual abuse on her daughter, and implored the Court to impose the maximum possible sentence.

[The Commonwealth] then highlighted questionable portions of [Appellant's] psychosexual evaluation. [W]hile [Appellant] claimed he was trying to "fix his marriage," in reality, his wife had already divorced him. In addition, while [Appellant] claimed during his evaluation that he had never videotaped any of his sexual encounters, he had previously admitted to videotaping himself and his wife having intercourse.

* * *

The Court began its portion of the proceeding by noting for the record that it had reviewed all of the available information in preparation for this sentencing. The Court observed that [P.S.'s] testimony was particularly instructive, in that [Appellant's] conduct would continue to haunt the Victim and her friends and family for the remainder of her life.

. . . Taking all of the circumstances into account, the Court concluded that [Appellant] was a repeat sexual offender who was unfit for society. It therefore imposed the following sentence:

With respect to the resisting arrest and tampering with evidence charges, the Court imposed consecutive sentences of five (5) to ten (10) months of incarceration at a SCI.

The nine (9) counts of sexual abuse of children merged by law. Therefore, on this charge, the Court imposed a consecutive SCI sentence of fifteen (15) to

² We have redacted the name of the child's mother to protect the child's identity.

thirty (30) months, followed by forty-eight (48) months of state probation. In addition, the Court imposed a consecutive charge of twelve (12) to twenty-four (24) months of incarceration, followed by twelve (12) months of state probation on the indecent exposure charge.

Finally, with respect to the indecent assault of a minor charge, the Court imposed a consecutive SCI sentence of fifteen (15) to thirty (30) months of incarceration, followed by twelve (12) months of state probation.

In summary, the Court imposed an aggregate SCI sentence of fifty-two (52) to one hundred four (104) months, followed by seventy-two (72) months of state probation. The Court noted that these were aggravated range sentences. The Court denied [Appellant] RRRI eligibility.

Trial Ct. Op., 7/18/12, at 1-5 (citations omitted).

Appellant filed timely post-sentence motions, which were denied by the trial court. This timely appeal followed. Appellant filed a timely court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal. The trial court filed a responsive opinion.

Appellant raises the following issues in his statement of questions involved for our review:

I. Whether the Lower Court erred as a matter of law or abused its discretion in that it failed to properly state the legitimate aggravating circumstances upon the record so as to justify an aggravated range sentence; and that the Trial Court failed to observe that no such circumstances exist to justify an aggravated range sentence?

II. Whether the Lower Court erred as a matter of law or abused its discretion in that the sentence imposed by this Honorable Court is manifestly excessive and unreasonable; and is not supported by any facts which may properly have

been considered by the Court; and is based only upon the perceived seriousness of the offense to the exclusion of all other relevant facts; and is inconsistent with the Sentencing Code and/or contrary to the fundamental norms underlying the sentencing process?

III. Whether the Lower Court erred as a matter of law or abused its discretion in considering evidence at the time of Sentencing as the Lower Court considered information offered by the District Attorney's Office that [Appellant] was a repeat offender despite having never been convicted of a crime involving children prior to the instant offense?

IV. Whether the Lower Court erred as a matter of law or abused its discretion in that the sentence imposed by this Honorable Court failed to consider [Appellant's] illness in the form of cancer when crafting he (sic) sentence?

Appellant's Brief at 4-5.

Appellant concedes he is challenging the discretionary aspects of his sentence. **See id.** at 11-14.

Initially, we must determine whether [a defendant] has the right to seek permission to appeal the sentencing court's exercise of its discretion. Where a defendant pleads guilty without any agreement as to sentence, the defendant retains the right to petition this Court for allowance of appeal with respect to the discretionary aspects of sentencing.

Commonwealth v. Brown, 982 A.2d 1017, 1018-19 (Pa. Super. 2009).

Instantly, while Appellant pleaded guilty under a negotiated agreement, there was no agreement as to sentence. Thus, we next consider whether Appellant has preserved his claims.

An appeal from the discretionary aspects of sentencing is not guaranteed as a matter of right. ***Commonwealth v. Mastromarino***, 2 A.3d 581, 585 (Pa. Super. 2010).

To reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether [the] appellant filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, Pa.R.Crim.P. 720; (3) whether [the] 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[.]

A substantial question will be found where an appellant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the Sentencing Code or is contrary to the fundamental norms which underlie the sentencing process. At a minimum, the Rule 2119(f) statement must articulate what particular provision of the code is violated, what fundamental norms the sentence violates, and the manner in which it violates that norm.

Id. at 585-86 (citations omitted).

In addition, Pennsylvania Rule of Appellate Procedure 2119(f) requires that "[a]n appellant who challenges the discretionary aspects of a sentence in a criminal matter shall 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. The statement shall immediately precede the

argument on the merits with respect to the discretionary aspects of sentence.”³ Pa.R.A.P. 2119(f).

Instantly, Appellant, in the rule 2119(f) statement contends that the court abused its discretion by failing to state its reasons on the record for a sentence in the aggravated range and basing its sentence “only upon the perceived seriousness of the offense to the exclusion of all other relevant facts.” Appellant’s Brief at 14. This claim raises a substantial question. “An averment that the court sentenced based solely on the seriousness of the offense and failed to consider all relevant factors raises a substantial question.” ***Commonwealth v. Bricker***, 41 A.3d 872, 875 (Pa. Super. 2012).

Appellant addresses issues I. and II. together in the argument section of the brief. Appellant thus does not comply with Pa.R.A.P. 2119(a), which provides: “The argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.” **See** Pa.R.A.P. 2119(a). Furthermore, in the comingled

³ We note that Appellant’s Pa.R.A.P. 2119(f) statement does not immediately precede the argument section of the brief. However, the Commonwealth did not file a brief in the instant case and thus we do not find waiver on this basis. **See *Commonwealth v. Pollard***, 832 A.2d 517, 525 (Pa. Super. 2003) (holding “failure to comply with Rule 2119(f) may be waived if the Commonwealth does not object to the defect.”) .

discussion of issues I. and II., Appellant does not argue that the sentence was based solely on the seriousness of the crime. Thus, this specific claim is waived. "We must deem an issue abandoned where it has been identified on appeal but not properly developed in the appellant's brief." ***Commonwealth v. Rodgers***, 605 A.2d 1228, 1239 (Pa. Super. 1992).

In the argument for issues I. and II., Appellant avers that "[t]he Lower Court deviated from the Standard Guideline range for each sentence without stating the reasons for aggravation for each crime."⁴ Appellant's Brief at 10. "An allegation that a judge 'failed to offer specific reasons for [a] sentence does raise a substantial question.'" ***Commonwealth v. Dunphy***, 20 A.3d 1215, 1222 (Pa. Super. 2011). Thus, we will address this issue. ***See id.***

⁴ We note that while Appellant's argument refers to our crimes code and sentencing code, it does not set forth any case law. ***See*** Appellant's Brief at 9-11.

Pursuant to the Pennsylvania Rules of Appellate Procedure, failure to cite to relevant authority provides a basis for us to find waiver. ***See*** Pa.R.A.P. 2119; ***Commonwealth v. Einhorn***, 911 A.2d 960, 970 (Pa. Super. 2006) (holding that appellant's failure to properly develop claims in brief rendered the claims waived); ***Commonwealth v. Drake***, 452 Pa. Super. 315, 681 A.2d 1357, 1360 (1996) (explaining that this Court will not become the counsel for an appellant, "and will not, therefore, consider issues . . . which are not fully developed in [the] brief[]") (citation omitted). Nevertheless, considering that the trial court addressed Appellant's discretionary sentencing claim . . . , we consider the merits of Appellant's claim.

Commonwealth v. Bowen, 55 A.3d 1254, 1263 n.3 (Pa. Super. 2012).

When reviewing a challenge to the sentencing court's discretion, our standard of review is as follows:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to 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.

Bowen, 55 A.3d at 1263 (citation omitted).

In the instant case, the court considered the factors set forth in 42 Pa.C.S. § 9721(b), which provides:

[T]he court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.

See 42 Pa.C.S. § 9721(b).

Instantly,

the trial court had the benefit of a pre-sentence report, and the trial court stated on the record that it had considered all of the information contained therein. "Our Supreme Court has determined that where the trial court is informed by a pre-sentence report, it is presumed that the court is aware of all appropriate sentencing factors and considerations, and that where the court has been so informed, its discretion should not be disturbed."

See Commonwealth v. Downing, 990 A.2d 788, 794 (Pa. Super. 2010) (citation omitted). Furthermore,

A sentencing court need not undertake a lengthy discourse for its reasons for imposing a sentence or specifically reference the statute in question, but the record as a whole must reflect the sentencing court's consideration of the facts of the crime and character of the offender.

Commonwealth v. Crump, 995 A.2d 1280, 1283 (Pa. Super. 2010).

The sentencing court stated:

[W]e note that the Court identified the following aggravating factors on the record: (1) [Appellant] is a repeat offender; (2) [Appellant] is a poor candidate for rehabilitation; (3) the Victim's vulnerability due to her age; (4) [Appellant's] previous failure with respect to the criminal justice system; and (5) [Appellant's] danger to society at large.

Trial Ct. Op. at 6-7. We submit that each enumerated factor is both a legitimate aggravating factor and adequately supported by the record.

At the sentencing hearing, the court stated that it had received the presentence investigation, psychosexual evaluation and sexual predator evaluation from the sexual offender assessment board. N.T., 2/3/12, at 2. The court further stated that it had reviewed the presentence report. ***Id.*** at 3. Counsel for Appellant stated that he had no changes or amendments for the presentence report or the psychosexual evaluation. ***Id.*** at 5. Appellant's counsel stated that Appellant has a master's degree in education and degrees in mathematics and has worked throughout his life. ***Id.*** at 7.

The court made a finding that Appellant was a sexually violent predator. ***Id.*** at 15. Counsel for Appellant stated that the presentence report included Appellant's criminal history and record. ***Id.*** at 23. He noted

“that the charges of endangering the welfare of children from 2009, and corruption of minors, were dismissed.” **Id.** at 23. He further stated that “the charges of obscene materials from 2009 were *nolle prossed* by the District Attorney’s Office.” **Id.** The Commonwealth noted that “the reports indicate that [Appellant] had child pornography.” **Id.** at 24. Detective Randy Knauss testified. **Id.** at 24. He stated that he investigated Appellant “from 2009 until these recent charges.” **Id.** at 25. He requested that Appellant serve his sentence in a state correctional facility and remain on the sexual predator’s list for the rest of his life. **Id.** at 25.

Victim’s mother testified at the sentencing hearing and described Appellant as follows:

He is a liar, a manipulator, a wife beater, a thief, and a child molester.

* * *

No one in their right mind would molest their niece just several weeks after her father commits suicide. A person who shows no remorse for their heinous crime is the most dangerous. I fear for my daughter’s well-being now that she’s been exposed to a predator.

She has been forever negatively affected by his sick actions. And you have to know that [Victim] is the sweetest and kindest person in our entire family. And my brother has permanently tainted her trust and respect for people.

Even her school teachers have told me that they noticed a difference in [her]. She is more withdrawn and shy, where before she was very outgoing.

* * *

He has proven to us all that he does not want to change his ways, when he did not seek help for this disorder before when he was arrested in 2009. He is obviously a danger to society.

Id. at 17-18.

The sentencing court stated:

Well, let's not mince any words here because I believe that [Appellant's] sister, among all of us here, has a very keen understanding of her brother.

We received information through reports. . . .

I would only be redundant by commenting upon the effect that this has had not only on this youngster, but this youngster's mother, and the continuing denigration of this youngster, as she remembers what happened to her and as she proceeds through life.

[I] have looked over all of these reports, and I have studied them very carefully.

This was an arraignment plea, which your lawyer is saying that on arraignment day, that members of the Court are more apt to accept a lesser penalty because of the early acceptance of responsibility. That's a principle that goes across the discretion of the Court and the sentencing power of the Court.

I have to balance that, however, because I believe at the time you entered the plea, that you just simply avoided a long trial and exposition of the horrendous events that occurred as a result of your molestation of this nine year old, coupled with the other evidence that the prosecution would present about proclivity, your inclination to get involved in this child pornography. . . .

Taking all of that into consideration I conclude, sir, that you re a repeat offender, notwithstanding the fact that the charges were dismissed and some were *nolle prossed*.

That continues to be a reporting event that doesn't mean that you were innocent of the charges. It means that you—that it was *nolle prossed* for reasons that weren't put on this record.

But you are clearly a repeat offender. You do have a felony history. This victim in this case was particularly vulnerable and very young.

You've proven that while you have a good education, you are a very poor candidate to fit into our society.

I conclude, as a result of everything that I have heard today, that you are a danger to us. And independent of your physical problems, there are other issues which I believe cause the court to have an excellent picture of [you].

Id. at 26-28. The court acknowledged that it was sentencing Appellant to aggravated range sentences.

The court provided adequate reasons for the sentence imposed. Instantly, the court considered the facts of the crime and the character of Appellant. **See Crump, supra.** Furthermore, the court considered the presentence report. **See Downing, supra.** We discern no abuse of discretion. **See Bowen, supra.**

Third, Appellant contends the court abused its discretion in considering information that he was a repeat offender when he was not convicted of a similar crime prior to this offense. The claim that the sentencing court considered an improper factor when sentencing in the aggravated range raises a substantial question. **Commonwealth v. Brooks**, 2013 WL 66474 at *3 (Pa. Super. 2013). Therefore, we will address this claim.

It is well-established that

“a proceeding held to determine sentence is not a trial, and the court is not bound by the restrictive rules of evidence properly applicable to trials.” **Commonwealth v. Medley**, 725 A.2d 1225, 1229 (Pa. Super. 1999) (citations omitted). “Rather, the court may receive any relevant information for the purposes of determining the proper penalty.” **Id.** (citations omitted); **see also Commonwealth v. duPont**, 730 A.2d 970, 986 (Pa. Super. 1999) (“in sentencing, a court is not limited only to consideration of information which would be admissible evidence at trial”). Such information may include evidence of prior arrests or criminal conduct, even where a conviction did not arise from that behavior. **See** P.L.S., 894 A.2d at 130 (“the fact that a defendant is guilty of prior criminal conduct for which he escaped prosecution has long been an acceptable sentencing consideration”); **Commonwealth v. Fries**, 362 Pa. Super. 163, 523 A.2d 1134, 1136 (1987) (citing **Commonwealth v. Johnson**, 333 Pa. Super. 42, 481 A.2d 1212, 1214 (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”)).

Id. at *4.

In the case *sub judice*, the sentencing court opined “that a court may, for sentencing purposes, consider a prior arrest that did not result in a conviction, so long as it acknowledges this fact. . . . We submit that the Court observed that limitation in this case and therefore properly applied [Appellant’s] prior criminal history.” Trial Ct. Op. at 7-8. We agree. We discern no abuse of discretion. **See Bowen, supra.**

Lastly, Appellant avers the sentencing court erred because it failed to consider his “illness in the form of cancer when crafting [his] sentence.”

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Appellant's Brief at 5. Appellant addresses this issue in one paragraph. ***Id.*** at 17-18. He fails to argue or cite to any authority to support this assertion, therefore, this issue is waived. ***See Bowen, supra.***

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Sambitt", written over a horizontal line.

Prothonotary

Date: 5/22/2013