

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
ANTWAN BURGESS	:	
	:	
Appellant	:	No. 3058 EDA 2022

Appeal from the Judgment of Sentence Entered May 13, 2019
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0006042-2018

BEFORE: BOWES, J., NICHOLS, J., and KING, J.

MEMORANDUM BY NICHOLS, J.:

FILED JANUARY 18, 2024

Appellant Antwan Burgess appeals from the judgment of sentence imposed following his convictions for persons not to possess firearms and firearms not to be carried without a license.¹ On appeal, Appellant challenges the discretionary aspects of his sentence. After review, we affirm.

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

On February 27, 2018, while on this court's probation on multiple dockets for robbery, aggravated assault, violations of the uniform firearms act ("VUFA"), criminal conspiracy, and possession with intent to distribute ("PWID")[,], Appellant . . . appeared in a video on social media, in which he could be seen holding what appeared to be an operable firearm. The video was filmed on the 600 block of Creighton Street in Philadelphia. Philadelphia Police Officers saw the video, and recognized Appellant, who they knew to be prohibited from carrying firearms. A search warrant was executed at 681 Creighton Street, and officers recovered multiple firearms,

¹ 18 Pa.C.S. §§ 6105(a)(1), and 6106(a)(1), respectively.

including one matching the gun Appellant brandished in the video. As a result of this incident, Appellant was arrested and charged with VUFA offenses. Appellant entered into a non-negotiated guilty plea before this [c]ourt to VUFA offenses [in the instant case at trial court Docket No. 6042-2018] on December 12, 2018.

On May 13, 2019, following a joint sentencing and [violation of probation (VOP)] hearing, this court found Appellant to be in direct violation of its probation [at trial court Docket Nos. 403661-2002 and 12933-2015] and imposed an aggregate VOP sentence of five to ten years of confinement.^[2] [In the case at bar, 6042-2018], this court imposed a sentence of eleven and one-half to twenty-three months of confinement followed by eight years of probation for VUFA [18 Pa.C.S. § 6105(a)(1)], and a consecutive seven years of probation for VUFA [18 Pa.C.S. § 6106(a)(1)], to run concurrently to the VOP sentences.^[3]

Appellant filed an untimely *pro se* motion for reconsideration of sentence on October 10, 2019. Appellant filed a second untimely

² The aggregate VOP sentences of five to ten years of incarceration were imposed at trial court Docket Nos. 403661-2002 and 12933-2015. We note that Appellant filed timely appeals at 403661-2002 and 12933-2015, which were docketed at Superior Court Docket Nos. 1986 EDA 2022 and 1987 EDA 2022, respectively. Those appeals will be addressed in a separate memorandum (J-S36024-23).

³ During the sentencing hearing, the trial court stated that it was imposing a sentence of six to twelve years of incarceration followed by eight years of probation for persons not to possess firearms, and a consecutive term of seven years of probation for firearms not to be carried without a license. **See** N.T. Sentencing Hr'g, 5/13/19, at 14. However, the written and signed sentencing order stated that the trial court sentenced Appellant to a term of eleven and one-half to twenty-three months of incarceration, followed by eight years of probation for persons not to possess a firearm, and a consecutive seven-year term of probation. **See** Sentencing Order, 5/13/19. Generally, if there is a discrepancy between the sentence imposed in open court and the trial court's written sentencing order, the written sentencing order controls. **See Commonwealth v. Kremer**, 206 A.3d 543, 550 (Pa. Super. 2019); **Commonwealth v. Brooker**, 103 A.3d 325, 329 n.4 (Pa. Super. 2014). In its brief, the Commonwealth acknowledges this discrepancy, notes that it did not challenge it, and concedes that the written sentencing order controls in this matter. **See** Commonwealth's Brief at 3.

pro se motion for reconsideration on February 14, 2020, which this court treated as a petition pursuant to the Post Conviction Relief Act^[4] (“PCRA”). PCRA counsel was appointed, and on January 6, 2022, filed an amended PCRA petition. This court granted relief and reinstated Appellant’s post-sentence motion and appellate rights [*nunc pro tunc*] on June 27, 2022. Appellant filed post-sentence motions on all cases on July 7, 2022, and filed a timely notice of appeal to the Superior Court of Pennsylvania on the VOP matters on July 26, 2022 (1986 EDA 2022 and 1987 EDA 2022).^[5]

Trial Ct. Op., 1/31/23, at 1-2 (some formatting altered).

On November 2, 2022, Appellant’s post-sentence motion in the instant case was denied by operation of law, and Appellant filed a timely notice of appeal. Both the trial court and Appellant complied with Pa.R.A.P. 1925.

On appeal, Appellant raises the following issue:

Whether the trial court erred when, after Appellant . . . entered a non-negotiated (open) guilty plea, it sentenced [Appellant] to 11.5 months to 23 months [of] incarceration, to be followed by 8 years [of] probation, for (F2) persons not to possess firearms and 7 years [of] probation, for (F3) firearms not to be carried without a license, to be served consecutively, as this sentence was manifestly excessive and unreasonable, due to the length of time of incarceration and probation, and did not take into consideration 42 Pa.C.S. § 9721(b) (“General Standards”), due to the

⁴ 42 Pa.C.S. §§ 9541-9546.

⁵ Appellant filed the appeals in the VOP cases on July 26, 2022 because, unlike the case at bar, the filing of a post-sentence motion for reconsideration of a VOP sentence does not toll the appeal period. **See Commonwealth v. Flowers**, 149 A.3d 867, 871 (Pa. Super. 2016) (explaining that, generally, although the filing of a post-sentence motion extends the appeal period until after the motion is decided, the filing of a motion to modify a VOP sentence does not toll the thirty-day appeal period); Pa.R.Crim.P. 708(E), 720(A); Pa.R.A.P. 903(a).

rehabilitative needs of [Appellant] and the considerable amount of mitigation that was presented at sentencing?

Appellant's Brief at 4 (formatting altered).

Appellant's claim relates to the discretionary aspects of sentencing. Specifically, Appellant argues that his sentence was manifestly excessive in light of Appellant's mental health issues and drug and alcohol problems, and the trial court failed to take into consideration Appellant's rehabilitative needs under 42 Pa.C.S. § 9721(b). **See** Appellant's Brief at 20-24.

"[C]hallenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right." **Commonwealth v. Derry**, 150 A.3d 987, 991 (Pa. Super. 2016) (citations omitted). Before reaching the merits of such claims, we must determine:

(1) whether the appeal is timely; (2) whether Appellant preserved his issues; (3) whether Appellant's brief includes a [Pa.R.A.P. 2119(f)] concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is inappropriate under the sentencing code.

Commonwealth v. Corley, 31 A.3d 293, 296 (Pa. Super. 2011) (citations omitted).

"To preserve an attack on the discretionary aspects of sentence, an appellant must raise his issues at sentencing or in a post-sentence motion. Issues not presented to the sentencing court are waived and cannot be raised for the first time on appeal." **Commonwealth v. Malovich**, 903 A.2d 1247, 1251 (Pa. Super. 2006) (citations omitted); **see also** Pa.R.A.P. 302(a)

(stating that “[i]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal”).

“The determination of what constitutes a substantial question must be evaluated on a case-by-case basis.” **Commonwealth v. Battles**, 169 A.3d 1086, 1090 (Pa. Super. 2017) (citation omitted). “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.” **Commonwealth v. Grays**, 167 A.3d 793, 816 (Pa. Super. 2017) (citation omitted).

Here, the record reflects that Appellant preserved his issue by raising it in his *nunc pro tunc* post-sentence motion, filing a timely notice of appeal and court-ordered Rule 1925(b) statement, and including a Rule 2119(f) statement in his brief. **See Corley**, 31 A.3d at 296. Further, we conclude that Appellant has raised a substantial question for our review by alleging the trial court failed to consider mitigating factors and, that the court imposed a manifestly excessive sentence. **See Commonwealth v. Raven**, 97 A.3d 1244, 1253 (Pa. Super. 2014) (explaining that a claim asserting that the sentencing court imposed an excessive sentence in conjunction with a claim that the court failed to consider mitigating factors raises a substantial question); **Commonwealth v. Fullin**, 892 A.2d 843, 847 (Pa. Super. 2006) (holding that that a substantial question existed where the appellant claimed

that the trial court failed to properly consider the factors set forth in 42 Pa.C.S. § 9721(b)). Accordingly, we will review the merits of Appellant's claim.

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. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Raven, 97 A.3d at 1253.

Moreover, "[w]hen imposing a sentence, the sentencing court must consider the factors set out in 42 Pa.C.S. § 9721(b), [including] the protection of the public, [the] gravity of offense in relation to impact on [the] victim and community, and [the] rehabilitative needs of the defendant." **Fullin**, 892 A.2d at 847 (citation omitted and formatting altered). "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. Schutzues**, 54 A.3d 86, 99 (Pa. Super. 2012) (citations omitted).

The trial court must also consider the applicable sentencing guidelines. **Fullin**, 892 A.2d at 848. However, "where the trial court is informed by a [presentence investigation] PSI [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.” ***Commonwealth v. Edwards***, 194 A.3d 625, 638 (Pa. Super. 2018) (citation omitted and formatting altered).

The balancing of the sentencing factors is the sole province of the sentencing court, which has the opportunity to observe the defendant and all witnesses firsthand. ***See Commonwealth v. Kurtz***, 294 A.3d 509, 536 (Pa. Super. 2023), *appeal granted on other grounds*, --- A.3d ---, 289 MAL 2023, 2023 WL 7123941 (Pa. filed Oct. 30, 2023). In conducting appellate review, this Court “cannot reweigh sentencing factors and impose judgment in place of [the] sentencing court where [the] lower court was fully aware of all mitigating factors[.]” ***Id.*** (citation omitted).

“Generally, Pennsylvania law affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. [An a]ppellant is not entitled to a ‘volume discount’ on his multiple convictions by the imposition of concurrent sentences.” ***Commonwealth v. Brown***, 249 A.3d 1206, 1216 (Pa. Super. 2021) (citations omitted and formatting altered).

Here, in its Rule 1925(a) opinion, the trial court explained:

[T]his [c]ourt considered the Sentencing Guidelines when formulating . . . Appellant’s sentence. The Sentencing Guidelines, when they are applied, are only mandatory to the extent that they must be considered when sentencing. Although a sentencing court is not required to follow the guidelines, it is obligated to provide, on the record, a statement of the reason or reasons for deviation from the Guidelines. Appellant has a prior record score (“PRS”) is RFEL. VUFA § 6105(a)(1), the lead offense, has an offense gravity score (“OGS”) of ten. Thus, the guidelines call for

a [minimum] sentence of seventy-two to eighty-four months of confinement, plus or minus twelve months for aggravating or mitigating circumstances. The sentence of eleven and one-half to twenty-three months of confinement, followed by eight years of probation, is in fact below the recommended range. VUFA § 6106(a)(1) has an offense gravity score of nine, making the recommended sentencing range sixty to seventy-two months of confinement, plus or minus 12 months for aggravating or mitigating circumstances. The sentence of seven years of probation also falls below the recommended range.

To the extent that Appellant is dissatisfied with his aggregate sentence, . . . this court considered all relevant factors, and determined that Appellant's multiple convictions and the fact that he was flaunting his illegal possession of a firearm on social media show that he has no intention of stopping his criminal conduct. This court is particularly concerned that Appellant committed a firearms offense while on its probation for robbery and aggravated assault, showing that he has no appreciation for the seriousness of his criminal history, or for the danger illegally possessed firearms pose to public safety.

The record also directly contradicts Appellant's claims that this court did not consider his rehabilitative needs or the mitigation presented. This court specifically stated that it considered the arguments of counsel and the [PSI] reports in fashioning its sentence. In addition, Appellant spoke at length prior to sentencing. This court considered all of this and determined that a state sentence followed by a lengthy period of probation was necessary because previous attempts at rehabilitation had failed. Specifically, this court stated that "[y]ou've been with me for a while. I know about you. I tried county sentences. They have not worked. I've tried other forms of rehabilitation in the form of JFK and the Community Mental Health and those things seem to have not work[ed], so I am left to try to still make you a productive member of society, but I have to move to a higher level. A higher level means taking you into the state supervision." [N.T. Sentencing Hr'g, 5/13/19, at 13.] Similarly, this court believes that, upon leaving prison, Appellant requires substantial supervision, as he poses a substantial threat to public safety.

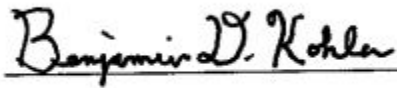
Trial Ct. Op., 1/31/23, at 3-4 (formatting altered and some citations omitted).

Following our review of the record, we discern no abuse of discretion by the trial court, nor legal error in its imposition of Appellant's sentence. **See *Raven***, 97 A.3d at 1253. Further, the trial court ordered a PSI report, which it reviewed prior to sentencing. **See** N.T. Sentencing Hr'g, 5/13/19, at 13. Therefore, we presume that the trial court was fully aware of the mitigating factors and considered them when imposing Appellant's sentence. **See *Edwards***, 194 A.3d at 637; **see also *Kurtz***, 294 A.3d at 536. In addition to the PSI report, the trial court expressly considered the sentencing guidelines, and the factors set forth in Section 9721, including Appellant's rehabilitative needs. **See** N.T. Sentencing Hr'g at 13. Accordingly, we will not re-weigh the trial court's consideration of the relevant sentencing factors on appeal. **See *Commonwealth v. Macias***, 968 A.2d 773, 778 (Pa. Super. 2009) (explaining that the appellate court cannot reweigh sentencing factors and impose judgment in place of sentencing court where lower court was fully aware of all mitigating factors).

On this record, we have no basis upon which to conclude that the trial court abused its discretion in imposing Appellant's sentence. **See *Edwards***, 194 A.3d at 637; ***Fullin***, 892 A.2d at 849–50; **see also *Brown***, 249 A.3d at 1216 (noting that a defendant is not entitled to a “volume discount” on his multiple convictions by the imposition of concurrent sentences” (citations omitted)). For these reasons, Appellant is not entitled to relief, and we affirm the judgment of sentence.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 1/18/2024