

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

vs.

WESLEY RUSSITANO,

Defendant

:  
:  
: NO. 1218-2007  
:  
:  
: 1925(a) OPINION

Date: **December 18, 2007**

**OPINION IN SUPPORT OF THE ORDER OF SEPTEMBER 12, 2007 IN COMPLIANCE  
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Defendant Wesley Russitano, (hereafter “Russitano”), has appealed this court’s sentencing order of September 12, 2007, arguing that the court abused its discretion by imposing a manifestly unreasonable sentence of 13 to 48 months of State Incarceration. Russitano also argues that the court abused its discretion by imposing sentence without a previously requested psychological evaluation to allow the consideration of mitigating evidence. Russitano’s appeal should be denied and the sentencing order affirmed.

**I. BACKGROUND**

On August 13, 2007, Russitano pleaded guilty to the following charges: Count 3, Simple Assault by Physical Menace, 18 § 2701(a)(3); Count 4, Criminal Mischief, 18 § 3304(a)(2); Count 5, Disorderly Conduct, 18 § 5503(a)(1); Count 7, Harassment, 18 § 2709(a)(3); and Count 9, Cruelty to Animals, 18 § 5511(c). Within the guilty plea findings and order, the court ordered a presentence investigation, (“PSI”), be completed by the Adult Probation Officer prior to sentencing. In directing the PSI be obtained the court also requested Adult Probation to arrange

for Russitano to undergo a psychological evaluation and, if available, a neuropsychological assessment.

On September 12, 2007, this court sentenced Russitano on charges 3, 4, and 5 to a term of confinement in a State Correctional Institution. On Count 3 Russitano received a minimum term of 11 months and a maximum of 24 months, on Count 4 a term of one month to 12 months, and Count 5 one month to 12 months. The court ordered these sentences to run consecutively to one another resulting in a total sentence of 13 to 48 months of state incarceration. The court also ordered Russitano to pay a \$250.00 fine under Count 1, a \$150.00 fine under Count 9, and full restitution to the victims in the following amounts: Rebecca Peters \$1,293.11; Daniel Maneval \$250.00; and Allstate Insurance Company \$1,850.00.

On September 28, 2007, Russitano filed a Motion to Reconsider Sentence Nunc Pro Tunc and Request for Hearing to Determine Restitution. Within that motion Russitano argued that he notified defense counsel on September 27, 2007 that he wanted his sentence reconsidered and disputed the restitution determined at the time of sentencing. Russitano specifically argued that the court erred in sentencing him without first ordering a psychological evaluation and that his sentence was excessive. This court denied Russitano's motion on October 1, 2007 stating that reasons for the sentence were set forth in the record. We also noted the restitution amount had not been disputed at the time of sentencing and must be imposed by law.

On October 8, 2007, Russitano's Notice of Appeal to Superior Court was filed. On October 9, 2007 this court filed an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing Russitano to file a Concise Statement of Matters Complained of on Appeal within fourteen days of the order. On October 24, 2007, Russitano filed by and through his attorney, Janan Tallo, a Concise Statement of Matters Complained of on Appeal.

In the Concise Statement of Matters, Russitano asserts the following issues on appeal:

- (1) The trial court abused its discretion by imposing a manifestly unreasonable sentence of 13 to 48 months of State Incarceration for the offenses of Simple Assault by Physical Menace, Criminal Mischief, Disorderly Conduct, and Cruelty to Animals.
- (2) The sentence is manifestly unreasonable because the Defendant was sentenced without a previously Court ordered psychological evaluation thereby denying him the opportunity to present mitigating evidence at sentencing.

## **II. DISCUSSION**

Contrary to Russitano's assertions, the court did not abuse its discretion by imposing a manifestly unreasonable sentence because: (1) the sentence is within the standard sentencing guidelines; (2) the court took into consideration previous supervision violation in formulating its sentencing order; (3) the court considered the pre-sentence investigation; (4) Russitano's attitude, as shown through his demeanor in court and evidence presented by the Commonwealth, exhibited a threat and general lack of remorse and appreciation of the seriousness of the offenses; and (5) sufficient evidence of Russitano's present mental state was presented at sentencing, rendering a psychological evaluation unnecessary in imposing sentence.

Sentencing is a matter vested in the discretion of the trial court and it will not be disturbed absent an abuse of that discretion. *Commonwealth v. Miller*, 2003 PA Super 395, 835 A.2d 377, 380 (Pa. Super. 2003). An abuse of discretion is not merely an error in judgment, but occurs when the record discloses that the sentencing court misapplies or overrides the law, exhibits partiality, bias or ill will, or reaches a conclusion that is manifestly unreasonable. *Commonwealth v. Smith*, 543 Pa. 566, 673 A.2d 893 (1996). "[A] sentencing court must state on the record its reasons for imposing sentence." *Id.*; 42 Pa.C.S.A. § 9721(b). "Nevertheless, a

lengthy discourse on the trial court's sentencing philosophy is not required." *Commonwealth v. McAfee*, 2004 PA Super 143, 849 A.2d 270, 275 (Pa. Super. 2004). Rather, the record as a whole must reflect the court's reasons and its meaningful consideration of the facts of the crime and the character of the offender. *Commonwealth v. Anderson*, 2003 PA Super 290, 830 A.2d 1013, 1018, 1019 (Pa. Super. 2003).

The court stated on the record its rationale for imposing the 13 to 48 months sentence upon Russitano, and this rationale is not manifestly unreasonable. Appellate review of the trial court's determination of sentence is only permitted when the defendant establishes to the appellate court's satisfaction that a "substantial question" exists as to whether the sentence "violates a particular provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing process." *Commonwealth v. Johnson*, 2005 PA Super. 108, 873 A.2d 704, 708 (Pa. Super. 2005), 42 Pa.C.S.A. § 9781(b). "Only where the appellant has provided a plausible argument that the sentence is contrary to the Sentencing Code or fundamental norms underlying the sentencing process does a substantial question exist." *Commonwealth v. Simpson*, 2003 PA Super. 260, 829 A.2d 334, 336 (Pa. Super. 2003). "When a sentence falls within the standard range of sentences prescribed by the Pennsylvania Commission for Sentencing Guidelines, a challenge to that sentence will not normally establish the existence of a 'substantial question' for appellate purposes." *Commonwealth v. Kimbrough*, 2005 PA Super 140, 872 A.2d 1244, 1263-1264 (Pa. Super. 2005).

The sentence in this case is within the standard range for the sentencing guidelines. The District Attorney determined Russitano's prior offense score to be a three due to seven misdemeanor supervision violations. Notes of Testimony, 09/12/2007, pg. 15-16. Based upon this prior record score, the standard minimum range for simple assault, a misdemeanor of the

second degree, is one to twelve months incarceration. Russitano received a minimum sentence of eleven months for that offense. The standard minimum sentence range for the criminal mischief offense, a misdemeanor of the 3<sup>rd</sup> degree, is one to three months incarceration. Russitano received a minimum sentence of one month for that offense. The standard minimum sentence range for the disorderly conduct offense, a misdemeanor of the 3<sup>rd</sup> degree, is also one to three months incarceration. Russitano received a minimum sentence of one month for this offense as well. These three sentences are each within the standard guidelines. Furthermore, Russitano has articulated no specific circumstances which would cause the application of the guidelines to be unreasonable.

This court noted at the time of sentencing that state incarceration was warranted in this case because Russitano's prior parole violations were being considered in determining where Russitano should serve his sentence. N.T. 09/12/2007, pg. 5. Altogether there were seven supervision violations consisting of alcohol abuses and two prior "assault-type" offenses against two separate women. N.T. 09/12/2007, pg. 13-14, 16. The court noted that given the number of the county supervision violations, even a minor charge would have warranted a sentence of state incarceration. N.T. 09/12/2007, pg. 18. As the county parole violations justified a sentence of state incarceration and the sentences themselves were within the standard range of the sentencing guidelines, the sentence imposed was not manifestly unreasonable.

The court properly considered the pre-sentence report supplied by the Adult Probation Office, the report from the county prison, and the report furnished by the West Branch Drug and Alcohol Abuse Commission prior to sentencing. N.T. 09/12/2007, pg. 3-4. The Supreme Court has stated that "[w]here pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and

weighed those considerations along with mitigating statutory factors....Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed." *Commonwealth v. Devers*, 519 Pa. 88, 101-02, 546 A.2d 12, 18 (1988). The court noted that the pre-sentence reports prepared by the Adult Probation Office as well as the West Branch Drug and Alcohol Abuse Commission demonstrated that Russitano had an alcohol abuse problem while under supervision. N.T. 09/12/2007, pg. 14. The Adult Probation Officer at the hearing, Scott Metzger, opined that Russitano would not be an appropriate candidate for State Intermediate Punishment, ("State IP"), due to his lack of understanding regarding the seriousness of his alcohol abuse and anger issues. N.T. 09/12/2007, pg. 14. As the court evaluated these pre-sentencing reports on the record prior to sentencing, the court's discretion should not be disturbed.

The court was also presented with evidence at sentencing that Russitano was not remorseful, did not understand the seriousness of the crimes committed and was likely to commit further harm to himself and the community. At sentencing the Commonwealth presented and the court entered into evidence a letter written by Russitano to his long time friend, Bonnie Cane. Exhibit #1, N.T. 09/12/2007, pg. 8. Russitano had sent the letter on September 2, 2007, shortly before his sentencing on September 12, 2007. N.T. 09/12/2007, pg. 10. The relevant part of the letter was read into the record and contained language amounting to a threat by Russitano toward the victim under the current charges, Rebecca Peters. N.T. 09/12/2007, pg. 11. In relevant part the letter stated that Russitano had hired a private investigator to follow the victim and document her actions which, in Russitano's words, would allow him to "tear her apart like a feather in a windstorm." N.T. 09/12/2007, pg. 11. The letter then read, "Bonnie, if I lose, I'll blank that blank. This state isn't even big enough for blank to hide in." N.T. 09/12/2007, pg. 11. The

Commonwealth indicated to the court that the word “kill” was scratched into one of the blank spaces so the sentence would have read “I’ll *kill* that blank.” N.T. 09/12/2007, pg. 11.

The court also found Russitano’s demeanor and tenor to show a lack of remorse and understanding toward the seriousness of his crimes. N.T. 09/12/2007, pg. 18-19. The court noted that Russitano was rolling his eyes toward the ceiling and appeared apathetic during the proceedings. N.T. 09/12/2007, pg. 18-19. The court also noted Russitano’s current course of actions toward himself and others was “next to causing somebody’s death” including his own if he did not seek immediate treatment. N.T. 09/12/2007, pg. 19. The court found his attitude to be consistent with the contents of the letter presented at sentencing. Ex #1, N.T. 09/12/2007, pg. 18.

Russitano’s attitude also lost him the chance to discuss State IP. The court asked Russitano if he would like to request State IP and he declined. N.T. 09/12/2007, pg. 16. Shortly before the final sentencing order was made, Russitano changed his mind and requested State IP. N.T. 09/12/2007, pg. 19. The court denied Russitano’s request finding the time for such considerations had passed. N.T. 09/12/2007, pg. 19. Given the evidence of Russitano’s mental state contained in the letter combined with his attitude at sentencing, the sentence imposed is appropriate as Russitano posed a threat to himself and to the community.

The court’s decision to impose sentence without having Russitano complete a psychological evaluation was not manifestly unreasonable nor an abuse of discretion. Although at the time of the guilty plea the court felt completion of the assessment before sentencing would provide useful information. The court found the information before the court at sentencing was sufficient to impose a reasonable sentence without the evaluation. The August 13, 2007 guilty plea order requested Adult Probation to arrange for a psychological evaluation including a

neuropsychological assessment if possible. N.T. 08/13/2007, pg. 17-18. At the time of the September 12, 2007 sentencing, the psychological evaluations had not yet been completed. N.T. 09/12/2007, pg. 16. Scott Metzger, the Adult Probation Officer, explained that the evaluation could not have been completed within the 30 day time frame between the guilty plea order and sentencing because the evaluations normally take two to three months to complete. Metzger also explained that the evaluation could not have been completed within the given time period because only one psychologist was performing them in the county and that doctor was already booked with several prior court requests. N.T. 09/12/2007, pg. 17.

Although the psychological evaluation could not be arranged by Adult Probation, the court found the pre-sentencing reports, the letter, Russitano's demeanor as well as the seriousness of the crimes before the court, sufficient to formulate an appropriate sentence. Specifically the threat Russitano posed to himself and the community as expressed in the letter presented at sentencing justified the court's sentence as reasonable. The letter gave the court incite into Russitano's thoughts about the crimes he had committed and revealed that he not only failed to recognize the seriousness of the crimes, but intended on taking retaliatory measures against the victim. The court recognized that given Russitano's unremorseful and volatile feelings toward his actions and the victim, any psychological evaluation or treatment that took place would best serve Russitano and the community if it were undertaken while he was incarcerated. Given the apparent threat Russitano posed to himself and others, the court ordered the State Correctional Institution to proceed with a neuropsychological evaluation at its earliest opportunity and to carry out appropriate programming for Russitano while he was incarcerated. N.T. 09/12/2007, pg. 21. Under the circumstances and evidence presented within the letter and



other reports, sentencing Russitano without first obtaining a psychological evaluation was not manifestly unreasonable.

For the foregoing reasons, the court's sentencing order of September 12, 2007 should be affirmed and Russitano's appeal dismissed.

BY THE COURT,

William S. Kieser, Judge

cc: Janan Tallo, Esquire  
DA  
Judges  
Rebecca Penn, Esquire (Law Clerk)  
Gary L. Weber, Esquire (Lycoming Reporter)