IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
v.	**:**	**No.: 912-2008; 913-2008**
	:	**CRIMINAL DIVISION**
JAMAR ANDREWS,	**:**	**APPEAL**
Defendant	**:**	

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

The Defendant appeals this Court's Sentencing Order dated February 2, 2009, amended on February 18, 2009, and amended again on February 23, 2009. The Court notes a Notice of Appeal was timely filed on March 9, 2009 and that the Defendant's Concise Statement of Matters Complained of on Appeal was filed on March 3, 2009. Defendant asserts two main issues on appeal: (1) that the Court abused its discretion in imposing sentence; (2) that the Court failed to consider certain mitigating factors when imposing its sentence and gave undue weight to aggravating factors; (3) that the Court incorrectly found the unloaded gun was in "close proximity" to the drugs; and (4) the Court incorrectly applied the five year handgun mandatory twice.

Background

On October 3, 2008, the Defendant pled guilty to the following under information 912-2008: one count of Possession with the Intent to Deliver (cocaine), two counts of Possession with the Intent to Deliver (heroin), one count of Delivery of a Controlled Substance (cocaine), two counts of Delivery of a Controlled Substance (heroin), and one count of Criminal Use of a Communication Facility. The Defendant also pled guilty to the following under information 913-

2008: two counts of Criminal Conspiracy, one count of Possession with the Intent to Deliver (heroin), one count of Possession with the Intent to Deliver (cocaine), one count of Possession of a Controlled Substance (heroin), one count of Possession of a Controlled Substance (cocaine), and one count of Persons Not to Use, Manufacture, Control, Sell or Transfer Firearms. The Plea Agreement was open. The Defendant was put on notice of the mandatories that applied for weight of the drugs used in drug trafficking and the weapon mandatory. Defendant was sentenced before this Court February 2, 2009 at which time he received an aggregate sentence of twenty-five and a half (25 ½) years to forty-six (46) years in a State Correctional Institution. Defendant filed a timely Motion to Reconsider Sentence which was denied by this Court on February 19, 2009.

Discussion

Defendant contends in his Statement of Matters Complained of on Appeal that the Court abused its discretion in imposing sentence.

When a Defendant is challenging the discretionary aspects of his sentence, there is no absolute right to appeal the sentence imposed. 42 Pa.C.S.A. § 9781(b). The Defendant is required to show there is a substantial question that the sentence imposed is not appropriate under the sentencing code. Id. "A bald claim of excessiveness of sentence does not raise substantial question so as to permit review where the sentence is within the statutory limits." Commonwealth v. Petaccio, 764 A.2d 582, 587 (Pa. Super. Ct. 2000). See also Commonwealth v. Jones, 613 A.2d 587, 593 (Pa. Super. 1992) (en banc). "In order to establish a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process."

Commonwealth v. Fiascki, 886 A.2d 261, 263 (Pa. Super. Ct. 2005). The trial court's sentence will stand unless there is a manifest abuse of discretion. To demonstrate an abuse of discretion, "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." Commonwealth v. Perry, 883 A.2d 599, 602 (Pa. Super. Ct. 2005).

The Court did not abuse its discretion in imposing sentence and believes the Defendant's allegations do not raise a substantial question that his sentence was inappropriate. The Defendant entered into an open guilty plea to the following under information 912-2008: one count of Possession with the Intent to Deliver (cocaine), two counts of Possession with the Intent to Deliver (heroin), one count of Delivery of a Controlled Substance (cocaine), two counts of Delivery of a Controlled Substance (heroin), and one count of Criminal Use of a Communication Facility. The Defendant also pled guilty to the following under information 913-2008: two counts of Criminal Conspiracy, one count of Possession with the Intent to Deliver (heroin), one count of Possession with the Intent to Deliver (cocaine), one count of Possession of a Controlled Substance (heroin), one count of Possession of a Controlled Substance (cocaine), and one count of Persons Not to Use, Manufacture, Control, Sell or Transfer Firearms. The total statutory maximums for all of the offenses are 109 years; Defendant received an aggregate sentence of twenty-five and a half (25 ½) years to forty-six (46) years. The Defendant was also put on notice that there were also several mandatory sentences that applied. Furthermore, the Defendant had a prior record. As the plea was open and the Court was bound by the applicable mandatories the Court did not abuse its discretion when imposing its sentence. As the Defendant sets forth no specific claim as to how the Court has abused its discretion, his claim has no merit.

The Defendant failed to consider mitigating factors when imposing its sentence and gave undue weight to aggravating factors

Defendant contends that the Court failed to consider certain mitigating factors when imposing its sentence and gave undue weight to aggravating factors.

'"[A]n allegation that a sentencing court failed to consider or did not adequately consider certain factors does not raise a substantial question that the sentence was inappropriate. Such a challenge goes to the weight accorded the evidence and will not be considered absent extraordinary circumstances.'" Petaccio, 764 A.2d at 587 (quoting Commonwealth v. Urrutia, 653 A.2d 706, 710 (Pa. Super. 1995).

The Court believes the Defendant's allegations do not raise a substantial question that his sentence was inappropriate. Further, based upon a review of the transcript, the Court believes Defendant's assertion without merit. At the time the Defendant was sentenced, the Court was aware the Defendant entered his plea without the benefit of a plea agreement which saved the County time and expense, that the Defendant did not exit the home possessing a handgun when shots were fired by a third party outside the home, and that the handgun located in the home was unloaded and no bullets were located. The Court also considered the applicable mandatory sentences for the crimes, the photograph of the Defendant with his son holding money and flashing gang signs and the fact that the house contained large quantities of multiple types of drugs. The court also noted the fact that this is the largest or one of the largest heroin seizures in Lycoming County, and that the Court wanted to send a strong message to the community that this type of behavior will not be tolerated. Finally, the Court sentenced the Defendant in the standard range for the offenses which did not carry mandatories because the Defendant pled open. The Court's decision was based upon all of the information received by the Court;

therefore, the Court did not fail to consider mitigating factors when imposing its sentence or give undue weight to aggravating factors.

The Court incorrectly found the unloaded gun was in close proximity to the drugs

Defendant contends that the Court incorrectly found the unloaded gun was in close proximity to the drugs when the gun was found in the basement in a boot without any ammunition and the drugs were on a different floor in the house in the refrigerator.

The Court relied on Commonwealth v. Sanes, 955 A.2d 369 (Pa. Super. Ct. 2008) in finding that the unloaded gun found in a boot in the basement of the house the Defendant was staying at was in close proximity to the drugs. In Sanes, the Defendant and his girlfriend were in bed together and a quantity of cocaine was in a plastic bag on top of the dresser and a fully loaded 9mm handgun was inside a box in the closet of the same room. Id. at 371. The Superior Court found those facts to be sufficient to satisfy the statute with regard to close proximity. Id. The Court also noted that while only persuasive the United States Court of Appeals for the Eighth Circuit found that drugs on one floor and a handgun and cash on another floor was a minimal distance and was sufficient for close proximity. United States v. Williams, 10 F.3d 590, 592-96 (8th Cir. 1993).

When sentencing the Defendant, the Court found that there was a sufficient nexus existing between the drugs and the firearm to support the handgun enhancement. The Court found that this was a drug house, that

> proceeds of drugs or drug paraphernalia [was found] from the attic to the basement and that the Defendant and his co-Defendant were coming out of the basement at the time they were taken into custody, which meant that they were in close proximity to the firearm that was contained in the basement at the time that they were taken into custody, and, in fact, if you – if I take what the Defendant's paramour would of said that I thought

> I heard something coming in the basement, it sounds to me as though that was a regular entry and exit for that building along with perhaps a front door or any other doors so that equally accessible were items contained in the basement as they were in the attic.

N.T. 2/2/09, pg. 30-31. The Court considered the legislative intent and the case law in relation to the facts of this case to find that the gun was in close proximity to the drugs. Therefore, the Court believes it did not err in finding the handgun was in close proximity to the drugs.

The Court incorrectly applied the five year handgun mandatory twice

Finally, Defendant contends the Court incorrectly applied the five year handgun mandatory twice pursuant to 42 Pa.C.S. § 9712.1 due to the presence of two different controlled substances found in his home.

The applicable statute states in relevant part that

> Any person who is convicted of a violation of . . . The Controlled Substance, Drug, Device and Cosmetic Act, when at the time of the offense the person or the person's accomplice is in physical possession or control of a firearm, . . . or in close proximity to the controlled substance, shall likewise be sentenced to a minimum sentence of at least five years of total confinement.

42 Pa.C.S. § 9712.1(a).

In applying the handgun mandatory twice pursuant to the statute, the Court again looked to the legislative intent. The Court noted that the statute quoted Senator Piccola who stated that

> it is a severe problem particularly in the cities of the Commonwealth and will act as a deterrent for those who deal in drugs and use firearms. It does not and I repeat this does not provide for the mandatory minimum if the individual is only possessing drugs. It requires that they be dealing in drugs and in possession of a firearm before the mandatory would apply.

N.T. 2/2/09, pg. 30. Based upon this intent the Court believed it would be an "absurd result to just say, okay now, you can't use firearms and drugs in trafficking or you're subject to a mandatory, but you can only get punished once." Id. at 31. The Court found that the mandatory

would apply equally to any and all substances of sufficient quantity offered for sale that were contained in the home as well as the mandatory when a firearm was found in close proximity to those drugs. Therefore, the Court did not err in applying the five year handgun mandatory twice, and as such the decision should be affirmed.

Conclusion

As none of the Defendant's contentions appear to have merit, it is respectfully suggested that the Defendant's sentence be affirmed.

By the Court,

Dated: _____ Nancy L. Butts, Judge

xc: DA (EL)
Joel McDermott, Esq.
Trisha D. Hoover, Esq. (Law Clerk)
Gary L. Weber, Esq. (LLA)