

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No.: 1856-2009
	:	
v.	:	
	:	CRIMINAL DIVISION
BRYAN NICHOLAS GIACOMI,	:	
Defendant	:	

OPINION AND ORDER

The Defendant filed a timely Post-sentence Motion on May 8, 2012. Argument on Defendant's Motion was held on June 25, 2012. Defendant argues that the Court's sentence of ten (10) years consecutive probation following the period of incarceration imposed constitutes a manifestly excessive sentence.

Background

On December 21, 2009, Bryan Giacomi (Defendant) pled guilty to Burglary, a felony of the first degree. On March 4, 2010, this Court Sentenced the Defendant for the Burglary and a parole violation. Impact Statements offered by the victims of the Defendant's Burglary count were read by the Court into the record at the sentencing hearing. The victim impact statements revealed that the Defendant broke into the victim's home on two occasions prior to the Burglary incident up for sentencing.

The Court determined at the hearing that the Defendant had a prior record score of four (4) and that the Defendant was not eligible for Recidivism Risk Reduction Incentive due to a Terroristic Threats conviction. The statutory maximum on the burglary charge was twenty (20) years. The Court sentenced the Defendant to eighteen (18) to thirty-six (36) months in jail with

consecutive seventeen (17) years probation under the supervision of the Pennsylvania Board of Probation and Parole.

On March 16, 2010, the Defendant filed a Motion for Reconsideration of Sentence which was denied by this Court on March 23, 2010. On March 25, 2010, the Defendant filed a Notice of Appeal with the Superior Court of Pennsylvania. On November 30, 2010, the case was remanded to this Court for the Defendant to be resentenced. The Superior Court stated that this Court “abused its discretion in imposing a 17-year term of probation in this matter.” On April 1, 2011, this Court reduced the Defendant’s period of consecutive supervision to ten (10) years. At the resentencing the Court re-read the victim’s impact statement into the record.

The Defendant filed a PCRA on February 22, 2012 and this Court appointed Donald F. Martino, Esquire to represent him. The Defendant stated in his Petition that he wanted his counsel to appeal his re-sentence but his counsel did not. After a PCRA conference this Court reinstated the Defendant’s right to file a Post Sentence Motion and a direct appeal. On May 17, 2012, the Defendant filed a Post-Sentence Motion with the single issue of whether this Court’s sentence of ten (10) years consecutive probation following the period of incarceration imposed constitutes a manifestly excessive sentence.

Discussion

The Court’s sentence was manifestly excessive

Defendant contends that his sentence was manifestly excessive. When imposing a sentence, a court must consider the factors set forth in 42 Pa.C.S.A. § 9721(b). The sentencing guidelines are “advisory, not binding on the court.” Commonwealth v. Walls, 926 A.2d 957, 962-63 (Pa. 2007). “Nevertheless, if the court sentences a defendant outside those guidelines, the court must provide a contemporaneous written statement setting forth its reasons for the

deviation therefrom.” Commonwealth v. Feucht, 955 A.2d 377 (Pa. Super. 2008). A court is able to meet this requirement by placing its reasons for departure on the record during sentencing. Id. (citing Commonwelath v. Littlehales, 915 A.2d 662, 666 (Pa. Super. 2007)). “When a sentencing court deviates from the sentencing guidelines, it is important that the court reflect a consideration of the sentencing guidelines, the background and character of the defendant, the circumstances of the crime, and impose a sentence that is consistent with the protection of the public and the rehabilitative needs of the defendant.” Commonwealth v. Ortega, 539 A.3d 849 (Pa. Super. 1988).

Here, the statutory maximum for felony one Burglary is twenty (20) years. As the offense has an offense gravity score of nine (9) and the Defendant has a prior record score of four (4), the standard guideline range was thirty-six (36) to forty-eight (48) months. The Defendant was sentenced below the statutory maximum but outside the guidelines when he was re-sentenced to eighteen (18) months to thirty-six (36) months in a state correctional institution with a period of ten (10) years consecutive probation. As stated above, a court is able to depart from the sentencing guidelines if they place reasons for the departure on the record during sentencing. Here, the Court stated on the record during sentencing:

What made me want to sentence you to 17 years of probation was because of your immature attitude, of your belief that you basically did nothing wrong, that you – it was not a big deal to you and that based upon the impression I had from you at the [original] sentencing hearing that you were probably just going to go back and do what it was that you wanted to do when you got out of wherever it is that you were going to do because it was no big deal and under 9721 of the Judiciary Code, which is the sentencing section, the Court has the responsibility in terms of fashioning a sentence to consider a number of different things, protection of the public, the gravity of the offense in relation to the impact on the victim and the community, and the rehabilitative needs of the defendant. I believe that to me the most important factor in those three was the gravity of the offense in relation to the impact on the victim and the community, meaning, they wanted you to go to jail for 10 to 20 years. They wanted the statutory maximum, but I felt that that was not an appropriate sentence in light of your age, your past criminal history even thou you had a prior record score of four. I just felt that the total confinement wasn’t required.

What I believe, and again like I said, because of your attitude I believe that what you needed was a lengthy period of supervision because if you weren't going to be able to monitor your own behavior because of your lack of maturity then the Pennsylvania Board of Probation and Parole could do that for you and that's why I picked 17 years. . . . I'm happy to report that based upon my conversation with you I believe that a period of supervision is required, but it sounds as though in the time since I last saw you that you have grown up, that you have accepted responsibility for what you did and now have an actual personal appreciation for what you did. I'm not going to sentence you to a consecutive 17 years of supervision. I have available to me 17 years, but I'm going to put you on supervision for a period of ten years. . . . I still think you need a lengthy period of supervision because of your history, because of the age in which you were when you started your criminal history as a juvenile and as an adult

Resentence, 4/1/2011, p.14-18. Throughout the re-sentencing this Court emphasized the impact on the victims, the Defendant's lack of remorse, and the Defendant's criminal history.¹ Further, this Court addressed other factors including the fact that the Defendant broke into the victim's home on two prior occasions, that he was already on probation when he committed the Burglary, and that he was previously removed from the Drug Court Program due to technical violations. Id. at 3-9. The Court also considered that the Defendant started school for computer technology and had been working in a warehouse in prison. Id. at 10. This Court adequately considered and addressed multiple factors on the record prior to re-sentencing the Defendant.

In Feucht, the trial court departed upward from the sentencing guidelines for the sentence of Indecent Assault. Commonwealth v. Feucht, 955 A.2d 377, 385-86 (Pa. Super. 2008). The defendant had no criminal record, had participated in alcohol rehabilitation, and had acknowledged wrongdoing. Id. The Pennsylvania Superior Court affirmed the departure because of the impact of the crime on the victim and because the crime was ongoing over an extended period of time. Id.

¹ The victim stated, in part, that "the most important thing he took from us was our peace of mind. Obviously locked windows and doors do not deter him and thus do not keep our property safe. In summary, we have been violated financially and emotionally." Resentence, 4/1/2011, p 6.

While the review of sentencing is done on a case-by-case basis, the facts in Feucht indicate that this Court was not unreasonable in its departure from the guidelines. Here, the victim was greatly impacted and the Defendant broke into the victim's home twice before being charged with the current crime. Moreover, the Defendant had an extensive criminal history and showed no remorse for his crime. See also Commonwealth v. Hoch, 936 A.2d 515, 520 (Pa. Super. 2007) (upholding a sentence based on an unusual burglary and mental health issues); Commonwealth v. Allen, 24 A.3d 1058, 1065 (Pa. Super. 2011) (determining that consideration of the victim, gravity of the offense, protection of the public, and lack of past rehabilitation was adequate to uphold a sentence). This Court had the opportunity to observe the Defendant during his plea and sentencing and believes it was absolutely correct to depart from the sentencing guidelines.²

Finally, this Court did address the fact that if the Defendant continued to improve and show remorse that it would consider changing the sentence to five (5) years of probation in the future.

If it turns out that in the first five years your adjustment to supervision is excellent, you have a job or as Miss Longo said you got your education, you're employed, you're not using controlled substance, you got significant clean time under your belt, I have absolutely no problem because I'll still have the authority to change the sentence. I have absolutely no problem if after five years you make a request to the Board and say you don't need to supervise me any more.

Resentence, 4/1/2011, p.17. This Court, however, did not feel as if that was an appropriate sentence for the Defendant at that time. It was stated that the Defendant, who has a criminal and drug history, still needed the further supervision to ensure that he makes correct decisions after

² The Pennsylvania Superior Court relied heavily on Ferguson in finding that this Court abused its discretion in the first sentence of seventeen (17) years of probation. Commonwealth v. Ferguson, 893 A.2d 735 (Pa. Super. 2006). In that case, the defendant was given a probationary term of thirty-six (36) years and would have been nearly sixty (60) by the time he was released from probation. Here, the Defendant was given ten (10) years of probation and would be in his early thirties when off of probation. Further, in Ferguson, the Court stated that probation up to fifteen (15) years would still assist in rehabilitative needs but that anything more would be dubious.

incarceration. Therefore, this Court believes that the sentence imposed on the Defendant is reasonable and appropriate.

Conclusion

Based upon the foregoing, the Court finds no reason upon which to grant Defendant's Post-Sentence Motion. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4)(a), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of this Order to the Pennsylvania Superior Court; "(b) the right to assistance of counsel in the preparation of the appeal; (c) the rights, if the defendant is indigent, to appeal in forma pauperis and to proceed with assigned counsel as provided in Rule 122; and (d) the qualified right to bail under Rule 521(B)."

ORDER

AND NOW, this _____ day of July, 2012, based upon the foregoing Opinion, it is hereby ORDERED and DIRECTED that the Defendant's Post Sentence Motion is DENIED.

By the Court,

Nancy L. Butts, Judge

xc: DA (KO)
Don Martino, Esq.