

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	CR-280-2013
	:	OTN: L763841-1
v.	:	
	:	2021 MDA 2014
BENJAMIN BRITFORD,	:	
Defendant	:	CRIMINAL APPEAL

OPINION AND ORDER

Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

This Court issues the following Opinion and Order pursuant to Pennsylvania Rule of Appellate Procedure 1925(a). This is an appeal from an Order imposing sentence upon Benjamin Britford on October 28, 2014 and the Court's denial of Defendant's post-sentence motion on November 18, 2014.¹ On January 8, 2014, Defendant plead no contest to Count 1, criminal conspiracy (to deliver heroin), an ungraded felony, and Count 2, criminal use of a communications facility (to arrange the sale of heroin), a felony of the third degree. Defendant plead guilty to Count 3, delivery of a controlled substance (heroin weighing between one gram to less than five grams), a felony, Count 4, possession with intent to deliver (with a firearm within reach or in close proximity at the time of the offense), an ungraded felony, Count 5, criminal use of a communication facility (to arrange the sale of heroin), a felony of the third degree, Count 6 receiving stolen property, a felony of the second degree, and County 7, possession with intent to deliver (with a firearm in close proximity to the controlled substance), an ungraded felony.² In

¹ The Order imposing sentence was filed October 28, 2014.

² 35 P.S. §903(a)(1); 18 Pa. C.S.A. § 7512; 35 P.S. §780-113 (a)(30); 35 P.S. §780-113 (a)(30); 18 Pa. C.S.A. § 7512; 18 Pa. C.S.A. § 3925(a); 35 P.S. §780-113 (a)(30). On January 7, 2014, the Information filed against Benjamin Britford was amended to add the following language: For Count 3 – TO WIT: in the course of committing this offense, the defendant possessed a quantity of heroin weighing between one (1) gram to less than five (5) grams. For Count 4- TO WIT: At the time of the offense a firearm was within the Defendant's reach or in close proximity to the controlled substance. For Count 7- TO WIT: At the time of the offense a firearm was in close proximity to the controlled substance.

his concise statement of matters complained of on appeal, Defendant raises the issue of whether the Trial Court abused its discretion when imposing sentence.³

On October 28, 2014, this Court sentenced Defendant within the standard range of the recommended guidelines. The Court notes that the sentences on the criminal conspiracy counts run concurrent to the related counts. In addition, the Defendant was made RRRI eligible, making him eligible for a lesser minimum sentence.

In support of the sentence, this Court respectfully relies upon its Order imposing sentence dated October 28, 2014. In addition, this Court respectfully submits the following opinion.

As there is no absolute right to appeal, a defendant appealing the discretionary aspects of a sentence must raise a substantial question that the sentence is inappropriate. 42 Pa. C.S. § 9781(b). The appellate court initially determines whether a substantial question to the appropriateness of the sentence has been raised to warrant review a sentence. See Commonwealth v. Mouzon, 812 A.2d 617, 627 (Pa. 2002), *citing*, Commonwealth v. Cappellini, 456 Pa. Super. 498, 690 A.2d 1220, 1227 (Pa. Super. 1997). A sentence that is against fundamental norms of the sentencing process can raise a substantial question that the sentence should be reviewed as inappropriate even when the sentence is within the sentencing guidelines. Commonwealth v. Mouzon, 812 A.2d 617 (Pa. 2002). However, bald allegations of

³ In his post sentence motion filed on November 14, 2014, Defendant contends that, even though sentenced within the guidelines, the sentence was excessive and was not within the fundamental norms of the sentencing process. In his post sentence motion, the Defendant further contends that the Court failed to consider several factors at sentencing and “fashioned his sentence in a manner which applied the mandatories.” In that motion, the Defendant further asserted that the Commonwealth abandoned pursuit of the mandatories. In response, this Court notes that it did **not** sentence the Defendant to serve the time that would have been required by the mandatory sentences under 18 Pa. C.S. § 7508 and 42 Pa. C.S. § 9712.1. Although the Defendant plead to the facts giving rise to the mandatories, thereby eliminating the Constitutional concerns raised in Alleyne v. United States, 133 S.Ct. 2151, 186 L. Ed. 2d 314 (2013), the Court agreed with Counsel that Defendant was not subject to the mandatory sentences where the statutes imposing the mandatories had been deemed unconstitutional by the Superior Court. *See*, Commonwealth v. Newman, 99 A.3d 86 (Pa. Super. 2014). The Court further notes that the Commonwealth never abandoned pursuit of the mandatories; indeed after sentence was imposed, the Commonwealth noted for the record its objection to not imposing the mandatory minimums. N.T, 8/28/14, at 22:19-20.

excessiveness are insufficient to raise a substantial question unless the manner in which “the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process” is articulated. *See, e.g., Mouzon, supra*, 812 A.2d at 627-628, *citing, Koehler*, 737 A.2d at 244; *Saranchak*, 675 A.2d at 277 n. and *Goggins*, 748 A.2d at 727.

In the present case, the Defendant’s concise statement of matters complained of on appeal provides a bald assertion that the Court abused its discretion when imposing sentence. However, Defendant does not specify how the discretion was abused. Defendant’s post-sentence motion asserts that the Court “fashioned his sentence in a manner which applied the mandatories as there were no aggravating factors to justify his excessive sentence.” Defendant’s Post-Sentence Motion, ¶ 8. At the same time, Defendant concedes that the Defendant “was sentenced within the guidelines.” Defendant’s Post-Sentence Motion, ¶ 8. Defendant does not explain why the sentence, which he concedes is within the guidelines, should be considered excessively harsh in this particular case. Defendant does not assert that this “case involves circumstances where the application of the guidelines would be clearly unreasonable” pursuant to 42 Pa.C.S. § 9781(c)(2). Had the Court applied the mandatory minimum sentences, the sentence would have been much harsher, as the mandatory minimum for some of the counts would have been five years. This Court does not believe the Defendant has articulated a violation of either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process. Therefore, this Court does not believe that Defendant presented a substantial question that the sentence was inappropriate

Even if Defendant sufficiently raised a colorable claim of a substantial question, this Court believes that the sentence is appropriate. Sentencing is within the discretion of the

sentencing judge and will not be disturbed absent an abuse of discretion. See Commonwealth v. Rodda, 723 A.2d 212, 214 (Pa. Super. 1999)(en banc) Additionally, in Commonwealth v. Fullin, 892 A.2d 843 (Pa. Super. 2006), our Superior Court held that:

[w]hen imposing a sentence, the sentencing court must consider the factors set out in 42 Pa.C.S.A. § 9721(b), that is, the protection of the public, gravity of offense in relation to impact on victim and community, and rehabilitative needs of the defendant.... And, of course, the court must consider the sentencing guidelines. *Id.* at 847-48 (citations omitted).

In the present case, there is no dispute that sentence was within the sentencing guidelines. In the absence of specifics as to how the Court abused its discretion, this Court provides the following discussion explaining the reasons for the sentence imposed. As noted in the Court's Order, the Court considered the appropriate factors when sentencing the Defendant and specifically addressed the protection of the public, the gravity of offense in relation to impact on the community, the rehabilitative needs of the defendant and the sentencing guidelines as required by 42 Pa.C.S.A. § 9721(b). Specifically the Order provides the following.

The Court has, in making this sentence, considered the presentence investigation and the Court has considered the multiple incidents of drug dealing and the firearms found on or about the scene. The Court believes that the drug and gun danger in our community is substantial. The court believes the sentence is necessary to deter further similar drug dealing conduct. See 10/28/14 Order, at 2-3.

Defendant plead no contest to the offense described in the police affidavit as arranging the sale of \$120 worth of heroin with an exchange to take place at or near an apartment complex in the community on February 1, 2013. The Court notes that the offense gravity scores for the related offenses were 5 and 6. The Defendant plead guilty to the drug related offenses occurring on February 6-7, 2013. According to the police affidavit, Defendant made arrangement by text to sell 50 bags of heroin for \$350 at a Kmart parking lot. At the Kmart parking lot, Defendant

parked his vehicle near the confidential informant's vehicle and delivered 41 bags of heroin to the informant in the informant's vehicle. At the time of the transaction, there was a firearm in Defendant's vehicle. A search of the Defendant's residence revealed 3 additional bundles of heroin, a digital scale, packaging material two handguns and one shotgun. One of the handguns was stolen. The Court notes that the relevant offenses have a gravity score ranging from 5 to 8. It is also noted that the Defendant used a fictitious name for the transactions.

During the period of about ten months, while released on bail and awaiting sentencing, Defendant appears to have taken encouraging steps toward rehabilitation. The Defendant is to be commended for reaching out to youth to help them avoid the same mistakes he has made. Unfortunately, Defendant's expressed change of heart and positive steps cannot erase the gravity of the offenses that were committed or the risks Defendant's actions posed to the public. As the Court noted, there are consequences to dealing heroin in the proximity of firearms in public places and keeping drugs and multiple firearms in a residence. The Court believes that its sentence provided an appropriate balance with regard to protection of the public, the gravity of offense in relation to impact on the community, and the rehabilitative needs of the defendant.

For these reasons, and those provided in this Court's Order imposing sentence on October 28, 2014, this Court respectfully requests that the sentence be affirmed.

BY THE COURT,

January 16, 2015
Date

Richard A. Gray, J.

cc: District Attorney's Office
Public Defender's Office
(Superior & 1) (Superior & 1)