

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	CR-1878-2014
	:	
v.	:	
	:	1309 MDA 2015
DAVID CARTER,	:	
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 P.R.A.P. 1925(a). This is an appeal from an Order imposing sentence upon Defendant, David Carter, on July 9, 2015 (Order, 7/9/15). In his concise statement filed on August 12, 2015, Mr. Carter raises one issue for appeal as follows.

1. The Court abused its discretion when it sentenced Defendant because it did not take into account the mitigated reasons for sentencing presented by the Defendant at the sentencing hearing.

On July 9, 2015, following a sentencing hearing, the Court sentenced Carter within the sentencing guidelines. Specifically, as to count 1, persons not to possess, a felony of the second degree, the court sentenced Carter to serve a minimum of five (5) years and maximum of ten (10) years incarceration in the State Correctional Institution.¹ Five years represents the lowest end of the standard range for a person not to possess given the offense gravity score (OGS) of 10 and Carter's prior record score (PRS) of 5. In accordance with a plea agreement, the sentence for count 2, possession with intent to deliver (PWID), an ungraded felony, in which the Court sentenced Carter to serve a minimum of twelve months and a maximum of twenty-four months, runs concurrently to the sentence for count 1. Such sentence was within the six to sixteen month

¹ Due to a clerical error, the order dated July 9, 2015 erroneously listed the minimum as six years, which was corrected to five years by an Order dated July 31, 2015. N.T., 7/9/15 at 17:14.

standard range for an OGS of 3 and a PRS of 5. Moreover, it ran concurrently to count 1 in accordance with the plea agreement. Carter was ineligible for RRRI.

By information filed on December 5, 2014, the Commonwealth charged Carter with count 1, persons not to possess, use manufacture, control sell or transfer firearms, a felony of the second degree, count 2, possession with intent to deliver, a felony, count 3, possession of a controlled substance, (marijuana) a misdemeanor, and count 4 possession of drug paraphernalia, a misdemeanor.² The offenses occurred on or about October 18, 2014 at Carter's residence.

Upon motion of the Defense, without objection from the Commonwealth, on April 2, 2015, the Court severed the firearm charge, count 1, from the remainder of the charges. On that same date, Carter waived his right to a jury trial on Count 1. On April 21, 2015, the Court declared a mistrial as to counts 2-4. Following a non-jury trial on April 21, 2015 as to count 1, the Court entered a verdict of guilty against Carter for the firearm charge. On May 12, 2015, the Court accepted a guilty plea entered by Carter on count 2, possession with intent to deliver a controlled substance (marijuana, second or subsequent conviction), an ungraded felony. Upon motion of the Commonwealth at the time of sentencing, all charges not disposed of or which do not merge for the purpose of sentencing were dismissed.

On July 9, 2015, this Court considered the presentence investigation report (PSI) and the mitigating factors presented at the sentencing hearing, and sentenced Carter well within the standard range of the recommended guidelines. *See*, Notes of Transcript, July 9, 2015, (N.T., 7/9/15), at 2:8-9; Order, 7/9/15). In support of the sentence, this Court respectfully relies upon its reasons stated in its Order imposing sentence dated July 9, 2015 and respectfully submits the following opinion.

² 18 Pa. C.S.A. § 6105(A)(1); 35 P.S. §780-113 (a)(30); 35 P.S. §780-113 (a)(16); 35 P.S. §780-113 (a)(32). Upon motion of the Commonwealth, any charges not disposed of or merged for the purpose of sentencing were dismissed in the Court's sentencing Order, 7/9/15.

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). This Court respectfully submits that Mr. Carter has failed to raise a substantial question as to the appropriateness of his sentence.³ “An allegation that the sentencing court failed to consider certain mitigating factors generally does not necessarily raise a substantial question.” Commonwealth v. Moury, 992 A.2d 162 (Pa. Super. 2010) at 171. (citations omitted) *But see*, Commonwealth v. Perry, 883 A.2d 599, 602 (Pa. Super. 2005)(A substantial question was raised where Defendant set forth a plausible argument that sentence violated fundamental norms by his allegation that the sentence was “manifestly excessive,” that the trial court failed to consider substantial mitigating factors, that the trial court focused solely on the serious nature of the offense, and where the defendant lacked a prior criminal record, expressed remorse, desired to make restitution, and was not the principal organizer of the criminal acts.) In the present case, Carter has a prior criminal record, did not express remorse, and was the sole actor of the crimes committed.

If the appellate Court determines that a substantial question was raised warranting a review, this Court submits that it properly considered mitigating factors when fashioning an appropriate sentence. 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

³ Carter’s concise statement of matters complained of on appeal pursuant to Pa. R.C.P. 1925 is overly broad and should constitute waiver. “Issues raised in an overly broad and vague concise statement are waived as being the “functional equivalent” of not being raised at all. *See, e.g., Hess v. Fox Rothschild, LLP*, 2007 PA Super 133, 925 A.2d 798 (Pa. Super. 2007)(citations omitted).

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, the sentence was well within the sentencing guidelines. The sentence on the firearms count was the lowest sentence within the standard range for an individual with a PRS of 5. The second count for PWID ran concurrently to the first and was also within the 6 – 16 month standard range for PWID with an OGS of 3 and a PRS of 5. The Court rejected arguments in favor of an aggravated range sentence as well as arguments in favor of a mitigated range. In doing so, this Court considered the PSI, which it explicitly referred to in its Order, and considered the mitigating and aggravating factors presented at the sentencing hearing. See, (N.T., 7/9/15, at 2:8-9, Order, 7/9/15). The Court considered 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). In the Court's Order imposing sentence, this Court noted the following.

The Court has considered not only the testimony here in court today and the arguments of counsel but also the presentence investigation and specifically the part that indicated previous drug issues and previous firearm charges. The Court believes that drugs are a significant danger and problem in our community as are firearms. The Court notes that there has been no real remorse expressed. Opinion, 7/9/15 at 1.

Further, this Court observed the demeanor of Mr. Carter at the sentencing hearing and his lack of remorse. Mr. Carter had a PRS of 5, was a person not to possess firearms, was on supervision and nonetheless had a firearm in his home which he was laying on top of on a cushion of the couch. At the same time, Carter possessed marijuana with the intent to deliver it. And, at the same time, children were staying at Carter's house overnight. Being on supervision, Mr. Carter had signed and agreed to the condition not to have firearms in his residence. N.T., 4/21/15 (non-jury trial), at 80. A child lived at the residence. N.T., 4/21/15, at 88. When the parole agents

entered the house, Mr. Carter told them right where to find the weapon.” N.T. 4/21/15 at 80, 8-9. The gun was located at the “open top of the cushion, underneath another pillow, underneath Mr. Carter’s rear end as he laid on the couch.” N.T., 4/21/15, at 98. As this Court noted at trial: it is not “credible for any grandmother to allow a loaded gun to lay on the living room couch when grandchildren are coming or about to come to the premises.” N.T., 4/21/15 at 99. The sentence is appropriate given the need for protection of the public from deliver of drugs within the community and from the possession of firearms by individuals with a criminal record involving firearms and drugs, who are not lawfully allowed to possess a firearm. Mr. Carter himself described the neighborhood as having problems with drug dealing and violence. N.T. 7/9/15 at 8.

The Commonwealth sought a sentence in the aggravated range in the amount of a 7 year sentence. N.T., 7/9/15, at 2:11-12. The Commonwealth cited the following reasons for an aggravated sentence. Carter had a prior record score of 5. Carter was on supervision with the board at the time of these offenses. N.T., 7/9/15, at 2:20-24. The firearm and the drugs, possessed with the intent to deliver, were located at Carter’s residence at the same time on the date the offense occurred. N.T., 7/9/15, at 2. Carter was on supervision with the board at the time the firearms and drugs were found in his residence. *Id.* Grandchildren had been at the house the same day. N.T., 7/9/15, at 3:1-8. The Commonwealth further pointed out that Mr. Carter’s health problems did not substantially mitigate the crime; Carter’s prior record score resulted from crimes committed *after* Carter had been shot in 1992. N.T., 7/9/15, at 14-15. In rejecting the Commonwealth’s request for an aggravated sentence, the Court considered the fact that Mr. Carter “had a substantial period of good behavior after his last criminal act in 2006.” Order, 7/9/15 at 2 (unnumbered).

Carter presented argument and testimony as mitigating factors for the Court's consideration. A significant mitigating factor raised was that Carter suffers from serious medical issues since he was shot in 1992.⁴ Carter requires an ileostomy and self catheterization N.T., 7/9/15, at 6. Carter described anticipated problems in that his medical care and needs will be neglected while he is incarcerated. N.T., 7/9/15, at 6-7. Carter described additional privacy issues with regard to his medical needs and care while living in the same cell with another inmate. N.T., 7/9/15, at 6-7. It was further noted that as Carter ages, his medical conditions will likely worsen. In its Order imposing sentence, this Court requested that "the State Correctional Institute when classifying Mr. Carter consider his medical needs in assigning him to an appropriate place of incarceration." Order, 7/9/15 at 2 (unnumbered).

Carter further argued mitigating factors arose from the drugs being marijuana and in smaller amounts than typically seen in PWID. In addition, there was not a large sum of cash at the residence. N.T., 7/9/15, at 4:15-18. Carter further argued that mitigation was supported by no evidence being presented that the gun was used to threaten anyone or evidence of the delivery of drugs from the residence. N.T., 7/9/15 at 4:22-23. Carter argued as a mitigating factor that Carter told the parole agents where the gun and drugs were located when they conducted the home visit of his residence. N.T. 7/9/15 at 4:24-25; 5:1-2.

Carter further argued mitigation with regards to his commission of the offenses based upon the problem of drug dealing and violence in his neighborhood. Carter testified that the gun was needed to protect himself, his wife and his family from neighboring drug dealers who had beaten them badly. N.T. 7/9/15 at 8-9. Carter emphasized that he had gone five years without any trouble. However, Mr. Carter did not really acknowledge any wrongdoing on his part.

⁴ It should be noted that the record supports an inference that Carter was shot in 1992 during the commission of the crime of criminal trespass. N.T., 7/9/15, at 12-15.

Instead, Mr. Carter blamed his neighborhood and circumstances as requiring him to violate the law.

For these reasons, and those provided in this Court's Order imposing sentence on July 9, 2015, this Court respectfully requests that the sentence be affirmed.

BY THE COURT,

October 2, 2015
Date

Richard A. Gray, J.

cc: District Attorney's Office (KO/NI)
Public Defender's Office (JF)
(Superior & 1)