

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : **No. CR-1687-2016**
 :
vs. :
 :
RUDOLF P. STARK, : **Opinion and Order re**
 : **PCRA petition**
Defendant :

OPINION AND ORDER

This matter came before the court on the Post Conviction Relief Act (PCRA) petition filed by Rudolf Stark.

By way of background, Stark was charged with burglary, robbery, unlawful restraint, possession of an instrument of crime (weapon), false imprisonment, simple assault, theft, receiving stolen property, and separate counts of conspiracy to commit each of these offenses. Stark and his girlfriend went to a residence, carrying a bucket and fishing pole. They knocked on the door and a 90-year old woman answered. They engaged the woman in small talk about fishing and then they asked her for paper towels. When the woman turned to assist them, they entered the residence without permission. Stark pointed a black handgun at the victim and demanded money. He took the victim upstairs, made her sit down and then he duct taped her hands and ankles. He and his co-defendant then searched the residence for money. They took some money and the victim's wallet, and then left.

On April 10, 2017, Stark entered a guilty plea to burglary, conspiracy to commit burglary, and robbery, all felonies of the first degree, in exchange for a twelve (12) year minimum sentence. There was no agreement regarding the maximum sentence to be imposed. The court accepted the plea agreement and imposed an aggregate sentence of twelve (12) to forty (40) years' incarceration in a state correctional institution, consisting of

four (4) to fifteen (15) years for burglary, a consecutive three (3) to ten (10) years for conspiracy to commit burglary, and five (5) to fifteen (15) years for robbery. Stark did not file a post sentence motion or an appeal.

Stark filed a PCRA petition in which he asserted that he asked his attorney to appeal his sentence but she failed to do so. He requested reinstatement of his direct appeal rights nunc pro tunc.

At the PCRA hearing, Stark testified that, prior to sentencing, his attorney told him that his maximum sentence should be 24 years, as the maximum is usually double. In his case, however, the maximum imposed was 40 years. He did not speak to his attorney prior to leaving the courtroom; he was in shock. However, once he got back to the prison, he wrote his attorney a letter asking her to file an appeal. A day or two later, he asked a friend to call his attorney and tell her that he wanted to appeal. Stark testified that he never received a response from his attorney, but his attorney told his friend that he was sentenced and there was nothing that could be done anymore. His attorney did not file a post sentence motion or appeal. When he got to state prison and started talking to guys there, they told Stark that if he tells his attorney to appeal, she has to file an appeal.

On cross-examination, Stark admitted that he did not have a copy of the letter he sent to his attorney. He was at the county prison when he wrote the letter. He left the letter on the gate of his cell. A corrections officer (C.O.) would look to make sure there was no contraband in the letter and then seal it. The letter should have been mailed by the C.O. He also indicated that his friend said she called his attorney, but he only knows what the friend said.

After Stark got to state prison, he called his attorney by telephone several times. He asked about an appeal and if anything could be done. He told his attorney that some guys told him he could appeal, and she told him that there was nothing else that could be done. He did not call her from the county prison because the calls from there have to be collect and the attorneys won't accept collect calls.

Stark's attorney, Trisha Hoover Jasper, testified that she did not receive any letter from Stark in which he requested an appeal. If she had received such a letter within the appeal period, she would have filed an appeal. She also did not recall him saying anything on the day of sentencing. She received several phone calls from Stark after he went to state prison. Well after his sentencing and after she returned from maternity leave in February 2018, Stark asked if there was anything that he could do about his maximum sentence, and she believed she told him to file a PCRA. She was surprised Stark wanted to appeal, because he called her frequently and never mentioned that he wanted to appeal before she returned from maternity leave.

Ms. Jasper did not recall any friend of Stark's calling her. If that had occurred, Ms. Jasper would have reached out to Stark to see if he wanted to appeal.

On cross-examination, Ms. Jasper was asked if she had any discussions with Stark about the maximum sentence he could expect to receive. She assumed that she did, because she typically does. She admitted that Stark probably did not expect a 40-year maximum sentence. She was also asked if she had any discussions with Stark about his right to file a post sentence motion and an appeal. She indicated that she had a discussion with him prior to his hearing, but she did not recall if she had one after he was sentenced.

The transcript of the hearing clearly shows that Stark was advised that the maximum was up to the court. N.T., April 10, 2017, at 4. Furthermore, Stark was specifically told that the maximum sentence had to be at least 24 years, but could be as high as 60 years. See N.T., April 10 2017, at 5-6 (“Now I want to make sure you understand the plea agreement. The 12 year minimum I –I would have to give you at least 24 years maximum, because I have to give you at least double that. If I—and I can give you up to the statutory max, I actually could give you 12 years to 60 years.”). The court also advised Stark of his right to file a post sentence motion and an appeal, as well as the time limits for filing such. N.T., April 10, 2017, at 24-25.

PCRA counsel argued that Stark “quite possibly requested an appeal” but even if he did not, counsel was ineffective for failing to have a conversation with him in a timely manner to see if he wanted to appeal or not, as the maximum sentence imposed was beyond that anticipated. Therefore, Stark’s appeal rights should be reinstated nunc pro tunc.

The Commonwealth argued that Stark did not request an appeal until long after the appeal period had expired. Furthermore, the argument that counsel should have consulted with Stark to determine whether he wished to appeal was not raised in the PCRA petition at all. For those reasons, the petition should be denied.

The court finds that Stark never asked his attorney to file a post sentence motion requesting reconsideration of his maximum sentence and he did not ask his attorney to file an appeal within 30 days, despite being advised by the court on the record of the 10-day time limit for filing a post sentence motion and the 30-day time limit for filing an appeal. The court finds that Stark did not wish to appeal until after he spoke with other inmates in

state prison, well after the time period for filing an appeal had expired.

The court also finds Attorney Jasper's testimony more credible than Stark's. Attorney Jasper's testimony is consistent with the timing of the filing of Stark's PCRA petition. Furthermore, despite asserting that he wrote a letter and had a friend call Attorney Jasper to request an appeal, Stark did not present any evidence other than his own testimony to support his assertions. He did not call his friend, Angel, to testify on his behalf or present any evidence from prison officials regarding the letter he allegedly sent or the procedures for sending the letter.

With respect to PCRA counsel's argument that Attorney Jasper was ineffective for failing to consult with Stark regarding his desire to appeal, the court is constrained to agree with the Commonwealth that this issue was not raised in the PCRA petition. Furthermore, ineffectiveness due to a failure to consult with a client about his appellate rights only arises if there were issues of merit to assert on direct appeal or the defendant, in some manner, displayed signs of desiring an appeal. *Commonwealth v. Markowitz*, 32 A.3d 706, 714 (Pa. Super. 2011), *appeal denied*, 40 A.3d 1235 (Pa. 2012).

Stark did not display signs of desiring an appeal to Attorney Jasper until well after the appeal period expired. By both his own testimony and Attorney Jasper's testimony, Stark did not say anything to Attorney Jasper about his sentence or his desire to appeal at the hearing or in the courtroom immediately thereafter. Furthermore, as previously noted, the court found Attorney Jasper's testimony more credible than Stark's.

This issue is complicated by the fact that the issue is a challenge to the discretionary aspects of sentencing, which was not preserved in a timely post sentence

motion. *Commonwealth v. Bishop*, 831 A.2d 656, 660 (Pa. Super. 2003)(“a claim that the sentence imposed by the trial court was manifestly excessive is a challenge to the discretionary aspects of the sentence.”). Discretionary aspects of sentencing are not appealable as of right. *Commonwealth v. Disalvo*, 70 A.3d 900, 902 (Pa. Super. 2013)(“It is well settled that with regard to the discretionary aspects of sentencing, there is no automatic right to appeal.”); *Commonwealth v. Rhoades*, 8 A.3d 912, 916 (Pa. Super. 2010)(“a challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute.”). In order for an appellate court to review the merits of a challenge to the discretionary aspects of sentencing, the appellant must satisfy a four-part analysis, which examines: (1) whether the appeal is timely ; (2) whether the appellant preserved the issue; (3) whether the appellant’s brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentencing; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the sentencing code. *Disalvo, id.*

The court does not believe a challenge to Stark’s maximum sentence has merit in this case.

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, 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. Garcia-Rivera, 983 A.2d 777, 780 (Pa. Super. 2009), quoting *Commonwealth v. Hoch*, 936 A.2d 515, 517-518 (Pa. Super. 2007).

The term “discretion” imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for purposes of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions.

Commonwealth v. Soto, 202 A.3d 80, (Pa. Super. 2018)(quoting *Commonwealth v. Reese*, 31 A.3d 708, 715-716 (Pa. Super. 2011)(en banc)(citations omitted)). The term “unreasonable” commonly connotes a decision that is “irrational” or “not guided by sound judgment.” *Commonwealth v. Walls*, 926 A.2d 957, 963 (Pa. 2007).

The sentencing judge has broad discretion in determining a reasonable sentence, as it is in the best position to view the defendant’s character, displays of remorse, defiance or indifference, and the overall effect and nature of the crime. *Id.* at 961.

Sentences must be consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. *Commonwealth v. Ali*, 197 A.3d 742, 765 (Pa. Super. 2018).

When imposing a sentence, the court is required to consider the particular circumstances of the offense and character of the defendant. *Edwards*, 194 A.3d at 637. The sentencing court “should refer to the defendant’s criminal record, age, personal characteristics and potential for rehabilitation.” *Id.*

The facts and circumstances of the case justified a maximum sentence of 40 years. Stark was forty-six years old at the time of sentencing. N.T. April 10, 2017, at 17. He had an extensive history of burglary and theft related offenses, as well as convictions for possession of contraband by an inmate. *Id.* at 16-17. Stark’s prior record score of 5 did not

adequately reflect Stark's true criminal history. Id. at 17. Stark had been in and out of prison for the last twenty years, but he kept committing crimes. Id. at 18, 21.

This crime was a random act of violence. Stark and his co-defendant randomly selected a house. Id. at 11-12. The occupant of the house was a 90 year old woman. Id. at 12. The crime occurred in the middle of the afternoon. Id. at 16. Stark and his co-defendant used a ruse of needing assistance and when the elderly woman turned to assist them, they entered the residence without permission and Stark pointed a handgun at the woman. Id. at 12-14. In addition to taking the woman's money and wallet, Stark took the woman upstairs and duct taped her hands and ankles. Id. at 14. Stark indicated that he committed the crime because he needed money for rent. Id. at 11-12. Stark was using heroin on the date of incident and for about 8 months prior thereto. Id. at 15, 20.

The court objectively considered all of these facts and circumstances at determined that the protection of the victim and the public as well as Stark's criminal history warranted a lengthy maximum sentence. Specifically, the court stated:

When I impose a sentence I have to look at protecting the community, I have to look at the seriousness of the crime to the extent it's impacted on the victim and the community, and I have to look at your rehabilitative needs. Those are the purposes behind a sentence.

And then in considering an appropriate sentence I have to take into account a whole lot of things. Your prior record score, your—the guidelines, your history and characteristics, the circumstances of the crime, my observations.

It's just another sad chapter in – in the heroin scourge. While many times we – we focus at least on the initial levels with respect to treatment, at –at –at some point that focus has to change, and I believe this is a –that type of case to accountability, to making sure the system protects the innocent.

This was a random act of – of violence against a vulnerable victim. And I'm glad you're ashamed, and you know, I don't say this to be a mean person, but you should be ashamed. You know she was—she was, you know, the most vulnerable of victims, and this scares the heck out of

everybody. You know these random acts are—are just, you know, they—they create an atmosphere in the community where people just isolate themselves, they don't want to go out, and it takes away the – the beauty of living in a small town where you have your doors open and you go out and you see people and you relate to people, but now people have to be afraid.

You have a long history of similar behaviors. I don't know whether you will get out at your minimum, that's up to you, but I do agree that there has to be a substantial maximum to—to keep you under, you know, I don't know if control is the right word, but that's probably what it is. It's –it's two-fold. It's—it's to number one, make sure that you do what you need to do, and number two, for you to know that you have somebody looking at you, and if you don't do what you're supposed to do then they'll just stick you right back in....

Id. at 23-24.

In light of the foregoing, the court does not believe that there was a meritorious sentencing issue to assert on appeal.

ORDER

AND NOW, this ___ day of May 2019, the court DENIES Stark's PCRA petition.

Rudolf Stark is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirement set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Rudolf Stark may lose forever his right to raise these issues.

The Clerk of Courts shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)
Donald Martino, Esquire
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