IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-0000004-2019**
	:	
vs.	:	
	:	
	:	
STEPHEN BRADSHAW,	:	
Appellant	:	**1925(a) Opinion**

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

This opinion is written in support of this court's judgment of sentence dated December 23, 2019. The court notes that, through Post Conviction Relief Act (PCRA) proceedings, it reinstated Appellant's right to appeal nunc pro tunc.

By way of background, Appellant was charged with twenty counts related to the possession and delivery of controlled substances and the criminal use of communication facilities.[1] On October 4, 2019, Appellant entered an open guilty plea to four counts of delivery of heroin, two counts of delivery of cocaine, and four counts of criminal use of a communication facility, arising out of incidents that occurred on November 14, 2018; November 20, 2018; December 3, 2018; and December 10, 2018.[2] Appellant admitted that on November 14, 2018 and November 20, 2018 he delivered heroin to a third party and utilized a cellular telephone to arrange the transactions. Appellant also admitted that on December 3, 2018 and December 10, 2018, he delivered heroin and cocaine to a third person

[1] 35 P.S.A. §780-113(a)(16), (30); 18 Pa. C.S.A. §7512.
[2] In a prior Opinion and Order, the court incorrectly stated that the dates were November 3, 10, 14 and 20.

utilizing a cellular telephone to arrange the transactions.

On December 23, 2019, the court sentenced Appellant to undergo incarceration in a state correctional institution for an aggregate term of eight (8) to twenty (20) years, which consisted of two (2) to four (4) years for each delivery of heroin to be served consecutively to each other.[3]

Appellant filed a motion for reconsideration of sentence. He alleged that his sentence was excessive because: the Commonwealth never made an offer; the court failed to provide sufficient weight to Appellant's good behavior while incarcerated; despite Appellant's minimization of his mental health and substance use disorders, Appellant actually suffers from such; the court did not accord sufficient weight to the fact that Appellant was never convicted of any crimes of violence or of a sexual nature; and Appellant pled guilty and did not proceed to trial. In an Opinion and Order entered on April 7, 2020, the court denied Appellant's motion for reconsideration of sentence.

Although Appellant wished to appeal his sentence, no appeal was filed within thirty (30) days due to a breakdown in communication between Appellant and his plea counsel due at least in part to the pandemic. Through PCRA proceedings, however, the court reinstated Appellant's direct appeal rights nunc pro tunc in an order dated May 25, 2021 and docketed on June 2, 2021.

Appellant filed a notice of appeal on June 23, 2021. In his statement of errors complained of on appeal, Appellant asserts the following issues:

1. The sentence of the court is excessive due to the consecutive application of the sentences;

[3] On each of the remaining counts of delivery of cocaine and criminal use of a communication facility, the court imposed a concurrent sentence of one (1) to three (3) years' incarceration.

2. The court erred in considering the national impact of drug addiction and overdose when imposing sentence, and speculating that individuals may have died as a result of Appellant's conduct;
3. The court erred in determining that Appellant needs to be warehoused and that he is incapable of rehabilitation; and
4. The court erred in discounting the effect of Appellant's mental health problems.

DISCUSSION

> 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 [defendant] 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. Conte, 198 A.3d 1169, 1176 (Pa. Super. 2018) (*quoting Commonwealth v. Zirkle*, 107 A.3d 127, 132 (Pa. Super. 2014)(citations omitted)).

In sentencing an individual, the court must follow the general principle that the sentence imposed should call for confinement that is 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. 42 Pa. C.S.A. § 9721(b). The record as a whole must reflect the sentencing court's consideration of the facts of the case and the defendant's character. *Commonwealth v. Crump,* 995 A.2d 1280, 1283 (Pa. Super. 2010), *appeal denied*, 608 Pa. 661, 13 A.3d 475 (2010).

When a sentencing court has reviewed a PSI, it is presumed that the court properly considered and weighed all of the relevant factors in fashioning the defendant's sentence. *Commonwealth v. Baker,* 72 A.3d 652, 663 (citing *Commonwealth v. Fowler*, 893 A.2d 758, 767 (Pa. Super. 2006)). Furthermore, it is presumed that the court was aware of the

relevant information regarding the defendant's character and weighed those considerations in conjunction with any mitigating factors. *Commonwealth v. Clemat,* 218 A.3d 944, 960 (Pa. Super. 2019).

Appellant first contends that the sentence of the court was excessive due to the consecutive application of the sentences. The court cannot agree.

A sentencing judge has discretion to impose consecutive sentences. 42 Pa. C.S.A. §9721(a)(in determining the sentence to be imposed the court shall consider and select one or more of the listed sentencing alternatives, and may impose them consecutively or concurrently.); *Commonwealth v. Brown*, 249 A.3d 1206, 1212 (Pa. Super. 2021)(the court has the discretion to impose its sentences concurrently or consecutively); *Commonwealth v. Zirkle*, 107 A.3d 127, 133 (Pa. Super. 2014)(imposition of consecutive rather than concurrent sentences lies within the discretion of the sentencing court). The appellate court will not disturb consecutive sentences unless the aggregate sentence is "grossly disparate" to the defendant's conduct, or viscerally appears as patently unreasonable. *Brown*, supra. "[W]here a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code." *Commonwealth v. Griffin*, 65 A.3d 932, 938 (Pa. Super. 2013). Furthermore, a defendant is not entitled to a volume discount for his crimes by having all sentences run concurrently. *Zirkle*, 107 A.3d at 134; *Commonwealth v. Hoag*, 665 A.2d 1212, 1214 (Pa. Super. 1995).

The court reviewed a Pre-Sentence Investigation (PSI) report, a risk/needs assessment, a supervision report from prior supervision, a social assessment prepared at the request of defense counsel, and a report from the Lycoming County Prison. The court also

heard arguments from counsel and a statement from Appellant.

Appellant's prior criminal record consisted of **five** separate prior convictions for the manufacture, delivery or possession with intent to deliver (PWID) a controlled substance, ungraded felonies; a conviction for identity theft, a felony of the third degree; a conviction for possession of a controlled substance, an ungraded misdemeanor; and a conviction for possession of a small amount of marijuana, an ungraded misdemeanor. Appellant was sentenced to probation, county prison and state sentences for his prior convictions. Sentencing Transcript, 12/23/2019, at 3. Nothing deterred Appellant's criminal activities or changed his ways. He just served his sentences and then continued to traffic controlled substances. Most, if not all, of Appellant's crime free periods were explainable by his incarceration. **Id.** at 9. Moreover, Appellant admitted that he did not need the money; he simply wanted to "live comfortably." **Id.** at 4.

Although Appellant does not consider himself an addict, he admitted that he has used drugs for 28 years and he has no desire to stop. Sentencing Transcript, at 4, 6.

Appellant's Prior Record Score (PRS) was five but if the guidelines did not cap the point-score at five,[4] his true score would have been 12. The Offense Gravity Score was six for the deliveries of heroin; it was five for the remaining offenses. Therefore, the standard minimum sentencing guideline ranges were 21 to 27 months for each delivery of heroin, and 12 to 18 months for each of the remaining offenses.

The court imposed consecutive sentences of 2 to 5 years' incarceration for each delivery of heroin, but imposed concurrent sentences of 1 to 3 years' incarceration for

[4] 204 Pa. Code §303.4(a)(3)("Offenders who do not fall into the REVOC or RFEL categories shall be classified in a Point-Score Category. The Prior Record Score shall be the sum of the points accrued based on previous

delivery of cocaine, PWID cocaine, and the four counts of criminal use of a communications facility. All of these sentences were in the middle to bottom end of the standard guideline ranges.

The court did not impose consecutive sentences due to partiality, bias or ill-will. Rather, given Appellant's prior criminal history and opportunities for rehabilitation, it was now time to protect the public. Enough was enough. Under the facts and circumstances of this case, a lengthy prison sentence was appropriate.

As the court noted in its sentencing order:

> [Appellant] wrote a relatively heartfelt and very articulate letter to the [c]ourt setting forth his regret for what he did, his insight into the nature of his behaviors, and how he has learned from his mistakes. The [c]ourt can only question, however, the ability of [Appellant] to make changes. [Appellant] has spent a significant amount of time in jail prior to this, and the [c]ourt is left wanting as to why [Appellant] did not reach such conclusions about his behaviors and his future when he spent years in prison previously. He had available programming, and had certainly enough time to think about where he did not want to be.
>
> [Appellant] does present a significant danger to the public. For over half of his life he has been involved in distributing controlled substances. Despite escalating sanctions[,] [Appellant] has not changed his behaviors. [Appellant] adimitted that he became addicted to the lifestyle, and did not sell controlled substances for any other reasons but to be more comfortable with his financial situation. He indicated he did not need the money, but wanted it.
>
> The cost to the community as a result of [Appellant's] conduct cannot be accurately measured. To say that the community, families, mothers, children, siblings, and even innocent individuals is significant would be an understatement. In 2017 alone[,] over 70,000 people died of drug overdoses in the United States. The [c]ourt can only wonder how many individuals, if any, died as a result of [Appellant's] conduct. The [c]ourt can only wonder, but does not really have to guess how many families and individuals were destroyed as a result of [Appellant's] conduct.
>
> The impact of the offense on the community is significant and cannot really be put in words. Protecting the public under these

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convictions and adjudications, up to a maximum of five points.").

> circumstances is a very high need. [Appellant's] rehabilitation is questionable. While [Appellant] speaks very well in connection with his intentions, his conduct over the past twenty (20) years belies such intentions.
>
> This is a sad day. While many [c]ourts and [j]udges hesitate in being entirely candid, this [c]ourt tries to be as candid as possible. [Appellant] needs to be warehoused. Society needs to be protected. [Appellant] appears to this [c]ourt to be institutionalized and incapable of changing his behaviors despite his insight. In weighing all relevant factors, the [c]ourt has to place the most emphasis on protecting the public.
>
> Yes, drug dealing will be prevalent and continue to exist, and yes others may take [Appellant's] place, but this does not mean that [Appellant] should not be accountable, or that the public should not be protected from [Appellant's] conduct. In the past nineteen (19) years [Appellant] has had eight (8) drug[-]related convictions, and five (5) delivery or possession with intent to deliver convictions. The [c]ourt takes no pleasure in warehousing [Appellant]. The [c]ourt takes no pleasure in impacting his family's life. The [c]ourt takes no pleasure in seeing another young man become a statistic versus an exception. Yet, as [Appellant] properly noted, these were his choices. He did have choices available to him[,] and he chose this route. As defense counsel aptly notes, and unfortunately notes, this is the price of doing business and [Appellant] was well aware of such.

For the foregoing reasons, the court does not believe that the imposition of some consecutive sentences in this case resulted in an excessive sentence.

Appellant next contends that the court erred in considering the national impact of drug addiction and overdose when imposing sentence, and speculating that individuals may have died due to Appellant's conduct. Again, the court cannot agree.

The court's statements in this regard were in response to the minimization of Appellant's drug crimes. The writer of the social assessment indicated that Appellant did not want to further the problem of addiction in our society by continuing to sell drugs because he knows the damage that they cause, but a lengthy state sentence would only warehouse Appellant and perpetuate the vicious cycle prominent in his life. Furthermore, the writer indicated whether Appellant continues to sell drugs or not, the replacement effect will occur

and someone else will take his place. Sentencing Transcript, at 5. Additionally, during the sentencing hearing and in the motion for reconsideration of sentence, defense counsel argued that a lengthy state sentence was not appropriate because Appellant did not have a history of violent crimes or sexual offenses; he just had a history of repeat drug offenses. Sentencing Transcript, at 13-14; Motion for Reconsideration, ¶6(d).

While delivery of heroin is not a "crime of violence" as defined in 42 Pa. C.S.A. §9714(g), it is a crime which negatively affects society greatly and carries a risk of death. At the reconsideration hearing, both defense counsel and the district attorney acknowledged that fact. Defense counsel stated, "Yes this is a problem. This is a horrible problem. Yes many people do die from opiate use." Reconsideration Transcript, 3/16/2020, at 6. The district attorney stated:

> This is an individual that has prior drug delivery convictions, he had a prior protracted state sentence, none of this was a deterrence leading up to the most recent set of charges for which he's subsequently been sentenced. The only thing devoid in this young man's record with respect to drug crimes is a drug delivery resulting in death, and that's fortunate for both him and society.

Id. at 8. Moreover, appellate case law recognizes the dangers inherent with the delivery of opiods. As the Superior Court noted in *Minn. Fire and Cas. Co. v. Greenfield*, 805 A.2d 622, (Pa. Super. 2002), *aff'd* 855 A.2d 854 (Pa. 2004):

> [I]t is certain that frequently harm will occur to the buyer if one sells heroin. Not only is it criminalized because of the great risk of harm, but in this day and age, everyone realizes the danger of heroin use.

805 A.2d at 624; see also *Commonwealth v. Burton*, 234 A.3d 824, 833 (Pa. Super. 2020); *Commonwealth v. Kakhankham*, 132 A.3d 986, 995-96 (Pa. Super. 2015). By repeatedly selling heroin, Appellant was playing Russian roulette with the lives of his purchasers. See

Minn. Fire and Cas. Co. v. Greenfield, 855 A.2d 854, 870-71 (Pa. 2004)(Castille, J., concurring)(the use of illegally-purchased heroin is a modern form of Russian roulette). No one died from his current sales because Appellant sold to undercover officers who never were going to use the substances, but that does not diminish the seriousness of Appellant's offenses or the pervasive nature of Appellant's drug dealing since approximately 1999.

Appellant asserts that the court erred in determining that Appellant needs to be warehoused and he is incapable of rehabilitation. He also asserts that the court erred in discounting the effect of Appellant's mental health problems. The court found that Appellant needs to be warehoused and his rehabilitative needs should be accorded little weight compared to the protection of the public because this was the **sixth** time that Appellant had been convicted of delivery of controlled substances, and he engaged in four separate deliveries of heroin. Although Appellant wrote a heartfelt letter setting forth his regret for what he did, his insight into the nature of his behaviors, and how he has learned from his mistakes, his words rang hollow in light of his behaviors and failure to change during his previous sentences of probation, county incarceration and state incarceration. Actions speak louder than words. Through his actions, Appellant has shown that he cannot or will not stop dealing drugs.

Although Appellant has used controlled substances for 28 years, he has no desire to stop and does not consider himself an addict. Appellant acknowledged that he is like a moth drawn to a flame. What he fails to recognize is that as long as he continues to use controlled substances and have contact with the individuals providing those substances to him, he likely will continue to be drawn to his lifestyle of dealing drugs.

With respect to his mental health problems, the defense provided little or no information regarding those problems. There was a reference in the social assessment that as long as Appellant can remember he has been on disability, he had vision and hearing issues, and a mental health diagnosis but he doesn't know what that diagnosis was. Sentencing Transcript, 12/23/2019, at 4. Appellant also made statements at the reconsideration hearing about his rough home life growing up with drug-addicted relatives in Philadelphia and how due to various difficulties (including abuse), at one point he wanted to take himself off this planet. Reconsideration Transcript, 3/16/2020, at 10. From these statements, one could infer that at least at one point in his life Appellant had issues with depression and thoughts of suicide. However, without knowing Appellant's mental health diagnoses or the treatment he needs, if any, the court could not find that Appellant's mental health problems outweighed the need to protect the public in this case.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: District Attorney
Helen Stolinas, Esq.
The Mazza Law Group, P.C.
2790 West College Ave, Suite 800
State College PA 16801
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)