

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :

v. : **CP-41-CR-0000526-2023**
KEVIN LESLIE SANDY, :
Defendant : **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 October 24, 2023.

Kevin Sandy (Sandy) was charged with two (2) counts of Incest¹ a felony of the second degree. Sandy had a sexual relationship with his adopted daughter over a period of many years resulting in the birth of four children.² Two of those children were born in Lycoming County during the years of 2007 and 2009.³ The victim, Sandy’s adopted daughter, would have been a minor when Sandy began to have sexual intercourse with her in 2002 in another county; she was an adult when the offenses occurred in Lycoming County.

On August 14, 2023 Sandy entered an open guilty plea to both of the incest charges. On October 24, 2023, the court sentenced Sandy to an aggregate of four (4) to eight (8) years to be served

¹ 18 Pa. C.S.A. §4302.

² According to the Pre-Sentence Investigative report (PSI), the children were 5, 9, 13 and 15 at the time the PSI was written.

³ There was a discrepancy regarding which children were born in Lycoming County and in what years. The assistant district attorney at the guilty plea amended the Information to indicate that the offenses occurred in 2007 and 2009; however, the affidavit of probable cause indicated that the parties lived in Lycoming County between 2011 and 2021 and the assistant district attorney at the sentencing hearing stated that it was the third and fourth child that were born in Lycoming County. The court gave Sandy the benefit of the earlier offense dates, which lowered his prior record score. Otherwise, the dates did not have any impact on the sentencing guidelines or Sandy’s registration requirements.

in a State correctional institution.⁴ The court also directed that Sandy have no contact with the victim and the children of this relationship.

Sandy filed timely post sentence motions on November 3, 2023, in which he sought a reduction of his sentence and the removal of the condition prohibiting Sandy from having contact with his biological children. On February 29, 2024 the court modified its original sentencing order to permit Sandy to have contact with his children once they reach the age of 18 years.

Sandy filed a timely appeal to the Superior Court on March 28, 2024. The court directed Sandy to file a concise statement of errors complained of on appeal. On April 22, 2024 Sandy filed his concise statement in which he asserted two issues:

1. Defendant respectfully avers that the Honorable Court abused its discretion when it sentenced the Defendant to four (4) to eight (8) years in a State Corrections Institute because the Sentencing Court did not fully consider the Defendant's physical condition at the time of sentencing.
2. Defendant respectfully avers that this Honorable Court abused its discretion when it ordered a parole condition of no contact by the Defendant with the Defendant's children who were not victims of the Defendant's criminal conduct that the Defendant was convicted of.

Sandy first alleges that the court abused its discretion in imposing a 4–8-year sentence because the court did not consider his physical condition. In Sandy's post sentence motion, he alleges that he has heart issues along with the need to use 'a litany' of electronic devices to keep him alive for which incarceration would interfere.

⁴Since the offenses occurred in 2007 and 2009, Subchapter I of the Judicial Code would determine the sexual offender registration requirements in this case, if any. *See* 42 Pa. C.S.A. §9799.52. Sandy is not subject to registration under Pennsylvania's Sexual Offender Registration and Notification Act (SORNA II), because his adopted daughter was not a minor when the children of their incestuous relationship were born in Lycoming County in 2007 and 2009. *See* 42 Pa. C.S.A. §9799.55(a)(1)(i)(A) and (b)(2)(requiring a 10-year period of registration for incest where the victim is 12 years of age or older but under 18 years of age and requiring lifetime registration when the victim is under 12 years of age). Even if Subchapter H applied, Sandy would not have to register because the victim was not a minor when any sexual conduct occurred in Lycoming County. *See* 42 Pa. C.S. §9799.14(d)(9)(requiring registration only for violations of 18 Pa. C.S. §4302(b), which criminalizes incest of a minor).

Sentencing is a matter vested within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *Commonwealth v. Rush*, 162 A.3d 530, 544 (Pa. Super. 2017), citing *Commonwealth v. Crump*, 995 A.2d 1280, 1282 (Pa. Super. 2010); see also *Commonwealth v. Perry*, 32 A.3d 232, 236 (Pa. 2011). “An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.” *Perry, id* (internal quotations omitted), citing *Commonwealth v. Walls*, 926 A.2d 957, 961 (Pa. 2007).

A defendant presents a substantial question when he “sets forth a plausible argument that the sentence violates a provision of the sentencing code or is contrary to the fundamental norms of the sentencing process.” *Commonwealth v. Dodge*, 2013 PA Super 253, 77 A.3d 1263, 1268 (2013).

In imposing sentence, “the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and the community, and the rehabilitative needs of the defendant.” 42 Pa. C.S.A. § 9721 (b).

This Court is also guided by § 9781 (d) of the Judicial Code, which requires appellate courts in reviewing a sentence to determine from the record whether the court considered:

“(1) the nature and circumstances of the offense and the history and characteristics of the Defendant; (2) the opportunity of the sentencing court to observe the Defendant, including any pre-sentence investigation; (3) the findings upon which the sentence was based; and (4) the guidelines promulgated by the Commission.” 42 Pa. C.S.A. § 9781 (d). In determining if a

sentence is excessive or unduly harsh, great weight must be afforded to the sentencing court's discretion. *Commonwealth v. Colon*, 102 A.3d 1033, 1043 (Pa. Super. 2014), quoting *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa. Super. 2003)).

Where the sentencing court is informed by a presentence investigation report ("PSI"), it is presumed that the sentencing court was aware of relevant information regarding the Sandy's character and weighed those considerations and the appropriate sentencing factors. *Commonwealth v. Harper*, 273 A.3d 1089, 1097-1098 (Pa. Super. 2022). *Commonwealth v. Hill*, 210 A.3d 1104, 1117 (Pa. Super. 2019). "[W]here the court has been so informed, its discretion should not be disturbed." *Harper*, 273 A.3d at 1098. "Further, where a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code. *Hill*, *supra* (citing *Commonwealth v. Moury*, 992 A.3d 162, 171 (Pa. Super. 2010)).

An allegation of excessiveness due to the imposition of consecutive sentences implicates the discretionary aspects of sentencing. *Commonwealth v. Mastromarino*, 2 A.3d 581, 585 (Pa. Super. 2010). The imposition of consecutive, rather than concurrent, sentences only raises a substantial question in the most extreme circumstances. *Moury*, 992 A.2d at 171. Furthermore, a Defendant is not entitled to a volume discount for his crimes.

Commonwealth v. Prisk, 13 A.3d 526, 533 (Pa. Super. 2011); *Commonwealth v. Hoag*, 665 A.2d 1212, 1214 (Pa. Super. 1995).

Sandy was convicted of two (2) counts of Incest, a felony of the second degree⁵, offense gravity score (OGS) of 9. Although the PSI indicated that Sandy had a prior record score (PRS) of four, the court found that Sandy's PRS was actually two. According to his presentence investigation report, Sandy's prior record consisted of burglary conviction in 1982, a recklessly endangering another person conviction in 1982, and a loitering and prowling conviction in 2010. The court counted the burglary as a two-point offense because the PSI indicated that Sandy and his friends, who had been drinking and smoke marijuana, decided to burglarize Sandy's place of employment. Burglaries of businesses generally receive two points when calculating a prior record score unless the Commonwealth shows that there was a person present at the time of the burglary. *See* 204 Pa. Code §303.15. The court also did not count the loitering conviction in 2010, since this occurred after the charges in this case as the Commonwealth amended the Information to indicate that the offenses occurred in 2007 and 2009. *See* 204 Pa. Code §303.8(a)(2). With a PRS of two, the standard guideline range for the minimum sentence on each offense was 24-36 months. Sentencing Transcript, 10/24/23, at 14.

The court sentenced Sandy to 24-48 months' incarceration on each offense to run consecutively for an aggregate sentence of 4-8 years to be served in a State Correctional Institution. The court also imposed a one-year consecutive reentry sentence⁶ since Sandy's aggregate minimum sentence was four years.

The minimum sentences were at the bottom of the standard guideline range for each offense. Pennsylvania law views sentences within the standard range of the guidelines as appropriate under the Sentencing Code. *Commonwealth v. Moury*, 992 A.3d 162, 171 (Pa. Super. 2010).

⁵ 18 Pa. C.S.A. § 4302.

⁶ 61 Pa. C.S.A. §6137.2(a).

The minimum sentence cannot exceed one-half of the maximum sentence. *See* 42 Pa .C.S. §9756(b). Therefore, when the court imposes a minimum sentence of two years, it was required to impose a maximum sentence of four years or more. Since incest is graded as a felony of the second degree, the maximum lawful sentence for each offense was ten years. In other words, the court could have imposed maximum sentences of up to ten years for each offense, but it did not.

In its discussion of the appropriate sentence to be imposed, the court specifically discussed Sandy's age and prior record and considered all of the facts presented to it through the pre-sentence report.

Defense counsel argued that Sandy has significant health problems and required the use of a nebulizer and defibrillator. Defense counsel also argued that it was a consensual relationship, the parties were together for nearly 20 years, and they were not related by blood, but adoption. According to defense counsel, the combination of factors justified a probationary sentence. The court considered these factors in imposing a minimum sentence at the bottom of the standard range. The court rejected the request for a sentence of probation, finding that a probationary sentence or a lesser period of incarceration would diminish the seriousness of the offense. Sentencing Transcript, 10/24/23, at 13, 16.

The court also highlighted the comments of the Commonwealth that in a case such as this, and agreed that an important component of the sentence is the deterrent factor it would have on other families created by adoption. That there is no distinction between sexual relations between a parent and child related by blood or adoption. *See* 18 Pa. C.S. §4302(c).

The victim also testified at the sentencing hearing. It appeared to the court that, despite what Sandy said, it did not appear to be a consensual relationship from the victim's perspective. The victim was visibly anxious and upset in describing her feelings about the Defendant and her desire to keep him away from their children.

All of the facts and circumstances were considered by the court and it imposed a sentence that the court believed was a balance of all factors. A sentence of any less would be to minimize the serious nature of his acts.

In his second issue, Sandy alleges that the court abused its discretion when the court ordered as a condition of parole that Sandy was prohibited him from seeing his children. After hearing on the post sentence motion, the court modified that condition and ordered that he be prohibited from having contact with the children of the relationship while they remained under the age of 18 years.

“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. Carr, 262 A.3d 561, 568 (Pa. Super. 2021). The sentencing court is required to impose “reasonable conditions” that “it deems necessary to ensure or assist the defendant in leading a law-abiding life.” 42 Pa.C.S. § 9754(c). *Id.*

“[T]he matter of whether the trial court possesses the authority to impose a particular sentence is a matter of legality [of the sentence].” *Commonwealth v. Dennis*, 164 A.3d 503, 510 (Pa. Super. 2017) (citation and quotation marks omitted). Furthermore, the scope and standard of review applied to determine the legality of a sentence are well established. If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated. In evaluating a trial court's application of a statute, the appellate court's standard of review is plenary and is limited to determining whether the trial court committed an error of law. *Commonwealth v. Richardson*, 1555 MDA 2022, 2023 WL 2580633 (Pa. Super. Mar. 21, 2023). Additionally, “a trial court does not have statutory authority to impose conditions on a sentence of incarceration that exceeds

two years, and ‘any condition the sentencing court purport[s] to impose on [a defendant's] state parole is advisory only.’ ” *Id.* at *2 (citing *Commonwealth v. Coulverson*, 34 A.3d 135, 141-42 (Pa. Super. 2011); 61 Pa.C.S. § 6134(b)(1), (2)).

It would appear that the court did not have the authority to impose as a condition of Sandy’s sentence that his contact with the children born of this relationship be limited in any way, rendering its sentence illegal. Therefore, it would appear that the court imposed an illegal sentence with respect to imposing a parole condition.

However, the sentencing court may make recommendations to the Pennsylvania Parole Board/Department of Corrections for conditions of sentence or supervision. *See* 61 Pa. C.S. §6134 (2). If the sentence would be vacated and remanded, the court would characterize the condition as a recommendation due to the significant impact Sandy’s behavior has had on the mother of his children, the circumstances of their birth and the stigma it could have on them until they are old enough to understand and appreciate those consequences, and ask that the PPB/DOC consider it in their conditions of supervision to be imposed on Sandy once he is released on parole. _

Date: May 2, 2024

By the Court,

Nancy L. Butts, President Judge

cc: DA (PY)
PD (TC)
Superior Court (original & 1)
Gary Weber, Esquire
Jerri Rook

nlb