

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :
 :
 vs. : No. CR-1075-2020
 :
 KEITH ELSE, :
 Defendant :
 :

Michael S. Greek, Esquire	Counsel for Commonwealth
	District Attorney
Mary Connors, Esquire	Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - May 12 , 2022

The Defendant, Keith Else (hereinafter "Defendant" or "Else") has filed an appeal to the Pennsylvania Superior Court claiming that we imposed a "manifestly excessive sentence" upon him as a result of a guilty plea he had previously entered to One Count of Criminal Homicide, Murder in the Third Degree. This opinion is in support of the sentence imposed on March 1, 2022. For the reasons noted herein, we ask the Appellate Court to dismiss the appeal, or in the alternative, affirm the judgment of sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On October 5, 2020, the Defendant mortally wounded his wife, Laura Else in the presence of her three young children.¹ On December 23, 2021, Else entered a guilty plea to Third Degree Murder.

¹ Two of these children were also the children of the Defendant and the third child was his step-child.

Sentencing was deferred by the Court to March 1, 2022 to allow for the preparation of a pre-sentence investigation (hereinafter "PSI") by the Carbon County Adult Probation Office.

This Court commenced Sentencing on March 1, 2022 as ordered. At that time, reference was made to the completion of the PSI report and whether Attorney Paul Levy, counsel for Else, would like to address any corrections, additions, modifications, or deletions to that report. In response, counsel only indicated that he wished that a letter from a mutual family friend be included in the report. Counsel also made reference to a report from Dr. Dattilio², noting that it was his belief that the Court also had received a copy of it. The Court noted "I have reviewed that as well."³

During the course of the sentencing hearing, counsel for the Defendant argued the following:

"It's my position, Judge, that there are actually mitigating factors based on the report. The reason I say that is the report in the end indicates a diminished capacity issue. It goes over the fact that he doesn't meet the criterial for the McNaughton standard, but

² Dr. Datillio is a clinical psychologist who performed a mental health evaluation on the Defendant to determine the mental state of the Defendant which could possibly impact the outcome of this case. In fact, this report, dated March 8, 2021, was apparently done to determine whether any mental abnormalities existed that would affect criminal responsibility for the Defendant's actions as a defense to these charges. If this was in fact the intent of the report from March 8, 2021, it seems odd that the report would include recommendations of Dr. Dattilio pertaining to the sentencing of the Defendant for a guilty plea entered nine (9) months after the date of the report.

This report also suggests, on page 20, that "Mr. Else may be eligible for a defense of diminished capacity."

³ Sentencing hearing, March 1, 2022 (notes of transcript p.3).

ultimately there is a diminished capacity argument here, Judge, which could mitigate the sentence. It's my position that I would hope that based on all the circumstances here the Court would either impose the very bottom end of the standard range guideline with whatever max necessary to make sure that Mr. Else in fact receives the treatment in the future and at the facility.

Additionally, Judge, if the Court would entertain even doing a mitigated sentence because of the mental health issues that he suffered. It's not something that he conjured up. It predates this offense. It dates back from early on in his life, Judge. It doesn't make it okay. It doesn't make it not a crime, Judge. It does at least give the Court some understanding as to how a person who is described in the letter from this other woman and how Mrs. Else fell in love with him and that they had a family and they were moving forward."⁴

After the defense and Commonwealth presented evidence and/or arguments pertaining to the sentencing, the Court addressed the Defendant. As part of those comments, the Court read into the record, at the request of the eight-year-old daughter of the victim and the Defendant, a letter which was a part of the PSI report. Following, we imposed a period of incarceration of not less than eighteen (18) years nor more than forty (40) years in a State Correctional institution followed by one year of State re-entry supervision. Conditions were placed on this sentence including a requirement that the Defendant undergo a further mental health evaluation and follow any treatment recommendations. No post-sentencing motions were ever filed.

On March 31, 2022, a timely notice of appeal was filed.

⁴ Sentencing hearing, March 1, 2022 (notes of transcript pp. 5-6).

Thereafter, in response to an Order of Court, the Defendant filed his concise statement of matters complained of on appeal. In that concise statement, the Defendant contends the following, that:

"The Trial Court abused its discretion when it imposed a manifestly excessive sentence of total Confinements of eighteen to forty years followed by one year of consecutive re-entry supervision. Specifically:

- a. The Trial Court failed to consider the mitigating factors enumerated in 42 Pa.C.S.A. §9721, such as the Defendant's limited criminal history and rehabilitative needs, which were set forth in both the Pre-Sentence Investigation Report as well as a Mental Health Evaluation Report that was introduced by the Defendant at Sentencing.
- b. The Trial Court placed undue weight on the impact of the offense on the victims and failed to give sufficient weight to other factors enumerated in 42 Pa.C.S.A. §9721."

Based on these claims we believe that the issues raised on appeal by the Defendant, go to the discretionary aspect of sentencing.

LEGAL DISCUSSION

Else's specific claim that the Trial Court abused its discretion in imposing the sentence that it did without considering certain factors or placing undue weight on others enumerated in 42 Pa.C.S.A. §9721 presents a challenge to the discretionary aspect of sentencing. See *Commonwealth v. Rhoades*, 8 A.3d 912 (Pa. Super. 2010). Thus, before reaching the merits of a discretionary sentencing or issue, "where an appellant challenges the discretionary aspect of a sentence, [the Appellate Court] must engage in a four-part analysis to determine:

(1) Whether the appeal is timely; (2) whether Appellant preserved his [] issue; (3) whether Appellant's brief includes a concise statement of the reasons relief upon for allowance of appeal with respect to the discretionary aspects of sentence [pursuant to Rule of Appellant Procedure 2119(f), Pa.R.A.P. 2119(f)]; and (4) whether the concise statement raised a substantial question that the sentence is [not] appropriate under the [S]entencing [C]ode." *Commonwealth v. Lekka*, 210 A.3d 343, 349 (Pa. Super. 2019), citing *Commonwealth v. Williams*, 198 A.3d 1181, 1186 (Pa. Super. 2018) (citation omitted).

We would submit to the Appellate Court that Else's appeal filed on the 30th day post-sentencing is timely and that the time to address the third and fourth prongs, i.e., Appellants brief and Pa.R.A.P. 2119(f) compliance is not yet ripe. However, we do not believe that Else has satisfied the second prong identified above in that he has failed to preserve these issues for an appeal.

I. Whether Else Preserved the Issue on Appeal

"Issues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. Absent such efforts, an objection to a discretionary aspect of a sentence is waived." *Commonwealth v. Lamonda*, 52 A.3d 365, 371 (Pa. Super. 2012) (*en banc*) (internal quotations and citations omitted) *appeal denied*, 75 A.3d 1281 (Pa. 2013).

As previously noted, Else did not file any post-sentencing motion. Neither did he object to or claim at the time of sentencing that the Court failed to consider the Defendant's limited criminal

history, his rehabilitative needs or Dr. Datillio's report or that the Court placed undue weight on the impact of the offense on the victims.⁵ Absent such an objection, this issue should be considered waived. *Id.*

II. 2119(f) Substantial Question

Assuming arguendo that Else has presented these issues for appeal, this Court does not believe he will be able to raise a substantial question pursuant to Pa.R.A.P. 2119(f). "In order to raise a substantial question, an Appellant's Pa.R.A.P. 2119(f) statement must allege 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 sentence process." *Commonwealth V. Riggs*, 63, A.3d 780, 786 (2012), citing *Commonwealth v. Mouzon*, 812 A.2d 617, 628 (2002). As noted in the concise statement filed pursuant to our 1925(b) order, Else claims that the Court either failed to consider certain criteria or put too much weight on other factors in arriving at the sentence imposed. In 42 Pa.C.S.A. §9721(b),

"In selecting from the alternative set forth in subsection (a), the court shall follow the general principle that the sentence imposed should call for total confinement that is consistent with section 9725 (relating to total confinement) and 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. The court shall also consider any guidelines

⁵ The Court believes that counsel meant on the victim's [Laura Else] family.

for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing and taking effect under section 2155 (relating to publication of guidelines for sentencing, resentencing and parole, risk assessment instrument and recommitment ranges following revocation." (emphasis ours).

"The sentencing court is given broad discretion in determining whether a sentence is manifestly excessive because the sentencing judge is in the best position to measure factors such as the nature of the crime, the defendant's character and the defendant's display of remorse defiance, or indifference." *Commonwealth v. Andrews*, 720 A.2d 764, 768 (Pa. Super. 1998) (quoting *Commonwealth v. Ellis*, 700 A.2d 948, 958 (Pa. Super. 1997)). In order to find that a trial court imposed an "unreasonable" sentence, we must determine that the sentencing court imposed the sentence irrationally and that the court was "not guided by sound judgment." *Commonwealth v. Walls*, 926 A.2d 957, 967 (Pa. 2007).

The sentencing code offers general guidelines with respect to the imposition of a particular sentence. Reasonableness of the sentence imposed by the trial court is based on:

- (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 presentence investigation.
- (3) The findings upon which the sentence was based.
- (4) The guidelines promulgated by the commission.
- (5) 42 Pa.C.S.A. §9781(d). The sentencing code guidelines also require the sentence to 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." *Ahmad*, 961 A.2d at 888 citing 42 Pa.C.S.A. §9721(b)). *Id.*

The Court considered all of the above in fashioning the sentence imposed. First, this sentence was within the guidelines promulgated by the Pennsylvania Commission on Sentencing.⁶

⁶ Based upon the offense gravity score (OGS), the grading of this offense (felony of the first degree) and Defendant's prior record score (PRS), the standard range without a deadly weapon enhancement is 96 - 240 months and with the

Secondly, the Court took into consideration the pre-sentence investigation and the arguments of counsel. There is no evidence of any undue weight given to one factor over another nor a failure to consider Defendant's criminal history, or mental health/rehabilitative needs, all of which were outlined in the pre-sentence investigation. While the Court expressly referenced and read into the record at her request, the letter from the eight-year-old child of the victim, no undue weight was added based upon this letter, which we can only surmise is what counsel is referring to in the concise statement as that statement is couched in very general terms. We do point out however, for the reasons stated by the Court on the record, that the facts show this to be a very heinous crime committed in front of the three young children of the victim.

This Court also references the sentence hearing transcript⁷, in which we noted the reasons for this particular standard range sentence was that a lesser sentence would depreciate the seriousness of the charge and that while it cannot compensate the family for their loss, it would provide the appropriate level of restoration for the vicious and callous act.

This Court is also not aware of any "mitigating factors" enumerated in 42 Pa.C.S.A. §9721," as stated by Else in his concise

enhancement it is 114 - 240 months with a maximum of 480 months (40 years) on both guidelines.

⁷ Sentencing Hearing, March 1, 2022 (notes of transcript p. 16).

statement. If he is referring to the mental health report, this Court has addressed any rehabilitative needs by including a condition of his sentence that he obtain a mental health evaluation and follow recommendations arising therefrom. If Else is suggesting a failure to consider "diminished capacity" as an abuse of discretion and therefore a manifestly excessive sentence, this claim is also meritless. Diminished capacity is a defense in which "a defendant is attempting to prove that he was incapable of forming the specific intent to kill; if the defendant is successful, First-Degree Murder is mitigated to Third Degree." *Commonwealth v. Legg*, 711 A.2d 430, 433 (Pa. 1998), citing *Commonwealth v. Travaglia*, 661 A.2d 352, 359 (Pa. 1995), *cert denied*, 516 U.S. 1121 (1996). To the extent Else is arguing that we failed to consider this "defense to *mens rea*" in fashioning our sentence, he is correct. However, it has no impact on sentencing but rather on the conviction, which he apparently succeeded on and his plea was to Third-Degree Murder, not First-Degree Murder.

Lastly, as the claims of abuse of discretion identified in Else's concise statement are otherwise generalizations, we cannot continue to guess as to what other "failures" he may be referring to. Thus, we consider them waived, as should the Appellate Court.

CONCLUSION

For the reasons contained herein, the issues raised in Else's concise statements should be deemed waived and the appeal subsequently dismissed. In the alternative, if not deemed waived, we should ask the Appellate Court to affirm our judgment of sentence.

BY THE COURT:



Joseph J. Matika, J.