

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

PATRICIA E. GADALETA

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3502 EDA 2012

Appeal from the Judgment of Sentence November 30, 2012
In the Court of Common Pleas of Carbon County
Criminal Division at No(s): CP-13-CR-0000975-2011

BEFORE: ALLEN, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.:

FILED NOVEMBER 06, 2013

Appellant, Patricia E. Gadaleta, appeals from the November 30, 2012 aggregate judgment of sentence of six to 30 months' imprisonment, imposed after she was found guilty of one count each of identity theft and forgery.¹ After careful review, we affirm.

We summarize the relevant factual and procedural background of this case as follows. On January 17, 2012, the Commonwealth filed an information charging Appellant with one count of forgery and two counts of identity theft. In addition, the Commonwealth charged Appellant with one count each of theft by deception, receiving stolen property, and access

* Former Justice specially assigned to the Superior Court.

¹ 18 Pa.C.S.A. §§ 4120(a) and 4101(a)(3), respectively.

device fraud.² On July 17, 2012, Appellant proceeded to a one-day jury trial, at the conclusion of which the jury found Appellant guilty of one count each of identity theft and forgery. The jury found Appellant not guilty of the remaining charges. On November 30, 2012, the trial court imposed an aggregate sentence of six to 30 months' imprisonment.³ On December 12, 2012, Appellant filed an untimely post-sentence motion. On December 14, 2012, Appellant filed a timely notice of appeal.⁴ That same day, the trial court entered an order scheduling a hearing for February 22, 2013. However, on January 10, 2013, the trial court entered an order, indicating that it would take no action on Appellant's untimely post-sentence motion as a notice of appeal had been filed. On January 11, 2013, the trial court entered a separate order, canceling the February 22, 2013 hearing.

On appeal, Appellant raises two issues for our review.

1. Did trial counsel interfere with [Appellant]'s ability to defend herself at trial by advising her that her criminal record would be used against her without having filed a pre-trial motion to determine the admissibility of such record and

² 18 Pa.C.S.A. §§ 3922(a)(1), 3925(a), and 4106(a)(1)(iv), respectively.

³ The trial court imposed a sentence of six to 30 months' imprisonment for forgery and three to 18 months' imprisonment for identity theft. Both sentences were to run concurrently. The entire sentence in this case, at docket number CP-13-CR-975-2011 was to run consecutively to the sentence the trial court imposed the same day at docket number CP-13-CR-285-2011, which is currently on appeal before this Court at 3501 EDA 2012.

⁴ Appellant and the trial court have complied with Pa.R.A.P. 1925.

by advising her that her prior convictions would be used against her at trial and that she could not take the stand without being prejudiced by the prior convictions and fail [sic] to explain to [Appellant] that the crimes could only be used under the circumstances set forth in 42 Pa.C.S.[A.] § 5918(c) [and] **Commonwealth v. Garcia**, [] 712 A.2d 746 ([Pa.] 1998)?

2. Should [Appellant]’s sentence be modified because the sentences imposed in [CP-13-CR-285-2011] and [CP-13-CR-975-2011] when imposed consecutively are excessive and do not represent a sentence that is a just punishment or reflects the rehabilitative needs of [Appellant]?

Appellant’s Brief at 7.

In her first issue, Appellant avers that trial counsel erroneously advised her that “she could be cross examined as to other offenses[]” if she took the stand in her own defense. Appellant’s Brief at 12. In Appellant’s view, this interfered with her right to testify at trial. **Id.** at 13. Appellant further argues that “[d]efense counsel should have advised [A]ppellant she had a right to testify and that her prior crimes could not be used against her.” **Id.**

We note that Appellant’s first issue raises a claim of ineffective assistance of counsel. Therefore, before we may address the merits of this claim, we must first determine whether it is properly before us. In **Commonwealth v. Grant**, 813 A.2d 726 (Pa. 2002), our Supreme Court held that an appellant “should wait to raise claims of ineffective assistance of

trial counsel until collateral review.” **Id.** at 738. However, our Supreme Court has also recognized an exception to **Grant** where the trial court conducts hearings on the ineffective assistance claim at which counsel testifies, and where the trial court issues an opinion explicitly addressing said claim. **Commonwealth v. Bomar**, 826 A.2d 831, 853-855 (Pa. 2003), *cert. denied*, **Bomar v. Pennsylvania**, 540 U.S. 1115 (2004). However, this Court announced that our Supreme Court’s exception in **Bomar** was limited.

With the proviso that a defendant may waive further PCRA review in the trial court, absent further instruction from our Supreme Court, this Court, pursuant to [**Commonwealth v. Wright**, 961 A.2d 119 (Pa. 2008)] and [**Commonwealth v. Liston**, 977 A.2d 1089 (Pa. 2009)], will no longer consider ineffective assistance of counsel claims on direct appeal.

Commonwealth v. Barnett, 25 A.3d 371, 377 (Pa. Super. 2011) (*en banc*) (footnote omitted). After careful review of the certified record, we conclude that Appellant has not made any such waiver. Accordingly, we dismiss Appellant’s claim of ineffective assistance of counsel without prejudice so it may be raised on collateral review pursuant to the Post Conviction Relief Act.⁵ **See Commonwealth v. Quel**, 27 A.3d 1033, 1037 (Pa. Super. 2011) (concluding when an appellant does not waive PCRA review of an ineffective

⁵ 42 Pa.C.S.A. §§ 9541-9546.

assistance claim, under **Barnett**, dismissal of the ineffective assistance claim without prejudice is the appropriate remedy).

In her second issue, Appellant avers that the sentence in this case, which was imposed consecutively to the sentence at docket number CP-13-CR-285-2011, was excessive and “did not take into consideration the rehabilitative needs of [A]ppellant.” Appellant’s Brief at 15. Our standard of review in assessing whether a trial court has erred in fashioning a sentence is well settled.

[T]he proper standard of review when considering whether to affirm the sentencing court’s determination is an abuse of discretion. [A]n 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. ... An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

Commonwealth v. Provenzano, 50 A.3d 148, 154 (Pa. Super. 2012) (citation omitted).

At the outset, we observe that Appellant does not challenge the legality of her sentence. Rather, her issue raised on appeal goes to the discretionary aspects of her sentence. Appeals regarding the discretionary aspects of sentencing are not reviewable as a matter of right.

Commonwealth v. Desalvo, 70 A.3d 900, 902 (Pa. Super. 2013) (citation

omitted). In order for this Court to review the discretionary aspects of her sentence, Appellant must comply with the following.

[W]e must ... determine: (1) whether the appeal is timely; (2) whether Appellant preserved [her] issue; (3) whether Appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the sentencing code.

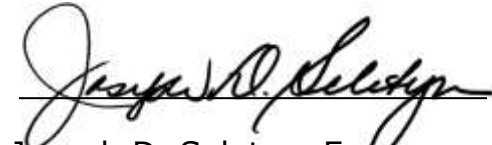
Commonwealth v. Carrillo-Diaz, 64 A.3d 722, 725 (Pa. Super. 2013) (citation omitted).

Upon our review of the certified record, we conclude that Appellant has not preserved this issue for our review. Pennsylvania Rule of Criminal Procedure 720 states that "a written post-sentence motion shall be filed no later than 10 days after imposition of sentence." Pa.R.Crim.P. 720(A)(1). In the case *sub judice*, the trial court imposed its sentence in open court on November 30, 2012. As a result, Appellant was required to file any post sentence motions by December 10, 2012. Appellant filed the post-sentence motion in this case on December 12, 2012. As a result, Appellant's post-sentence motion was untimely and does not preserve any issues for our review. We further note that Appellant did not raise any issues of excessiveness on the record at sentencing. Therefore, we deem Appellant's second issue on appeal waived for failure to file a timely post-sentence motion. ***See Carrillo-Diaz, supra.***

Based on the foregoing, we conclude that Appellant's only reviewable claim is waived. Accordingly, the trial court's November 30, 2012 judgment of sentence is affirmed.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/6/2013