

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :  
 :  
 vs. : No. 975 CR 2011  
 :  
 PATRICIA E. GADALETA, :  
 Defendant/Appellant :  
  
 Jean A. Engler, Esquire Counsel for Commonwealth  
 Assistant District Attorney  
  
 Kent D. Watkins, Esquire Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - February , 2013

The Defendant, Patricia E. Gadaleta, has appealed from the judgment of sentence imposed on November 30, 2012, raising several issues outlined in her concise statement filed in response to this Court's Pennsylvania Rules of Appellate Procedure 1925 Order of December 14, 2012.<sup>1</sup> This Memorandum Opinion is filed in accordance with Pennsylvania Rules of Appellate Procedure 1925(a).

**FACTUAL AND PROCEDURAL BACKGROUND**

The Defendant was charged with theft by deception, a violation of 18 Pa.C.S.A. § 3922(a)(1), theft by receiving stolen property, a violation of 18 Pa.C.S.A. § 3925(a), forgery, a violation of 18 Pa.C.S.A. § 4101(a)(3), access device fraud, a

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<sup>1</sup> By Order of Court dated January 4, 2013, the Court granted Defendant's request to extend the time to file the concise statement to January 25, 2013, due to the transcript not being completed.

violation of 18 Pa.C.S.A. § 4106(a)(1)(iv), and two counts of identity theft, violations of 18 Pa.C.S.A. § 4120(a). A trial by jury was held on July 17, 2012, after which the jury returned a guilty verdict on the forgery charge, along with one count of identity theft charge, listed as count five on the information.

On November 30, 2012, this Court held sentencing in this matter. Prior to sentencing, the Court ordered a pre-sentencing investigation report which it reviewed in anticipation of sentencing. Said report was made part of the record.

Defendant, at the time of sentencing, was fifty-five years old with a significant criminal history that spans a twenty-three year period starting in 1995 and continuing through 2008. Within this twenty-three year time period, Defendant had amassed twelve convictions. Due to Defendant's criminal history she had a prior record score of three. As such, the standard guideline range for each of the two offenses, forgery and identify theft, for which the Court was to impose sentence was both restorative sanctions to less than twelve months.

Defendant's prior criminal history consisted of virtually the same types of deceptive, "crimen falsi" type crimes as those she was being sentenced on in this case. Consequently, the Court imposed the following sentences on the two remaining counts Defendant was found guilty of: 1) forgery, identified as count three of the information: not less than six (6) months nor

more than thirty (30) months in a state correctional institution to run consecutive to the sentence imposed in case index CR-285-2011, count number five of the information;<sup>2</sup> and 2) identity theft, identified as count five on the information: not less than three (3) months nor more than eighteen (18) months in a state correctional institution to run concurrent with the sentence imposed on count three in this matter. Therefore, the total sentence in this case was for a period of incarceration in a state correctional institution of not less than six months nor more than thirty months running consecutive to the total sentence imposed in CR-285-2011. This resulted in a total period of confinement in both cases of not less than twenty-four (24) months nor more than ninety (90) months.<sup>3</sup>

The rationale for the sentences, as stated at the sentencing hearing, includes Defendant's lack of remorse, and her obvious criminal history which contained numerous convictions involving crimes of deception, deceit, and fraud. The Court also took into consideration the impact Defendant's conduct had on her victims, and the fact that she was becoming a career criminal.

Twelve days later, on December 12, 2012, Defendant filed

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<sup>2</sup> At the time of sentence the Court imposed sentence upon Defendant in two different cases in which a trial by jury found Defendant guilty of certain offenses.

<sup>3</sup> At the time of sentencing, the Court gave the Defendant and her counsel an opportunity to address the Court which the Defendant chose not to do so.

her post-sentence motions. However, before the Court had an opportunity to address said motions, Counsel for the Defendant filed this appeal on December 14, 2012. Accordingly, this Court issued an order on January 10, 2013, to take no action on Defendant's post-sentence motions based upon our belief that jurisdiction had been divested by Defendant's appeal.

### **DISCUSSION**

Before addressing the merits of the issues raised on appeal, the Court must address the timeliness of this appeal as it implicates the Appellate Court's jurisdiction. *Commonwealth v. Yarris*, 731 A.2d 581, 587 (Pa. 1999). Jurisdiction is vested in the Superior Court upon the filing of a timely notice of appeal. *Commonwealth v. Miller*, 715 A.2d 1203, 1205 (Pa. Super. Ct. 1998). In the case before the Court, the focus of such determination is whether Defendant's post-sentence motions, which were filed on December 12, 2012, were timely.

Pennsylvania Rules of Criminal Procedure Rule 720(A)(1) states: "Except as provided in paragraphs (C) and (D), a written post-sentence motion shall be filed no later than 10 days after imposition of sentence." *Id.* Herein, Defendant was sentenced on November 30, 2012. Accordingly, Defendant had ten days from November 30, 2012, or until December 10, 2012, to file her post-sentence motion. However, Defendant's post-sentence motions

were not filed until December 14, 2012, which consequently renders said motions untimely.

The effect of Defendant's untimely post-sentence motion is that this Court's judgment of sentence dated November 30, 2012, becomes a final order that is appealable and under the exclusive appellate jurisdiction. See, 42 Pa.C.S.A. § 742; *Commonwealth v. Borrero*, 692 A.2d 158, 159 (Pa. Super. Ct. 1997) (citing *Commonwealth v. Alvarado*, 650 A.2d 475, 476 (Pa. Super. Ct. 1994)).<sup>4</sup> The result is that Defendant's appeal, dated December 14, 2012, is timely, proper, and within the jurisdiction of the Appellate Court.<sup>5</sup>

Defendant's first two issues raised on appeal are in essence Sixth Amendment ineffective assistance of counsel claims. Defendant argues in her concise statement that her trial counsel erroneously advised her about the Commonwealth's ability to incriminate Defendant with her criminal record if she were to testify. Defendant, in her concise statement, cites to

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<sup>4</sup> Pursuant to Rule 720(A)(3) of the Pennsylvania Rules of Criminal Procedure, "[i]f the defendant does not file a timely post-sentence motion, the defendant's notice of appeal shall be filed within 30 days of imposition of sentence, except as provided in paragraph (A)(4) [dealing with Commonwealth filing motion to modify sentence]." *Id.*

<sup>5</sup> This Court does acknowledge that its Court Order dated January 10, 2013, did not expressly dispose of Defendant's post-sentence motions, but rather passed on the merits of the motions upon the belief that jurisdiction had been divested. Even so, this Court finds, for the purpose of judicial efficiency, the Superior Court should not remand this matter back to the Trial Court to expressly deny Defendant's post-sentence motions as untimely to then only have Defendant file another appeal raising the same issues as she has in this appeal.

statute 42 Pa.C.S.A § 5918, which explains examination of a defendant as to other offenses. Without passing judgment as to the merits of the two issues raised by the Defendant, this Court believes such matters are more appropriately raised in a claim filed under the Post Conviction Relief Act (PCRA) rather than a direct appeal. See, *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002) (holding that "as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." *Id.*); *Commonwealth v. Spatz*, 870 A.2d 822, 837 (Pa. 2005); *Commonwealth v. DeJesus*, 880 A.2d 608, 610-11 (Pa. 2005); *Commonwealth v. May*, 887 A.2d 750, 757-58 (Pa. 2005).

The third issue Defendant raises on appeal is that the sentences imposed are excessive. Defendant appeals this Court's sentences imposed upon her, claiming said sentences are excessive and not just given the needs of the Defendant. This issue raised by the Defendant is one challenging the Court's discretion in imposing consecutive sentences.<sup>6</sup> *Commonwealth v. Marts*, 889 A.2d 608, 611 (Pa. Super. Ct. 2005) (holding that a challenge to a court imposing a consecutive sentence is in essence a challenge to the discretionary aspect of that

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<sup>6</sup> The Court is unsure as to whether the Defendant is arguing the consecutive aspect of the sentences in each case (this case and the case indexed to CR-285-2011) or the sentences of the individual charges, thus the Court will address both scenarios.

sentence). In *Commonwealth v. Pass*, 914 A.2d 442 (Pa. Super. Ct. 2006) the Superior Court articulated the principle stated in 42 Pa.C.S.A. section 9721 that affords sentencing courts discretion to impose a sentence concurrently or consecutively to other sentences currently being imposed, or such sentences already imposed. "Any challenge to the exercise of the discretion ordinarily does not raise a substantial question." *Id.* at 446-47.

When such a challenge is raised on appeal, the first issue an appellant needs to address is how the sentence is not appropriate under the Sentencing Code. Pennsylvania Rules of Appellate Procedure 2119 (f) states:

[a]n appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence. Pa.R.A.P. 2119(f).

As here, where the claim is one of an "excessive sentence," the defendant must articulate how the sentence violates either a specific provision of sentencing as set forth in the Sentencing Code, or a "particular norm underlying the sentencing process." *Commonwealth v. Mouzon*, 812 A.2d 617, 627 (Pa. 2002) (plurality opinion).

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. To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive. 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. Twitty*, 876 A.2d 433, 438 (Pa. Super. Ct. 2005) (quoting *Commonwealth v. Ritchey*, 779 A.2d 1183, 1185 (Pa. Super. Ct. 2001)).

Further, the Superior Court in *Commonwealth v. Mouzon*, 828 A.2d 1126 (Pa. Super. Ct. 2003), suggests that the Appellate Court should give great weight to the discretion of the sentencing court as the lower court has the best opportunity and is in the best position to evaluate the circumstances surrounding the defendant as it relates to sentencing, and in particular her character, display of any remorse, defiance, or indifference. *Id.* at 1128 (citing *Commonwealth v. Ellis*, 700 A.2d 948, 958 (Pa. Super. Ct. 1997)).

In this case, the two sentences imposed were all within the standard guideline ranges for each particular offense. This Court ran the sentence on the identity theft charge concurrent to the forgery charge in this matter, but imposed the sentence on forgery charge consecutive to the sentence imposed in case index 285-CR-2011. The Court's rationale for such is simple:



the Defendant had committed a number of separate and distinct violations of the law in relation to a number of different victims, namely, Elaine Bieniakowski, and the Pennsylvania State Employees Credit Union. While the Court considered the identity theft charge to be a related act intended to defraud or injure others, the forgery charge was the culmination of all the Defendant's actions to achieve her goal of deception in obtaining funds from the Pennsylvania State Employees Credit Union.

In her concise statement, Defendant suggests that the sentence imposed in this case does not represent a sentence that "is a just punishment or reflects the rehabilitative needs of the Defendant." The Court finds that running the sentence in this particular case consecutive to the total sentence imposed in the case index 285-CR-2011 is just punishment in light of the circumstances of this case and of the impact Defendant's conduct had on the victim's life, Elaine Bieniakowski, and the fact that Defendant's conduct is seemingly repetitious since 1995. Based upon Defendant's past criminal conduct, it is evident that no term of incarceration will sufficiently punish the Defendant in light of her continued violation of the law as the conduct of the Defendant in this case occurred while she was on state parole.

Additionally, the Defendant's lack of remorse substantiates

the notion that no matter the sentence, rehabilitation is not in her future as she fails to acknowledge the severity and frequency of her actions and its impact on society.

Defendant has presented no argument that the sentence imposed violates the Sentencing Code or represents a deviation from the norms underlying the sentencing process, nor unreasonable or manifestly excessive.

This Court notes that it is asking the Appellate Court to affirm our sentence in this case as to running said sentence consecutive to that imposed in case index CR-285-2011. Defendant in this appeal has challenged the Court's sentence as both excessive in terms of the total minimum and maximums of each offense individually, and also the Court's running of said sentence in this case consecutive to that sentence in CR-285-2011. Although the judgment of sentence in the other case is not a final order as a result of Defendant's post-sentence motions, the rationale of the Sentencing Court to impose a consecutive sentence to the other case is being challenged. For the reasons stated previously, this Court believes such a sentence is fair, just, and appropriate given the circumstances in each case, CR-285-2011 and CR-975-2011, as the two cases involved different operative facts and thus different and distinct offenses.

Based upon the foregoing, we respectfully ask that

Defendant's first two raised on appeal be dismissed without prejudice as they are collateral matter and not appropriate for a direct appeal at this time. Further, this Court recommends that Defendant's third issued raised on appeal be dismissed on the merits of the issue raised therein, as the sentence imposed was not an abuse of discretion, did not exceed the standard sentencing guidelines, and was appropriately tailored to Defendant. Accordingly, we respectfully recommend that our Order of Court dated November 30, 2012, imposing a period of incarceration in a state correctional institution of not less than six months nor more than thirty months to run consecutive to the sentence imposed on the Defendant in the case CR-285-2011, be affirmed.

**BY THE COURT:**

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**Joseph J. Matika, J.**