

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

vs. :

NO. 477 CR 2020

GAGE JOSHUA DUCH,  
Defendant :

Criminal Law – Challenging the Discretionary Aspects of Sentencing – Requirement that a “Substantial Question” be Raised – Significance of Pre-Sentence Investigation Report and a Sentence Imposed Within the Standard Guideline Range

1. Where a discretionary aspect of sentencing is raised on appeal, to be considered the defendant must (1) file a timely notice of appeal; (2) properly preserve the issue at sentencing or in a post-sentence motion; (3) include a concise statement in his brief pursuant to Pa.R.A.P. 2119(f); and (4) raise a “substantial question” that the sentence appealed from is not appropriate under the Pennsylvania Sentencing Code.
2. A “substantial question” exists only where the defendant advances a colorable argument that the sentencing judge’s actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underly the sentencing process.
3. When imposing a sentence, a court is required to consider the particular circumstances of the offense and the character of the defendant, including his prior criminal record, his age, personal characteristics and his potential for rehabilitation. In imposing a valid sentence, the sentence imposed must 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.” 42 Pa.C.S.A. §9721(b).
4. Absent something out of the ordinary, where the sentencing court with the benefit of a pre-sentence investigation report imposes a sentence within the standard guideline range, the sentence will not be found to be either excessive or unreasonable.

ORIGINAL

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COMMONWEALTH OF PENNSYLVANIA :

vs. :

NO. 477 CR 2020

GAGE JOSHUA DUCH,  
Defendant :

Cynthia Ann Dyrda Hatton, Esquire  
Assistant District Attorney

Counsel for Commonwealth

Michael P. Gough, Esquire

Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – August 4, 2022

The Defendant, Gage Joshua Duch, now 29 years of age, appeals from his sentence of no less than one nor more than three and half years in a state correctional institution following his plea to endangering the welfare of children, a felony of the third degree.

PROCEDURAL AND FACTUAL BACKGROUND

On February 11, 2020, Defendant's three-year-old son died of fentanyl poisoning while in his home in Nesquehoning.

At the time, the Defendant resided in an apartment with the child's mother, Brittany Grace Burke, and their four children, ages three, four, seven and nine. Also living in the apartment were Rebecca Lynn Walck and Anthony Hanibal Pudvah. Walck and Pudvah were drug dealers. Walck and Pudvah paid Defendant and Burke with controlled

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substances, primarily heroin<sup>1</sup>, for providing transportation for the receipt and delivery of drugs and to stay in the apartment. Defendant had a history of heroin usage since 2017.

All four used heroin in the apartment: Walck and Pudvah primarily by shooting, intravenous injection, and Defendant and Burke primarily by snorting, nasal inhalation. This occurred in the presence of the children. Moreover, all four "engaged in the unlawful act of possessing and utilizing controlled substances in a residence with small children and did so in a grossly negligent manner which permitted the victim to have been exposed to the potential lethal controlled substance of fentanyl which resulted in his death." (Affidavit of Probable Cause, p.5, included as part of the Pre-Sentence Investigation Report). The day prior to his death, the victim opened a storage stool which contained discarded rigs, syringes used to inject heroin.

On the date of the victim's death, while Defendant was driving Walck and Pudvah to pick up money in Lehighton, then to Hazleton to pick up drugs, Burke contacted them and notified them of the victim's death. Defendant returned to Nesquehoning and cleared the apartment of evidence of drug usage, including throwing away drug paraphernalia. When interviewed early the following morning about his son's death, Defendant initially provided false information to the police about drug usage in the apartment, about his activities on the date of his son's death, and about his tampering with evidence in the apartment.<sup>2</sup>

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<sup>1</sup> Fentanyl is commonly used as an additive or substitute in heroin packaging.

<sup>2</sup> The foregoing factual background is taken from the affidavit of probable cause to the criminal complaint which was made part of the Pre-Sentence Investigation Report and agreed to by Defendant. (Pre-Sentence Investigation Report, p.3).

On December 10, 2021, Defendant pled guilty to endangering the welfare of children, a felony of the third degree.<sup>3</sup> On May 20, 2022, he was sentenced to a period of incarceration of no less than one year nor more than three and half years in a state correctional institution, with 382 days credit. The Sentencing Order expressly provided that Defendant was not ineligible for the State Drug Treatment Program. Post-sentence motions were filed on May 27, 2022, and denied on May 31, 2022. Defendant's appeal to the Pennsylvania Superior Court was filed on June 14, 2022. A timely Concise Statement of Matters Complained of on Appeal was filed on June 23, 2022.

In his Concise Statement, Defendant identifies the following five issues which he intends to raise on appeal:

1. That this Court abused its discretion in imposing what is commonly identified as a "State" sentence, as opposed to one where the Defendant would be confined in a County facility, inasmuch as the biological mother of the victim, who pled guilty to a more serious offense of Involuntary Manslaughter and who, like the Defendant, had a significant drug abuse history, was afforded the opportunity to serve a period of incarceration in a County facility.
2. That Your Honorable Court undervalued the record testimony by the Defendant that since the death of the victim, the Defendant has addressed his drug addiction issue, maintained employment, developed a stable relationship with another female and otherwise proceeded in a positive manner and therefore the severity of the sentence constituted an abuse of discretion.
3. That similarly, Your Honorable Court abused its discretion by giving undue weight to the Defendant attempting to conceal evidence of drug usage on the date of death of the victim which therefore constituted undue emphasis on retribution over rehabilitation, deterrence of incapacitation.
4. That this Court erred and abused its discretion by sentencing at the top of the Standard Range, rather than in the Mitigated Range or at most at the bottom of the Standard Range, in light of the age and significant history of substance abuse on the part of the Defendant, and the fact that the person fatally harmed as a result of his purported actions was his biological son.

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<sup>3</sup> 18 Pa.C.S.A. §4304(a)(1) (Endangering Welfare of Children).

5. That the reasons offered by the Court for sentencing the Defendant to a term of total confinement of One (1) year to Three And One-Half (3½) years fail to demonstrate compliance with governing sentencing law.

Concise Statement of Matters Complained of on Appeal.

#### DISCUSSION

The issues Defendant identifies in his Concise Statement amount essentially to alleging the sentence imposed was unreasonable, unfair and excessive. All involve the discretionary aspects of sentencing. As such, Defendant is not entitled to review of these claims as of right, but to be considered Defendant must (1) file a timely notice of appeal; (2) properly preserve the issue at sentencing or in a post-sentence motion; (3) include a concise statement in his brief pursuant to Pa.R.A.P. 2119(f); and (4) raise a "substantial question" that the sentence appealed from is not appropriate under the Pennsylvania Sentencing Code. See Commonwealth v. Carr, 262 A.3d, 561, 567 (Pa.Super. 2021). While the first two requirements of this four-part test have been met, and the third is not before us, Defendant has failed to raise a "substantial question" that the sentence imposed was not appropriate under the Pennsylvania Sentencing Code.

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. A substantial question exists only when the appellant advances a colorful argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.

Commonwealth v. Andrews, 213 A.3d 1004, 1017 (Pa.Super. 2019) (quoting Commonwealth v. Manivannan, 186 A.3d 472, 489 (Pa.Super. 2018)), appeal denied, 222 A.3d 376 (Pa. 2019). Here, Defendant cites to no provision of the Sentencing Code

which has been violated or explains why the sentence is contrary to the fundamental norms which underlie the sentencing process. "As to what constitutes a substantial question, [the Superior] Court does not accept bald assertions of sentencing errors. An appellant must articulate the reasons the sentencing court's actions violated the sentencing code." Commonwealth v. Moury, 992 A.2d 162, 170 (Pa.Super. 2010) (citation omitted).

Defendant's sentence of no less than one nor more than three and a half years in a state correctional institution was within the standard guideline range of three to twelve months. Additionally, at the time of the sentencing, we had the benefit of a pre-sentence investigation report which we had reviewed and were familiar with when the sentence was imposed. Where the sentencing court has the benefit of a pre-sentence investigation report, it is assumed the sentencing court "was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." Moury, 992 A.2d at 171 (quoting Commonwealth v. Devers, 546 A.2d 12, 18 (Pa. 1988)). Further, the combination of a pre-sentence investigation report and a standard range sentence, absent more, cannot be considered excessive or unreasonable. *Id.* (citing Commonwealth v. Cruz-Centeno, 668 A.2d 536 (Pa.Super. 1995)).

"When imposing a sentence, a court is required to consider the particular circumstances of the offense and the character of the defendant," including his "prior criminal record, his age, personal characteristics and his potential for rehabilitation." Moury, 992 A.2d at 171 (citations and quotation marks omitted). For this reason,

Defendant's contention that it was error not to impose a county sentence, as opposed to the state sentence he received, because Burke received a county sentence is unsustainable and fails to appreciate the necessity of a sentencing court tailoring its sentence to the particulars of each individual defendant. Defendant's second issue ignores the references in the Pre-Sentence Investigation Report to Defendant's failure to attend scheduled counseling appointments for two months, and failure to keep scheduled appointments with the Ethos Clinic and take prescribed medications for his diagnosed bipolar disorder and general anxiety disorder (Pre-Sentence Investigation Report, pp.4-7); his failure to maintain employment (Pre-Sentence Investigation Report, p.8); or the serious questions raised regarding the suitability and living arrangements Defendant maintained with his fiancée since he and Burke separated (Pre-Sentence Investigation Report, pp.4-5).

Similarly, Defendant in his third and fourth issues fails to recognize that his tampering with evidence in the apartment following his son's death and his active involvement and complicity in trafficking drugs with Walck and Pudvah on the same day he learned of his son's death, if anything, could be considered aggravating factors justifying a sentence within the aggravated range, rather than one at the high end of the standard range. Commonwealth v. Shugars, 895 A.2d 1270, 1275 (Pa.Super. 2006) (noting that "a trial court judge has wide discretion in sentencing and can, on the appropriate record and for the appropriate reasons, consider any legal factor in imposing a sentence in the aggravated range") (citation and quotation marks omitted). The fact that Defendant was 29 years old at the time of his sentencing, and has a significant history

of substance abuse does not mitigate for a more lenient sentence as Defendant intimates, but one in which Defendant will receive a valid assessment of his addiction and appropriate treatment, which we believe will be furthered by the sentence imposed.

Finally, as to Defendant's fifth issue, that the sentence imposed "fails to demonstrate compliance with governing sentencing law," we are unaware of what law Defendant alludes to, but again cite to Moury's note that the combination of a pre-sentence investigation report and a standard range sentence, absent more, cannot be considered excessive or unreasonable.

#### CONCLUSION

That Defendant's three-year-old son died as a direct or indirect result of Defendant's drug addiction and usage is tragic. This, however, is not a basis for invalidating the sentence, one which we believe complies with the Sentencing Code and the fundamental norms which underlie the sentencing process, and was within our discretion to impose. See Shugars, 895 A.2d at 1275 (setting forth the measure for assessing a court's exercise of discretion in sentencing); 42 Pa.C.S.A. §9721(b) providing that the sentencing court is charged to impose a sentence 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."

BY THE COURT:



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P.J.