

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

COMMONWEALTH OF PENNSYLVANIA :  
 :  
 vs. : NO. CR-563-2022  
 :  
 DANIEL WILLIAM HOLLAN, :  
 Defendant :

Criminal Law - Discretionary Aspects of Sentence – Whether Sentence Excessive – Consideration of Defendant’s Rehabilitative Needs – Substantial Question – Challenge to Validity of Plea – Timing - Waiver – Manifest Injustice

1. A challenge to an alleged excessive sentence is a challenge to the discretionary aspects of a sentence.
2. A challenge to the discretionary aspects of a sentence must raise a substantial question that the sentence appealed from violates either a specific provision of the Sentencing Code or a particular fundamental norm underlying the sentencing process to be reviewed on appeal.
3. In deciding whether a substantial question has been raised, an appellate court focuses on the *reasons* for which the appeal is sought, in contrast to the *facts* underlying the appeal, which are necessary only to decide the appeal on its merits.
4. A challenge to the imposition of consecutive sentences as unduly excessive, together with a claim that the court failed to consider defendant’s rehabilitative needs upon fashioning the sentence, presents a substantial question.
5. Whether the court abused its discretion in sentencing is ultimately a question of whether the sentence is clearly unreasonable.
6. A sentence within the standard guideline range is deemed appropriate under the Sentencing Code unless the circumstances of the case render application of the guidelines clearly unreasonable.
7. The commission of a crime while on parole is an aggravating circumstance properly considered by the sentencing court when imposing a sentence.
8. A challenge to the validity of a guilty plea made after a sentence has been imposed must be made either during the plea colloquy or in a timely post-sentence motion to withdraw the plea in order that the court which accepted the plea may consider and correct, in the first instance, any error which may have occurred. A failure to timely raise this challenge results in waiver of the issue.
9. Withdrawal of a plea after sentencing requires a showing of manifest injustice. This standard is met if the plea was entered into involuntarily, unknowingly, or unintelligently.

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

COMMONWEALTH OF PENNSYLVANIA :  
 : NO. CR-563-2022  
 vs. :  
 :  
 DANIEL WILLIAM HOLLAN, :  
 Defendant :  
 :

Joseph D. Perilli, Esquire Counsel for Commonwealth  
Assistant District Attorney  
Jeffrey G. Velander, Esquire Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – February 14, 2023

Defendant, Daniel William Hollan, appeals from the judgment of sentence entered November 29, 2022, claiming the court abused its discretion in imposing an excessive sentence which fails to consider his rehabilitative needs and challenging the validity of his plea as not having been made knowingly and intelligently. Under the law and under the facts, both challenges are without merit.

PROCEDURAL AND FACTUAL BACKGROUND

Defendant pled guilty on November 29, 2022, to one count of resisting arrest, a misdemeanor of the second degree, Count 3 of the Information,<sup>1</sup> and one count of unauthorized possession of an access device under 18 Pa.C.S.A. §4106(a)(3), a

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<sup>1</sup> 18 Pa.C.S.A. §5104.

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misdemeanor of the third degree, Count 4 of the Information,<sup>2</sup> in connection with his arrest on July 6, 2022, on an outstanding warrant. At the time of his arrest, Defendant was under supervision for a drug-related offense he had committed in Schuylkill County on April 2, 2019, and for which he was serving a sentence of no less than eleven and a half to no more than twenty-three months in jail. (N.T., pp. 8-9).<sup>3</sup> The warrant for Defendant's arrest related to a February 12, 2021, second drug offense for which he was later sentenced on September 1, 2022, in Carbon County to a period of imprisonment of no less than one year less a day to no more than two years less a day, with fifty-three days credit. (N.T., p. 7). When Defendant was arrested on July 6, 2022, the police discovered seventeen individual Suboxone strips and a debit card belonging to another on his person. Defendant waived a pre-sentence investigation report and was sentenced the same day as his plea. (N.T., pp. 6-7).

On the charge of resisting arrest, Defendant was sentenced to a period of imprisonment of no less than six months nor more than two years in a state correctional institution. This sentence was within the standard guideline range of one to nine months. On the charge involving access device fraud, Defendant was sentenced to a period of imprisonment of no less than three months nor more than twelve months, concurrent to the sentence Defendant received for resisting arrest. This sentence was also within the

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<sup>2</sup> 18 Pa.C.S.A. §4106(a)(3).

<sup>3</sup> The Pennsylvania Commission on Sentencing Guideline Sentence Form completed by the Carbon County Adult Probation Office was available to the court at sentencing, together with Defendant's criminal background history as of November 2, 2022, attached to the form.

standard guideline range of one to six months. Defendant's sentence for resisting arrest ran consecutive to his sentence on September 1, 2022 for possession of a controlled substance.

At the time of Defendant's sentencing in this case, the court noted Defendant's criminal record which demonstrated a history of drug violations. (N.T., p. 10). Each of the sentences imposed on November 29, 2022, required Defendant to have a drug and alcohol evaluation and follow the recommendation of that evaluation. The state sentence Defendant received for resisting arrest specifically made Defendant eligible for RRR<sup>4</sup> consideration and not ineligible for the state drug treatment program.<sup>5</sup>

Defendant's plea on November 29, 2022, was made pursuant to a stipulation he entered on October 25, 2022, to plead guilty to Counts 3 and 4, with the remaining counts to be dismissed.<sup>6</sup> The only other term of the stipulation was that there was no objection to the sentences running concurrent to one another<sup>7</sup> and that the court could exercise its discretion in imposing a sentence. (N.T., p. 6).

Defendant was represented by counsel at the time the stipulation was entered and at the time of his sentencing. On the date of his sentencing, Defendant acknowledged

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<sup>4</sup> Recidivism Risk Reduction Incentive. See 61 Pa.C.S.A. §§4501-4512.

<sup>5</sup> See 61 Pa.C.S.A. §§4101-4109.

<sup>6</sup> The remaining counts were for flight to avoid apprehension, 18 Pa.C.S.A. §5126(a), a felony of the third degree, and possession of a controlled substance, 35 P.S. §780-113(a)(16), an ungraded misdemeanor offense for which Defendant was subject to a maximum period of imprisonment not to exceed three years and a fine not to exceed \$25,000.00 or both. 35 P.S. §780-113(b).

<sup>7</sup> Presumably referring to the sentences on Counts 3 and 4 for which Defendant was to plead guilty.

on the record that he had no questions regarding the sentences imposed. (N.T., p. 11). Additionally, at no time during his sentencing did Defendant or his counsel state that the sentences he received were contrary to the stipulation.

On December 5, 2022, Defendant filed a Post-Sentence Motion in the Nature of a Motion for Reconsideration of the sentence imposed, requesting that the sentence be modified to a county sentence to be served in the County prison. The Motion specifically acknowledged that Defendant had a "criminal history [ ] replete with drug-related offenses," and sought the imposition of a county sentence in order that Defendant could be furloughed by the sentencing court at some future date to an in-patient treatment facility. (Post-Sentence Motion, ¶¶ 7-11). The Motion was denied by order dated December 6, 2022. This order specifically noted the court's recognition of Defendant's drug addiction and that because of this, Defendant was given a state sentence and found not ineligible for the state drug treatment program. (Order dated 12/6/22, n.1).

Defendant filed his instant appeal on December 27, 2022 and, in response to our Rule 1925(b)<sup>8</sup> Order, filed a timely concise statement on January 9, 2023. Therein, Defendant raises two issues for appeal: (1) that Defendant's sentence was excessive and failed to consider his individualized need for drug treatment; and (2) that the plea Defendant entered on November 29, 2022, was not knowingly and intelligently made in that Defendant believed he would receive a sentence of "1-9 mths ran concurrent to my

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<sup>8</sup> Pa.R.A.P. 1925(b).

case now.” (Post-Sentence Motion, ¶ k-l). This latter issue has been raised for the first time on appeal.

## DISCUSSION

### Discretionary Aspects of Sentence

Defendant’s first issue challenges the discretionary aspects of his sentence. Commonwealth v. Ahmad, 961 A.2d 884, 886 (Pa.Super. 2008) (“A challenge to an alleged excessive sentence is a challenge to the discretionary aspects of a sentence.”). For this issue to be considered, the issue must be preserved at the trial level, either during sentencing or in a motion to reconsider and modify the sentence, and must involve a substantial question that the sentence appealed from violates either a specific provision of the Sentencing Code or a particular fundamental norm underlying the sentencing process.

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. Prior to reaching the merits of a discretionary sentencing issue[, w]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, see Pa.R.Crim.P. 720; (3) whether appellant’s brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. §9781(b).

Commonwealth v. Johnson, 253 A.3d 321, \*6 (Non-Precedential Decision) (Pa.Super. 2021) (quoting and citing Commonwealth v. Manivannan, 186 A.3d 472, 489 (Pa.Super. 2018)), appeal denied, 284 A.3d 881 (Pa. 2022). Specifically, Defendant argues the court abused its sentencing discretion by failing to consider

and in the process failing to impose a county sentence - one less than two years at the maximum end<sup>9</sup> - with the consequent retention of authority in the sentencing court to furlough Defendant to attend and receive treatment for his addiction in an in-patient treatment facility.

We accept, for purposes of our discussion, that the issue is preserved in Defendant's Post-Sentence Motion for Reconsideration. Whether the question raised by Defendant is a substantial question is, in our view, a close one. "A substantial question exists only when the appellant 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 underlie the sentencing process." Johnson, at \*6 (quoting Manivannan, 186 A.3d at 489). In deciding whether a substantial question has been presented, an appellate court "focus[es] on the *reasons* for which the appeal is sought, in contrast to the *facts* underlying the appeal, which are necessary only to decide the appeal on the merits." Ahmad, 961 A.2d at 887 (citation and quotation marks omitted). The determination of what constitutes a substantial question is evaluated on a case-by-case basis. Commonwealth v. Griffin, 65 A.3d 932, 935 (Pa.Super. 2013), appeal denied, 76 A.3d 538 (Pa. 2013).

In Commonwealth v. Coolbaugh, 770 A.2d 788 (Pa.Super. 2001), the Court found a claim that the sentence failed to take into consideration the defendant's

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<sup>9</sup> 42 Pa.C.S.A. §9762 (b) (3) .

rehabilitative needs and was manifestly excessive did not raise a substantial question where the sentence was within the statutory limits and within the sentencing guidelines. Id. at 793. See also Griffin, 65 A.3d at 936 (finding that defendant's allegation that his sentence failed to take into account his rehabilitative needs under 42 Pa.C.S.A. §9721(b) and was thus manifestly excessive entitled him to no relief). Additionally, a court's exercise of discretion in imposing a sentence concurrently or consecutively does not ordinarily raise a substantial question. Commonwealth v. Caldwell, 117 A.3d 763, 769 (Pa.Super. 2015) (*en banc*) ("[T]he imposition of consecutive rather than concurrent sentences will present a substantial question in only 'the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment.'" (citation and quotation marks omitted), appeal denied, 126 A.3d 1282 (Pa. 2015); Commonwealth v. Pass, 914 A.2d 442, 446-47 (Pa.Super. 2006) (holding challenge to court's imposition of sentence of six to twenty-three months imprisonment consecutive to another unrelated case on which defendant had approximately thirteen months of prison time left to serve, did not present a substantial question).

Nonetheless, the Court in Caldwell held that "Appellant's challenge to the imposition of his consecutive sentences as unduly excessive, together with his claim that the court failed to consider his rehabilitative needs upon fashioning his sentence, presents a substantial question." Caldwell, 117 A.3d at 770. See also

Commonwealth v. Swope, 123 A.3d 333, 338 (Pa.Super. 2015) (stating that a "challenge to the imposition of [the defendant's] consecutive sentences as unduly excessive, together with [a] claim that the court failed to consider [the defendant's] rehabilitative needs and mitigating factors upon fashioning its sentence, presents a substantial question").

In Caldwell, the consecutive sentences imposed resulted in an aggregate sentence of thirty-one to sixty-two years' incarceration and were imposed in the context of a single criminal episode surrounding a robbery, whereas in the instant matter, the effect of running Defendant's sentence for resisting arrest consecutive to his prior sentence of no less than one (less a day) and no more than two (less a day) years at most resulted in an aggregate sentence of one year and six months less a day to four years less a day and involved two entirely separate and distinct criminal episodes occurring at different times. Such a sentence is neither unduly harsh or excessive, especially when considering the common thread of drug involvement running through Defendant's recent criminal history - the sentence to which the resisting arrest sentence runs consecutive involved drug violations, the Schuylkill County sentence which Defendant was serving and on supervision at the time Defendant resisted arrest involved drug violations, and drugs were found in Defendant's possession at the time of his arrest on July 6, 2022<sup>10</sup> - his age (39

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<sup>10</sup> Defendant's criminal background history as of November 2, 2022, not including the present case, begins on September 1, 1998, and extends over a period of twenty years to February 12, 2021.

at the time of the instant offense), and the need to address Defendant's drug addiction through correctional treatment.<sup>11</sup> While we seriously question whether under these circumstances a substantial question has been raised, for purposes of completeness we also examine the merits of Defendant's claim.

Whether the court abused its discretion in sentencing is ultimately a question of whether the sentence is clearly unreasonable.

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.

Caldwell, 117 A.3d at 770 (citations and quotation marks omitted).

A sentence within the standard range of the guidelines is deemed appropriate under the Sentencing Code unless the circumstances of the case render application of the guidelines clearly unreasonable. Commonwealth v. Dodge, 77 A.3d 1263, 1270 (Pa.Super. 2013) (holding that "a bald claim of excessiveness due to the consecutive nature of a sentence will not raise a substantial question"), appeal denied, 91 A.3d 161 (Pa. 2014); Commonwealth v. Corley, 31 A.3d 293, 298 (Pa.Super. 2011) (holding that

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<sup>11</sup> It is also noteworthy that while the circumstances of Defendant committing the current crimes while on parole for another drug-related crime would establish aggravating circumstances to impose an aggravated guideline range sentence, this did not occur. Commonwealth v. Watson, 228 A.3d 928, 937 (Pa.Super. 2020). Nevertheless, it was a factor properly taken into account in the sentence actually imposed. Commonwealth v. Simpson, 829 A.2d 334, 339 (Pa.Super. 2003).

an appellate court can only reverse a standard range sentence "if the sentence is clearly unreasonable when viewed in light of the four statutory factors outlined in 42 Pa.C.S. §9781(d)"<sup>12</sup> (citing Commonwealth v. Walls, 926 A.2d 957, 963-64 (Pa. 2007)). Further "Pennsylvania law affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed." Commonwealth v. Austin, 66 A.3d 798, 808 (Pa.Super. 2013) (citation omitted), appeal denied, 77 A.3d 1258 (Pa. 2013). Finally, a court on appeal is not to re-weigh the sentencing factors and impose its own judgment in place of the sentencing court. Commonwealth v. Macias, 968 A.2d 773, 778 (Pa.Super. 2009) (citation omitted).

Defendant was given a standard range sentence. At the time of sentencing, we explicitly recognized on the record that Defendant's significant and extensive history of criminal misconduct was driven by an underlying abuse of drugs and needed to be addressed. We specifically ordered that Defendant receive a drug evaluation and follow the recommendations of that evaluation.

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<sup>12</sup> Section 9781(d) provides that when reviewing a sentence, an appellate court must consider:

- (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.

42 Pa.C.S. §9781(d).

Defendant's criminal history attached to the Guideline Sentence Form shows Defendant has either received probationary or county sentences in the past, which unfortunately have proven unsuccessful in treating Defendant's addiction, and has never received treatment in a State facility. We found Defendant not ineligible for the state drug treatment program and explained to Defendant the benefits of this program. (N.T., pp. 10-11). The program requires two years in state custody to complete and, therefore, the sentence must provide minimally for this period of state custody. See 61 Pa.C.S.A. §4105(b) (Duration and components). With this objective in mind and taking into account that the current offenses on which Defendant was sentenced arise from a distinct and separate set of criminal acts, the sentence was run consecutive to the September 1, 2022, sentence Defendant was then serving.

Defendant's argument that his rehabilitative needs would be better met by a county sentence is speculative at best and unrealistic. The County prison, as we suspect is the case in most counties of the sixth class, has limited resources to adequately treat ingrained drug addiction, and certainly not to the same extent as those available at the State level. Defendant's hope and suggestion that he be furloughed at some future date to gain admission into an in-patient treatment facility for some undetermined period of time is just that, a hope and a possibility, which even if Defendant is not admitted into the state drug treatment program is less than what can reasonably be expected Defendant will receive at the state level.

### Validity of Plea

Procedurally, this question has been waived. A challenge to the validity of a guilty plea made after a sentence has been imposed must be made either during the plea colloquy or in a timely post-sentence motion to withdraw the plea in order that the court which accepted the plea may consider and correct, in the first instance, any error which may have been committed. Commonwealth v. Lincoln, 72 A.3d 606, 609-610 (Pa.Super. 2013), appeal denied, 87 A.3d 319 (Pa. 2014); see also Pa.R.Crim.P. 720(A)(1), (B)(1)(a)(i) (stating post-sentence motion challenging validity of guilty plea shall be filed no later than ten days after imposition of sentence). Instantly, Defendant did neither. Rather, the issue is raised for the first time in Defendant's concise statement on appeal.

Substantively, the issue is without basis. The standard for allowing the withdrawal of a guilty plea after sentencing – “manifest injustice” - has not been met. Commonwealth v. Broaden, 980 A.2d 124, 129 (Pa.Super. 2009), appeal denied, 992 A.2d 885 (Pa. 2010). “A plea rises to the level of manifest injustice when it was entered into involuntarily, unknowingly, or unintelligently.” Lincoln, 72 A.3d at 610 (citation and quotation marks omitted). At the time of sentencing, the requirements of Pa.R.Crim.P. 590, cmt. were met, the Defendant completed a written guilty plea colloquy which was made part of the record, and the court found Defendant's decision to plead guilty was knowingly, voluntarily and intelligently made. (N.T., pp. 5-6). Defendant's self-serving statement that he subjectively believed he would receive a sentence different from the one he actually

received without any basis in the record to support this belief is insufficient to justify the withdrawal of his plea after sentencing.

### CONCLUSION

Defendant has pointed to no basis for finding the sentence imposed is inappropriate under the Sentencing Code, or that the court ignored or misapplied the law, exercised its discretion for reasons of partiality, prejudice, bias, or ill will, or arrived at a manifestly unreasonable decision, and thus has not shown that the sentence was unduly harsh or manifestly excessive. Defendant's claim that the court failed to consider his individualized need for drug treatment is belied by the record. To the contrary, the court recognized Defendant's abuse of drugs as a motivating factor in his criminal conduct and the need to address this underlying factor for both Defendant's benefit and the protection of the public in general. See 42 Pa.C.S.A. §9721(b).<sup>13</sup> Cf. Swope, 123 A.3d at 340-41 (concluding the record disproved defendant's claim the sentencing court had not considered defendant's rehabilitative needs and mitigating factors, and that the court did not abuse its discretion in imposing an aggregate sentence of six to twenty years' incarceration for two burglary offenses and was free to impose the sentence

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<sup>13</sup> Section 9721(b) provides in pertinent part:

[T]he court shall follow the general principle that the sentence imposed should call for confinement 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. The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing[.]

42 Pa.C.S.A. §9721(b)

consecutively to his other sentences for the crimes he committed while on probation). The sentence Defendant received was fair and appropriate, and Defendant has set forth no legitimate reasons to call that sentence into question.

Defendant's claim that his plea was neither knowingly or intelligently made has been waived and is without merit on the record before us.

BY THE COURT:

  
\_\_\_\_\_ P.J.