

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :  
 :  
 vs. : NO. 1260-CR-2019  
 :  
 THOMAS WEISS, :  
 Defendant :

Criminal Law - Failure to File Court Ordered Concise Statement of Issues on Appeal – Waiver of Issues on Appeal – *Per Se* Ineffectiveness of Counsel – Optional Remand for Appointment of New Counsel and Filing of a Concise Statement *Nunc Pro Tunc* – Challenge to the Discretionary Aspects of Sentence (*e.g.*, that the Sentence is Excessive and Fails to Address Defendant’s Rehabilitative Needs) – Substantial Question.

1. The failure to file a court ordered concise statement of the issues a defendant intends to raise on appeal waives all issues. Such failure is *per se* ineffectiveness of counsel and may result in remand for appointment of new counsel, the filing of a concise statement *nunc pro tunc*, and the filing of an opinion by the trial judge, but this may not occur if the trial court files an opinion which addresses the issues defendant intended to raise.
2. To the extent a defendant contends his sentence was excessive and did not address his claimed need for mental health treatment, defendant challenges the discretionary aspects of his sentence.
3. 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 is contrary to the fundamental norms which underlie the sentencing process for appellate review.
4. Defendant’s claim that the sentence he received failed to take into consideration his rehabilitative needs and was manifestly excessive fails to raise a substantial question where, as here, his sentence was within both the statutory limits and the sentencing guidelines.
5. 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.
6. The sentence Defendant received, a period of imprisonment of not less than one month nor more than one year to be served on consecutive weekends, was within the standard guideline range of RS to 1. The sentence was fair and just, and Defendant has set forth no legitimate reasons to call that sentence into question.

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

COMMONWEALTH OF PENNSYLVANIA

vs.

THOMAS WEISS,  
Defendant

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NO. 1260-CR-2019

Seth E. Miller, Esquire  
Assistant District Attorney  
Paul J. Levy, Esquire

Counsel for Commonwealth  
Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – April 4, 2023

Putting aside Defendant's failure to file a court ordered 1925(b) Concise Statement and the resulting issue of waiver, to the extent Defendant may seek to appeal the discretionary aspects of his sentence for the reasons set forth in his Petition to Reconsider Sentence, the issue does not raise a substantial question cognizable on appeal and, in any event, is without merit.

PROCEDURAL AND FACTUAL BACKGROUND

On August 27, 2019, at approximately 9:55 p.m. Officer Joel Gulla of the Lehighton Borough Police Department observed a vehicle driven by Defendant pulling into a Dunkin' Donuts parking lot where Officer Gulla noticed the inspection sticker attached to the vehicle had been altered. Upon approaching Defendant, Officer Gulla observed that

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CARBON COUNTY

Defendant's eyes were heavily glassed and bloodshot, that Defendant spoke in a rapid fashion, and that Defendant was sweating profusely. A consensual search of Defendant's person located 0.5 grams of methamphetamine in a clear plastic bag inside Defendant's wallet. Defendant admitted using methamphetamine approximately ten hours earlier on the same date. (Criminal Complaint, Affidavit of Probable Cause).

Field sobriety tests administered to Defendant showed impairment and Defendant was arrested for driving under the influence of a controlled substance. A drug recognition evaluation conducted at the police barracks confirmed Defendant's impairment was due to stimulants. When requested to consent to a blood draw, Defendant refused. (Criminal Complaint, Affidavit of Probable Cause).

Defendant pled guilty to possession of a controlled substance (35 P.S. §780-113(a)(16)), an ungraded misdemeanor, on January 24, 2023<sup>1</sup>. When questioned why a charge of driving under the influence of a controlled substance was not being pursued, the Assistant District Attorney responded the case was weak.<sup>2</sup> (N.T., pp. 2-3). Defendant was sentenced on the same day to a period of imprisonment of not less than one month nor more than one year beginning on February 24, 2023, to be served on consecutive weekends from Friday at 9:00 a.m. until the following Sunday at 9:00 a.m. Defendant was also directed to undergo a drug and alcohol and a mental health evaluation within 30

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<sup>1</sup> The maximum penalties for this offense are a period of imprisonment not to exceed one year and a fine not to exceed \$5,000.00. 35 P.S. §780-113(b).

<sup>2</sup> Defendant was convicted of a prior DUI offense in Northampton County on May 29, 2002, and had an August 6, 2020, DUI offense pending in Carbon County at the time of his plea.

days and follow all recommendations. The sentence Defendant received was in the standard guideline range of RS to 1.

Defendant filed a Petition to Reconsider Sentence on January 30, 2023, contending, *inter alia*, that because the root cause of his use of methamphetamine were mental health issues and substance use disorder, incarceration would serve little deterrence, but rather would "significantly deteriorate his mental health," and that the reasons given by the court for imposing a jail sentence, versus one of probation, were inappropriate. (Petition to Reconsider Sentence, ¶¶ 5, 6 and 8).<sup>3</sup> The Petition was denied by court order dated February 2, 2023.

Defendant appealed his judgment of sentence on February 23, 2023. By order dated March 1, 2023, and filed on March 2, 2023, Defendant was directed to file a Concise Statement of the Errors Complained of on Appeal and serve a copy on the undersigned no later than 21 days from entry of the order. As of this date, Defendant has failed to comply with this order.

#### DISCUSSION

At the outset, Defendant's failure to file a 1925 Concise Statement waives all issues on appeal. Commonwealth v. Burton, 973 A.2d 428, 432 (Pa.Super. 2009) (*en banc*): While such failure is *per se* ineffectiveness and may result in remand "for appointment of new counsel, the filing or service of a Statement *nunc pro tunc*, and the

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<sup>3</sup> Defendant does not identify in what respect he contends the reasons given for incarceration were inappropriate; we do not know to what he refers; and we will not guess.

preparation and filing of an opinion by the judge,"<sup>4</sup> this is not necessarily the case if the trial court files an opinion which addresses the issues defendant intended to raise. Commonwealth v. Thompson, 39 A.3d 335, 340-41 (Pa.Super. 2012).

Here, given Defendant's guilty plea and Petition to Reconsider Sentence, we find it likely that to the extent Defendant intended to pursue an appeal, the appeal would involve the same issues raised in his Petition to Reconsider Sentence. These issues go to the discretionary aspects of his sentence: that his sentence was excessive and did not properly address his rehabilitative needs.

To be considered on appeal, a challenge to the discretionary aspects of a sentence imposed by the trial court 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. 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). "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). The determination of what constitutes a substantial

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<sup>4</sup> Pa.R.A.P. 1925(c)(3).

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 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); Commonwealth v. Mobley, 581 A.2d 949, 952 (Pa.Super. 1990) (finding a claim that the sentence failed to take into consideration the defendant's rehabilitative needs and was manifestly excessive did not raise a substantial question where the sentence was within both the statutory limits and sentencing guidelines). Under this authority, Defendant's challenge to the sentence imposed by this court would not raise a substantial question on appeal.

Addressing the merits of such a challenge, 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. Such is not the case in the present matter.

Defendant was given a standard range sentence. At the time of sentencing, Defendant acknowledged that he had been self-medicating with methamphetamine because the medication prescribed for his mental health issues was not working, that he

had continued to use methamphetamine for more than 3 years after the August 27, 2019, offense date (having only ceased using methamphetamine, according to Defendant, eight to nine months before being sentenced), and that he had never successfully completed any treatment for methamphetamine. (N.T., pp. 11, 15-18). In recognition of this, the sentence Defendant received directed that he have both a drug and alcohol and a mental health evaluation and follow all recommendations of those evaluations. Defendant also acknowledged that he was scheduled for a guilty plea later in the same week for driving under the influence in another matter and had yet to have his drug and alcohol evaluations completed. (N.T., p. 9).

At the time of sentencing, it appeared that Defendant was making strides in addressing his mental health issues with the proper medication. (N.T., pp. 10-11). Defendant's report date for jail was not until one month after his sentencing date, thereby giving him time not only to have the court ordered drug and alcohol and mental health evaluations completed, but also further time to address his mental health issues with his physicians. Moreover, the sentence imposed was a weekend sentence only, again allowing Defendant time to address his mental health issues during the week.


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. The sentence Defendant received was fair and

appropriate, and Defendant has set forth no legitimate reasons to call that sentence into question.

CONCLUSION

Defendant's failure to file a 1925 Concise Statement waives all issues on appeal. This notwithstanding, in the hope of avoiding remand, we have addressed the only issue of which we are aware Defendant might intend to appeal - one questioning the discretionary aspects of sentencing - which fails to raise a substantial question and which, in any event, is without merit.

BY THE COURT:

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