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OPINIONS

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OPINIONS

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COMMONWEALTH OF PENNSYLVANIA v. ERICA MARKUS*Criminal Appeal—Abuse of Discretion—Excessive Sentence*

No. CP-02-CR-0000317-2021. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Howsie, Jr., J.—May 4, 2022.

OPINION

On July 16, 2021, the Defendant, Erica Markus, pleaded guilty to three counts each of Aggravated Assault by Vehicle While Driving Under the Influence, Aggravated Assault by Vehicle, Recklessly Endangering Another Person; and one count each of Driving Under the Influence: Controlled Substance or Metabolite First Offense, Possession of a Controlled Substance, Use/Possession of Drug Paraphernalia, Reckless Driving, Careless Driving, and Exceeding Maximum Speed Limit by 10 MPH.

The record establishes the following: On June 20, 2020, Scott Township Police were called to a multi-vehicle collision, wherein two (2) parked vehicles and three (3) pedestrians were struck by a Ford Fiesta, operated by the Defendant. The three (3) pedestrians suffered critical injuries. One victim suffered a bilateral amputation of both legs and multiple internal injuries; one victim suffered critical injuries which included fractured ribs, a fractured pelvis, a closed head injury and internal injuries; the final victim suffered critical injuries which included a broken leg, head injuries, and internal bleeding. On June 27, 2020, the Defendant's medical records were obtained from the hospital, which indicated that Defendant had tested positive for cocaine and opiates. A search warrant was obtained for the blood of the Defendant. On August 12, 2020, a lab report was obtained from the Allegheny County Crime Lab, which indicated that Defendant's blood specimen contained Fentanyl and Norfentanyl.

At the Sentencing Hearing on October 14, 2021, the Honorable David Cashman¹ imposed the following sentence: Count 1 – 18 to 36 months of incarceration, followed by five (5) years of probation; Count 4 – 18 to 36 months of incarceration, followed by five (5) years of probation; Count 7 – 18 to 36 months of incarceration, followed by five (5) years of probation. In addition, at Count 10 – 72 hours of incarceration to be followed by a period of five (5) months' probation, and a mandatory fine of \$1,000.

On October 18, 2021, the Honorable David Cashman conducted a Re-Sentencing Hearing to clarify the sentence on the record. At Counts 1, 4, and 5, the sentence was 18-36 months, with the sentences running consecutively. The sentences of incarceration were to be followed by a period of probation for five (5) years, which would run concurrently with each other, but consecutive to the sentences of incarceration. At Count 11, Judge Cashman imposed a sentence of incarceration of 72 hours, to be followed by a period of probation of five months, which would run concurrently with the other periods of incarceration, and a mandatory fine of \$1,000. A corrected Order of Sentence was entered on November 30, 2021, reflecting that the periods of incarceration of 18 to 36 months were imposed at Counts 1, 4, 7, and 11.

On October 23, 2021, Defendant, through her counsel, filed a timely Post-Sentence Motion, which was denied by the Honorable David Cashman on October 28, 2021. Defendant filed a Notice of Appeal on November 29, 2021. In her concise statement of matters complained of on appeal, Defendant raises the following issues for appeal:

“The lower court abused its discretion in running the terms of 18 to 36 months’ [sic] consecutively in resentencing Ms. Marcus to an aggregate term of 54 to 108 months, after initially running the terms of incarceration concurrently, where the court failed to state any reasons on the record for increasing the sentence by running the terms of imprisonment consecutively, effectively imposing an aggregate term of imprisonment of 4 ½ years to 9 years. In addition, the sentence is manifestly excessive and unreasonable insofar as it apparently is based solely on the impact of the offense on the complainants and fails to adequately consider the rehabilitative needs of Ms. Marcus, who only recently became addicted to heroin, and has no criminal history. After the incident, Ms. Markus was proactive in seeking treatment for her addiction, who gained insight as the impact of her addiction on people besides herself. Furthermore, she took full responsibility for her action, expressed sincere and deep remorse for her actions, and has the support of her family.

While some degree of incarceration is appropriate, 4 ½ to 9 years’ [sic] imprisonment, is unduly long for someone whose conduct was not malicious but is the result of drug addiction. When crafting a sentence, Court must consider the serious nature of the offense but also the impact on the community and rehabilitative needs of the defendant. The sentence does not adequately reflect those factors where her acts were motivated by her addiction impacting her judgment, and not an intent to kill. The failure to consider those factors resulted in a manifestly excessive and unreasonable sentence that was contract to the sentencing code and contrary to the fundamental norms underlying the sentencing process.”

Essentially, it appears that Defendant has raised two (2) issues in her concise statement for appellate review: 1) that the lower court abused its discretion in running the terms of 18 to 36 months of incarceration consecutively in resentencing Ms. Marcus to an aggregate term of 54 to 108 months, after initially running the terms of incarceration concurrently, where the court failed to state any reasons on the record for increasing the sentence by running the terms of imprisonment consecutively, effectively imposing an aggregate term of 4 ½ to 9 years; 2) that the sentence is manifestly excessive and unreasonable in light of the facts of this particular case.

The Defendant challenges the discretionary aspects of her sentence. An appellant challenging the discretionary aspects of his sentence must invoke the appellate court's jurisdiction by satisfying a four-part test under which the appellate court must determine: (1) whether appellant has filed a timely notice of appeal, under rules governing the manner of taking the appeal and the time for appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, under rules governing post-sentence procedures; (3) whether the appellant's brief has a fatal defect, under rules governing a challenge to the discretionary aspects of sentencing; and (4) whether there is a substantial question that the sentence appealed from is not appropriate, under statutes governing the allowance of appeal of a sentence. 42 Pa. Cons. Stat. Ann. § 9781(b); Pa. R. App. P. 902, 903, 2119(f); Pa. R. Crim. P. 720. *Commonwealth v. Durazo*, 2019 PA Super 150, 210 A.3d 316 (2019).

Here, the Defendant has properly invoked the jurisdiction of the appellate court. The standard of review for a claim challenging the discretionary aspects of sentencing is well-established:

Sentencing is a matter vested in the sound discretion of the judge and will not be disturbed on appeal absent a manifest abuse of discretion. 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. Foxx, No. 1450 WDA 2017, 2019 WL 4899215, at *3 (Pa. Super. Ct. Oct. 4, 2019)

Moreover, pursuant to 42 Pa.C.S. § 9721(b), “the 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.” 42 Pa.C.S. § 9721(b). Additionally, “the court shall make as part of the record and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed.” *Id.* The record in toto “must reflect the [trial] court’s consideration of the facts of the crime and character of the offender.” *Commonwealth v. Crump*, 995 A.2d 1280, 1283 (Pa. Super. 2010), appeal denied, 13 A.3d 475 (Pa. 2010). “In particular, the court should refer to the defendant’s prior criminal record, his age, personal characteristics and his potential for rehabilitation.” *Commonwealth v. Griffin*, 804 A.2d 1, 10 (Pa. Super. 2002), appeal denied, 868 A.2d 1198 (Pa. 2005), cert denied, 545 U.S. 1148 (2005). *Commonwealth v. Foxx*, No. 1450 WDA 2017, 2019 WL 4899215, at *4 (Pa. Super. Ct. Oct. 4, 2019).

Here, the trial Judge carefully considered the law and facts of this particular case when sentencing the Defendant to 4 ½ to 9 years of imprisonment. The imposed sentence was within the sentencing guidelines. The victims in this case had their lives forever changed by the Defendant’s actions, with one victim losing both of her legs. The Defendant’s actions were motivated by her drug addiction, without regard for the consequences of her actions on others. As stated by the trial Judge at the time of sentencing, the Defendant’s actions were much like throwing a rock in a pond. “When those ripples start, they keep on going. And your actions touched not only the victims but the victims’ families, the friends of the victims, the relatives of the victims, and even people who didn’t even know them but heard of them.” The trial Judge carefully considered the protection of the public, the gravity of the offense as it related to the impact on the lives of the victims and on the community, and on the rehabilitative needs of the Defendant. As such, the judgement of sentencing should be affirmed.

BY THE COURT:

/s/Howsie, Jr., J.

Date: May 4, 2022

¹ The Honorable David Cashman retired as of December 31, 2021, and this case was reassigned to the Honorable Elliot C. Howsie, Jr.