

IN THE
SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

NO. 1058 WDA 2019

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.
MARCIA DINARDO,
Appellant

BRIEF FOR APPELLEE

Appeal from the judgment of sentence entered January 14, 2019, in the Court of
Common Pleas, Criminal Division, Allegheny County, at No. CC 2018-4090.

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COUNTER-STATEMENT OF THE QUESTION INVOLVED

- I. Whether the trial court imposed the sentence of fines without first determining whether appellant has the ability to pay the fine?

COUNTER-STATEMENT OF THE CASE

This is an appeal from the judgment of sentence entered January 14, 2019, in the Court of Common Pleas, Criminal Division, Allegheny County, at No. CC 2018-4090.

A. Procedural History

The Commonwealth agrees to the Procedural History as set forth in appellant's brief.

B. Factual History

The facts underlying appellant's conviction were summarized by the prosecutor during the guilty plea colloquy as follows:

Yes, Your Honor. Over several occasions, officers went to the residence that Ms. Dinardo owns and found cats and a house in deplorable conditions.

There were over 100 cats both dead and alive found in there. Of the ones that were alive, there were 49 taken. Seven of which had to be put down at one point and one at another. So eight were euthanized.

The cats were taken care of by a veterinarian and given to shelters, and some of them have been re-homed.

(HT of 1/14/19 at p. 6).

SUMMARY OF THE ARGUMENT

Appellant contends that the trial court failed to consider her ability to pay her fines in contravention of the Sentencing Code's requirement as set forth in 42 Pa.C.S.A. § 9726, and therefore, abused its discretion in imposing these fines. The Commonwealth agrees that this claim does raise a substantial question, and therefore, this Honorable should exercise its discretionary jurisdiction and entertain the claim on its merits. The Sentencing Code provides that a court shall not sentence a defendant to pay a fine unless it appears of record that the defendant is or will be able to pay the fine. Contrary to appellant's assertions, a hearing was held on appellant's ability to pay, albeit following appellant's motion to modify sentence, at which time the trial court was fully apprised of appellant's finances. Notably, appellant is not asserting that the court lacked certain information regarding her finances, but rather, did not agree with her regarding what affect it has on her ability to pay. The Commonwealth submits that the record supports the trial court's findings regarding appellant's ability to pay, and therefore, the trial court did not abuse its discretion in imposing sentence.

ARGUMENT

- I. THE TRIAL COURT WAS FULLY INFORMED REGARDING APPELLANT'S FINANCIAL STATUS AND MONTHLY INCOME, AND THE RECORD SUPPORTS THE TRIAL COURT'S CONCLUSION THAT APPELLANT HAD THE ABILITY TO MAKE MONTHLY PAYMENTS, AND THEREFORE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING FINES OF \$10,200.

Appellant contends that the trial court failed to consider her financial circumstances and ability to pay the fines before sentencing her, and that the imposition of \$10,200 in fines was either an abuse of the court's discretion or in the alternative, illegal. The Commonwealth submits that these claims are meritless.

Sentencing is a matter vested within the discretion of the court and will not be disturbed absent an abuse of that discretion. *Commonwealth v. Miller*, 835 A.2d 377, 380 (Pa.Super. 2003). To the extent that appellant is challenging the discretionary aspect of his sentence, she has no right of appeal, rather "appellant's appeal must be considered as a petition for permission to appeal. 42 Pa.C.S. § 9781(b); Note to Pa.R.A.P. 902; *Commonwealth v. Tuladziecki*, 513 Pa. 508, 511, 522 A.2d 17, 18 (1987)." *Commonwealth v. Williams*, 386 Pa. Super. 322, 324, 562 A.2d 1385, 1386–87 (1989). Accordingly, as a first step, appellant is required to include in his brief a separate statement of the

reasons relied upon for such an appeal, pursuant to Pa.R.A.P. 2119(f), and articulate why this court should invoke its discretionary jurisdiction. *Id.* The determination of what constitutes a substantial question is evaluated on a case-by-case basis. *Commonwealth v. Paul*, 925 A.2d 825, 828 (Pa.Super. 2007). 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.” *Commonwealth v. Sierra*, 752 A.2d 910, 912-913 (Pa.Super. 2000). Moreover, this Court has stated that when evaluating what constitutes a substantial question, it will not accept bald assertions of sentencing errors. *Commonwealth v. Malovich*, 903 A.2d 1247, 1252 (Pa.Super. 2006). An appellant must articulate the reasons the sentencing court's actions violated the sentencing code. *Id.*

In her Concise Statement appellant, appellant contends that the trial court failed to consider her ability to pay her fines in contravention of the Sentencing Code's requirement as set forth in 42 Pa.C.S.A. § 9726(d). The Commonwealth agrees that this claim does raise a substantial

question, and therefore, this Honorable should exercise its discretionary jurisdiction and entertain the claim on its merits.¹ That said, however, the record belies appellant's claim.

The Sentencing Code provides that "[t]he court shall not sentence a defendant to pay a fine unless it appears of record that [] the defendant is or will be able to pay the fine." 42 Pa.C.S.A. § 9726(c)(1). See *George v. Beard*, 824 A.2d 393, 395 (Pa.Cmwlth. 2003), *aff'd*, 574 Pa. 407,

¹ In response to the trial court's statement that appellant waived her claim that she lacked the ability to pay fines by failing to raise it at the time of her plea or sentencing, appellant attempts to raise the claim as a challenge to the legality of the sentence. See Appellant's Brief at pp. 29-32. In doing so, appellant misconstrues what a challenge to the legality of the sentence means, *i.e.*, that the court lacks the legal authority to impose a sentence. See *Commonwealth v. Foster*, 609 Pa. 502, 518, 17 A.3d 332, 342 (2011) ("Consistent, then, with this Court's jurisprudence in this area of the law throughout the years, legality of sentence issues occur generally either: (1) when a trial court's traditional authority to use discretion in the act of sentencing is somehow affected, see e.g. *In re M.W.*, 725 A.2d at 731 (holding that, when a sentencing issue 'centers upon a court's statutory authority' to impose a sentence, rather than the 'court's exercise of discretion in fashioning' the sentence, the issue raised implicates the legality of the sentence imposed); and/or (2) when the sentence imposed is patently inconsistent with the sentencing parameters set forth by the General Assembly."). The Commonwealth submits that appellant does not have a discrete challenge to the legality of the sentence imposed, but rather, has simply repackaged the same challenge regarding the court's alleged abuse of discretion in imposing a fine without giving due consideration to her ability to pay, which, for the reasons that follow, fail.

831 A.2d 597 (2003). “Imposition of a fine is not precluded merely because the defendant cannot pay the fine immediately or because he cannot do so without difficulty. *Commonwealth v. Church*, 513 Pa. 534, 540, 522 A.2d 30, 33 (1987).” *Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa.Super. 2005).

Contrary to her assertion, the trial court held a hearing on the matter of her ability to pay after appellant filed her objections and request to modify the sentence on June 18, 2019, which was concluded on July 11, 2019. Notably, appellant made no objection to the imposition of a fine, or argued that she lacked the ability to pay, at the time of sentencing, but rather, only did so in her motion to modify sentence. See HT of 7/18/19 at 8-10. During that hearing, the court was fully informed regarding appellant’s monthly income of \$325 in Social Security Disability benefits and \$466 in Social Security Income benefits per month, as well as the fact that she lives with her daughter and fiancé and has no rent or mortgage payments. While appellant claimed to be paying monthly utility bills, the evidence presented at the hearing demonstrated that the bills were in her daughter’s name, and further, she admitted that each of the three was paying a portion of those bills. And while appellant claimed that she was also paying bills for her former residence at 177 45th Street, that building

had been condemned, was in conservatorship and had not been occupied in over a year. (HT of 6/18/19). As the trial court further noted, appellant could have been placed on a monthly payment plan which she could have afforded.

Furthermore, appellant is not asserting that the court lacked certain information regarding her finances, but rather, did not agree with her regarding what affect it has on her ability to pay. In *Commonwealth v. Williams*, 386 Pa.Super. 322, 562 A.2d 1385 (1989) (*en banc*), in considering whether the defendant had raised a substantial question requiring the Court to grant the permission to appeal, this Honorable Court determined that an allegation that the sentencing court “failed to consider” or “did not adequately consider” various factors is, in effect, a request for this court to substitute its judgment for that of the lower court in fashioning a defendant's sentence. The Court reasoned that allegations of this type, in the absence of contrary allegations, concede that the lower court was provided with adequate information on which to base its sentencing decision. *Id.* at 326, 562 A.2d at 1388.

“[A]lthough she asserts that the sentencing court “failed to consider” or “did not adequately consider” various factors, her statement makes clear that the court was in fact provided with adequate information on which to base its sentencing decision. “It would be foolish, indeed, to take the position that if a court

is in possession of the facts, it will fail to apply them to the case at hand.” *Commonwealth v. Devers*, 519 Pa. 88, 102, 546 A.2d 12, 18 (1988) (holding that where pre-sentence report exists, reviewing court will presume that sentencing court was aware of relevant information regarding defendant's character and weighed those considerations along with mitigating statutory factors). The essence of appellant's Rule 2119(f) statement is that Judge Salus, after considering the information provided to him, should have imposed a lesser, “more appropriate” sentence. In effect, appellant asks this Court to substitute its judgment regarding an appropriate sentence for that of Judge Salus. Such a statement does not raise a substantial question that the sentence imposed was in fact inappropriate. *Commonwealth v. Billett*, 370 Pa.Super. 125, 131, 535 A.2d 1182, 1185 (1988).

Id. at 326–27, 562 A.2d at 1388. These observations are equally applicable here in considering the merits of appellant’s claim. Appellant is asking this Honorable Court to substitute its judgment for the trial court regarding her ability to pay the fines. Rather, the proper question is whether the record supports the trial court’s exercise of its discretion. The Commonwealth submits that it does.²

² To the extent that appellant is arguing that the trial court was required to place its findings on the record at the time of sentencing, that is belied by the plain language of the Sentencing Code, which includes no such requirement. See 42 Pa.C.S.A. § 9726. While it would appear that the Commonwealth Court has suggested such a requirement, see *George*, (continued ...)

supra, that has no binding effect upon this Honorable Court. “This Court is not bound by decisions of the Commonwealth Court. However, such decisions provide persuasive authority, and we may turn to our colleagues on the Commonwealth Court for guidance when appropriate.” *Petow v. Warehime*, 2010 PA Super 95, 996 A.2d 1083, 1089 (2010), *quoting Maryland Cas. Co. v. Odyssey*, 894 A.2d 750, 756 n. 2 (Pa.Super. 2006). The Commonwealth submits that given that the statute imposes no such duty, this Court should not follow the Commonwealth Court’s lead on this point.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that judgment of sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Kevin F. McCarthy

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PROOF OF SERVICE

I hereby certify that I am this day serving two (2) copies of the within Brief for Appellee upon Counsel for Appellant in the manner indicated below which service satisfies the requirements of Pa.R.A.P 121:

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