

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
:
v. :
:
:
CARLTON F. WALTER :
:
Appellant : No. 1613 WDA 2019

Appeal from the Judgment of Sentence Entered September 18, 2019
in the Court of Common Pleas of Cambria County
Criminal Division at No(s): CP-11-CR-0001656-2018

BEFORE: BOWES, J., OLSON, J., and MUSMANNO, J.

MEMORANDUM BY MUSMANNO, J.: FILED OCTOBER 26, 2020

Carlton F. Walter (“Walter”) appeals from the judgment of sentence imposed following his convictions of two counts of rape, and one count each of sexual assault, simple assault, and kidnapping.¹ We affirm.

In its Opinion, the trial court summarized the relevant factual and procedural history underlying this appeal as follows:

On September 27, 2016, Officer James Ardary [(“Officer Ardary”),] [with the] Stoneycreek Township Police Department, received a call for service to investigate a sexual assault that had taken place in the 200 block of Ohio [Street], Johnstown, Cambria County, [Pennsylvania]. When [Officer Ardary] arrived at [the victim’s] residence, he found her crying on the kitchen table. [The victim] told Officer Ardary that a black male, approximately 5’9” tall, skinny to medium built, wearing glasses, and clean shaven, put what she believed to be a gun on her back[,] took her into an alley[,] and had non-consensual sex

¹ 18 Pa.C.S.A. §§ 3121(a)(1), (a)(2); 3124.1; 2701(a)(1); 2901(a)(2).

with her. [The v]ictim was transported to the hospital[,] where a sexual assault forensic evidence kit was collected. A serology analysis of bodily fluids recovered from [the v]ictim's vaginal area and underwear identified a mixture of three DNA profiles.

On September 7, 2018, Officer Thomas Owens [(“Officer Owens”),] [with the] Stoneycreek Township Police Department, received a report from Forensic DNA Scientist Rachael Rodriguez [(“Rodriguez”),] which indicated that [Walter] was “indicated” by [the Federal Bureau of Investigation’s Combined DNA Index System (“CODIS”)] as a potential source of one of the DNA profiles [that was] collected from the [v]ictim's vaginal area and underwear. After receiving this report, Officer [Owens] began his investigation[,] which revealed that[,] despite not being from the Johnstown area, [Walter] had been in the 300 block of Ohio Street on or around May 2018. After obtaining a photograph of [Walter], Officer Owens noticed that the photograph matched the description given by the [v]ictim. Based on this information, Officer Owens filed a Complaint, obtained a warrant, and [Walter] was arrested. ...

[Walter’s] trial began on June 17, 2019, and lasted for two days. On June 18, 2019, the jury found [Walter] guilty of [the above-mentioned crimes.] On September 18, 2019, [the trial court] sentence[d] [Walter] to incarceration in a state prison for an aggregate period of nine years and two months to eighteen years and four months. On September 25, 2019, [Walter] filed his post-sentence [M]otion[,] in which he moved [for the trial court] to modify the sentence (unduly harsh), and to grant his [M]otion for acquittal based on: sufficiency and weight of the evidence, and prosecutorial misconduct challenges. After [a] hearing, [the trial court] denied [Walter’s] post-sentence [M]otion on October 10, 2019.

On October 22, 2019, [Walter] filed this timely appeal.... On November 12, 2019, [Walter] filed his [court-ordered Pa.R.A.P. 1925(b)] Concise Statement of the [m]atters [c]omplained of on [a]ppeal.

Trial Court Opinion, 1/10/20, at 1-3.

On appeal, Walter raises the following questions for our review:

I. Whether the trial [c]ourt was in error in denying [Walter]'s Post[-]Sentence Motion for Sentence Modification when it found that it was not unduly harsh to sentence [Walter] to consecutive sentences?

II. Whether the trial [c]ourt was in error in denying [Walter]'s Post Sentence Motion [f]or Judgment of Acquittal when it found the Commonwealth had presented sufficient evidence as to the crimes of [r]ape by forcible compulsion, [r]ape by threat of forcible compulsion, [k]idnap to facilitate a felony, [s]exual assault, and [s]imple assault[?]

III. Whether the trial [c]ourt was in error in denying [Walter]'s Post Sentence Motion [t]hat a new trial should be granted when it found that the verdict was not against the weight of the evidence when the [p]rosecution relied on a non-credible in[-]court identification of [Walter] as the assailant to prop up a weak scientific identification through DNA analysis?

IV. Whether the trial [c]ourt was in error in denying [Walter]'s Motion [t]hat a new trial should be granted when[,] in closing argument[,] [the] prosecutor misrepresented critical scientific testimony and also suggested to the jury that the DNA evidence in the state [CODIS] system could be used to exonerate [Walter]?

Brief for Appellant at 8.

In his first claim, Walter argues that the trial court abused its discretion by sentencing him to consecutive sentences. See Brief for Appellant at 23-24. Walter claims that the sentence is excessive; the trial court did not state sufficient reasons for imposing the sentence; and the trial court did not give adequate consideration to mitigating factors. *Id.*

This claim challenges the discretionary aspects of Walter's sentence. "An appeal raising the discretionary aspects of sentencing is not guaranteed as of right; rather, it is considered a petition for permission to appeal."

Commonwealth v. Mulkin, 228 A.3d 913, 916 (Pa. Super. 2020). 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. Grays, 167 A.3d 793, 815-16 (citation omitted).

When the appellant has not included a Rule 2119(f) statement and the Commonwealth has not objected, this Court may ignore the omission and determine if there is a substantial question that the sentence imposed was not appropriate, or enforce the requirements of Pa.R.A.P. 2119(f) sua sponte, i.e., deny allowance of appeal. However, this option is lost if the Commonwealth objects to a 2119(f) omission. In such circumstances, this Court is precluded from reviewing the merits of the claim and the appeal must be denied.

Commonwealth v. Kiesel, 854 A.2d 530, 533 (Pa. Super. 2004); see also Commonwealth v. Dawson, 132 A.3d 996, 1005 (Pa. Super. 2015) (denying an appellant's petition for permission to appeal the discretionary aspects of her sentence where the appellant failed to include a Rule 2119(f) statement in her brief and the Commonwealth objected).

Here, Walter filed a timely Notice of Appeal and raised his sentencing claim in a post-sentence Motion. However, Walter did not include a Rule 2119(f) statement in his brief, and the Commonwealth has objected to this deficiency. Brief for Commonwealth at 9. Accordingly, we are precluded

from considering Walter's discretionary sentencing claim on appeal. See Kiesel, *supra*; Dawson, *supra*.

In his second claim, Walter challenges the sufficiency of the evidence supporting his convictions for rape by forcible compulsion, rape by threat of forcible compulsion, kidnapping, sexual assault, and simple assault. Brief for Appellant at 24-28. According to Walter, the testimony of Ashlee Mangan ("Mangan"), the Pennsylvania State Police Crime Lab manager who reviewed the serology report, was unreliable. *Id.* at 25. Walter points out that Mangan did not prepare the serology report, and the serology report was not offered into evidence.² *Id.* Walter argues that the remaining evidence produced at trial was insufficient to identify him as the perpetrator of the above-mentioned crimes. *Id.* at 28.

When considering a challenge to the sufficiency of the evidence, we ascertain

² Walter also challenges the admission into evidence of Mangan's testimony, and claims a violation of his Sixth Amendment right under the United States Constitution to confront a witness against him. See Brief for Appellant at 25-28. Walter argues that because the serology report was not admitted into evidence, and because Mangan did not prepare the report, Mangan should not have been permitted to testify regarding its contents. *Id.* Walter claims that his Sixth Amendment right was violated because the Commonwealth did not produce for cross-examination the lab technician who prepared the serology report. *Id.* To the extent that Walter raises these claims, they are waived, because they were not raised in his Concise Statement. See *Commonwealth v. Lemon*, 804 A.2d 34, 36 (Pa. Super. 2002) (stating that "issues not included in a Pa.R.A.P. 1925(b) statement are deemed waived on appeal.").

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