

IN THE
SUPREME COURT OF THE UNITED STATES

EMRU KEBEDE- Petitioner

VS.

COMMONWEALTH OF PENNSYLVANIA- Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

APPENDIX A

PA SUPREME COURT DOCKET
JUNE 7, 2022 *PER CURIAM ORDER*

Supreme Court of Pennsylvania



Allocatur Docket Sheet

Docket Number: 308 MAL 2020

Page 4 of 4

September 4, 2022

DOCKET ENTRY

Filed Date	Docket Entry / Representing	Participant Type	Filed By
June 7, 2022	Order Denying Petition for Allowance of Appeal		Per Curiam
Comments: AND NOW, this 7th day of June, 2022, the Petition for Allowance of Appeal is DENIED.			
June 7, 2022	Order Exited		Office of the Prothonotary
June 28, 2022	Notice of Disposition Sheet Exited		Office of the Prothonotary

CROSS COURT ACTIONS

Docket Number: 301 MDA 2018
Docket Number: 4 MM 2019

IN THE
SUPREME COURT OF THE UNITED STATES

EMRU KEBEDE- Petitioner

VS.

COMMONWEALTH OF PENNSYLVANIA- Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

APPENDIX B

PA SUPERIOR COURT OPINION & ORDER
FEBRUARY 26, 2020

COMMONWEALTH OF PENNSYLVANIA v. EMRU KEBEDE, Appellant
SUPERIOR COURT OF PENNSYLVANIA
2020 Pa. Super. Unpub. LEXIS 681; 227 A.3d 441
No. 301 MDA 2018
February 26, 2020, Decided
February 26, 2020, Filed

Notice:

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37PUBLISHED IN TABLE
FORMAT IN THE ATLANTIC REPORTER.**

Editorial Information: Prior History

Appeal from the Judgment of Sentence January 3, 2018. In the Court of Common Pleas of Lancaster County Criminal Division at No(s): CP-36-CR-0003556-2007. Commonwealth v. Kebede, 23 A.3d 1080, 2011 Pa. Super. LEXIS 320 (Pa. Super. Ct., Jan. 11, 2011)

Judges: BEFORE: DUBOW, J., NICHOLS, J., and COLINS, J.* MEMORANDUM BY DUBOW, J.

Opinion

Opinion by: DUBOW

Opinion

MEMORANDUM BY DUBOW, J.:

Appellant, Emru Kebede, appeals *pro se* from the January 3, 2018 Judgment of Sentence of 30 years' to life imprisonment imposed upon resentencing after the grant of post-conviction relief based on *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).¹ After careful review, we affirm.

A detailed recitation of the procedural and factual history is unnecessary to our disposition. Briefly, in 2007, when Appellant was 16 years old, he participated in events that led to the murder of the victim by another actor. On September 10, 2009, a jury found Appellant guilty of Second-Degree Murder, and on September 18, 2009, the court sentenced Appellant to a statutorily mandated sentence of life without parole ("LWOP"). This Court affirmed the Judgment of Sentence. *Commonwealth v. Kebede*, 23 A.3d 1080 (Pa. Super. 2011) (table).

On May 22, 2012, Appellant filed a Petition pursuant to the Post Conviction Relief Act ("PCRA") invoking *Miller*. The PCRA court denied relief, and on February 20, 2015, this Court affirmed. *Commonwealth v. Kebede*, 120 A.3d 387, 2015 WL 7575706 (Pa. Super. 2015). While his Petition for Allowance of Appeal was pending, the U.S. Supreme Court, in *Montgomery, supra*, held that *Miller* would be applied retroactively. Therefore, the Pennsylvania Supreme Court vacated this Court's February 20, 2015 Order, and remanded the case for proceedings consistent with *Montgomery*.² *Commonwealth v. Kebede*, 635 Pa. 153, 132 A.3d 973 (Pa. 2016).

A resentencing hearing commenced on January 3, 2018. Appellant requested that the court sentence

him to a minimum sentence of 15 years' imprisonment while the Commonwealth requested the court to impose a sentence of not less than 30 years' to life imprisonment. After providing a thorough review of the applicable sentencing factors, the court resentenced Appellant to a standard range sentence of 30 years' to life imprisonment for his Second-Degree Murder conviction.

Appellant filed a Post-Sentence Motion, which the trial court denied.

This timely appeal followed. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

Issues Raised

Appellant raises the following six issues on appeal, reordered for ease of disposition:

1. Did the trial court violate Appellant's constitutional right to due process and equal protection protected under the Fourteenth Amendment of the U.S. Constitution and Article 1 § 9 of the Pennsylvania Constitution by committing reversible error by failing to give an instruction/definition of the "reasonable man" standard as requested by the Appellant regarding the inference of malice as applied to the felony murder rule?
2. Did the trial court violate Appellant's constitutional right to due process and equal protection and commit reversible error by failing to give an instruction on involuntary manslaughter in conjunction with the first-degree/second-degree murder instruction.
3. Did the resentencing court violate Appellant's constitutional right to due process protected under the Fourteenth Amendment of the U.S. Constitution and Article 1 § 9 of the Pennsylvania Constitution by imposing an illegal sentence when it failed to perform an on the record consideration of the *Miller/Knox* factors as required pursuant to the Pennsylvania Supreme Court Decision in *Commonwealth v. Machicote*, 14 WAP 2018, 2019 Pa. LEXIS 2374 (Pa. 4/26/2019)?
4. Did the resentencing court violate Appellant's constitutional right to equal protection and due process protected under the fifth and fourteenth amendments of the U.S. Constitution by considering/relying upon Title 18 Pa. C.S.A. § 1102.1 as a guiding factor in imposing its sentence?[]
 - a. § 1102 is unconstitutional as it violates the equal protection clause of both the state and federal constitutions. The statute differentiates punishment based solely upon a child offender's chronological age. This arbitrary divide of child offenders discriminates against similarly situated juveniles and does so by neither protecting any compelling state interest nor is it supported by any rational basis.
5. Did the resentencing court violate Appellant's due process rights and abuse its discretion by sentencing [Appellant] to a manifestly excessive period of incarceration for the following reasons?"
 - a. The court failed to sufficiently consider the [Appellant's] progress and rehabilitation while incarcerated, as evidenced by his prison record and the testimony of prison staff, [Appellant's] expression of remorse during his testimony before the court, [and Appellant's] amenability for rehabilitation.
6. Did the resentencing court violate Appellant's due process rights and abuse its discretion and impose a manifestly excessive sentence by improperly relying on impermissible factors?
 - a. The court's stated reasons for deviating from similarly situated defendant[]s were based upon improper factors.
 - b. The court improperly relied on statements of the prosecutor about facts of the case which were

not supported by the criminal trial record. Appellant's Supplemental Br. at 10-14.

Jury Instructions

In his first two issues, Appellant asserts that the trial court erred by failing to give certain jury instructions. *Id.* at 62-80. These issues, however, warrant no review.

An appellant is limited in the issues he can raise in an appeal challenging a disposition rendered after a remand for resentencing. ***Commonwealth v. Williams***, 2016 PA Super 262, 151 A.3d 621, 625 (Pa. Super. 2016). Where an appellant has already had the benefit of a direct appeal, which resulted in remand for resentencing, he is barred from raising any issues other than a challenge to the sentence imposed on remand. *Id.* (citing ***Commonwealth v. Anderson***, 2002 PA Super 204, 801 A.2d 1264, 1266 (Pa. Super. 2002)). ***Cf. Commonwealth v. Sepulveda***, 636 Pa. 466, 144 A.3d 1270, 1280 n.19 (Pa. 2016) ("[W]here a case is remanded for a specific and limited purpose, issues not encompassed within the remand order may not be decided on remand as a remand does not permit a litigant a proverbial second bite at the apple.") (internal quotation marks and citation omitted)). A defendant waives any issues that a defendant should have raised in the initial direct appeal. ***Williams***, 151 A.3d at 625.

In his initial direct appeal, Appellant challenged only the sufficiency and weight of his Second-Degree Murder conviction. ***See Commonwealth v. Kebede***, No. 838 EMDA 2010, 23 A.3d 1080, unpublished memorandum at 2 (Pa. Super. filed January 11, 2011). After the Supreme Court's decision in ***Montgomery***, the case was remanded only for resentencing. ***See Kebede***, 132 A.3d at 973; ***Kebede***, 144 A.3d 201, 2016 WL 1064951, at *1.

Therefore, in this appeal, Appellant can challenge only the sentence imposed on remand. Moreover, because Appellant could have challenged the jury instructions in his first appeal but did not do so, Appellant waived his claims that the trial court erred by failing to give certain jury instructions. ***See Williams***, 151 A.3d at 625; ***Anderson***, 801 A.2d at 1266.

Legality of Sentence

In his third issue, Appellant challenges the legality of his sentence. "When reviewing the legality of a sentence, our standard of review is *de novo* and our scope of review is plenary." ***Commonwealth v. Lekka***, 2019 PA Super 155, 210 A.3d 343, 355 (Pa. Super. 2019).

Appellant contends that the sentencing court imposed an illegal sentence because it failed to consider the factors set forth in ***Miller/Knox*** on the record in violation of ***Commonwealth v. Machicote***, 206 A.3d 1110 (Pa. 2019). Appellant's Supp. Br. at 57-61.

In ***Batts II***, the Supreme Court established a framework for the sentencing of juvenile offenders who are convicted of offenses for which the Commonwealth seeks a LWOP sentence. ***Commonwealth v. Clary***, 226 A.3d 571, 2020 PA Super 1, 2020 WL 21200, at *4 (Pa. Super. filed Jan. 2, 2020). In cases where the Commonwealth requests a sentence of LWOP, the sentencing court must consider the ***Miller*** and Section ***1102.1(d)*** factors⁴ on the record before imposing a LWOP sentence. ***Commonwealth v. Machicote***, 206 A.3d 1110, 1120 (Pa. 2019); ***Batts II***, *supra* at 459-60.

If, however, the Commonwealth does not request a LWOP sentence, the sentencing court shall apply traditional sentencing considerations. ***Batts II***, *supra* at 460. In such a case, the sentencing court should fashion a sentence "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); ***Clary***, *supra* 2020 PA Super 1, [WL] *4; ***see Batts II***, *supra* at 460.

In this case, the Commonwealth did not request that the sentencing court impose a sentence of LWOP; therefore, the trial court was not required to consider the *Miller* factors in fashioning a sentence and did not err in failing to do so. *Lekka, supra* at 356-57 (concluding trial court did not err when it did not consider the *Miller* factors when resentencing defendant where the Commonwealth did not seek a LWOP sentence). Accordingly, this issue has no merit.

Constitutionality of Section 1102.1(c)

In his fourth issue, Appellant argues that Section 1102.1(c) violates the Equal Protection Clause because it differentiates punishment based solely upon a specific child offender's chronological age, 15 years of age or older and 14 years of age and younger, without protecting any compelling state interest nor having support from any rational basis.⁵ Appellant's Br. at 21-38. We, however, decline to address the merits of this claim because the sentencing court did not impose the mandatory minimum sentence set forth in Section 1102.1(c). Therefore, Appellant was not harmed by the statute and lacks standing to challenge its constitutionality.

It is a fundamental principle of constitutional law that a party challenging a statute may not raise the issue in the abstract, but must find its basis in an injury to the party seeking to have the enactment declared constitutionally infirm. *Commonwealth v. Bell*, 512 Pa. 334, 516 A.2d 1172, 1177 (1986). "[O]ne who is unharmed by a particular feature of a statute will not be heard to complain of its alleged unconstitutionality." *Commonwealth v. Wildermuth*, 347 Pa. Super. 640, 501 A.2d 258, 260 (Pa. Super. 1985) (quoting *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47, 49 n.2 (Pa. 1980)).

Section 1102.1 clearly and unambiguously only applies, *inter alia*, to juvenile defendants who are convicted of second-degree murder "after June 24, 2012." 18 Pa.C.S. § 1102.1. Since a jury convicted Appellant in 2009, Section 1102.1 does not apply to Appellant and the resentencing court did not and could not sentence Appellant pursuant to Section 1102.1. Because the sentencing court did not base its sentence on Section 1102.1, Section 1102.1 did not cause Appellant any "harm," and therefore, Appellant lacks standing to challenge its constitutionality.

Discretionary Aspects of Sentencing

Appellant's remaining issues challenge the discretionary aspects of sentencing. Challenges to the discretionary aspects of sentence are not appealable as of right. *Commonwealth v. Leatherby*, 2015 PA Super 90, 116 A.3d 73, 83 (Pa. Super. 2015). Rather, an appellant challenging the sentencing court's discretion must invoke this Court's jurisdiction by (1) filing a timely notice of appeal; (2) properly preserving the issue at sentencing or in a post-sentence motion; (3) complying with Pa.R.A.P. 2119(f), which requires a separate section of the brief setting forth a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence; and (4) presenting a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S. § 9781(b). *Id.* The trial court determines on a case-by-case basis whether a substantial question has been raised regarding discretionary sentencing. *Commonwealth v. Moury*, 2010 PA Super 46, 992 A.2d 162, 170 (Pa. Super. 2010). 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. *Id.* (citation and quotation omitted).

Here, Appellant satisfied the first three elements by filing a timely Notice of Appeal, preserving the issues in a Post-Sentence Motion, and including a Rule 2119(f) Statement in his Brief to this Court. Thus, we address whether Appellant raises a substantial question for each challenge.

In his next issue, Appellant asserts that he raised a substantial question because the court abused its

discretion in resentencing him when it failed to adequately consider his progress and rehabilitation while incarcerated as well as his remorse. Appellant's Br. at 39. Specifically, he contends that the court failed to sufficiently consider the following mitigating factors: his parents' separation; his struggles with substance abuse; his relationship with his brother who was frequently in and out of prison; and his rehabilitation. *Id.* at 40.

It is well-established that claims that the sentencing court did not adequately consider mitigating factors generally do not raise a substantial question. *Commonwealth v. Disalvo*, 2013 PA Super 187, 70 A.3d 900, 903 (Pa. Super. 2013). A specific claim that the court refused to weigh mitigating factors as an appellant wished, absent more, does not raise a substantial question. *Moury*, 992 A.2d at 175; *Commonwealth v. Zirkle*, 2014 PA Super 279, 107 A.3d 127, 133 (Pa. Super. 2014) ("[W]e have held that a claim that a court did not weigh the factors as an appellant wishes does not raise a substantial question").

Appellant's claim amounts to no more than a bald allegation that the sentencing court abused its discretion in failing to consider mitigating factors. Pursuant to the above case law, Appellant has failed to raise a substantial question and this challenge to the discretionary aspects of his sentence, thus, fails.

In his sixth issue, Appellant asserts that he raised a substantial question because the trial court improperly relied on impermissible factors. Specifically, Appellant contends that in fashioning his sentence, the sentencing court improperly considered "individuals who have been before [it] under similar circumstances[.]" and the fact that the resentencing judge remembers "being on the bench at the time [o]f the trial[.]" Appellant's Supp. Br. at 48, 51 (quoting N.T. Resentencing Hr'g, 1/3/18, at 96, 97, emphasis omitted).

This Court has concluded that an allegation that a court relied on an impermissible factor constitutes a substantial question. *Commonwealth v. Macias*, 2009 PA Super 45, 968 A.2d 773, 776 (Pa. Super. 2009). Thus, Appellant has raised a substantial question, and we consider the sentence itself.

Sentencing is a matter vested in the sound discretion of the sentencing court, and a sentence will not be disturbed on appeal without a manifest abuse of that discretion. *Commonwealth v. Mouzon*, 2003 PA Super 249, 828 A.2d 1126, 1128 (Pa. Super. 2003). To constitute an abuse of discretion, the sentence must either exceed the statutory limits or be manifestly excessive. *Id.* "[W]here a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code." *Moury*, 992 A.2d at 171. A sentencing court will not have abused its discretion unless the record discloses 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. *Mouzon*, *supra* at 1128.

After review of the parties' arguments and the record, we conclude that this issue warrants no relief. The court imposed a standard-range sentence and detailed its consideration of the parties' sentencing memorandums,⁶ Appellant's mitigation report and psychological evaluation, letters in support of Appellant, and Appellant's Department of Corrections' records in fashioning Appellant's sentence. Trial Ct. Op. at 3-4 (unpaginated); N.T. Resentencing Hr'g at 95-98. The sentencing court did not ignore or misapply the law, exercise its judgment for reasons of partiality, prejudice, bias or ill-will, or arrive at a manifestly unreasonable decision.

Because there is no merit to Appellant's claims, we affirm the judgment of sentence.

Judgment of Sentence affirmed.

Judgment Entered.

Footnotes

*

1

In *Miller*, the U.S. Supreme Court held that it is unconstitutional for state courts to impose an automatic sentence of life without parole upon a homicide defendant for a murder committed while the defendant was under eighteen years old. *Miller*, 567 U.S. at 479. In *Montgomery*, the U.S. Supreme Court held that its decision in *Miller, supra*, applies retroactively. *Montgomery*, 136 S. Ct. at 732.

2

This Court then vacated the Judgment of sentence and remanded the case to the trial court for resentencing. *Commonwealth v. Kebede*, 144 A.3d 201, 2016 WL 1064951 (Pa. Super. 2016).

3

Commonwealth v. Knox, 2012 PA Super 147, 50 A.3d 732 (Pa. Super. 2012).

4

Miller requires that a sentencing court examine certain factors related to youth and its attendant characteristics ("Miller factors"). *Commonwealth v. Batts*, 640 Pa. 401, 163 A.3d 410, 421 n.5 (Pa. 2017) ("*Batts II*") (citation omitted). *Knox* summarized the *Miller* factors, which were subsequently adopted by our Supreme Court in *Commonwealth v. Batts*, 620 Pa. 115, 66 A.3d 286 (2013) ("*Batts I*"). Additionally, Pennsylvania's General Assembly responded to *Miller* by enacting a new sentencing statute, 18 Pa.C.S. § 1102.1, for juveniles convicted of murder after June 24, 2012. *Batts II, supra* at 419 n.4.

5

Section 1102.1(c) imposes a mandatory minimum sentence for juveniles convicted of second-degree murder after June 24, 2012. If the juvenile committed the murder when he was fifteen years old or older, the trial court must impose a mandatory minimum sentence of thirty years' to life imprisonment. 18 Pa.C.S. § 1102.1(c). If the juvenile committed the murder when he was younger than 15 years old, the trial court must impose a mandatory minimum sentence of twenty years' to life imprisonment. *Id.*

6

Appellant's sentencing memorandum discussed the general sentencing factors, *i.e.*, the protection of the public, the gravity of offense, and his rehabilitative needs.

IN THE
SUPREME COURT OF THE UNITED STATES

EMRU KEBEDE- Petitioner

VS.

COMMONWEALTH OF PENNSYLVANIA- Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

APPENDIX C

LANCASTER COUNTY COURT OF COMMON PLEAS
OPINION & ORDER MAY 17, 2018

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

COMMONWEALTH OF PENNSYLVANIA

v.

EMRU KEBEDE

No. 3556-2007

LANCASTER COUNTY, PA.

CLERK OF COURTS
2018 MAY 17 PM 2:34

Pa.R.A.P. 1925(a) MEMORANDUM OF OPINION

BY: REINAKER, J.
MAY 17, 2018

Introduction

The Defendant, Emru Kebede, has filed a Notice of Appeal to the Superior court from the judgment of his sentence imposed on January 3, 2018. On September 10, 2009, the Defendant was found guilty of Murder in the Second Degree and was sentenced to a mandatory term of Life without the Possibility of Parole. On March 9, 2016, this Court granted the Defendant a new sentencing hearing pursuant to the holding of *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), stating that the holding of *Miller v. Alabama*, 567 U.S. 460 (2012), was retroactive on state collateral appeal. On January 3, 2018, the sentencing hearing was held, and the Defendant was resentenced to a period of incarceration of not less than thirty (30) years nor more than life. The Defendant timely filed a Post-Sentence Motion which was denied by this Court in an order dated January 12, 2018. Defendant filed his Notice of Appeal on February 12, 2018, and submitted his concise statement on May 2, 2018.

In his Concise Statement the Defendant makes two claims: (1) the Court abused its discretion in sentencing the Defendant to an unduly harsh and lengthy period of incarceration; (2) The Court was improperly guided by Pa.C.S. 18 § 1102(c) in crafting its sentence. Regarding the first claim, the Defendant claims the Court abused its discretion for the following reasons: the

Court failed to sufficiently consider the Defendant's progress and rehabilitation while incarcerated; the Court failed to sufficiently consider the Defendant's expression of remorse during his testimony; the Court failed to consider the Defendant's amenability to rehabilitation; the Court was improperly swayed by, and placed too much emphasis on, the gravity of the offense and the emotional testimony of the victim's children; the Court's stated reasons for deviating from similarly situated Defendants were improper; the Court improperly relied on statements of the prosecutor about the facts of the case that were not supported by the record.

Discussion

Sentencing is a matter vested in the sound discretion of the sentencing court, and a sentence will not be disturbed on appeal without a manifest abuse of that discretion. *Commonwealth v. Hess*, 745 A.2d 29, 31 (Pa. Super. 2000) To constitute an abuse of discretion, the sentence must either exceed the statutory limits or be manifestly excessive; it is not shown merely by an error in judgment by the court. *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa. Super. 2003) Rather, the defendant must demonstrate, 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. *Id.* In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion, as the sentencing judge is in the best position to measure factors such as the nature of the crime, the defendant's character, and the display of remorse, defiance, or indifference. *Commonwealth v. Ellis*, 700 A.2d 948, 958 (Pa. Super. 1997).

In addition to considering the traditional factors when imposing sentence, a court determining the appropriate minimum period of incarceration for a juvenile convicted of homicide must consider the following factors:

[the] juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation.

Commonwealth v. Knox, 50 A.3d 732, 745 (Pa. 2012)(citing *Miller v. Alabama*, 467 U.S. 460 (2012)). In *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2018), the Supreme Court of Pennsylvania outlined the procedure that should be adopted to ensure that life without parole for juvenile offenders is rare, and discussed the legislative enactment of 18 Pa.C.S.A. § 1102(c). Specifically, the Supreme Court stated:

to promote uniformity in sentencing in pre-and post-*Miller* cases, when determining the appropriate minimum term of incarceration for pre-*Miller* offenders being sentenced to life without the possibility of parole, sentencing courts should be guided by the minimum sentences contained in section 1102.1(a).

Id. at 458. Therefore, in cases such as the instant one, where the statute is not directly applicable to the Defendant facing resentencing, the Court should nevertheless use § 1102(c) as a guideline in determining an appropriate minimum sentence.

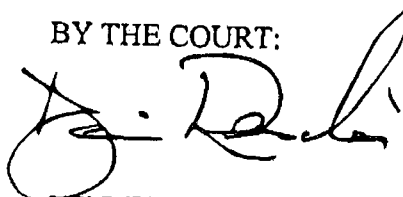
Here, the Court did not abuse its discretion in sentencing the Defendant to a term of incarceration of not less than thirty (30) years nor more than life in prison. Prior to the resentencing hearing, the Court reviewed documents submitted by the Defendant, specifically, a written report from a psychological evaluation administered by Dr. Jonathan Gransee, the mitigation report prepared by Ms. Bickmire, the Sentencing Memorandums submitted by the Defendant and the Commonwealth, numerous letters submitted in support of the Defendant, and records of the Defendant's conduct from the Department of Corrections. Notes of Transcript Resentencing Hearing (hereinafter N.T.), January 3, 2018, pp. 95:19-96:1. In addition to these documents, the Court considered traditional sentencing factors, as well as the *Miller/Knox* factors

in arriving at its decision. In crafting the sentence, the Court was also guided by § 1102.1 (a) and § 1102 (c) in giving the Defendant a sentence of thirty years to life, a standard range sentence. Additionally, the Court noted that the Defendant had a relatively stable home life, and strong parental guidance. N.T. p. 96:1-8. Additionally, the Court considered the significant effect the crime had on the victim's family and the community, especially considering that the incident happened at the victim's home. N.T. p. 96:19-25. Finally, the Court noted that, although the Defendant did not pull the trigger, he played an active role in the crime, and was near the front door where the victim was shot and killed. N.T. p. 96:14-18. The Court considered all necessary factors in crafting its sentence, and for these reasons, the Defendant's claims of abuse of discretion regarding his sentence should fail.

Conclusion

For the foregoing reasons, the Court finds that the issues contained in the Defendant's Statement of Matters Complained of on Appeal are meritless.

BY THE COURT:



DENNIS E. REINAKER
PRESIDENT JUDGE
MAY 7, 2018

Copies to:
Office of the District Attorney
Edwin G. Pfursich, Esquire
Emru Kebede, Inmate No. JF-6082, SCI-Rockview

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

COMMONWEALTH OF PENNSYLVANIA

v.

EMRU KEBEDE

No. 3556-2007

CLERK OF COURTS
2019 JUL 17 PM 4:51
LANCASTER COUNTY, PA

Pa.R.A.P. 1925(a) SUPPLEMENTAL MEMORANDUM OF OPINION

BY: REINAKER, J.
JULY 17, 2019

Introduction

The Defendant, Emru Kebede, has filed a Notice of Appeal to the Superior Court from the judgment of his sentence imposed on January 3, 2018. Defendant filed his Notice of Appeal on February 12, 2018 and submitted his concise statement on May 2, 2018. After a determination that the Defendant would proceed *pro se*, the Defendant asked to be able to amend his concise statement. The Court denied this, and the Defendant appealed. On June 25, 2019, the Superior Court overturned the denial, granting the Defendant leave to amend his concise statement. The Defendant filed his amended concise statement on July 4, 2019.

The Defendant makes five total claims in his amended concise statement. The first two of these are similar in nature to/the same as those presented in his original Concise Statement; the Court relies upon its original Memorandum of Opinion, entered May 17, 2018, to show its reasoning on those matters. The Defendant then makes three new claims: (1) the Court erred in not making an on-the-record finding regarding the *Miller*¹ and *Knox*² requirements for resentencing; (2) the Court erred by not instructing jurors on the “reasonable man” standard as it

¹ *Miller v. Alabama*, 567 U.S. 460 (2012).

² *Com. v. Knox*, 50 A.3d 749 (Pa. Super. 2012).

pertains to malice and the felony murder rule; (3) the Court erred by instructing the jury on first-degree murder and not instructing the jury on voluntary manslaughter. The Court's opinion on those issues follows.

Discussion

The Defendant's first new argument alleges that the Court failed to make an on-the-record determination of *Miller* and *Knox* factors at resentencing. When a juvenile offender faces a possible sentence of life imprisonment without parole, the sentencing court must make an on-the-record finding regarding those factors set forth in *Miller* and 18 Pa.C.S. §1102.1. *Commonwealth v. Machicote*, 206 A.3d 1110, 1120 (Pa. 2019). Factors that a court should consider when potentially sentencing a juvenile to life without parole include "immaturity, impetuosity, and failure to appreciate risks and consequences[...]the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional[...]the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him[...]incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Miller v. Alabama*, 567 U.S. 460, 477–78 (2012). The Pennsylvania Legislature expanded the factors a court should consider, adding victim/victim's family impact, individual/public safety threats posed by the defendant, community impact, seriousness and nature of the defendant's offense, the defendant's culpability, and sentencing guidelines to a growing list of age-related factors. 18 Pa.C.S. §1102.1(d). The *Machicote* court's concern was that courts were not considering each individual juvenile's circumstances, which necessitated

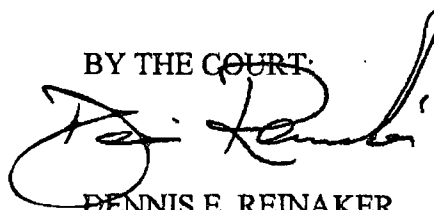
making these determinations on the record. *Machicote*, 206 A.3d at 1120. For example, the resentencing court in *Machicote* made an altogether brief statement on sentencing factors, failing to acknowledge a large majority of the factors; this statement proved insufficient. *Id* at 1116. At the resentencing hearing in the instant case, the Court made a lengthy statement regarding what factors it considered when determining the Defendant's sentence. *See* N.T., 1/3/18 at 95-97, January 3, 2018. The Court began by acknowledging that it considered documents provided outside of the hearing, including a mental health evaluation, a mitigation report, letters in support of the Defendant, and the Defendant's Department of Corrections records. *Id* at 95. Next, the Court outlined how this case stood out from other *Miller* resentencing cases in Lancaster County, because the Defendant had a "significantly better" home life than most defendants, one that most would not consider a factor in a juvenile's propensity for crime. *Id* at 96. In examining the Defendant's culpability, the Court acknowledged that, while the Defendant was not the shooter, he did actively participate in the robbery, and did so willingly. *Id*. The Court then addressed community impact concerns, explaining that the commission of the crimes at the victim's home exacerbated the level of concern more so than it would have if the crime were committed elsewhere. *Id* at 96-97. All of this followed testimony from a stream of witnesses that described to the Court, among other things, what type of person the Defendant was at the time of the crime and what his life was like, as well as statements from the victim's family explaining how the victim's death impacted them. *Id*. Given all of this, the Court cannot be deemed to have not considered these factors when deciding on the Defendant's sentence, especially given the number of factors that the Court specifically enumerated before it handed down the sentence. The Court's examination at the resentencing hearing is far more in depth than that of the resentencing court in *Machicote*. The Defendant's argument here should fail.

The Defendant's second and third arguments center around the Court's jury instructions regarding the felony murder rule, first-degree murder, and voluntary manslaughter. A party must, before a jury is sent into deliberation, make a specific objection to an instruction in order to assign error. Pa.R.Crim.P 647(C). "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). The objection cannot be "mere submission and subsequent denial of proposed points" at the time of determining the jury charge. *Commonwealth v. Pressley*, 632, 887 A.2d 220, 225 (Pa. 2005). Upon completion of the jury charge in the instant case, the Court asked the parties for "requests for additions or corrections," to which both parties replied that there were not. *See* N.T., 9/10/09 at 881-882. Furthermore, the parties had at least one discussion on the record, outside of the presence of the jury about specific instructions, including the first-degree murder instruction and the reasonable man instruction. *Id* at 802-812. At no point during any of this did the Defendant raise a specific objection to either of the instructions that he is now challenging. *Id*. Because the Defendant did not raise any specific objections, these issues cannot be deemed to have been preserved, and therefore they are waived.

Conclusion

For all the foregoing reasons, this Court respectfully requests that Appellant's appeal be denied.

BY THE COURT:



DENNIS E. REINAKER

PRESIDENT JUDGE

JULY 17, 2019

Copies to:
Office of the District Attorney
Emru Kebede

IN THE
SUPREME COURT OF THE UNITED STATES

EMRU KEBEDE- Petitioner

VS.

COMMONWEALTH OF PENNSYLVANIA- Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

APPENDIX D

**POST SENTENCE MOTIONS & ORDERS
LANCASTER COUNTY COURT OF COMMON PLEAS**

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CP-36-CR-3556-2007
	:	
EMRU KEBEDE	:	

POST-SENTENCE MOTION TO MODIFY SENTENCE

AND NOW, comes Defendant, by and through his counsel, Edwin G. Pfursich, and respectfully presents this post-sentence motion to modify:

1. On September 17, 2007 Defendant was convicted of *Murder in the Second Degree* and sentenced to a mandatory term of Life without the Possibility of Parole. Defendant filed a direct appeal and then subsequently a petition for post-conviction collateral relief.
2. On March 9, 2016, the trial court granted Defendant a new sentencing hearing as a result of the United States Supreme Court's decision in Montgomery v. Louisiana, 136 S. Ct. 717 (2016) which held that the Court's decision in Miller v. Alabama, 132 S.Ct. 2455 (2015) was retroactive on state collateral appeal.
3. After a stay granted by the trial court pending the Pennsylvania Supreme Court's decision in Commonwealth v. Batts, 45 MAP 2016 (2017), Batts was decided on June

26, 2017. Defendant's sentencing hearing was scheduled for January 3, 2018.

4. On January 3, 2018 the Court re-sentenced Defendant to a period of incarceration of Life in prison with the possibility of parole after a minimum of thirty (30) years.
5. The Court abused its discretion in sentencing the Defendant to an unduly harsh and lengthy period of incarceration for the following reasons:
 - a. The Court failed to sufficiently consider Defendant's progress and rehabilitation while incarcerated, as evidenced by his prison record and the testimony of prison staff.
 - b. The Court failed to sufficiently consider Defendant's expression of remorse during his testimony before the Court.
 - c. The Court failed to sufficiently consider Defendant's amenability to rehabilitation.
 - d. The Court was improperly swayed, and placed too much emphasis on the gravity of the offense and the emotional testimony of the victim's children.
 - e. The Court's stated reasons for deviating from sentences for similarly situated Defendants were improper.
 - f. The Court improperly relied on statements of the prosecutor about the facts of the case that were not supported by the record.
6. The Court was improperly guided by 18 § 1102 (c) in crafting its sentence. 18 § 1102 (c) is not applicable to Defendant and there exists no authority to use this subsection as guidance in sentencing a Defendant convicted of *Second Degree Murder*.
7. 18 § 1102 is unconstitutional, as it violates the Equal Protection Clause of both the

state and federal constitutions. The statute differentiates punishment based upon age of the juvenile offender without any rational basis to do so.

WHEREFORE, Defendant, Emru Kebede, respectfully requests that this Court resentence Defendant to a period of incarceration, the minimum of which to be 15 years.

Respectfully submitted,

CODY & PFURSICH

Date: _____

1/9/18

By: _____

Edwin G. Pfursich
Attorney for Defendant

CODY & PFURSICH

ATTORNEYS AT LAW

Stephen W. Cody
Douglas H. Cody
Edwin G. Pfursich

53 NORTH DUKE STREET, SUITE 420
LANCASTER, PENNSYLVANIA 17602-2859
TELEPHONE (717) 299-7374
www.codylegal.com

Harvey S. Miller
Of Counsel

Fax Phone No.
(717) 291-0998

February 8, 2018

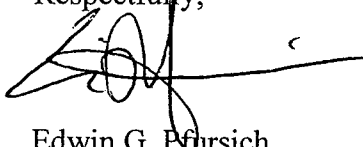
Emru Kebede
Inmate # JF6082
SCI Camp Hill
P.O. Box 200
Camp Hill, PA 17001

Re: Com v. Emru Kebede CP-36-CR-0003556-2007

Dear Mr. Kebede,

I received your recent correspondence and Motion to Withdraw. Enclosed please find a copy of the Motion to Amend Post Sentence Motion *Nunc Pro Tunc* and proposed Order that I intend to file in the near future. I have requested that a Grazier Hearing be scheduled; however, Judge Reinaker is on vacation at this time so I will not be able to schedule a date until he returns. You will be notified of the hearing date once it is scheduled.

Respectfully,



Edwin G. Pfursich

EGP:lkd
Enclosure

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :

v. : CP-36-CR-3556-2007

EMRU KEBEDE

ORDER

AND NOW, this _____ day of February, 2018, upon consideration of the within Petition, the Petition is GRANTED. Defendant's Post Sentence Motion is amended *nunc pro tunc* as follows:

The statute referenced in paragraph six (6) is amended to: 18§ 1102.1 (c)

The statute reference in paragraph seven (7) is amended to: 18§ 1102.1

BY THE COURT:

J.

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :

v.

: CP-36-CR-3556-2007

EMRU KEBEDE

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the attached Motion upon the person and in the manner indicated below. The manner of service satisfies the requirements of Pa.R.Crim.P. 575 and 576.

Via Hand Delivery

Craig Stedman, Esq.
District Attorney of Lancaster County
50 N. Duke Street
Lancaster, PA 17602

Via First Class Mail

Emru Kebede
Inmate JF6082
SCI Camp Hill
P.O. Box 200
Camp Hill, PA 17001

CODY & PFURSICH

DATE: 2/9/18

BY: 

Edwin G. Pfursich
Attorney for Defendant
Attorney I.D. No.: 94343