

This summary of Pennsylvania appellate case law addresses three topics: availability of and standards for appellate review, standards and allowable ground for departure, and constitutional requirements for proof of facts permitting upward departure under *Blakely v. Washington*.

## 1. Availability of and General Standards for Appellate Review.

Pennsylvania law provides for appellate review of a sentence based upon either the legality of the sentence or the discretionary aspects of the sentence.<sup>1</sup> Appellate review is available to the defense and prosecution as a matter of right when challenging the legality of a sentence.<sup>2</sup> In contrast, an appeal pertaining to the discretionary aspects of sentencing is not a matter of right,<sup>3</sup> and will only proceed if it raises a substantial question of appropriateness.<sup>4</sup>

### a. Challenges to Legality

Pennsylvania courts read challenges to legality narrowly.<sup>5</sup> Generally, a reviewing court will only recognize a legality-centered appeal if it raises a claim that the sentence:

- 1) falls “outside of the legal parameters prescribed by the applicable statute;”
- 2) involves merger/double jeopardy; or
- 3) implicates the *Apprendi* rule.<sup>6</sup>

With regard to the first type of claim, if the reviewing court finds no statutory authorization for a sentence, it must vacate that sentence as illegal.<sup>7</sup> Review of possible illegal sentencing is *de novo*, and the scope of review is plenary.<sup>8</sup>

### b. Challenges to Discretionary Aspects of a Sentence

In order to appeal based upon the discretionary aspects of sentencing, counsel must establish a substantial question that the sentence imposed was not appropriate.<sup>9</sup> This determination *must* be made before the reviewing court reaches the merits of the case.<sup>10</sup> If the reviewing court determines the substantial question test is met, it may hear the appeal, and will then apply one of several standards of review, depending on the nature of the alleged sentencing error.

### 1) Substantial question

An appellant must provide a concise statement of reasons explaining why a substantial question exists, and a reviewing court examines those reasons on a case-by-case basis.<sup>11</sup> To demonstrate that a substantial question exists, the appellant must articulate “reasons why a particular sentence raises doubts that the trial court did not properly consider the general guidelines provided by the legislature.”<sup>12</sup> Pennsylvania courts are more likely to find a substantial question exists if the appeal advances a colorable argument that the sentencing court’s actions were inconsistent with a specific provision of the Sentencing Code or were contrary to fundamental norms underlying the sentencing process.<sup>13</sup> Appellate courts have found fundamental norms implicated in cases such as the following where the appellant argued that:

- The sentencing court did not provide a contemporaneous written statement explaining reasons for sentence;<sup>14</sup>
- The sentencing court imposed a sentence that was disproportionate to the defendant’s crimes and unduly excessive;<sup>15</sup> or
- The sentencing court imposed sentence that was far below the lowest mitigated range and did not explain its deviation.<sup>16</sup>

### 2) Standards of review

If an appeal raises a substantial question, Pennsylvania law requires the reviewing court to vacate and remand the sentence when: (1) the sentencing court purported to apply the guidelines, but did so erroneously; (2) the sentencing court sentenced within the guidelines, but circumstances render application of the guidelines clearly unreasonable; or (3) the sentencing court sentenced outside the guidelines, and the sentence is unreasonable.<sup>17</sup> Appellate courts employ different standards of review dependent on whether the sentenced is challenged as the product of an erroneous guidelines application, or whether it is challenged as unreasonable.

Erroneous application of the guidelines is an error of law and requires remand for resentencing.<sup>18</sup> Examples of erroneous guidelines application are:

- The sentencing court used an incorrect offense gravity score when calculating the guidelines sentence;<sup>19</sup>
- The sentencing court miscalculated an offender's prior record score.<sup>20</sup>
- The sentencing court improperly did not apply an enhancement provision to the sentence calculation.<sup>21</sup>

A claim that a sentence is unreasonable is reviewed for abuse of discretion. Courts will not disturb a sentence because of its discretionary aspects absent a manifest abuse of discretion.<sup>22</sup> Abuse of discretion is more than just an error in judgment, but requires that the judgment of the sentencing court was "manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will."<sup>23</sup> As noted above, when the challenged sentence is within the guidelines, the statute provides it may be vacated if it is "clearly unreasonable;" when it is outside of the guidelines, it must be "unreasonable."<sup>24</sup> For sentences outside of the guidelines, the sentencing court must "demonstrate on the record, as a proper starting point . . . awareness of the sentencing guidelines."<sup>25</sup> But from there, regardless of the distinction created by the word "clearly," courts engage in substantially the same analysis in both instances.<sup>26</sup> Functionally, the "unreasonableness" inquiry does not follow concrete rules, but turns on consideration of statutory factors found in 42 Pa. Con. Stat. §§ 9721(b) and 9781(d).<sup>27</sup> In considering a challenge, an appellate court does not substitute its own judgment for how the relevant factors should have been weighed, but restricts itself to determining whether the sentencing court considered the factors in crafting a sentence.<sup>28</sup>

Courts have found sentences outside of the guidelines unreasonable where:

- The sentencing court placed undue emphasis on the goal of rehabilitation and did not adequately consider the gravity of the offense and protection of the public;<sup>29</sup>
- The sentencing court provided insufficient support for deviation, and did not address contrary evidence in the record;<sup>30</sup>
- The sentencing court did not provide reasons for deviation other than the offender's age.<sup>31</sup>

Courts have found unreasonableness despite adherence to the guidelines in cases where:

- The sentencing court did not fully consider and acknowledge the sentencing factors, crafted a sentence which was not individualized, and imposed a sentence which was unlikely to end during the offender's life span;<sup>32</sup>
- The sentencing court imposed sentences consecutive such that the term of imprisonment was essentially a life sentence.<sup>33</sup>

When appealing an indeterminate sentence ordered by a trial judge a defendant may challenge the decision on two grounds: (1) the trial judge abused his discretion; or (2) the sentence imposed was illegal. If the appellate court is reviewing a case for "abuse of discretion" it will consider whether the trial court has abused its discretion, failed to consider all legally relevant factors, or if the sentence imposed is clearly excessive.<sup>34</sup> An "abuse of discretion" appeal must be made within thirty days.<sup>35</sup>

An appeal asserting that a sentence imposed is an "illegal sentence" may be brought at any time.<sup>36</sup> The court will find a sentence illegal when "the sentencing court has no jurisdiction [or] where the sentence is beyond the authorized statutory range."<sup>37</sup> Because the guidelines are advisory, a sentence other than that indicated in the guidelines is not grounds for such an appeal. When assessing an appeal from an illegal sentence, the appellate court uses a "de novo" standard, because the review is focused on statutory interpretation.<sup>38</sup>

## **2. Standards and Allowable Grounds for Departure.**

The Pennsylvania Sentencing guidelines are advisory, only requiring that a sentencing court consider them when making sentencing decisions.<sup>39</sup> As such, subject to the grounds for appeal as explained above, the sentencing court may deviate from the guidelines freely, so long as the deviation is reasonable and the sentencing judge provides a clear statement of the rationale underlying a deviation.<sup>40</sup>

## **3. Constitutional Requirements For Proof of Facts Permitting Upward Departure (*Blakely v. Washington* issues)**

Because Pennsylvania's guidelines are merely advisory and not binding on sentencing courts, the Pennsylvania Supreme Court determined they do not face *Blakely* issues.<sup>41</sup>

## ENDNOTES

<sup>1</sup> 42 Pa. Con. Stat. § 9781 (2017).

<sup>2</sup> 42 Pa. Con. Stat. § 9781(a) (2017).

<sup>3</sup> *Com. v. Vega*, 850 A.2d 1277, 1280 (Pa. Super. Ct. 2004).

<sup>4</sup> 42 Pa. Con. Stat. § 9781(b) (2017); see *Com. v. Mouzon*, 812 A.2d 617, 621 (Pa. 2002).

<sup>5</sup> *Com. v. Berry*, 877 A.2d 479, 483 (Pa. Super. Ct. 2005) (“[T]he term illegal sentence is a term of art that our Courts apply narrowly, to a relatively small class of cases.”) (internal citations omitted).

<sup>6</sup> *Com. v. Robinson*, 931 A.2d 15, 21 (Pa. Super. Ct. 2007) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

<sup>7</sup> *Com. v. Kinney*, 777 A.2d 492, 494 (Pa. Super. Ct. 2001).

<sup>8</sup> *Com. v. Diamond*, 945 A.2d 252, 256 (Pa. Super. Ct. 2008).

<sup>9</sup> 42 Pa. Con. Stat. § 9781(b) (2017).

<sup>10</sup> *Com. v. Goggins*, 748 A.2d 721, 726 (Pa. Super. Ct. 2000); see also *Com. v. Tuladziecki*, 522 A.2d 17, 19 (Pa. Super. Ct. 1987) (stating that if the determination on the substantial question is not made before the merits are considered, the appellant has effectively received an appeal as of right on the merits).

<sup>11</sup> Pa. R. App. P. 2119(f); *Com. v. Mouzon*, 812 A.2d 617, 621 (Pa. 2002).

<sup>12</sup> *Com. v. Koehler*, 737 A.2d 225, 244 (1999).

<sup>13</sup> *Com. v. Goggins*, 748 A.2d 721, 726 (Pa. Super. Ct. 2000).

<sup>14</sup> *Com. v. Clever*, 576 A.2d 1108, 1110 (Pa. Super. Ct. 1990).

<sup>15</sup> *Com. v. Hill*, 66 A.3d 365, 367-69 (Pa. Super. Ct. 2013).

<sup>16</sup> *Com. v. Kenner*, 784 A.2d 808, 810 (Pa. Super. Ct. 2001).

<sup>17</sup> 42 Pa. Con. Stat. § 9781(c) (2017).

<sup>18</sup> *Com. v. Archer*, 722 A.3d 203, 211 (Pa. 1998) (standard governing claims of application error under 42 Pa. Con. Stat. § 9781(c)(1)).

<sup>19</sup> *Com. v. Kopp*, 591 A.2d 1122, 1127 (Pa. Super. Ct. 1991).

<sup>20</sup> *Com. v. Cook*, 941 A.2d 7, 12-13 (Pa. Super. Ct. 2007).

<sup>21</sup> *Com. v. Pokorny*, 520 A.2d 511, 512 (Pa. Super. Ct. 1987).

<sup>22</sup> *Com. v. Johnson*, 666 A.2d 690, 693 (Pa. Super. Ct. 1995).

<sup>23</sup> *Com. v. Smith*, 673 A.2d 893, 895 (Pa. 1996).

<sup>24</sup> 42 Pa. Cons. Stat. § 9781(c)(2), (3) (2017).

<sup>25</sup> *Com. v. Johnson*, 666 A.2d 690, 693 (Pa. Super. Ct. 1995)

(quoting *Com. v. Royer*, 476 A.2d 453 (Pa. Super. Ct. 1984)).

<sup>26</sup> *Com. v. Dodge*, 957 A.2d 1198, 1200 n.3 (Pa. Super. Ct. 2008).

<sup>27</sup> 42 Pa. Con. Stat. § 9721(b) (2017) (requires a sentencing court to consider “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. Cons. Stat. § 9781(d) (2017) (requires consideration of: “(1) The nature and circumstances of the offense and the history and characteristics of the defendant. (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation. (3) The findings upon which the sentence was based. (4) The guidelines promulgated by the [sentencing] commission.”).

<sup>28</sup> See, e.g., *Com. v. Johnson*, 666 A.2d 690, 693-95 (Pa. Super. Ct. 1995).

<sup>29</sup> *Com. v. Celestin*, 825 A.2d 670, 679-82 (Pa. Super. Ct. 2003).

<sup>30</sup> *Com. v. Vega*, 850 A.2d 1277, 1282-83 (Pa. Super. Ct. 2004).

<sup>31</sup> *Com. v. Kenner*, 784 A.2d 808, 811-12 (Pa. Super. Ct. 2001).

<sup>32</sup> *Com. v. Coulverson*, 34 A.3d 135, 146-49 (Pa. Super. Ct. 2011).

<sup>33</sup> *Com. v. Dodge*, 957 A.2d 1198, 1200-02 (Pa. Super. Ct. 2008).

<sup>34</sup> *State v. McCovey*, 803 P.2d 1234, 1235 (Utah 1990), *overruled on other grounds by State v. Smith*, 122 P.3d 615 (Utah 2005).

<sup>35</sup> Utah R. App. P. 4(a) (2017).

<sup>36</sup> Utah R. Crim. P. 22(f) (2017); see also *State v. Dana*, 246 P.3d 756, 757 (Utah Ct. App. 2010) (stating that an illegal sentence is void, and Rule 22(e) allows the appellate court to vacate the sentence without remanding it to the trial court).

<sup>37</sup> 246 P.3d at 757.

<sup>38</sup> *State v. Yazzie*, 203 P.3d 984, 986 (Utah 2009).

<sup>39</sup> 204 Pa. Code § 303.1(a) (2017).

<sup>40</sup> *Com. v. Gibson*, 716 A.2d 1275, 1277 (Pa. Super. Ct. 1998) (“[O]ur Supreme Court has indicated that if the sentencing court proffers reasons indicating that its decision to depart from the guidelines is not unreasonable, we must affirm a sentence that falls outside those guidelines. . . .”) (citing *Com. v. Smith*, 673 A.2d 893 (Pa. Super. Ct. 1996)).

<sup>41</sup> *Com. v. Yuhasz*, 923 A.2d 1111, 1119 (Pa. 2007) (“As the range is merely a suggestion, it avoids the constitutional problems encountered by the sentencing schemes reviewed in *Booker* and *Blakely*”).