PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

**This opinion was redacted by the ACBA staff. It is the express policy of the Pittsburgh Legal Journal not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.*

PLJ

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Opinions

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Commonwealth of Pennsylvania v. Courtland Mitchell*

Criminal Appeal—Evidence—Weight of the Evidence—Admission of Forensic Interview—Taint—Prior Consistent Statement

Nine year-old-girl freezes on the stand in front of abuser and thereafter her preliminary hearing testimony is admitted at trial.

No. CP-02-CR-07794-2016. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—December 13, 2017.

OPINION

On March 7, 2017, a jury found Appellant guilty of one count each of Unlawful Contact with a Minor, Endangering Welfare of Children ("EWOC") and Corruption of Minors.[1] On June 22, 2017, this Court imposed a sentence of six to twelve months incarceration at the Unlawful Contact count, six months of intermediate punishment consecutive to incarceration at the EWOC count, and a five year period of consecutive probation at the Corruption of Minors count. Appellant's Post Sentence Motion was denied on July 25, 2017. Appellant filed a Notice of Appeal on August 23, 2017 and a Concise Statement of Errors Complained of on Appeal on September 13, 2017.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges five errors on appeal. Appellant alleges this Court erred denying Appellant's request for a hearing on the issue of taint. (Concise Statement of Errors Complained of on Appeal at 1). Next, Appellant alleges this Court abused its discretion by admitting the victim's testimony from the preliminary hearing. Id. at 2. Appellant further alleges that this Court erred in admitting the March 23, 2016 audio/video recording of the victim's statement to Jamie Mesar. *Id.* at 3. In addition, Appellant alleges that this Court erred in permitting the victim's mother to testify to statements the victim made to her. *Id.* at 5. Lastly, Appellant alleges that the verdicts for Unlawful Contact with a Minor, EWOC, and Corruption of Minors were against the weight of the evidence. *Id.* at 6.

SUMARY OF THE EVIDENCE

On February 17, 2017, this Court held a pretrial hearing on the issues of competency and taint. This Court considered Appellant's Pre-trial Motion requesting a taint hearing, as well as briefs filed on behalf of the Commonwealth and Appellant. (Transcript of hearing on Pretrial Motion, Feb. 17, 2017, hereinafter PT at 3) This Court informed Appellant the burden is his to produce some evidence beyond mere speculation before this Court could grant a hearing on the issue of taint. *Id.* Appellant failed to present any evidence of taint beyond mere speculation. (PT 8) Appellant's allegation that the victim had many conversations with family members about the allegations is belied by the record, which indicated two conversations between the victim and her mother prior to the forensic interview. (PT 7-8) Thereafter, this Court conducted a competency hearing and deemed the child witness S.W. competent to testify at trial. (PT 9)

At trial, S.W., the nine year old victim, testified fully regarding numerous aspects of her daily life. (Transcript of Jury Trial, Mar. 1-7, 2017, hereinafter TT, at 45-48, 61-64) However, when the Commonwealth asked her specifics regarding Appellant, her step-grandfather, S.W.'s demeanor would change and she would become nonresponsive. (TT 52-53, 67, 72, 76) This Court observed that the witness appeared to be "frozen" on the witness stand, looking downward and failing to answer those questions asked. (TT 55) The most explicit S.W. was in her testimony was when she stated that she told her mother that "he like did bad things to like me and my body." (TT 74)

After her testimony, the Commonwealth moved to admit S.W.'s testimony from the preliminary hearing as a prior inconsistent statement. (TT 76) After brief argument by opposing counsel, this Court granted the motion and admitted her prior testimony from the preliminary hearing as both an inconsistent and a consistent statement under *Commonwealth v. Brady* and *Commonwealth v. Hunzer*. (TT 82) The preliminary hearing transcript was read into the record. (TT 88)

S.W. testified at the preliminary hearing that Appellant once licked her ear while the rest of her family was out of the home picking up Chinese food. (Transcript of Preliminary Hearing, July 1, 2016, hereinafter "PT" at 16). She testified that Appellant touched her buttocks underneath her clothes, (PT 17) kissed her on more than one occasion and put his tongue in her mouth, (PT 19) and he kissed her vagina under her clothes on more than one occasion. (PT 21-22)

Dr. Jennifer Wolford from the Children's Hospital of Pittsburgh Child Advocacy Center testified that she conducted a physical exam on S.W. (TT 93) Despite a small amount of hymenal tissue irritation, Dr. Wolford testified that the exam was "entirely normal." (TT 95) She stated that the lack of physical evidence does not rule out that a child has been abused. (TT 103)

Jamie Mesar, also from the Children's Hospital of Pittsburgh Child Advocacy Center testified that she conducted a forensic interview of S.W. on March 23, 2016. (TT 106) Mesar testified that the interview had been recorded. (TT 109) Over the objection of counsel for Appellant, the forensic interview video was played in open court for the jury. (TT 111)

During the forensic interview, S.W. disclosed to Mesar that Appellant stuck his tongue in her mouth and it grossed her out. (Transcript of forensic interview, Mar. 23, 2016, hereinafter FT at 9) Later in the interview, S.W. stated that Appellant put his tongue inside her vagina. (FT 12-13) Appellant would squeeze her butt while this happened. (FT 13) He would also lick her buttocks. (FT 14) The first time he did this was when she was in kindergarten and the last time was earlier that year. (FT 15) S.W. described other interactions with her grandfather, including one where he said "[N]ow that no one's here, um, let's kiss." and asking her if she kisses on the first date. (FT 18-19) S.W. also said that no one told her what to say at this interview. (FT 22)

S.W., S.W.'s mother, testified that she became aware of some inappropriate kissing between her mother-in-law (Appellant's wife) and some of the grandsons. (TT 124) She asked her sons, S.W.'s brothers, if their grandmother kissed them on the lips. (TT 125) One child denied and another said it happened "all the time." (TT 126) S.W.(mother) testified that after she asked the boys, S.W. came down the stairs and S.W.(mother) decided to ask S.W. about her grandmother. *Id.* S.W.(mother) then asked S.W. if her grandmother ever did anything that made her feel uncomfortable. (TT 127) S.W. said that her grandmother once rubbed Vaseline on her and that made her feel uncomfortable. *Id.* S.W.(mother) then asked if Pop-Pop (Appellant) had ever done anything that made her feel uncomfortable. (TT 128) S.W. paused, started breathing heavily, and then responded with a few "um"s before saying no. *Id.* S.W.(mother) said that S.W. got off her lap and pulled her off of the couch and led her upstairs, away from her brothers, and into S.W.(mother)'s bedroom. *Id.* Once upstairs, S.W.(mother) asked S.W. again if "Pop-Pop" ever did anything that made her feel uncomfortable. *Id.* S.W. told her mother that Appellant kisses her and "stick[s] his tongue in my mouth" and that it happens "a lot." (TT 130)

Detective Robert Synowiec testified that he interviewed Appellant on April 6, 2016. (TT 155) Appellant denied the allegations and denied that he was ever alone with S.W. (TT 165)

Appellant testified in his own defense, saying that he has never been accused of a crime before and that he was a father figure to his wife's children. (TT 276) He spoke at length regarding the family dynamics, specifically the tension which arose when certain family members failed to call and check on him when his wife was away. (TT 284-287) Appellant also discussed the failed attempt to work through the family's issues at the restaurant. (TT 289-290) He denied sexually touching S.W. or putting his tongue in her ear. (TT 295) He admitted that he played "dollies" with S.W. and pretended to go on dates with her, pretended to go to the movies, swimming, and specifically pretended to be her boyfriend. (TT 301) He denied asking S.W. if she kissed on the first date. (TT 302)

Clarnece Mitchell, Appellant's wife of 35 years, testified that she had never been accused of inappropriately kissing her grandchildren. (TT 249) She testified that in February of 2016, prior to any allegations of Appellant's sexual misconduct with his granddaughter, she and Appellant met with S.W.'s parents at a local restaurant to resolve some differences. *Id.* The family caused a scene to the extent that she thought the police would be called. (TT 251) She testified that she never observed anything in S.W.'s demeanor or interaction with Appellant that gave her pause or concern. (TT 254)

Lastly, M.W., S.W.'s father, testified that he kept any conflict between himself and Appellant away from S.W. (TT 322)

DISCUSSION

Appellant alleges this Court erred denying Appellant's request for a hearing on the issue of taint. An allegation of taint is related to the concept of competency. In Pennsylvania, the general rule is that every witness is presumed to be competent. *Commonwealth v. Delbridge*, 855 A.2d 27, 39 (Pa.2003), *opinion after remand*, 859 A.2d 1254 (Pa.2004); Pa.R.E. 601(a). However, young children must be examined for competency pursuant to the following test:

> (1) The witness must be capable of expressing intelligent answers to questions;
>
> (2) The witness must have been capable of observing the event to be testified about and have the ability to remember it; and,
>
> (3) The witness must be aware of the duty to tell the truth.

Delbridge, 855 A.2d at 39. An allegation of taint centers on the second element of this test. *Id.*

The standard for an allegation of taint is clear and convincing evidence. *Commonwealth v. Lukowich*, 875 A.2d 1169, 1173 (Pa. Super. 2005), *appeal denied*, 584 Pa. 706, 885 A.2d 41 (2005).

> Where an allegation of taint is made before trial the "appropriate venue" for investigation into such a claim is a competency hearing. *Delbridge*, 578 Pa. at 664, 855 A.2d at 40. A competency hearing is centered on the inquiry into "the minimal capacity of the witness to communicate, to observe an event and accurately recall that observation, and to understand the necessity to speak the truth." *Id.*, 578 Pa. at 663, 855 A.2d at 40.

Commonwealth. v. Judd, 897 A.2d 1224, 1228–29 (Pa. Super. 2006). However, before this Court could address taint at a competency hearing, Appellant was required to proffer some evidence of taint beyond mere speculation.

> In order for the court to investigate the issue of taint at a competency hearing, however, the moving party must come forward with evidence of taint. *Id.*, 578 Pa. at 664, 855 A.2d at 40. Once the moving party comes forward with some evidence of taint, the court must expand the scope of the competency hearing to investigate that specific question. *Id.* The party alleging taint bears the burden of production of "some evidence" of taint as well as the ultimate burden of persuasion to show taint by clear and convincing evidence after any hearing on the matter. *Id.*, 578 Pa. at 664–665, 855 A.2d at 41. When determining whether a defendant has presented "some evidence" of taint, the court must consider the totality of the circumstances surrounding the child's allegations. *Id.*, 578 Pa. at 664, 855 A.2d at 41. Some of the factors that are relevant in this analysis are: (1) the age of the child; (2) the existence of a motive hostile to the defendant on the part of the child's primary custodian; (3) the possibility that the child's primary custodian is unusually likely to read abuse into normal interaction; (4) whether the child was subjected to repeated interviews by various adults in positions of authority; (5) whether an interested adult was present during the course of any interviews; and (6) the existence of independent evidence regarding the interview techniques employed. *Id.*

Commonwealth. v. Judd, 897 A.2d 1224, 1228–29 (Pa. Super. 2006).

Appellant's taint allegation was not supported by the proffer. S.W. was eight years old at the time of the abuse and nine years old at the preliminary hearing. S.W. had two conversations with her mother regarding the allegations prior to the forensic interview. While the family had a disagreement over the adult children not checking in with Appellant while their mother was away, that type of ordinary family squabble is not the type of circumstance which might reasonably cause a parent to coach a child to falsely accuse a step-grandfather of inappropriate sexual conduct. Unlike, for example, a situation where parents are going through divorce and custody proceedings, or where a jilted mother may seek revenge against a paramour who broke her heart or otherwise caused her substantial pain, S.W.'s parents had full custody of S.W. and had nothing to gain from having their daughter make false sexual allegations. None of the other *Judd* factors support an allegation of taint. This Court conducted a competency hearing before trial and S.W. was deemed to be competent. Finally, the jury was permitted to hear testimony regarding the family dispute and the circumstances around the original disclosure. To the extent that the testimony raised questions of S.W.'s credibility, it was presented to the jury.

Appellant next alleges this Court abused its discretion by admitting the victim's testimony from the preliminary hearing. Appellant further alleges that this Court abused its discretion in permitting the Commonwealth to admit the victim's forensic interview video as a prior consistent statement. Appellant alleges that this Court erred in permitting the victim's mother to testify to statements the victim made to her. These allegations of error are substantially similar in nature and can be addressed together.

When offered for the truth of the matter asserted therein, prior consistent statements are usually inadmissible hearsay. However, when offered to corroborate in-court testimony, a prior consistent statement is not hearsay. *Commonwealth v. Willis*, 552 A.2d 682, 691 (Pa. Super. 1988).

> The general rule precluding corroboration of unimpeached testimony with prior consistent statements is subject to exceptions when particular circumstances in individual cases tip the relevance/prejudice balance in favor of admission. Among the common examples of such exceptions are prior consistent statements which constitute prompt complaints of sexual assault. . . Evidence of a prompt complaint of sexual assault is considered [e]specially relevant because (rightly or not) a jury might question an allegation that such an assault occurred in absence of such evidence. . . Similarly, jurors are likely to suspect that unimpeached testimony of child witnesses in general, and child victims of sexual assaults in particular, may be distorted by fantasy, exaggeration, suggestion, or decay of the original memory of the event. Prior consistent statements may therefore be admitted to corroborate even unimpeached testimony of child witnesses, at the trial court's discretion, because such statements were made at a time when the memory was fresher and there was less opportunity for the child witness to be effected by the decaying impact of time and suggestion.

Commonwealth v. Hunzer, 868 A.2d 498, 512 (Pa. Super. 2005) *quoting Willis*, 552 A.2d at 691-692. The rule regarding use of a prior inconsistent statement is articulated through *Commonwealth v. Brady* 507 A.2d 66 (Pa. 1986), and its progeny.

> We did not address in ***Brady*** under what circumstances a prior inconsistent statement would be considered highly reliable so as to render the statement admissible as substantive evidence. The issue was subsequently addressed in *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992). We held that a prior inconsistent statement by a non-party witness shall be used as substantive evidence only when it was given under oath at a formal legal proceeding, or the statement was reduced to a writing signed and adopted by the declarant, or the statement was recorded verbatim contemporaneously with the making of the statement.

Commonwealth v. Wilson, 707 A.2d 1114, 1116 (Pa. 1998).

S.W.'s testimony at trial could be construed both as consistent and as inconsistent with her prior statement to S.W.(her mother), to Ms. Mesar at the forensic interview, and during the preliminary hearing. At trial, S.W. testified and responded well to preliminary matters but when asked questions specific to the underlying allegations, she looked down at her feet and was generally unresponsive. She did, however, testify that she told her mother that her grandfather did bad things to her that S.W. did not like. As her prior testimony at the preliminary hearing was under oath and subject to cross-examination, and as S.W. did testify about the underlying allegations at that hearing, S.W.'s preliminary hearing testimony is admissible under *Hunzer* and *Wilson*.

The exceptions defined by the Superior Court for admissibility of prior consistent statements include child victims of sexual assault. The forensic interview falls within this exception, and this Court did not abuse its discretion by admitting the transcript. The forensic interview was played for the purpose of corroborating S.W.'s testimony at the preliminary hearing as well as the trial. *Hunzer*, 868 A.2d at 512. Courts have long recognized that a prior consistent statement of a child in a sexual assault case is particularly relevant and probative. *Hunzer*, 868 A.2d at 512. In this case, the probative value of establishing that the child's testimony had not been "distorted by fantasy, exaggeration, suggestion, or decay of the original memory of the event" outweighed any potential danger of unfair prejudice.

Next, Appellant alleges this Court abused its discretion by permitting the victim's mother to testify regarding the victim's disclosure to her that Appellant had performed oral sex on her. S.W.'s statement to her mother was substantially similar to her testimony from the forensic interview and from the preliminary hearing. S.W.(mother)'s testimony also qualifies as a prior consistent statement, admissible under *Hunzer*. Furthermore, S.W.(mother)'s statement was offered in response to Appellant's allegations of fabrication and improper motive. Pa.R.E. 613(c); *See Commonwealth v. Taylor*, No. 1168 MDA 2014, 2015 WL 6949312, at *4 (Pa. Super. July 7, 2015) (non-precedential) (Under similar facts, the Superior Court of Pennsylvania found such a statement to be admissible.)

Lastly, Appellant alleges that all of the verdicts were against the weight of the evidence. The standard for a "weight of the evidence" claim is as follows:

> A motion for a new trial alleging that the verdict was against the weight of the evidence is addressed to the discretion of the trial court. An appellate court, therefore, reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence. The factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. The trial court will award a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion. Thus, the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings.

Commonwealth v. Cousar, 928 A.2d 1025, 1035–36 (Pa. 2007).

The jury reasonably found credible the testimony of the victim, S.W. A fair reading of the evidence supports the conclusion that Appellant waited for opportunities to be alone with his minor granddaughter. When he found himself in this situation he engaged in mouth to mouth kissing and inserted his tongue into her mouth. He further engaged in oral sex with her on more than one occasion. Upon further review of the evidence, this Court's sense of justice is not shocked by the jury's verdict in this case as it was not against the weight of the evidence but rather supported by it.

CONCLUSION

For all of the above reasons, the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

[1] 18 Pa.C.S. §§ 6318 (a) (1), 4304 (a) (1), and 6301 (a) (1) (ii), respectively. Appellant was found not guilty of Involuntary Deviate Sexual Intercourse (18 Pa.C.S. § 3123 (a) (1)) and Indecent Assault (18 Pa.C.S. § 3126 (a) (7)).

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Commonwealth of Pennsylvania v. Terrill Hicks

Criminal Appeal—Sentencing (Discretionary Aspects)—Juvenile Lifer Without Parole—Standard Range Sentence

Upon remand, the trial court sentences the juvenile who committed homicide to 35 years to life in prison.

No. CP-02-CR-0006205-2007. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Rangos, J.—November 13, 2017.

OPINION

In an opinion dated November 18, 2016, the Superior Court of Pennsylvania instructed this Court "to resentence Appellant in accordance with the factors set forth in *Knox*[1] and *Miller*[2]. *Commonwealth v. Hicks*, 151 A.3d at 230. On July 21, 2017, this Court re-sentenced[3] Appellant, Terrill Javon Hicks, on one count of Murder of the First Degree, to 35 years to life imprisonment, with consecutive sentences of 10 to 20 years for Criminal Attempt-Homicide, and 2 ½ to 5 years for Aggravated Assault. This Court denied Appellant's Motion for Post Sentence Relief on July 26, 2017. Appellant filed a Notice of Appeal and a Statement of Errors Complained of on Appeal on August 8, 2017.

MATTERS COMPLAINED OF ON APPEAL

Appellant contends that the re-sentences of 35 years to life imprisonment for Murder in the First Degree, 10 to 20 years imprisonment for Criminal Attempt-Homicide and 2 ½ to 5 years imprisonment for Aggravated Assault, imposed consecutively, resulted in a sentence which was individually and manifestly excessive. (Statement of Errors to be Raised on Appeal, p. 7). Appellant alleges that this Court failed to adequately weigh Appellant's remorse, acceptance of responsibility for his actions, and his progress toward rehabilitation. *Id.*

SUMMARY OF EVIDENCE

For a factual summary of the case and testimony, *see Opinion*, February 8, 2012, at 3-6.

DISCUSSION

In order to address an alleged sentencing error, Appellant must first establish a substantial question that his sentence is 1) inconsistent with a specific provision of the Sentencing Code; or 2) contrary to the fundamental norms which underlie the sentencing process. *Id.* at 364. 42 Pa.C.S. §9781(b); *Commonwealth v. Urrutia*, 653 A.2d 706, 710 (Pa. Super. 1995). This determination is evaluated on a case by case basis. *Commonwealth v. House*, 537 A.2d 361, 364 (Pa. Super. 1988). The court's discretion in imposing consecutive as opposed to concurrent sentences is not viewed as a substantial question granting the allowance of an appeal. *Commonwealth v. Marts*, 889 A.2d 608, 612 (Pa. Super. 2005). A substantial question may be raised if the result of an aggregate sentence creates a penalty that no longer fits the crime. *Commonwealth v. Mastromarino*, 2 A.3d 581, 586 (Pa. Super. 2010).

Since Appellant's allegation of error is substantially similar to his allegation of error in his prior appeal, which the Superior Court determined to have raised a substantial question, this Court will address the merits of Appellant's allegation of error. The standard of review with respect to sentencing is whether the court abused its discretion. *Commonwealth v. Smith*, 673 A.2d 893, 895 (Pa. 1996). A court will not have abused its discretion unless "the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." *Id.* In sentencing Appellant, this Court must consider the protection of the public, the rehabilitative needs of the offender, and the gravity of the offense as it relates to the victim and the community. 42 Pa.C.S. § 9721(b).

Appellant was originally sentenced on August 2, 2010 to the then-mandatory term of life imprisonment for his conviction of Murder of the First Degree. Due to the subsequent decision in *Miller v. Alabama*, Appellant was re-sentenced.[4] In response to *Miller v. Alabama*, Pennsylvania enacted 18 Pa.C.S. § 1102.1, which provides the mandatory minimum sentences for juvenile murderers. A court is required to sentence a juvenile between ages 15-18 who commits a Murder in the First Degree to at least 35 years to life imprisonment. 18 Pa.C.S. § 1102.1(a) (1).

In accordance with § 1102.1, this Court resentenced Appellant on October 23, 2014 to 35 years to life imprisonment. Again the case was appealed, and eventually remanded, pursuant to the holding in *Batts II*[5], for the Court to resentence upon consideration of the sentencing factors outlined in *Knox and Miller*. The Court in *Knox* listed several factors to consider at resentencing:

> Therefore, although *Miller* did not delineate specifically what factors a sentencing court must consider, at a minimum it should consider a 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. Super. 2012).

At the July 21, 2017 resentence hearing, this Court considered the sentencing factors in *Knox* and *Miller*, the 18 Pa.C.S. § 1102.1(a) (1) factors, as well as the totality of information presented to fashion an individualized sentence. (Transcript of Resentencing Hearing, July 21, 2017, hereinafter "RT" at 16) Assistant District Attorney Jennifer DiGiovanni reviewed the *Knox*/*Miller* sentencing factors at the resentence hearing on July 21, 2017.

> If we just look at Knox and Miller sentencing factors quickly, Your Honor, obviously the Defendant was a little over 15 years old at the time [of] this offense. The decertification transcript showed that he had a low to average IQ. He got his GED while incarcerated. The circumstances of the crime I have already accounted, except for the interpretation of the crime. He obviously was the primary person participating on the crime.
>
> * * *
>
> The notion of maturity and development. We know that Mr. Hicks was expelled from school in December of 2006 due to violence and aggression. He was identified at school, and this [is] in some decertification materials, as being a member of a gang.

The extent of family or peer pressure may have [a]ffected him. As I noted in 2015, Raymont Walker [his co-defendant] was likewise 15. So there remains external influence on Mr. Hicks, and there was some testimony to that effect that the person he was palling around with in those days leading up to the crime was the same age as he was.

Past aggressive violence, there was no [ ] testimony about that. Drug and alcohol history. The Defendant told one of the evaluators that he did not drink alcohol and rarely smoked marijuana because he didn't like the effect that it had on him.

His ability to deal with the police. I think it's important to note that the Defendant lied during both the police interviews. During the first police interview right after the homicide, he gave a false al[i]bi saying he was with the family of his co-defendant, Raymont Walker, at the Monroeville Mall and later went to a church party.

So even at 15 years old, he had the ability to sit down and speak with the police and lie to them.

* * *

His capacity to assist his attorney, there's been no testimony that he is unable to do that.

Mental health history. In his original decertification evaluation by Mr. Metusak, there is no history.

Finally, Your Honor, potential for rehabilitation, I think I have already covered that.

(RT 13-14)

Furthermore, Appellant was sentenced in the standard range for the counts of Criminal Attempt-Homicide and Aggravated Assault. None of these sentences are individually excessive because they are each within the required or standard range proscribed by the Pennsylvania Sentencing Guidelines. A standard range sentence carries its own presumption of reasonability. *Commonwealth v. Walls*, 926 A.2d 957, 964-965 (Pa. 2007).

Furthermore, the aggregate sentence imposed is not excessive upon consideration of the sentencing factors of § 9721. Appellant heinously murdered 16 year-old Kevin Harrison on his own front porch and attempted to do the same to Kendall Dorsey and Michael Harris. Appellant is not entitled to a volume discount nor should he receive a benefit for his poor aim. It is this Court's obligation to protect the public from those who commit vicious crimes such as those committed by Appellant. This Court did not act unreasonably or with prejudice. This sentence is thoroughly reflective of the gravity of the offense as it relates to the three victims, particularly Kevin Harrison who was robbed of his life, and of the need to protect the community, yet allows the possibility for Appellant to reenter society as a rehabilitated man after having served his aggregate minimum sentence of forty-seven and one half years.

CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

[1] *Commonwealth v. Knox*, 50 A.3d 732 (Pa. Super 2012).

[2] *Miller v. Alabama*, 567 U.S. 460 (2012).

[3] For a detailed summary of the prior procedural history, *See Opinions*, Feb. 8, 2012, and Feb. 29, 2016.

[4] In *Miller v. Alabama*, the Supreme Court held that "mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments." *Miller v. Alabama*, 567 U.S. 460 (2012).

[5] *Commonwealth v. Batts*, 66 A.3d 286, 295 (Pa. 2013).

Commonwealth of Pennsylvania v. Terelle L. Smith

Criminal Appeal—Sufficiency—Photo of Tattoo—Flight to Avoid Apprehension

Trial court agrees that evidence is insufficient to support flight to avoid apprehension charge.

No. CC 2014 14 980. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Williams, J.—December 19, 2017.

OPINION

Mr. Smith was convicted after a jury disbelieved his alibi witnesses. According to him, he was at a nearby hospital when a City of Pittsburgh officer, who knew him from prior interactions, spotted someone and that someone ran after pulling a gun from the waistband of his pants.

The jury's decision was October 16, 2015. Sentencing took place on January 20, 2016. His punishment was 4-8 years incarceration for possessing a firearm with an altered serial number and 2 years of consecutive probation. At count 2, carrying a firearm without a license, the Court imposed a consecutive 8 years of probation.[1] The Court imposed no penalty on the third count – flight to avoid apprehension. His trial counsel, Hart Hillman, filed no post sentence motions nor did he file an appeal.

On September 13, 2016, Mr. Smith filed a *pro se* request for post-conviction relief. After hearing from the government, PCRA relief was granted in the form of allowing Mr. Smith to file a post sentence motion. On July 17, 2017, his post sentence motion was denied but for the correction of his sentence on count 2 from 8 years of probation to seven. On August 16, 2017, a Notice of Appeal was docketed. On October 10, 2017, Mr. Smith penned his Concise Statement. He raises two issues. Both will be addressed although in reverse order.

Smith has a tattoo on his chest. It says "De Ruad Mob". This incident happened on De Ruad Street. A rather short street in the City of Pittsburgh not far from UPMC-Mercy Hospital and PPG Paints Arena, the home of the current Stanley Cup Champion, Pittsburgh Penguins. Before trial this admissibility of the "tattoo" was brought up. The Court heard from both sides. Ultimately, the Court authorized a photograph to be taken of the tattoo and that photograph was then admitted. The basis for its admission was its relevance outweighed the prejudice. The case was tried through the filter of an alibi offered by Mr. Smith. Him having a tattoo made it more probable than not that he would be on that very street when the officer saw him immediately before the chase began.

Smith's other argument hits the mark. He claims the government failed to present sufficient evidence to support a conviction for Flight to Avoid Apprehension. Smith is right.

The Court has reviewed the government's evidence and has not uncovered a sufficient quantity of evidence that supports the jury's verdict of guilt. In fact, the only "evidence" the Court found is a stipulation between the parties.[2] Trial Transcript, pg. 222. The stipulation was:

> The defendant was previously convicted of a felony as of Sept. 17, 2014, the date of this incident.

T.T,114, 195. This is simply not enough. The jury needed more facts. The evidence did not show he was avoiding trial. In fact, the evidence showed his trial was over and done with. The evidence did not show he was avoiding punishment or avoiding something that might flow from a sentence, like a probation violation warrant. *See, Commonwealth v. Steffy*, 36 A.3d 1109 (Pa. Super.2012). The totality of the government's evidence fails to answer the quintessential question in this type of case – What was he avoiding? On this record that simple question remains a mystery. The conviction at Count 3 should be reversed and Mr. Smith should be adjudicated not guilty of this accusation.

Our Department of Court Records should send the certified record of this case to our Superior Court in due course.

BY THE COURT:
/s/Williams, J.

[1] The penalty exceeded the maximum by a year and was modified through the granting of PCRA relief which then prompted the filing of a post sentence motion.

[2] The Court quotes "evidence" because a stipulation is not evidence. The facts underlying the stipulation are what a jury can believe or disbelieve. The fact that both sides agree to certain facts does not mean a fact finder must accept them.

Commonwealth of Pennsylvania v. Dyllon Lee Powell

Criminal Appeal—Rule 600—Escape—Fugitive from Justice

Man escaped from work release and cannot be found for one year; his speedy trial rights are suspended while he is a fugitive from justice.

No. CC 201700426. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—December 4, 2017.

OPINION

The Appellant, Dyllon Powell (hereinafter referred to as "Powell"), was charged with escape, after failing to return to Riverside Community Corrections Center[1] at the expiration of a period of authorized work leave. Powell's work leave began on March 4, 2016, at approximately 4:30 p.m., and he was to return to the corrections center no later than 3:00 a.m. on March 5, 2016. When Powell did not return to Riverside at the expiration of this leave period, an employee of the facility notified police. On March 5, 2017, the Pennsylvania State Police (hereinafter referred to as "PSP") filed a criminal complaint charging Powell with one count of escape, and a warrant was issued for Powell's arrest. The PSP thereafter attempted to locate Powell, but their attempts were unsuccessful. The PSP documented its efforts to execute the arrest warrant for Powell by way of a departmental document referred to as a due diligence of warrant service report.

On September 12, 2017, Powell was arrested on unrelated charges in Westmoreland County, at which time the outstanding arrest warrant was discovered. Powell was lodged in the Westmoreland County Jail on the unrelated charges on September 12, 2017, and was subsequently booked into the Allegheny County Jail on the escape charge, on December 13, 2016. On or about April 28, 2017, Powell filed a Motion to Dismiss pursuant to Pa.R.Crim.P. 600, in which he alleged that his speedy trial rights had been violated. A Rule 600 hearing was held on May 16, 2017, after which this Court denied Powell's Rule 600 Motion to Dismiss. Powell waived his right to a jury trial, and a non-jury trial commenced on June 9, 2017. Powell was found guilty on the single escape charge, and was sentenced to time served, and three (3) years of supervised probation.

Powell filed Notice of Appeal to the Superior Court, on or about July 10, 2017. This Court thereafter issued an Order directing Powell to file his statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Powell timely filed his 1925(b) statement on September 28, 2017. In his statement of matters complained of on appeal, Powell alleges that this Court erred in denying his Rule 600 Motion, arguing that the Commonwealth did not exercise due diligence in attempting to bring him to trial within the 365-day period prescribed by Rule 600. Powell therefore argues that his Rule 600 Motion to Dismiss should have been granted.

Rule 600 of the Pennsylvania Rules of Criminal Procedure (hereinafter referred to as "Rule 600") provides, in relevant part: "[t]rial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed." Pa.R.Crim.P. 600 (A)(3). Under Rule 600's speedy trial rule, the Commonwealth must make a reasonable effort to bring a defendant to trial within the prescribed 365-day period. *Com. v. Hunt,* 2004 Pa.Super. 358 (2004). Rule 600 serves two equally important functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. *Com. v. Horne*, 2014 Pa.Super. 58 (2014).

In determining whether an accused's right to a speedy trial has been violated, Pennsylvania courts must consider society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. *Com. v. Hunt*, 2004 Pa.Super. 358. Rule 600's speedy trial mandate was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth. *Id.* So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the speedy trial rights of an accused, Rule 600 must be construed in a manner consistent with society's right to punish and to deter crime. *Id.*

The date by which a trial must commence under Rule 600 is referred to as the mechanical run date, and is calculated by adding 365 days to the date on which the criminal complaint is filed. *Com. v. Cook*, 544 Pa. 361, n. 12 (1996) *cert. denied*, 519 U.S. 1119 (1997). The plain language of Rule 600 makes clear that the Rule's 365-day speedy trial period is applicable only when the defendant is at liberty on bail. Pa.R.Crim.P. 600(A)(3). In the instant matter, Powell was not at liberty on bail during the period of time from the filing of the complaint and the date on which his non-jury trial commenced. To the contrary, Powell was a fugitive from justice from March 5, 2016, the date on which he escaped from the Riverside Community Corrections Center, and September 12, 2016, the date on which he was arrested on unrelated charges in Westmoreland County. Powell absconded from the Riverside Community Corrections Center, and did not voluntarily return at any time after his escape. Accordingly, he cannot assert that his speedy trial rights were violated.

Rule 600's time limitations are not absolute. Rule 600(C) and Rule 600(G) operate to modify the mechanical run date under certain circumstances. Assuming, *arguendo*, Rule 600's speedy trial mandates do apply in Powell's case, the period of time between the filing of the criminal complaint for escape and his subsequent arrest are excludable pursuant to Rule 600(C). Rule 600(C)(1) defines excludable time as, "the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence." Once the mechanical run date is modified pursuant to Rule 600(C), it becomes the adjusted run date. *Com. v. Ramos*, 2007 Pa.Super. 335 (2007).

If the defendant's trial commences prior to the adjusted run date, the court need go no further in addressing a Rule 600 motion. *Id.* If, however, the defendant's trial takes place outside of the adjusted run date, the court must determine, pursuant to Rule 600(G), whether the delay occurred despite the Commonwealth's due diligence. The Commonwealth bears the burden of proving, by a preponderance of the evidence, that its efforts were reasonable and diligent, in order avail itself of an extension pursuant to Rule 600(G). *Id.* A Rule 600 motion to dismiss must be denied where the Commonwealth exercises due diligence[3] in bringing the case to trial before the run date. *Com. v. Trippett*, 2007 Pa.Super. 260 (2007).

The Superior Court succinctly summarized the process employed by Pennsylvania courts when considering a Rule 600 motion to dismiss:

> [T]he courts of this Commonwealth employ three steps…in determining whether Rule 600 requires dismissal of charges against a defendant. First, Rule 600(A) provides the mechanical run date. Second, we determine whether any excludable time exists pursuant to Rule 600(C). We add the amount of excludable time, if any, to the mechanical run date to arrive at an adjusted run date. If the trial takes place after the adjusted run date, we apply the due diligence analysis set forth in Rule 600(G). As we have explained, Rule 600(G) encompasses a wide variety of circumstances under which a period of delay was outside the control of the Commonwealth and not the result of the Commonwealth's lack of diligence. Any such period of delay results in an extension of the run date. Addition of any Rule 600(G) extensions to the adjusted run date produces the final Rule 600 run date. If the Commonwealth does not bring the defendant to trial on or before the final run date, the trial court must dismiss the charges.

Com. v. Ramos, 2007 Pa.Super. 335, (internal citations omitted).

In the instant matter, Powell escaped from incarceration on March 5, 2016. A criminal complaint was filed on March 5, 2016, and a warrant was issued for Powell's arrest on the same day. Following the issuance of the arrest warrant, the Pennsylvania State Police commenced efforts to locate Powell. During Powell's Rule 600 hearing, members of the PSP testified that the agency disseminated the arrest warrant for Powell, along with other relevant information, to both state and local law enforcement agencies, the PSP Fugitive Task Force, and Crime Stoppers. *See* May 16, 2017, Rule 600 Hrg. Tr. 4-10. The PSP also utilized social media to attempt to locate Powell. *Id.* In addition, to their administrative efforts to locate Powell, a Trooper traveled to Powell's last known address and canvassed the neighborhood. *Id.* at 19. The PSP documented their attempts to locate Powell by way of a due diligence of warrant service report. *Id.* at 5; 18. Despite the efforts of the PSP, Powell evaded capture until September 12, 2016, when he was arrested on the unrelated charges in Westmoreland County, and the outstanding arrest warrant was discovered.

As the Superior Court observed in *Hunt, supra*, Rule 600 was not intended to insulate the criminally accused from good faith prosecution. Not only would adoption of Powell's argument in the instant appeal insulate him from good faith prosecution, it would also yield absurd results. Under the theory advanced by Powell, all that would be required for an escaped inmate to avoid punishment would be to avoid detection until 365 days have passed. Pursuant to Rule 600(C), the adjusted run date of the speedy trial period was September 12, 2016, the date on which Powell was arrested in Westmoreland County[4]. Powell's non-jury trial commenced on June 9, 2017, which is 271 days from the adjusted run date. Powell was therefore brought to trial within the requisite 365 days of the adjusted run date, and his Rule 600 Motion was properly denied.

BY THE COURT:
/s/Cashman, A.J.

Dated: December 4, 2017

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[1] Pennsylvania Department of Corrections Detention Facility.

[2] Effective April 1, 2001, Pa.R.Crim.P. 1100 was amended and renumbered as Pa.R.Crim.P. 600.

[3] Due diligence is fact-specific, to be determined case-by-case; "it does not require perfect vigilance and punctilious care, but merely a showing the Commonwealth has put forth a reasonable effort." *Com v. Plowden*, 2017 Pa.Super. 61 (2017) (citing *Com. v. Selenski*, 606 Pa. 51, 61 (2010)).

[4] Rule 600(G) arguably applies to extend the Rule 600 run date for the period from Powell's arrest in Westmoreland County to his transfer to the Allegheny County Jail. *See Com. v. McNear*, 2004 Pa.Super. 218 (2004) ("the defendant should be deemed unavailable for the period of time during which the defendant…was absent under compulsory process requiring his or her appearance elsewhere in connection with other judicial proceedings."). Using this method of calculation, the adjusted run date would be December 13, 2016. If the adjusted run date were calculated using this method, Powell was brought to trial within 179 days of the adjusted run date. However, a Rule 600(G) analysis was not necessary in the instant matter, because the earlier run date of September 12, 2016, places Powell's June 9, 2017, non-jury trial within Rule 600's 365-day speedy trial period.