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. Curtis Franklin*

Criminal Appeal—Credibility of defendant as witness—jury instruction—judicial discretion—sentencing—consecutive sentences—discretion at sentencing—sentencing factors—authority to impose conditions of probation

Defendant was charged with years' long sexual abuse of a child beginning when she was 8. Defendant testified on his own behalf. Court gave Suggested Standard Jury Instruction 3.09 re: "Credibility of Defendant as Witness"as well as 4.17 "Credibility in General". Court wrote that 3.09 was intended to work in tandem with 4.17 and that it did not abuse its discretion given that the defendant testified. The Court sentenced the defendant to an aggregate term of 22 - 44 years for convictions of Involuntary Deviate Sexual Intercourse and Criminal Attempt with 5 years of probation running consecutively. The Court wrote that it did not abuse its discretion, that the consecutive terms was appropriate given the repeated sexual abuse over many years, and that it retained the authority to impose conditions of probation noting that it lacked the authority to usurp the authority of the Parole Board.

No. CC 202100044. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Beemer, J.—February 17, 2022.

OPINION

Appellant, Curtis Franklin appeals from the judgment of sentence order imposed after a jury trial, wherein he was found guilty of: Involuntary Deviate Sexual Intercourse (IDSI) with a Child; Criminal Solicitation (IDSI); Aggravated Indecent Assault of Child; two (2) counts of Criminal Attempt (Rape); Indecent Assault (child less than 13); Endangering the Welfare of Children (EWOC); Corruption of Minors; and Indecent Exposure.[1]

A jury trial commenced on May 7, 2021 and on May 11, 2021 the jury returned a guilty verdict at all counts. On July 27, 2021, the Court sentenced Appellant to an aggregate sentence of 22 to 44 years of incarceration followed by a period of 5 years of probation reflected as follows:

Count 1 – IDSI; 15-30 years of incarceration

Count 2 – Criminal Solicitation; 6-12 years of incarceration concurrent to Ct. 1

Count 3 – Aggravated Indecent Assault of Child; 6-12 years of incarceration concurrent to Ct. 1

Count 4 – Criminal Attempt; 7-14 years of incarceration consecutive to Ct. 1

Count 7 – EWOC; 5 years of probation consecutive to Cts. 1 and 4

Counts 5, 6, 8 and 9 - No Further Penalty

Additionally, the Court imposed a condition that Appellant register for his lifetime as a sex offender pursuant to the Sex Offender Registration and Notification Act (SORNA) because of the conviction at Count 1, a TIER III offense.[2] Charge specific special conditions of probation were imposed at the convictions of Counts 1, 2, 3, and 4. These special conditions will be addressed in more detail below, as they are raised in Appellant's concise statement.

Trial counsel filed a timely Post-Sentence Motion on August 6, 2021 challenging discretionary aspects of sentence. The motion was denied on September 22, 2021. Thereafter, a timely Notice of Appeal was filed on October 22, 2021 and after receiving an extension, Appellant filed his Concise Statement of Matters Complained of on Appeal on December 2, 2021. This opinion follows.

FACTUAL HISTORY

The convictions arose out of a series of incidents that took place over a period of approximately seven years, starting when victim was 8 years old. Appellant is the paternal Great Uncle of victim.[3] Victim testified that during this seven year period, she and her family, which consisted of her mother, father and three brothers, moved three times. With each move, Appellant maintained a presence with the family, either through temporarily living with them or by helping to babysit and/or care for victim and her siblings.[4] Through the collective testimony of victim's parents, it was clear that Appellant was a constant presence in the family's life. He benefited as a trusted member of the family as the parents assisted him with housing, took him to medical appointments, helped with his care, and ran errands for him.[5]

The abuse began when the Appellant lived with the victim and her family at a home located in McKees Rocks.[6] During a time when victim's father was in the hospital, the Appellant was watching her and her siblings.[7] On a day when her mother was at the hospital visiting her father, victim testified that the Appellant touched her chest area and vagina beneath her clothing.[8] Although the victim was unable to provide a specific date for this incident, her mother testified that the family lived at the McKees Rocks residence when the victim was between the ages of 6 and 12 years old and her father testified that he was hospitalized in 2014.[9]

The family then moved from McKees Rocks to a home in Crafton.[10] Although the Appellant did not live with them at this home, he was a visitor and occasionally stayed overnight.[11] On one particular overnight stay the Appellant was allowed to sleep in her bedroom.[12] It was during this night that the victim awoke to the Appellant performing oral sex on her.[13] She detailed that she was dressed in a shirt and pants, but that when she woke up both her pants and underwear were pulled down to her ankles.[14] She detailed that the Appellant stopped when he heard a noise and she fled into a bathroom and locked herself inside.[15]

When the victim was in the 6th grade her family moved to their current residence in Crafton.[16] Although the Appellant did not live with them, he remained a frequent visitor and stayed overnight. The abuse continued as he created opportunities to be alone with victim to perpetrate the abuse by asking victim's parents to run errands for him.[17] She testified to numerous incidents. Sometimes he would touch her buttock or her chest when he came into a room, but the abuse continued to escalate.[18]

One day victim was alone in a bedroom when the Appellant pulled down her pants and underwear and attempted to vaginally penetrate her with his penis.[19] The victim testified that she shielded her vagina with her hand and could feel his penis push up against her hand.[20] Although the Appellant was unable to perform penile penetration on this day, the Appellant did penetrate victim's vagina with his fingers, despite her physical efforts to get away.[21] The Appellant attempted vaginal intercourse with victim a second time while her parents were out of state and he was in charge of supervising the children.[22] On this day, victim was laying on the living room couch watching television when the Appellant laid on top of her. The Appellant pulled down her

pants and underwear and attempted vaginal intercourse, but again she was able to block him with her hand.[23] Appellant's abuse of victim also included repeated requests for her to perform oral sex on him.[24]

The trauma from these years of sexual abuse led to victim self-mutilating, by cutting her skin with razor blades.[25] Her mother discovered this in November of 2020 and victim then disclosed the abuse to her mother, which led to a criminal investigation and subsequent charges in this case.[26]

An expert in the field of child sexual abuse and disclosure, called by the Commonwealth, provided testimony about how and why children may delay disclosing abuse and that cutting or other forms of self-harm are ways sexual abuse victims act out on the pain.[27]

Appellant testified at trial that he moved from Chicago to Pittsburgh to have access to medical treatment for underlying health issues.[28] He confirmed that he either lived with victim's family or was a frequent visitor who also supervised the children at times, but denied that he ever sexually abused victim.[29]

CLAIMS OF ERROR

The first claim of error raised by Appellant is that the trial court improperly instructed the jury regarding the weight to be given to Appellant's testimony over the objection of trial counsel.

A charging conference was held on May 11, 2021, at which time Appellant's trial counsel objected to the Court instructing the jury with standard jury instruction 3.09 - Credibility of defendant as witness: interest, prior conviction, reputation. Pa. SSJI (Crim) 3.09. Specifically, trial counsel argued that in light of the fact that the Court would be giving the instruction regarding witness credibility in general[30], 3.09 unduly and unnecessarily highlights credibility concerns for a testifying defendant.[31] The Commonwealth countered that Pa. SSJI (Crim) 4.17 is a standard instruction and is appropriate since Appellant testified at trial.[32] The Court found this instruction to be appropriate under the circumstances and a correct reflection of Pennsylvania jurisprudence.[33]

"When reviewing a challenge to jury instructions, the reviewing court must consider the charge as a whole to determine if the charge was inadequate, erroneous, or prejudicial. The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. A new trial is required on account of an erroneous jury instruction only if the instruction under review contained fundamental error, misled, or confused the jury." Commonwealth v Fletcher, 986 A.2d 759, 792 (Pa. 2009) (internal citations omitted).

In this case, the issue regarding Pa.SSJI (Crim) 3.09 was properly preserved through objection and is ripe for review. Pa.R.Crim.P. 647(C), See Commonwealth v. Fletcher, 986 A.2d 759 (Pa. 2009). Although Appellant does not allege error in how the Court delivered the instruction at issue, for the sake of completeness the Court's instruction is reproduced below.

> Court: The [D]efendant took the stand as a witness in this case. In considering the [D]efendant's testimony, you are to follow the general instructions I just gave you for judging the credibility of any witness. You should not disbelieve the [D]efendant's testimony merely because he is the [D]efendant. In weighing his testimony, however, you may consider the fact that he has a vital interest in the outcome of this trial. You may take the [D]efendant's interest into account just as you would the interest of any other witness along with all of the other facts and circumstances bearing on credibility in making up your minds what weight his testimony deserves.

J.T. at 298.

It is evident that the Court's instruction virtually mirrors the standard instruction[34] which reads as follows:

> 1. The defendant took the stand as a witness. In considering the defendant's testimony, you are to follow the general instructions I gave you for judging the credibility of any witness.
>
> 2. You should not disbelieve the defendant's testimony merely because [he] [she] is the defendant. In weighing [his] [her] testimony, however, you may consider the fact that [he] [she] has a vital interest in the outcome of this trial. You may take the defendant's interest into account, just as you would the interest of any other witness, along with all other facts and circumstances bearing on credibility in making up your minds what weight [his] [her] testimony deserves.

PA.SSJI (Crim) 3.09

The Subcommittee Note for SSJI 4.17 regarding general credibility of witnesses reads in part that, "[t]his instruction should be supplemented as necessary with instructions concerning the defendant as a witness from chapter three and with instructions concerning specific matters affecting credibility from this chapter." Thus, standard instruction 4.17 is not meant to supplant 3.09, but to work in tandem with it, when the Defendant testifies at trial. Therefore, the Court's instruction to the jury in this case where the Appellant offered testimony was appropriate and consistent with the standard instruction and its purpose. The Court did not abuse its discretion by giving this instruction over the objection of trial counsel.

Appellant's next two (2) claims argue that the Court erred in its imposition of sentence will be addressed collectively, as they appear to raise the same underlying issue, which is that the Court abused its discretion regarding discretionary aspects of sentence. First, in requesting that the sentence be vacated, Appellant highlights factors, which although not identified as mitigating factors, are taken by the Court to be argued as such. From this brief delineation, Appellant argues that the sentence was both excessive and "manifestly unreasonable".[35] Next, Appellant claims that the Court erred in denying Appellant's Post-Sentence Motion. However, no explanation is offered as to how the Court erred.

To allow for meaningful review, "an appellant must articulate the reasons the sentencing court's actions violated the sentencing code." Commonwealth v. Moury, 992 A.2d 162, 170 (Pa. Super. 2010). As our appellate courts are aware, challenges to discretionary aspects of sentence can take many forms. See Commonwealth v. Ladamus, 896 A.2d 592 (Pa. super. 2006) (Appellant raised on appeal that the sentencing court neither addressed nor considered the issues related to his medical condition and his status as primary caregiver for his mother.); Commonwealth v. Felmlee, 828 A.2d 1105, 1107 (Pa. Super.2003) (en banc) (Appellant challenged that the sentencing court imposed a sentence in aggravated range without adequately considering mitigating circumstances.) Commonwealth v. Malovich, 903 A.2d 1247 (Pa. Super. 2006) (Appellant asserted that the sentencing court did not state its reasons for the penalty which it imposed; that the court's actions were inconsistent with a specific provision of the sentencing code; and that the sentence was excessive and disproportionate to those violations.)

> The Court observes the statutory guidance provided by Pa.R.A.P. 1925:
>
> Opinion in support of order.
>
> (b) Direction to file statement of errors complained of on appeal; instructions to the appellant and the trial court.--If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").
>
> (4) Requirements; waiver.
>
> (ii) The Statement shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge. The judge shall not require the citation to authorities; however, appellant may choose to include pertinent authorities in the Statement.
>
> (vii) Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.

Pa.R.A.P. 1925(b)(4)(ii) and (vii) (emphasis added).

Additionally, the Court turns to the long standing principle that:

> The Rule 1925(b) statement must be "specific enough for the trial court to identify and address the issue [an appellant] wishe[s] to raise on appeal." [A] [c]oncise [s]tatement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no [c]oncise [s]tatement at all." The court's review and legal analysis can be fatally impaired when the court has to guess at the issues raised. Thus, if a concise statement is too vague, the court may find waiver.

Commonwealth v. Hansley, 24 A.3d 410, 415 (Pa.Super. 2011) (citing Commonwealth v. Reeves, 907 A.2d 1, 2 (Pa.Super.2006)).

This is consistent with the principles followed by our appellate courts when reviewing discretionary aspects of sentence. "[W]here the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process, will such a statement be deemed adequate to raise a substantial question so as to permit a grant of allowance of appeal of the discretionary aspects of the sentence." Commonwealth v. Mouzon, 812 A.2d 617, 627 (Pa. 2002).

Cognizant of the applicable Rule and case law outlined above, the Court finds that Appellant's claims identified in paragraphs two and three are waived for vagueness. Appellant's first sentencing claim reads:

> Appellant Franklin also intends to argue that the 22-to-44 year aggregate sentence of imprisonment that was imposed upon him by this Court, …was a sentence that was excessive in length and manifestly unreasonable given that totality of the circumstances of the case (including, inter alia, his age (57) as of the date of sentencing, his extremely poor physical health, the fact that all of his prior convictions were misdemeanors, the staleness of his convictions, the fact that he will be a lifetime sex offender registrant, and the existence of the 42. Pa.C.S. §9718 mandatory sentence). That is to say, Appellant intends to argue to the Superior court that this Court's aggregate sentence, for all counts of conviction, should be vacated pursuant to 42 Pa.C.S. §9781(c)(2), and that this case should be remanded to this Court so that an aggregate sentence of lesser severity can be imposed.

It is unclear from this claim how the Court erred. Appellant points to what are presumably mitigating factors, mandatory sentences and sex offender registration. Is he claiming that the Court failed to consider mitigation or that the Court did not afford mitigating factors sufficient weight in comparison with other factors? When directing the Court to the applicable mandatory sentence, is Appellant arguing that the Court improperly exceeded its discretion by imposing a sentence that exceeded the mandatory? Is the aggregate sentence excessive because the Court imposed consecutive terms of incarceration? The Court poses these questions to illustrate the difficulty that flows from vague assertions of errors. It is simply insufficient to simply list sentencing attributes or utilize key phrases without any specificity as to how those attributes or phrases were incorrectly assessed or addressed by the sentencing court, yet also claim that these reasons support error as to allow for relief in the form of vacating a sentence.

The same vagueness exists with the claim of error raised in paragraph three of the Concise Statement, which reads:

> Appellant Franklin further intends to argue that this Court erred when it denied the Pa.R.Crim.P. 720 Post-Sentence Motion that was submitted to it by trial counsel on August 6, 2021. Appellant will ask that the judgement of sentence in this case be vacated so that the relief sought by his Post-Sentence Motion ---- the imposition of an aggregate sentence of lesser severity ---- can be imposed.

Again, this is a boiler plate allegation of error without specificity which the Court deems waived for vagueness.

Alternatively, if the reviewing court deems these claims sufficiently pled, they should nonetheless be denied as meritless.

The reviewing appellate court shall vacate sentence and remand under three circumstances: (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously; (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable. In all other cases the appellate court shall affirm the sentence imposed by the sentencing court. 42 Pa.C.S. §9781(c).

"In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance, or indifference." Commonwealth v. Mouzon, 828 A.2d 1126, 1128 (Pa.Super. 2003), citing Commonwealth v. Ellis, 700 A.2d 948, 958 (Pa.Super 1997). This discretion extends to the choice to run sentences concurrently or consecutively. Mouzon at 1130.

The record is unambiguous. This Court considered all sentencing factors set forth in 42 Pa.C.S. §9721(b). The Court reviewed the Presentence Report[36] and the sentencing guidelines which were placed on the record.[37] The Court acknowledged in detail Appellant's health[38], age, rehabilitative needs[39], and prior record[40], as well as the gravity of the offense and the impact on the victim[41], and the need to protect the community[42]. It was with all this in mind, that the Court rejected Appellant's request to be sentenced to 10-20 years. As argued by Appellant's counsel, this would be the lowest possible sentence permitted under the circumstances and would be a downward deviation from the guidelines for Count 1, which began at fifteen years of incarceration in the mitigated range.[43] Individualized sentences do not require courts to impose the minimum possible confinement. Moury, 992 A.2d at 171. Pursuant to 42 Pa.C.S.A. § 9721, the court has discretion to impose sentences consecutively or concurrently. Id. A sentence at only Count 1 of the criminal information, which also would require a downward deviation from the guidelines, is simply an inadequate reflection of the repeated sexual molestation perpetrated by Appellant against victim. Appellant used his familial position and health problems to ingratiate himself into this family and to facilitate opportunities to commit these acts against the victim over a period of almost seven years; abuse that began when she was only eight years old. The Court properly considered these facts along with the mitigation offered on behalf of Appellant, which the Court noted was not "insignificant".[44]

The final complaint of error is that the Court imposed an illegal sentence when it exceeded its authority by imposing conditions on Appellant's parole at Counts 1, 2, 3, and 4. These conditions are not identified by Appellant in his Statement, but rather identified by page numbers in the sentencing transcript. Presumably, these are the charge specific special conditions imposed as a result of him being convicted of sexual offenses. For the sake of clarity, upon parole the following conditions were imposed upon Appellant: (1) no contact with anyone under the age of 18 without approval from the parole office, (2) no contact with the victim, (3) participation in a sex offender treatment program, (4) prohibition from possessing pornographic or otherwise sexually stimulating material, (5) prohibition from being within 100 feet any place a child might expect to be, including but not limited to a school, arcade or playground, and (6) prohibition from sponsorship or involvement with youth sports or other child program without approval from the parole office. As Appellant is not challenging the nature of the conditions, but rather the Court's authority to impose them, this claim does not involves discretionary aspects of sentence but the legality of the sentence.

> (a) General rule.--In imposing an order of probation the court shall specify at the time of sentencing the length of any term during which the defendant is to be supervised, which term may not exceed the maximum term for which the defendant could be confined, and the authority that shall conduct the supervision. The court shall consider probation guidelines adopted by the Pennsylvania Commission on Sentencing under sections 2154 (relating to adoption of guidelines for sentencing) and 2154.1 (relating to adoption of guidelines for restrictive conditions).
>
> (b) Conditions generally.--The court shall attach reasonable conditions authorized by section 9763 (relating to conditions of probation) as it deems necessary to ensure or assist the defendant in leading a law-abiding life.

The Court informed Appellant on the record of probation conditions in an effort to comply with the recent Pennsylvania Superior Court decision, Commonwealth v. Koger, that "a sentencing court may not delegate its statutorily proscribed duties to probation and parole offices and is required to communicate any conditions of probation or parole as a prerequisite to violating any such condition. Koger, 255 A.3d 1285, 1292 (Pa. Super. 2021).

Appellant's claim that the Court imposed these conditions relative to Appellant's state parole is without merit. The Court concedes that it has no authority to impose conditions on state parole. The above referenced charge specific special conditions are appropriate and within this Court's authority relative to the probationary term imposed. As such, the relief requested by Appellant, to vacate sentence and remand for resentencing, should be denied as it does not upset the Court's overall sentencing scheme. See 42 Pa.C.S. §9781; Commonwealth v. Klein, 795 A.2d 424, 430 (Pa. Super. 2002) (When a case requires a correction of sentence, the appellate court has the option of either remanding for resentencing or amending the sentence directly. If the overall sentence is not changed by the correction, remand is not necessary.)

For all the above reasons, Appellant's judgment of sentence should be AFFIRMED.

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[1] 18 Pa.C.S. §3123(b); 18 Pa.C.S. §902; 18 Pa.C.S. §3125(b); 2 counts of 18 Pa.C.S. §901; 18 Pa.C.S. §3126(a)(7); 18 Pa.C.S. §4303(a)(1); 18 Pa.C.S. §6301(a)(1)(ii); and 18 Pa.C.S. §3127.
[2] 42 Pa.C.S. §9799.14(d)(4).
[3] Jury Trial Transcript (J.T.), May 7, 2021 – May 11, 2021, pp. 59, 87-88.
[4] Id. at 81, 117.
[5] Id. at 121, 139, 194, 205.
[6] J.T. at 60, 113-114, 133-134.
[7] Id. at 62, 86, 114, 134.
[8] Id. at 61-62.
[9] Id. at 113, 134.
[10] Id. at 63, 114 – 116, 135.
[11] Id.
[12] Id. at 65, 116, 200.
[13] Id. at 66.
[14] Id.
[15] Id. at 67.
[16] Id. 67-68.
[17] Id. at 74-75, 79-80, 114-115, 117.
[18] Id. at 70.
[19] Id. at 72.
[20] Id. at 72, 94, 104.
[21] Id. at 73-74.
[22] Id. at 81-82.
[23] Id. at 77-78.

[24] Id. at 79.
[25] Id. at 82-83.
[26] Id. at 106, 118-119.
[27] Id. at 152, 154-170.
[28] Id. at 193-194, 196.
[29] Id. at 196-199.
[30] Pa. SSJI (Crim) 4.17; J.T. at 227-229, 234-235, 294-296.
[31] J.T. 227-229.
[32] Id.
[33] Id.
[34] Paragraph 3 of PA.SSJI (Crim) 3.09 was omitted from the Court's instruction as inapplicable.
[35] Appellant Franklin's Concise Statement of Errors to be Asserted on Appeal, paragraph 2.
[36] Sentencing Transcript (S.T.), July 27, 2021, pp. 4, 23.
[37] S.T. at 8-9.
[38] S.T.10-13, 23-24, 26. The medical records identified as Defense Exhibits A, B, and C were voluminous and submitted to the Court the day before sentencing.
[39] S.T. at 24.
[40] S.T. at 27. Appellant states in his Statement that his priors are "stale". However, the appellate courts and §9721 do not recognize "staleness" as applied to a defendant's prior record score. See Commonwealth v. Diamond, 945 A.2d 252, 259 (Pa. Super. 2008) (Further, "[n]either the Sentencing Code nor the sentencing guidelines place any time limits on offenses to be included in the prior record score, as such criminal history is relevant to sentencing." (internal citation omitted)); See 204 Pa.Code §303.4.
[41] S.T. at 24-25.
[42] Id.
[43] S.T. at 8-9, 15.
[44] S.T. at 26-27.

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Commonwealth of Pennsylvania v. Moshe Journo

Criminal Appeal—Criminal Appeal—Extradition—Rape

Appellant convicted of Rape and other related sexual offenses challenges trial court's denial of Motion to Dismiss stating that the extradition treaty between the United States and the State of Israel only allowed for the prosecution of Rape and Sexual Assault. Court opines that since the Ministry of Justice for the State of Israel responded that the additional offenses are based on the same set of facts and relate to the same victim, prosecution as to all charges was permissible.

No. CC 200414863. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Beemer, J.—February 25, 2022.

OPINION

Appellant, Moshe Journo appeals from the July 12, 2021, judgment of sentence order imposed after a jury trial, wherein he was found guilty of: Aggravated Indecent Assault; Sexual Assault; Statutory Sexual Assault; Indecent Assault, and Rape.[1]

A jury trial commenced on May 27, 2021 and on June 3, 2021 the jury returned a guilty verdict at all counts. On July 12, 2021, the Court sentenced Appellant to an aggregate sentence of 10 to 25 years of incarceration. As a result of the convictions, Appellant was ordered to register for his lifetime as a sex offender pursuant to the Sexual Offender Registration Notification Act (SORNA) Subchapter I.[2]

On July 21, 2021, appellate counsel, Christopher Capozzi entered his appearance and filed a timely Post-Sentence Motion requesting a modification of sentence as well as an extension to file a supplemental post-sentence motion. On July 26, 2021, the Court granted Appellant 60 days to file a supplemental motion, however, no motion was filed. The Commonwealth issued a response to Appellant's request to modify his sentence and on October 14, 2021 this Court denied the post-sentence motion. A timely Notice of Appeal was filed on November 15, 2021, with a corresponding Concise Statement of Matters Complained of on Appeal filed on December 1, 2021. This opinion follows.

PROCEDURAL HISTORY

On September 7, 2004, Appellant was arrested and a criminal complaint was filed charging him with Aggravated Indecent Assault, Sexual Assault, Statutory Sexual Assault, Indecent Assault, and Corruption of Minors.[3] A preliminary hearing was scheduled on October 14, 2004. Appellant failed to appear and an arrest warrant was issued. Over the ensuing years, efforts were made to locate Appellant who was believed to have fled the country to Israel. On May 24, 2006, a second criminal complaint, Docket No. 200607952, was filed against Appellant charging him with one count of Rape, 18 Pa.C.S. §3121(a)(1). An arrest warrant was issued the same day, followed by a bench warrant on July 11, 2006. This second criminal complaint charged additional conduct that occurred during the September 6, 2004 criminal episode for which charges were pending at Docket No. 200414863.

On January 19, 2017, the Allegheny County District Attorney's Office sought extradition of Appellant from Israel to the United States for prosecution of CC200607952, wherein one count of Rape was charged.[4] Appellant was extradited to the United States and the warrant was cleared on February 25, 2019. On April 22, 2019, Appellant filed an Omnibus Pretrial Motion wherein he

made a Motion to Dismiss/Motion to Quash specific charges filed at CC200414836.[5] The Commonwealth filed a Response on June 13, 2019. On June 28, 2019, the presiding judge, Mark V. Tranquilli, conducted a hearing on the motion. An order was entered on July 2, 2019, granting the defense motion only as to Count 5 – Corruption of Minors. A full discussion of this motion and ruling will be addressed below as this is the sole claim of error on appeal.

Thereafter, the Commonwealth submitted a Nolle Prosse at 200607952, and the criminal information at CC200414863 was amended to include a count of Rape.[6] On December 9, 2019, Appellant entered a guilty plea to Counts 1 through 4, that being: Aggravated Indecent Assault, Sexual Assault, Statutory Sexual Assault, and Indecent Assault. The Commonwealth withdrew Count 5 - Rape, and there was no agreement as to sentence. A sentencing date was scheduled for March 16, 2020. On March 12, 2020, four days before the sentencing date, trial counsel moved to withdraw. On this same date, new counsel, Joseph Hudak, Esq., filed a motion on behalf of Appellant to withdraw his guilty plea. The Commonwealth filed an immediate response on March 13, 2020, and a hearing was held on July 17, 2020.[7] The motion was granted on July 21, 2020, and a jury trial commenced on November 6, 2020. On the first day of trial, a mistrial was granted at the request of Appellant due to defense error.[8] As noted above, a second jury trial began on May 27, 2021, and concluded on June 3, 2021, with a guilty verdict at all counts. Sentence was imposed on July 12, 2021.

FACTUAL HISTORY

As the facts are not the subject of the underlying appeal, the Court will provide a brief factual summary. On September 6, 2004, victim, who at the time was 15 years old, entered a retail store in Dormont named "Mo-Wear" along with a friend. This store was owned and operated by Appellant, who was present on this day. While inside the store, Appellant offered victim and her friend a free tanning bed session. Both girls accepted and Appellant showed them into separate rooms. Victim was in the process of undressing when Appellant entered the room unannounced and told her that he had to apply lotion on her. Appellant began rubbing lotion on her legs and while running his hands up towards her stomach he inserted his finger into her vagina, grabbed her, turned her around and pushed her onto the tanning bed. While he had his hands wrapped around her stomach he engaged in vaginal sex from behind. Upon leaving the store, victim immediately told her friend and her friend's mother. The Dormont Police Department was contacted and victim went to a local hospital where a sexual assault examination was performed. Appellant was arrested the next day on September 7, 2004. On October 14, 2004, Appellant failed to appear for a scheduled preliminary hearing and a warrant was issued. Appellant eluded police for the next 15 years, having fled to Israel. In February of 2019 Appellant was extradited to the United States to stand trial for the September 6, 2004 incident. Upon his return, a buccal swab was taken from Appellant and DNA testing was performed on the items collected from the 2004 sexual assault examination of victim. Test results determined that Appellant's DNA matched a semen stain located on the inside lining of victim's shorts.[9]

CLAIMS OF ERROR

The sole claim of error raised by Appellant is that the trial court erred in denying the Motion to Dismiss/Motion to Quash for the charges of Aggravated Indecent Assault, Statutory Sexual Assault, and Indecent Assault. Appellant's argument is a pure question of law, inasmuch as it involved the interpretation of the extradition treaty between the United States and the State of Israel through which Appellant was brought back for prosecution.[10] Exhibit 1 of Appellant's motion included the Commonwealth's January 19, 2017, Affidavit in Support of Request for Extradition wherein it sought extradition for the Rape charge. Appellant's claim of error mirrors that argued before the trial court. Which is that the Rule of Speciality contained within Article 8 of the Treaty only allows for the prosecution of an "offense for which extradition was granted, or a lesser included offense based on the same facts as the offense for which extradition was granted."[11] In this case, Appellant argued that Article 8 limits the Commonwealth to prosecuting him for only two charges: Rape, and Sexual Assault, which Appellant argued is the only charged offense that is a lesser included offense of Rape. Thus, the remaining charges of Aggravated Indecent Assault, Statutory Sexual Assault, Indecent Assault, and Corruption of Minors are barred from prosecution and must be dismissed/quashed in violation of the extradition treaty.[12]

In a written response, the Commonwealth presented two alternative arguments to allow for the prosecution of all charges. This response was supplemented with a letter dated June 13, 2019 from Deputy District Attorney Janet R. Necessary informing the Court that the United States Department of Justice was awaiting a response from the State of Israel regarding a request to waive the Rule of Speciality to allow for the prosecution of Aggravated Indecent Assault, Statutory Sexual Assault, and Indecent Assault. (Attachment 1). On June 24, 2019, the Ministry of Justice for the State of Israel replied by letter that waiver of the Rule of Speciality is not required. They reviewed the request along with the Commonwealth's 2017 request for extradition, and found that the additional offenses of Aggravated Indecent Assault, Statutory Sexual Assault, and Indecent Assault "are based on the same set of facts and relate to the same victim that appear in the extradition request;…for which Journo was extradited." (Attachment 2).

At the June 28, 2019, hearing conducted by Judge Mark V. Tranquilli, the Commonwealth offered the letter from the Israeli government in support of its position that the Court deny the Motion to Dismiss/Motion to Quash.[13] It was the Commonwealth's position that this decisive response from the Ministry of Justice resolved the question regarding which charges are considered "lesser included" under the extradition treaty, clearing the way for prosecution of all charges.

Judge Tranquilli explained that he agreed with the Commonwealth's position, that the letter from the Ministry of Justice resolved any dispute relative to which charges Appellant may be prosecuted for under the extradition treaty. He dismissed a single count of Corruption of Minors. Judge Tranquilli offered two reasons for the dismissal. One, that the count was not specified by the Ministry as an additional offense. Two, that Corruption of Minors is not considered a lesser included offense of Rape within the Commonwealth of Pennsylvania.[14] A corresponding order was issued on July 2, 2019.

As the current Court did not rule on this matter, and the former Judge is no longer a member of the bench, the Court incorporates the explanation given by Judge Tranquilli at the June 28, 2019 hearing, along with the discussion above in satisfaction of Pa.R.A.P. 1925(a).

For all the above reasons, Appellant's judgment of sentence should be AFFIRMED.

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[1] 18 Pa.C.S. §3125; 18 Pa.C.S. §3124.1; 18 Pa.C.S. §3122.1; 18 Pa.C.S. §3126(a)(1), and 18 Pa.C.S. §3121(a)(1).

[2] 42 Pa.C.S. §9799.55(b).

[3] Criminal Complaint for CC200414863, September 7, 2004.

[4] Omnibus PreTrial Motion, April 22, 2019, Exhibit 1.

[5] The Omnibus Pretrial Motion also contained a Motion to Suppress and a Motion for Discovery that are not the subject of this appeal.

[6] CC200607952, Petition for Nolle Prosse, July 2, 2019; Pretrial Motion Transcript, (P.T.) June 28, 2019, pp. 38-39, 60-61.
[7] A hearing date was delayed due in part to the suspension of the previously assigned judge, Mark V. Tranquilli, and various Judicial Emergency Court Orders limiting court proceedings due to the pandemic. The case was reassigned to this Court on February 28, 2020.
[8] Jury Trial (mistrial), November 6, 2020, pp. 113-117.
[9] 09 LAB 050608.
[10] Protocol between The Government of the United States and The Government of the State of Israel Amending the Convention on Extradition (hereinafter Treaty); See Omnibus PreTrial Motion, April 22, 2019, Exhibit 2.
[11] Id. at Article 8, Rule of Speciality, Paragraph 1(a).
[12] Omnibus Pretrial Motion, Motion to Dismiss/Motion to Quash; Pretrial Motion Transcript, (P.T.) June 28, 2019, pp. 31-34.
[13] P.T. at 29-31, 34-35; Exhibit 2.
[14] P.T., at 37-38.

ATTACHMENT 1

COUNTY OF ALLEGHENY
OFFICE OF THE DISTRICT ATTORNEY
STEPHEN A. ZAPPALA, JR.
DISTRICT ATTORNEY
1444 HILLSDALE AVENUE
PITTSBURGH, PENNSYLVANIA 15216
PHONE (412) 388-5300 • FAX(412) 388-5324

June 13, 2019

Honorable Mark V. Tranquilli
Allegheny County Courthouse
436 Grant Street
Pittsburgh, PA 15219

Re: Commonwealth v MOSHE JOURNO
CC 2006 07952; 2004 14863

Dear Judge Tranquilli:

The Commonwealth wishes to notify this Honorable Court and the defendant about a recent development that could affect the Court's decision on defendant's Omnibus Pretrial Motion - Motion to Dismiss/Motion to Quash. The Extradition Treaty previously discussed in the Commonwealth's Response to Defendant's Motion to Dismiss/Motion to Quash contains a provision in which the surrendering state may waive the Rule of Specialty, thus permitting prosecution of charges other than the charge (and lesser included offenses) for which defendant was extradited. Protocol Amending Extradition Convention With Israel, (Article 8) p. 9.

The Commonwealth just received notice from the United States Department of Justice that the United States Department of State will request that the State of Israel waive the Rule of Specialty and permit prosecution for count 1 (Aggravated Indecent Assault), count 3 (Statutory Sexual Assault), and count 4 (Indecent Assault) of CC 2004 14863. The surrendering country's express waiver of the Rule of Specialty forecloses a defendant's specialty claim. See United States v. Tse, 135 F.3d 200, 205 (1st Cir. 1998); United States v. Riviere, 924 F.2d 1289, 1297 (3d Cir. 1991); United States v. Stokes, 726 F.3d 880, 889 (7th Cir. 2013), cert. denied, 134 S.Ct. 713 (2013).

The Commonwealth immediately notified defense counsel of the waiver request and will keep both defense counsel and the Court apprised.

Very truly yours,
Janet R. Necessary
Deputy District Attorney

cc: Robert Mielnicki, Esq.

ATTACHMENT 2

State of Israel
Ministry of Justice
Office of the State Attorney
Department of International Affairs

24 June, 2019

Mark Aziz
Trial Attorney
Office of International Affairs
U.S. Department of Justice
Criminal Division
1301 NY Ave.,
Washington DC
20005
United States

via E-Mail

Re: Extradition of Moshe Journo
(re: your Diplomatic Note no. 11/19)

We have received the U.S. Embassy in Jerusalem's Diplomatic Note, dated June 21, 2019, regarding the U.S. authorities' request that the State of Israel consent to waive the Rule of Specialty in Moshe Journo's case.

Journo was extradited to the U.S. by the State of Israel following a request for his extradition to stand trial for the charge of rape, according to the PaCC 312l(a)(1) and (a)(2). The U.S. authorities are now requesting to charge Journo with additional offenses of statutory sexual assault (PaCC 3122.1), aggravated indecent assault (PaCC3125(a)(8)) and indecent assault (PaCC 3126(a)(8)) (hereinafter: "the additional offenses").

After analyzing the additional offenses, it is evident that the additional offenses are based on the same set of facts and relate to the same victim that appear in the extradition request; the sole difference between the offense of Rape, for which Journo was extradited, and the additional offenses, is the age requirement, which is in our view a legal circumstance of lesser significance, in particular, when the information regarding the age of the victim at the time of the offense was fully brought before the Israeli instances within the request for extradition - and was proven as part of the complaint, to the level of proof required by the Israeli Law.

Our office has thus concluded that according to the Israeli case law in this matter (C.A. 2950/11 Elior Chen v. State of Israel), charging Journo with the additional offenses does not constitute a deviation from the Rule of Specialty, so long as the additional offenses are part of the same affair as the original one and based on the same set of facts laid before the Israeli court of extradition. As such, charging Journo as planned does not require the consent of the State of Israel.

Please note that in the event of a similar situation, in which the State of Israel would pursue charging an individual (who had been extradited from the U.S.) for an offense that differs from the offenses included in the extradition request, the State of Israel will consult the U.S. authorities for their view of the situation.

Yours truly,
Matan Akiva, Att.
Assistant in the State Attorney
Department of International Affairs
Office of the State Attorney
Ministry of Justice

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