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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

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Opinions

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Commonwealth of Pennsylvania v. Montay Lee Bailey

Criminal Appeal—Circumstantial Evidence—Hearsay Exception—Cell Phone Location Data—Admissibility of Evidence—Harmless Error—Discretion at Sentencing—Sentencing Factors

Defendant convicted of Murder in the Third Degree and firearms violations following a bench trial. Defendant appealed alleging that the identification evidence was unreliable, that the verdict was against the weight of the evidence, the trial court improperly admitted evidence and that the trial court abused its discretion at sentencing. While no eyewitness identified the defendant, two witnesses testified that defendant admitted killing the victim in retaliation for another killing. The defendant told both witnesses that "Fonnie" drove the victim to meet defendant. Another witness testified she saw the victim get into Fonnie's car. Cell phone location data showed Fonnie's phone was in the general area where the victim was found.

No. CC 2019-01763, 2019-07711. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Mariani, J.—June 28, 2022.

OPINION

This is a direct appeal wherein the defendant appeals the Judgment of Sentence of September 16, 2021 which became final upon the denial of defendant's post-sentencing motions on December 17, 2021. At CP-02-CR-1763-2019, the defendant was convicted of Third-Degree Murder and he was sentenced to a term of imprisonment of not less than 20 years nor more than 40 years. At CP-02-CR-7711-2019, the defendant was convicted of Possession of a Firearm – Prohibited Person and he was sentenced to a consecutive term of imprisonment of not less than six years nor more than 20 years. His aggregate sentence was a term of imprisonment of not less than 26 years nor more than 60 years. This direct appeal followed.

The credible evidence presented at trial established that on April 13, 2018, Shawn Dillard was found dead laying near 1845 Cliff Street in the Hill District section of the City of Pittsburgh. The cause of death was multiple gunshot wounds to the head and trunk and the manner of death was homicide. Police were dispatched to that area after gunshots were heard in that area around 10:00 p.m. During the course of the investigation, detectives learned of two witnesses who came forward to provide information about the shooting. Makail Pendleton, who had known the defendant for approximately 11 years, encountered the defendant when they were both incarcerated at the Allegheny County Jail and they became cellmates. The defendant told Pendleton that he shot Shawn Dillard because Shawn Dillard was the brother of Willie Miller. The defendant told Pendleton that Willie Miller killed the defendant's close friend, Tyrone Noak. Pendleton testified that the defendant told Pendleton that the defendant shot and killed Dough to avenge Noak's murder because he (the defendant) could not find Brizzy. "Fonnie" (Delfonte Ellis) brought "Dough" to Cliff Street so the defendant could find him and shoot him.

Jasmin Goodnight testified that she had a child with Shawn Dillard. She also testified that Dillard's nickname was "Doughboy." Goodnight testified that on April 13, 2018 she dropped Dillard off with Fonnie. Dillard entered Fonnie's Jaguar and drove off. She learned that Shawn Dillard had been murdered later.

Keirra Walker testified at trial that she was in a rocky relationship with the defendant. She testified that the defendant would stay with her at times. Just after the shooting, she reached out to detectives and told them that the defendant admitted to her that he killed Shawn Dillard with a "head shot." She told detectives about the defendant's actions on the date of the shooting and she told them that Fonnie drove Dillard to Cliff Avenue where he was shot. Keirra Walker also testified to these facts before the grand jury. At trial, Kierra Walker testified she lied to detectives and before the grand jury because she was angry with the defendant at that time.

The Commonwealth presented testimony from FBI Agent John Orlando who conducted a forensic review of the defendant's cell phone records and Fonnie's cell phone records from the date of the shooting. Cell phone location data established that the defendant's cell phone was in the general area of the shooting at the time of the shooting. Cell phone location data also corroborated the fact that Fonnie and the defendant had been communicating prior to the shooting and Fonnie's phone was in the general area of the shooting at the time of the shooting. The cell site data also confirmed that the defendant's location on the day of the shooting was consistent with the information supplied by Kierra Walker during her interviews with law enforcement.

The defendant first claims that the evidence was insufficient to convict him of Third-Degree Murder and Person Not to Possess Firearms because the evidence identifying him as the person who possessed a firearm and used it to shoot Shawn Dillard was unreliable, contradictory and inconclusive. The standard of review for sufficiency of the evidence claims is well settled:

> the standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proof [of] proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all the evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Lehman, 820 A.2d 766, 772 (Pa. Super. 2003). In addition, "[a]ny doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances." Commonwealth v. Cassidy, 668 A.2d 1143, 1144 (Pa.Super. 1995). When considering a challenge to the sufficiency of the evidence, the appellate court must determine whether the evidence at trial, and all reasonable inferences derived therefrom, when viewed in a light most favorable to the Commonwealth, establish all of the elements of a crime beyond a reasonable doubt. Commonwealth v. May, 584 Pa. 640, 647, 887 A.2d 750, 753 (2005).

The defendant does not challenge the sufficiency of evidence of any of the other elements of Third-Degree Murder and Possession Not to Possess Firearms. He simply argues that the identification of him as the person who possessed the firearm and who was the shooter was insufficient to convict him. As set forth in Commonwealth v. Kinney, 157 A.3d 968, 971 (Pa.Super. 2017):

> Evidence of identification need not be positive and certain to sustain a conviction. Although common items of clothing and general physical characteristics are usually insufficient to support a conviction, such evidence can be used as other circumstances to establish the identity of a perpetrator. Out-of-court identifications are relevant to our review of sufficiency of the evidence claims, particularly when they are given without hesitation shortly after the crime while memories were fresh. Given additional evidentiary circumstances, any indefiniteness and uncertainty in the identification testimony goes to its weight.

While no witness actually observed the defendant shoot Shawn Dillard, two trial witnesses testified that the defendant admitted to killing him. The statements provided by Kierra Walker to police during her interview were corroborated by her testimony before the grand jury. She solicited the detectives and provided details of the murder without being pressured by anyone. Her demeanor during her recorded statement was calm and she appeared comfortable. The information she supplied concerning the defendant's commission of murder were corroborated by Mikail Pendleton. The defendant told two different, unrelated people about his motive to avenge Noak's murder. This Court believes this evidence was sufficient to establish that the defendant murdered Shawn Dillard. This claim of error is, therefore, meritless.

Defendant next claims, for a variety of reasons, that the verdict was against the weight of the evidence. As forth in Criswell v. King, 834 A.2d 505, 512. (Pa. 2003):

> Given the primary role of the jury in determining questions of credibility and evidentiary weight, the settled but extraordinary power vested in trial judges to upset a jury verdict on grounds of evidentiary weight is very narrowly circumscribed. A new trial is warranted on weight of the evidence grounds only in truly extraordinary circumstances, i.e., when the jury's verdict is so contrary to the evidence that it shocks one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. The only trial entity capable of vindicating a claim that the jury's verdict was contrary to the weight of the evidence claim is the trial judge -- decidedly not the jury.

834 A.2d at 512. Armbruster v. Horowitz, 572 Pa. 1, 813 A.2d 698, 703 (Pa. 2002); Commonwealth v. Brown, 538 Pa. 410, 648 A.2d 1177, 1189 (Pa. 1994)). Although Criswell spoke in terms of a jury verdict, there is no distinction relative to a non-jury verdict.

The initial determination regarding the weight of the evidence is for the fact-finder. Commonwealth v. Jarowecki, 923 A.2d 425, 433 (Pa.Super. 2007). The trier of fact is free to believe all, some or none of the evidence. Id. A reviewing court is not permitted to substitute its judgment for that of the fact-finder. Commonwealth v. Small, 741 A.2d 666, 672 (Pa. 1999). A verdict should only be reversed based on a weight claim if that verdict was so contrary to the evidence as to shock one's sense of justice. Id. See also Commonwealth v. Habay, 934 A.2d 732, 736-737 (Pa.Super. 2007). Importantly "[a] motion for a new trial on the grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but claims that 'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." Commonwealth v. Widmer, 744 A.2d 745 (Pa. 2000)). When the challenge to the weight of the evidence is predicated on the credibility of trial testimony, appellate review of a trial court's decision is extremely limited. Unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, weight of evidence claims shall be rejected. Commonwealth v. Rossetti, 2004 PA Super 465, 863 A.2d 1185, 1191 (Pa. Super. 2004). The fact-finder's rejection of a defendant's version of events or the rejection of an affirmative defense is within its discretion and not a valid basis for a weight of evidence attack. Commonwealth v. Bowen, 55 A.3d 1254, 1262 (Pa.Super. 2011).

The defendant's weight claims essentially challenge this Court's assessment of credibility of Mikail Pendleton and the interview/grand jury testimony of Kierra Walker. The defendant also takes issue with the fact that this Court did not credit the testimony of Brandon Williams, Dominique McLaughlin and Leonard Goggins. It is clear that the defendant's argument is that this Court should not have rendered a guilty verdict because it should have believed the testimony of his witnesses rather than the evidence presented by the Commonwealth. Inasmuch as the defendant's weight claim concedes that the evidence was sufficient to convict in this case and the weight of the evidence claim cannot be based solely on a challenge to the Court's credibility determinations, the defendant's weight claim fails. The trial evidence presented by the Commonwealth has been recounted herein and was credible, competent and reliable and established every element of the offenses of conviction. This Court has reviewed the trial record and believes that the verdict does not shock any rational sense of justice and, therefore, the verdict was not against the weight of the evidence.

Defendant's next claim of error relates to the admission of Kierra Walker's out-of-court video statement for the purpose of refuting her in-court claim that she was pressured by police officers to testify against the defendant. "The admissibility of evidence is solely within the discretion of the trial court and will be reversed only if the trial court has abused its discretion." Commonwealth v. Cunningham, 805 A.2d 566, 572 (Pa.Super. 2002), appeal denied, 573 Pa. 663, 573 Pa. 663, 820 A.2d 703 (2003). As a result, rulings regarding the admissibility of evidence will not be disturbed for an abuse of discretion "unless that ruling reflects 'manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous.'" Commonwealth v. Einhorn, 911 A.2d 960, 972 (Pa. Super. 2006).

It is axiomatic that evidence that is not relevant is not admissible. Pa.R.E. 402; Commonwealth v. Robinson, 554 Pa. 293, 304-305, 721 A.2d 344, 350 (1998) ("The threshold inquiry with admission of evidence is whether the evidence is relevant."). Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. See also Commonwealth v. Edwards, 588 Pa. 151, 181, 903 A.2d 1139, 1156 (2006) (evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact).

In Commonwealth v. Broaster, 863 A.2d 588, 592 (Pa. Super. 2004), the Superior Court explained that "[r]elevant evidence may nevertheless be excluded 'if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" See also Commonwealth v. Dejesus, 584 Pa. 29, 880 A.2d 608, 614-615 (Pa. Super. 2005).

As set forth in Commonwealth v. Owens, 929 A.2d 1187, 1191 (Pa. Super.2007) quoting Broaster, 863 A.2d at 592,

> Because all relevant Commonwealth evidence is meant to prejudice a defendant, [however] exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case. As this Court has noted, a trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts form part of the history and natural development of the events and offenses with which [a] defendant is charged.

Importantly, the erroneous admission of evidence does not necessarily entitle a defendant to relief if the error is harmless. As set forth in Commonwealth v. Williams, 554 Pa. 1, 19, 720 A.2d 679, 687-688 (1998) (citing Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155, 162 (Pa. 1978)):

> Harmless error is established where either the error did not prejudice the defendant; or the erroneously admitted evidence was merely cumulative of other untainted evidence; or where the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

On appeal, the defendant argues that the Court erred in admitting the entire video of Kierra Walker's interview with detectives because it was not probative of whether she was pressured by detectives to say what she said during the interview. This Court disagrees. At trial, Kierra Walker testified that she was threatened by agents if she did not tell them what they wanted to hear. In this Court's view, playing the entire video interview was probative of whether she was threatened in any fashion during the interview. After playing the entire interview, it was clear that Kierra Walker was calm, coherent and she volunteered relevant information concerning the murder of Shawn Dillard. The information was relevant to the central issue in this case, the identity of the person who killed Shawn Dillard. She was pleasant with the detectives and nothing about her demeanor remotely suggested that she was uncomfortable during the interview. The defendant's evidentiary challenge is meritless.[2]

The defendant's final claim is that this Court abused its discretion in sentencing the defendant. This claim is baseless. A sentencing judge is given a great deal of discretion in the determination of a sentence, and that sentence will not be disturbed on appeal unless the sentencing court manifestly abused its discretion." Commonwealth v. Boyer, 856 A2d 149, 153 (Pa. Super. 2004), citing Commonwealth v. Kenner, 784 A.2d 808, 811 (Pa.Super. 2001) appeal denied, 568 Pa. 695, 796 A.2d 979 (2002); 42 Pa.C.S.A. §9721. An abuse of discretion is not a mere error of judgment; it involves bias, partiality, prejudice, ill-will, or manifest unreasonableness. See Commonwealth v. Flores, 921 A.2d 517, 525 (Pa.Super. 2007), citing Commonwealth v. Busanet, 817 A.2d 1060, 1076 (Pa. 2002).

Furthermore, the "[s]entencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding his crime." Boyer, supra, quoting Commonwealth v. Moore, 617 A.2d 8, 12 (1992). Discretion is limited, however, by 42 Pa.C.S.A. §9721(b), which provides that a sentencing court must formulate a sentence individualized to that particular case and that particular defendant. Section 9721(b) provides: "[t]he court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense, as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant . . . . "Boyer, supra at 153, citing 42 Pa.C.S.A. §9721(b). Furthermore,

> In imposing sentence, the trial court is required to consider the particular circumstances of the offense and the character of the defendant. The trial court should refer to the defendant's prior criminal record, age, personal characteristics, and potential for rehabilitation. However, where the sentencing judge had the benefit of a presentence investigative report, it will be presumed that he or she was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.

Boyer, supra at 154, citing Commonwealth v. Burns, 765 A.2d 1144, 1150-1151 (Pa.Super. 2000) (citations omitted).

In fashioning an appropriate sentence, courts must be mindful that the sentencing guidelines "have no binding effect, in that they do not predominate over individualized sentencing factors and that they include standardized recommendations, rather than mandates, for a particular sentence." Commonwealth v. Walls, 592 Pa. 557, 567, 926 A.2d 957, 964 (2007). A sentencing court is, therefore, permitted to impose a sentence outside the recommended guidelines. If it does so, however, it "must provide a written statement setting forth the reasons for the deviation…." Id., 926 A.2d at 963.

A sentencing judge can satisfy the requirement of placing reasons for a particular sentence on the record by indicating that he or she has been informed by the pre-sentencing report; thus properly considering and weighing all relevant factors. Boyer, supra, citing Burns, supra, citing Commonwealth v. Egan, 451 Pa.Super. 219, 679 A.2d 237 (1996). See also Commonwealth v. Tirado, 870 A.2d 362, 368 (Pa.Super. 2005) (if sentencing court has benefit of pre-sentence investigation, law expects court was aware of relevant information regarding defendant's character and weighed those considerations along with any mitigating factors). In Commonwealth v. Moury, 992 A.2d 162, 171 (Pa.Super. 2010), the Superior Court explained that where a sentencing court imposes a standard-range sentence with the benefit of a pre-sentence report, a reviewing court will not consider a sentence excessive. The Superior Court has made clear,

> [w]here [PSI] reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.
>
> A [PSI] report constitutes the record and speaks for itself. In order to dispel any lingering doubt as to our intention of engaging in an effort of legal purification, we state clearly that [sentencing courts] are under no compulsion to employ checklists or any extended or systematic definitions of their punishment procedure. Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed. This is particularly true, we repeat, in those circumstances where it can be demonstrated that the judge had any degree of awareness of the sentencing considerations, and there we will presume also that the weighing process took place in a meaningful fashion.

Commonwealth v. Watson, 228 A.3d 928, 936 (Pa. Super. 2020) (quotation marks omitted) (second-fourth brackets in original) (citing Commonwealth v. Devers, 546 A.2d 12, 18 (Pa. 1988)). See also Commonwealth v. .Conte, 198 A.3d 1169, 1177 (Pa. Super. 2018).

Moreover, the imposition of consecutive rather than concurrent sentences lies within the sound discretion of the sentencing court. Commonwealth v. Lloyd, 878 A.2d 867, 873 (Pa. Super. 2005), appeal denied, 585 Pa. 687, 887 A.2d 1240 (2005) (citing Commonwealth v. Hoag, 665 A.2d 1212, 1214 (Pa. Super. 1995). Title 42 Pa.C.S.A. § 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. Commonwealth v. Marts, 889 A.2d 608, 612 (Pa. Super. 2005) (citing Commonwealth v. Graham, 661 A.2d 1367, 1373 (1995)). "In imposing a sentence, the trial judge may determine whether, given the facts of a particular case, a sentence should run consecutive to or concurrent with another sentence being imposed." Commonwealth v. Perry, 883 A.2d 599 (Pa. Super. 2005), quoting Commonwealth v. Wright, 832 A.2d 1104, 1107 (Pa.Super.2003); see also Commonwealth v. L.N., 787 A.2d 1064, 1071 (Pa.Super.2001), appeal denied 569 Pa. 680, 800 A.2d 931 (2002).

The record in this case supports the sentence imposed by this Court. The sentences imposed on each count were within the standard range of the sentencing guidelines. Additionally, this Court considered the presentence report as noted at the beginning of the sentencing proceeding. Based on the totality of the circumstances, this Court believed the defendant was a danger to the community. The defendant used a firearm in the instant offense when he clearly knew he was not permitted to possess a gun. As noted in the Presentence Report, the defendant was charged with possessing a synthetic narcotic while in the Allegheny County Jail. The defendant refuses to honor the law. This Court viewed the murder in this case as a cold, calculated and vengeful act. It was a targeted act against an innocent victim. The defendant committed an abhorrent act of "street justice." This Court considered the defendant's rehabilitative needs, protection of the public, deterring the defendant from engaging in future similar conduct, deterring the pubic from committing such crimes, retribution and the impact on the victim. Though the sentences were imposed to run consecutively, the minimum sentences imposed in this case were within the standard range of the sentencing guidelines and were not unduly harsh and properly reflected the defendant's culpability in this case.

Accordingly, the judgment should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: June 28, 2022

[1] Willie Miller's nickname is "Brizzy." Shawn Dillard's nickname was "Dough" or "Doughboy."

[2] The defendant also levels some sort of attack on this Court's evidentiary ruling as a violation of the hearsay rules. Because no such objection was made at trial, this claim is waived and will not be addressed.

Commonwealth of Pennsylvania v. Daniel Miles

Criminal Appeal—Violation of Probation—Abuse of Discretion—Discretion at Sentencing

Defendant serving a sentence of probation for illegally possessing a firearm. While on probation defendant convicted of Murder in the Third Degree and two separate firearms offenses. Supervising judge sentenced defendant to two to six years' incarceration for violating the terms of probation with three new convictions. Defendant challenged the discretionary aspects of sentencing claiming the Court abused its discretion. The Court cited its broad discretion in fashioning a sentence for violation of probation and said that the sentence would only be overturned if the Court demonstrated bias or ill will towards the defendant was otherwise manifestly excessive.

No. CC 2008-00054. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—June 27, 2022.

OPINION

This is a timely appeal from the sentence of imprisonment of not less than two years nor more than six years imposed on defendant based on the his violation of probation. On August 10, 2009, the defendant was sentenced to a a term of imprisonment of not less than three years nor more than six years followed by a five-years' probation after he pled guilty to two counts of Possession With Intent to Deliver a Controlled Substance. While on probation in this case, the defendant pled guilty to Third Degree Murder at CC No. 2020-06156 and was sentenced to a term of imprisonment of not less than 18 years nor more than 40 years. He also was found guilty in a separate felony gun case as well as a separate case for illegally possessing a firearm while on probation. The defendant did not report to the probation office after these convictions and he was on the run after these convictions.

The defendant claims that the sentence imposed in this case was unreasonable and manifestly excessive. This Court is guided by the following law:

> The imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal. An abuse of discretion is more than an error in judgment—a sentencing court has not abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Swope, 123 A.3d 333, 340 (Pa.Super. 2015), quoting Commonwealth v. Colon, 102 A.3d 1033, 1043 (Pa.Super. 2014), appeal denied, 109 A.3d 678 (Pa. 2015). See also Commonwealth v. Cartrette, 83 A.3d 1030 (Pa.Super. 2013) (en banc) (this court's scope of review in an appeal from a revocation sentencing includes discretionary sentencing challenges).

Additionally,

> Upon revoking probation, "the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing, due consideration being given to the time spent serving the order of probation." 42 Pa.C.S. § 9771(b). Thus, upon revoking probation, the trial court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence, although once probation has been revoked, the court shall not impose a sentence of total confinement unless it finds that:
>
> (1) the defendant has been convicted of another crime; or
> (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or
> (3) such a sentence is essential to vindicate the authority of the court. 42 Pa.C.S. § 9771(c).

Commonwealth v. Pasture, 107 A.3d 21, 27-28 (Pa. 2014). We also note that the sentencing guidelines do not apply to sentences imposed as the result of probation revocations. Id. at 27 (citations omitted); Commonwealth v. McAfee, 849 A.2d at 275; 42 Pa.C.S.A. § 9771(c).

A sentencing judge is given a great deal of discretion in the determination of a sentence, and that sentence will not be disturbed on appeal unless the sentencing court manifestly abused its discretion." Commonwealth v. Boyer, 856 A2d 149, 153 (Pa. Super. 2004), citing Commonwealth v. Kenner, 784 A.2d 808, 811 (Pa.Super. 2001) appeal denied, 568 Pa. 695, 796 A.2d 979 (2002); 42 Pa.C.S.A. §9721. An abuse of discretion is not a mere error of judgment; it involves bias, partiality, prejudice, ill-will, or manifest unreasonableness. See Commonwealth v. Flores, 921 A.2d 517, 525 (Pa.Super. 2007), citing Commonwealth v. Busanet, 817 A.2d 1060, 1076 (Pa. 2002).

Furthermore, the "[s]entencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding his crime." Boyer, supra, quoting Commonwealth v. Moore, 617 A.2d 8, 12 (1992). Discretion is limited, however, by 42 Pa.C.S.A. §9721(b), which provides that a sentencing court must formulate a sentence individualized to that particular case and that particular defendant. Section 9721(b) provides: "[t]he court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense, as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant . . . ." Boyer, supra at 153, citing 42 Pa.C.S.A. §9721(b).

This Court believes that the sentence imposed was justified and the record in this case supports the sentence imposed by this Court. The defendant acquired at least three separate felony convictions while on probation set by this Court. One conviction was for illegally possessing a firearm. One conviction was for engaging in similar felonious drug dealing as occurred in this case. The most serious conviction was for Third Degree Murder. The probation imposed by this Court clearly had no impact on the defendant and his criminal conduct only elevated while on probation. The defendant continued to participate in serious criminal activity to the point that he took the life of another person. The defendant has demonstrated a pattern of criminal activity. A prior sentence of incarceration did not dissuade the defendant from elevating his violent criminal behavior. The defendant's persistent criminal conduct makes clear that a lesser sentence would not have addressed the purposes of sentencing. This Court considered the need for the violation sentence to vindicate the authority of this Court. The need to protect society from the defendant's behavior and his need for confinement warranted the sentence imposed in this case.

For the reasons, this Court believes that the judgment of sentence should be affirmed.

BY THE COURT:
Date: June 27, 2022 /s/Mariani, J.

Commonwealth of Pennsylvania v. Ricco J. Sears

Criminal Appeal—Driving While Operating Privilege is Suspended—Illegal Sentence—Vagueness.

Petitioner challenged the legality of his sentence claiming that 75 Pa.C.S.A. 1543(b)(1)(iii) did not contain a statutory maximum and was therefore vague. Court found since 1543(b)(1)(iii) is defined as a misdemeanor of the third degree within the statute, it contains a maximum sentence and is not vague.

No. CP-02-CR-5395-2020. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Caulfield, J.—June 10, 2022.

OPINION

Background:

On March 11, 2020, the Wilkins Township Police were called to the scene of a two vehicle accident. Ricco Sears was the driver of one of the vehicles involved. He struck a vehicle that was on the back of a tow truck stopped at a red light on William Penn Highway. Mr. Sears' license was suspended as a result of a conviction for Driving Under the Influence of Alcohol or a Controlled Substance. Additionally, Mr. Sears had been twice convicted of Driving While Operating Privilege is Suspended or Revoked.

Mr. Sears was charged with 75 Pa.C.S.A. §1543(b)(1)(iii) Driving While Operating Privilege is Suspended or Revoked – Third or Subsequent Offense, and 75 Pa.C.S.A. §3310(a) Following Too Closely.

Procedure:

A stipulated non-jury was held on March 10, 2022, after which Mr. Sears was convicted of both charges. At count one, Mr. Sears was sentenced to a term of not less than six months nor more than twelve months in jail, and a concurrent nine months of probation, a $2500.00 fine and ordered to not operate a motor vehicle without a valid driver's license. At count two, no further penalty was imposed.

Mr. Sears filed a timely appeal, and makes one claim of error.

Discussion:

"Whether pursuant to Commonwealth v. Eid, 249 A.3rd 1030 (Pa. 2021), the DUS statute 75 Pa.C.S. § 1543(b)(1)(iii) contains an unconstitutional/illegal sentence because it does not contain a statutory maximum penalty and thus is unconstitutionally vague in violation of state and federal due process principles?"

The Pennsylvania Superior Court addressed this exact issue in Commonwealth v. Rollins, 161 EDA 2021, 270 A.3rd 1152 (Table) (2021). Although a non-precedential decision, it may be considered for its persuasive value. Pa.R.A.P. 126(b)(2).

"Section 1543(b)(1)(iii) provides:

> A third or subsequent violation of this paragraph shall constitute a misdemeanor of the third degree and, upon conviction of this paragraph, a person shall be sentenced to pay a fine of $2,5000 and to undergo imprisonment for not less than six months.

75 Pa.C.S.A.§ 1543(b)(1)(iii) (emphasis added).

Though the "not less than" language is identical in both Section 1543(b)(!.1)(i), which was at issue in Eid, and Section 1543(b)(1)(iii), they are distinguishable by way of grading. Section 1543(b)(1.1)(i) is graded as a summary offense while Section 1543(b)(1)(iii) is graded as a misdemeanor of the third degree. The grading is significant because 75 Pa.C.S.A. § 6502(c) provides that the Crimes Code's provisions regarding fines and imprisonment do not apply to summary convictions under the Vehicle Code. See 75 Pa.C.S.A. § 6502(c) ("Title 18 (relating to crimes and offenses), insofar as it relates to fines and imprisonment for convictions of summary offenses, is not applicable to this title").

No such provision exists for misdemeanors under the Vehicle Code. As a result, the sentencing provisions of the Crimes Code apply. Rollins was found guilty of a misdemeanor of the third degree, and relevant provisions of the Crimes Code provide a maximum sentence of one year. See 75 Pa.C.S.A. § 1543(b)(1)(iii); 18 Pa.C.S.A. § 106(b)(8) ("A crime is a misdemeanor of the third degree if it is so designated in this title or if a person convicted thereof may be sentenced to a term of imprisonment, the maximum of which is not more than one year"). Therefore, Section 1543(b)(1)(iii) is not unconstitutionally vague, pursuant to EID." Rollins, 161 EDA at 1-2, (emphasis in original).

Conclusion:

The reasoning of the Court in Rollins is adopted here. 75 Pa.C.S.A. § 1543(b)(1)(iii) is not unconstitutionally vague, it does not violate state and federal principles of due process, and does not contain an unconstitutional or illegal sentence.

BY THE COURT:
/s/Caulfield, J.

Date: June 10, 2022