

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-386-2017
:
:
DARNELL KELLAM :
Appellant : Motion to Reconsider

OPINION AND ORDER

On March 5, 2018 following a non-jury trial, the court found the defendant guilty with respect to Counts 1, persons not to possess firearms, a felony of the second degree; Count 3, firearms not to be carried without a license, a felony of the third degree; and Count 4, possession with intent to deliver, an ungraded felony. On April 19, 2018, the court sentenced the defendant to an aggregate term of five to ten years' incarceration, which consisted of four to eight years with respect to Count 1, a concurrent two and one-half to five years with respect to Count 3, and a consecutive one to two years with respect to Count 4.

On April 27, 2018, the defendant filed a motion to reconsider the sentence in which he asserted that the court applied the wrong offense gravity score with respect to Count 1. On April 30, 2018, the Commonwealth filed a motion to amend the sentence. In its motion, the Commonwealth argued that the court failed to apply the correct standard range with respect to Count 4 by failing to apply the enhancement for possession of a deadly weapon.

Argument on the parties' respective motions was held before the court on May 7, 2018. This Opinion will address those motions.

In his motion, the defendant contends that the Offense Gravity Score (OGS) of 10 utilized by the court was incorrect. The defendant argues that the court should have

utilized an OGS of 9.

Although a sentencing court has no obligation to sentence within the guidelines, the trial court must correctly apply the guidelines. *Commonwealth v. Archer*, 722 A.2d 203, 210 (Pa. Super. 1998). “[T]he sentencing court must correctly ascertain the offense gravity score in order to reach the proper sentence recommendation...” *Id.* “An improper calculation of the offense gravity score affects the outcome of the sentencing recommendations, resulting in an improper recommendation, thereby compromising the fundamental norms which underlie the sentencing process.” *Id.* at 210-211.

Pursuant to the Pennsylvania Code, the OGS for persons not to possess firearms, in violation of 18 Pa. C.S. § 6105(a)(1), depends upon whether the firearm was loaded and whether ammunition was available. The OGS is a 10 if the defendant was previously convicted of an enumerated felony and either the firearm possessed by the defendant was loaded or ammunition was available to the defendant. The OGS is 9 if the defendant was previously convicted of an enumerated felony but the firearm was not loaded and there was no ammunition available to the defendant.

The court properly concluded that the firearm possessed by the defendant was loaded and that ammunition was available. The testimony produced at trial supported the fact that the gun was loaded. This testimony was bolstered by additional evidence produced at the defendant’s sentencing, which included photographs of the weapon, the clip and the bullets in the clip. Accordingly, the defendant’s argument is without merit.

With respect to the Commonwealth’s motion, the Commonwealth claims that the enhancement for possession of a deadly weapon should have been applied to Count 4,

possession with intent to deliver a controlled substance. At sentencing, the court utilized an OGS of 6, a Prior Record Score (PRS) of 3, and a standard range of 12 to 18 months. The Commonwealth agreed with the OGS and PRS, but argued that the court should have applied the enhancement for possession of a deadly weapon, and utilized a standard guideline range of 18 to 24 months. 204 Pa. Code § 303.17 (a).

If the court utilized an incorrect standard range when applying the guidelines, the defendant must be re-sentenced. *Commonwealth v. Henry*, 681 A.2d 791, 792 (Pa. Super. 1996)(citing *Commonwealth v. McMullen*, 530 A.2d 450, 453 (Pa. Super. 1987)); *see also Commonwealth v. Johnakin*, 502 A.2d 620, 623 (Pa. Super. 1985).

“An offender has possessed a deadly weapon if any of the following were present on the offender’s person or within his immediate physical control: (i) Any firearm, (as defined in 42 Pa. C.S. §9712) whether loaded or unloaded....” 204 Pa. Code §303.10(a)(1). For purposes of the enhancement, the term “firearm” is defined as “[a]ny weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive or the expansion of gas therein.” 42 Pa. C.S.A. §9712(e).

The defendant was driving his vehicle when it was stopped by a police due to heavy window tint and information from a confidential source that the vehicle was involved in trafficking heroin. The officer observed numerous rubber bands on the windshield wiper control arm, which in his experience were commonly used by drug traffickers to bundle bags of controlled substances or large amounts of currency. Based on the information from the confidential source and the officer’s observations, he requested a criminal history inquiry of

the defendant's previous arrests. The defendant's criminal history showed that he had been arrested multiple times for firearms violations and narcotics violations, and he had a conviction in 2004 for delivery or possession with intent to deliver. The officer informed the defendant of his suspicions that the defendant may be involved in narcotics trafficking and he asked the defendant if he could search his vehicle. With the defendant's consent, the officer searched the defendant's vehicle and found a loaded handgun and controlled substances under a loose center console panel near the gear shifter. The officer easily removed the loose panel. Due to the close proximity of the driver's seat to the loose center console panel, the handgun was within the defendant's reach when he was seated in his vehicle. A handgun is designed to expel a projectile by the action of an explosive. Therefore, a firearm was within the defendant's immediate physical control, and the court erred when it failed to apply the enhancement for possession of a deadly weapon.

Accordingly, the following order is entered.

ORDER

AND NOW, this ___ day of May 2018, the court **DENIES** the defendant's motion for reconsideration of sentence but **GRANTS** the Commonwealth's motion for reconsideration of sentence. The sentencing order dated April 27, 2018 is **VACATED**. It is **ORDERED** and **DIRECTED** that the Lycoming County Sheriff's Department proceed to the State Correctional Institution at Camp Hill and take into custody Darnell Kellam, inmate no. NJ7630 and transport him to the Lycoming County Prison where he will be housed until he is

re-sentenced. Defendant's re-sentencing is scheduled for **June 20, 2018 at 2:30 p.m. in courtroom #4 of the Lycoming County Courthouse.**

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire, District Attorney
Matthew Welickovitch, Esquire (APD)
Gary Weber, Esquire, Lycoming Reporter
Sheriff (2)
Warden-LCP
SCI – Camp Hill
Work File