

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NOS. 96-10,610; 96-10,612
 : 96-10,717; 96-10,805
 BRYAN GILBERT, a/k/a BRIAN GILBERT, :
 :
 Defendant : 1925(a) OPINION

Date: September 29, 2000

**OPINION IN SUPPORT OF THE ORDER OF FEBRUARY 6, 1997, AS AMENDED
FEBRUARY 11, 1997, IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE**

Defendant appeals the Judgment of Sentence entered against him February 6, 1997. On January 13, 1997, Defendant pled guilty to offenses under the various informations captioned above, as follows: No. 96-10,610 -- robbery, possession of instruments of a crime and conspiracy; No. 96-10,612 -- robbery, conspiracy, possession of instruments of a crime, theft and receiving stolen property; 96-10,717 -- theft of a motor vehicle; 96-10,805 -- robbery (2 counts) and conspiracy. Defendant was sentenced under the various counts of the informations on February 6, 1997, to an aggregate of 10 years to 30 years.¹

On August 30, 1999, Defendant filed a *pro se* "Motion to Modify Sentence *Nunc Pro Tunc*," asking for a reduction in his sentence due to personal progress he had made while incarcerated. By Order of Court dated September 3, 1999, we denied the motion, noting we had no legal authority to modify Defendant's sentence at that time.

¹ The sentence was amended by Order of Court filed February 11, 1997, but the amendment did not change the overall minimum and maximum periods of sentence.

On October 26, 1999, Defendant filed another *pro se* motion for reconsideration, asking once again that his sentence be reduced due to his taking the advice of the sentencing court and participating in programs relating to personal improvement and education. This Court denied the motion November 8, 1999, stating that while Defendant's efforts were commendable, it was necessary that appropriate sanctions be imposed against him. Moreover, the Court had no jurisdiction to amend the sentencing Order.

Defendant filed his first Petition for Post Conviction Collateral Relief January 11, 2000. The petition was filed *pro se*. The Public Defender's Office was directed to assign counsel to review the petition and file an amended PCRA petition if necessary. After some delay, a conference was held July 10, 2000, at which time we entered an Order indicating our acceptance of Defendant's argument that he was unaware his original defense counsel did not timely appeal his sentence. Accordingly, Defendant was given thirty days to file the instant appeal *nunc pro tunc*.

Defendant lists three points in his Statement of Matters Complained of on Appeal, filed August 25, 2000: first, consecutive sentences should not have been imposed; second, the Defendant's conduct in prison while awaiting sentencing should not have been considered; third, the Defendant's conduct in prison while serving the sentence merits a reduction in the sentence. For the reasons stated below these contentions should be rejected and the sentence upheld.

Defendant argues that the Court committed an abuse of discretion in running two of the five year minimum sentences consecutively (informations 96-10,610 and 96-10,612), because we failed to consider the rehabilitative needs of Defendant, his lack of

education and the letters and statements of friends and family, instead focusing solely on the concern for victims and the seriousness of the offenses. The record belies these contentions. At sentencing, the Court inquired about Defendant's level of education (2/6/97 N.T. 9), indicated receipt of letters from Defendant's aunt and a former teacher (*Id.* at 11-12), received testimony from Defendant's aunt (*Id.* at 13-16), and heard Defendant's statement and his counsel's arguments on Defendant's behalf (*Id.* at 12, 16-19, 27). The Court also considered Defendant's initial lack of remorse, reluctance to take responsibility for his actions, participation in more than one armed robbery, putting people at risk and in fear of their lives, and continued misconduct while in prison (*Id.* at 29-32).

In a related complaint, Defendant states this Court "unduly" considered write-ups from the prison concerning Defendant's behavior, when the sentence was imposed, as such information is unreliable and violates due process where Defendant did not have a full and fair hearing on these matters. A sentencing Court is mandated to consider a defendant's behavior in determining an appropriate sentence, as "the character of the defendant in general and his need for rehabilitation in particular are matters at the very heart of the sentencing process." *Commonwealth v. Losch*, 535 A.2d 115, 120 (Pa.Super. 1987). In *Losch*, defense counsel attempted to bring to the attention of the sentencing court information relating to defendant's good behavior in prison following his conviction. The Superior Court found that the trial court's refusal to consider this evidence, which related to defendant's character, was reversible error given the mandates of the Sentencing Code. In so doing, the *Losch* Court stated: "A key function of the sentencing hearing is to allow an opportunity for the defense and the prosecution to supply a wide range of information concerning the person who is to be punished.

It is the role of trial judge to weigh all mitigating and aggravating factors and arrive at an appropriate sentence.” *Id.* at 120.

Instantly, information relating to Defendant’s misconduct was appropriately and fairly considered in formulating Defendant’s sentence. At the sentencing hearing, this Court noted that Defendant’s nine write-ups was a significant amount of misconducts, given that we could not recall ever having been made aware at other sentencings of more than one or two write-ups for a given defendant. 2/6/97 N.T. 29. The reason this was significant to the Court was that it evinced a continued lack of remorse and refusal to accept responsibility, as well as a disdain for authority. *Ibid.* We noted that the continued misconduct was in contrast to statements made in Defendant’s behalf by his aunt, Vivian Flinn. Ms. Flinn felt that Defendant had committed the crimes for which he was being sentenced due to his difficult childhood and lack of a place to call home; the repeated threat or fear of being left which was caused by Defendant’s unfortunate childhood caused Defendant to follow his friends down the wrong path. *Id.* at 30, testimony of Ms. Flinn at 13-15. Accordingly, Defendant’s prison misconduct was fairly and appropriately taken into consideration at sentencing.

Defendant also complains, again, that his sentence should be modified based upon his rehabilitative efforts while in prison. The Court cannot help but note that while Defendant insists we consider his good behavior since sentencing, we should have ignored his bad behavior prior to sentencing. This argument has been considered twice previously by this Court and rejected. Once again, we sincerely commend the progress Defendant has made and certainly, Defendant’s efforts should be brought to the attention of the Pennsylvania Board of Probation and Parole. What Defendant is accomplishing while incarcerated was one of the

goals and aims of this Court when he was sentenced, and should serve him well when he is released. Defendant's efforts to better himself for the benefit of society and his own, are what he should expect from himself, and should have always demanded of himself. We do not believe a reduction in sentence is warranted based upon Defendant's good behavior since sentencing. Defendant has not contested the legality of the sentence, nor that it did not conform to the applicable guidelines. This Court imposed sentence after a hearing at which all relevant information was made known and carefully considered. The sentence should be affirmed on appeal.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
James R. Protasio, Esquire
District Attorney
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)
96-10,612
96-10,717
96-10,805

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