

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: No. 97-11,488
	:
vs.	: CRIMINAL DIVISION
	:
	:
RONALD DOWNS, JR.,	:
Defendant	: PCRA

OPINION AND ORDER

This matter came before the Court on the defendant's Post Conviction Relief Act (PCRA) petition. The relevant facts are as follows.

The defendant was arrested and charged with robbery, theft by unlawful taking, receiving stolen property, robbery of a motor vehicle, kidnapping, unlawful restraint, false imprisonment, terroristic threats, and possession of an instrument of crime. A jury trial was held March 9 and 11, 1998.

At trial, the Commonwealth presented evidence that Eric Cowden was working at the Kings Inn on August 8, 1997. At approximately 1:30 a.m. while Mr. Cowden was posting phone charges, the defendant approached him from behind and grabbed him. The defendant placed a metal object against Mr. Cowden's neck, stated he had a razor and then pushed Cowden to the ground. While continuing to hold the razor at Mr. Cowden's neck, the defendant asked him where the money was kept. Cowden replied that they kept the bulk of the money in the floor safe and in the cash register. The defendant told Cowden to open the safe and Cowden complied. Once the safe was open, the defendant removed the money and put it into Jersey Shore State Bank bags. He then asked Mr. Cowden to open the cash register and Cowden told him what

button to push. The defendant went to the cash register, opened it and took the money out. During this time, Cowden was not being restrained by the defendant, but he was still lying on the floor. Mr. Cowden testified, however, that throughout the incident he was afraid for his life.

After taking the money, the defendant asked Cowden if there was anywhere he could lock Cowden up so the defendant could get away. When Cowden replied in the negative, the defendant took him into the efficiency apartment behind the office, shoved him face down on the bed and looked for something with which to tie him up. When these efforts failed, the defendant made Cowden carry the bags of money out to Cowden's car. The defendant then forced Mr. Cowden into the passenger seat of the vehicle by going through the driver's side door and made Cowden put his head between his legs so he could not see the defendant and identify him later. The defendant then got into the car and drove across the Market Street bridge. At this point, the defendant realized he left his gloves at the Kings Inn so he turned the car around and returned there to retrieve them. Upon arriving back at the Kings Inn, the defendant exited the vehicle and retrieved his gloves. Cowden got a look at the defendant's profile at this point because he watched the defendant cross in front of the car. The defendant returned to the vehicle and drove across the Market Street bridge to the alley behind the Rite Aid Pharmacy. The defendant parked the vehicle behind the drug store, grabbed the bags of money and ran off.

Mr. Cowden returned to the Kings Inn and called the owner, Rick Rosato, to tell him he had been robbed. The police were called. When they arrived, Mr. Cowden gave them a description of the individual and a composite sketch was made. The description was of a white male, five foot nine inches tall, medium build, approximately 160 to 165 pounds, blond hair, wearing a black shirt, pants and cap.

The defendant testified in his own defense. His version of the events was quite different than those of the Commonwealth witnesses. The defendant testified that he went to the Kings Inn on August 8th, intending to rob the place because he was stressed out over money. He dressed in dark clothes and a black baseball cap. He took a red t-shirt to use as a mask and some old snow gloves and placed them in a white grocery bag. He then grabbed the straight razor off the wall of his father's barbershop. He walked two to three miles to the Kings Inn. While he was walking, the defendant debated whether or not to rob the hotel. When he arrived at the Kings Inn by cutting through the woods behind it, he sat down until the kitchen lights went off. While he was sitting there, he decided not to rob the place.

The defendant was hot and tired from his walk to the hotel, so he decided to go inside and call a cab. The night clerk, Mr. Cowden, asked if he could help the defendant. The defendant told Cowden he wanted to use the phone. Cowden asked if he was staying at the hotel and the defendant replied in the negative. Cowden then asked if the defendant's car broke down and again the defendant said no. Cowden's questions were irritating the defendant, so he came right out and said "If you want to know the truth I came here to rob you, but changed my mind and just want to use the phone." Cowden then asked if he didn't want the money anymore. The defendant responded that he did not want the trouble that went with taking the money. Cowden said what if you wouldn't get caught. Cowden then proceeded to tell the defendant how he was thinking how easy it would be to have a friend pretend to rob the place and split up the money. He said he would leave something out of the description to throw the police off. Cowden thought the defendant would work even better than a friend because they didn't know each other and would never see each other again. Cowden then took the money out of the safe and gave the

bag to the defendant. The defendant followed Cowden to his car. Cowden started driving the defendant back to Williamsport. They were talking in the car. The defendant told Cowden to tell the police a black man was the robber so that the defendant would not get caught. Cowden then inquired why the defendant did not wear a mask. At this point the defendant realized he left the bag with the shirt and gloves in it at the hotel.

Cowden drove back to the hotel to get the bag and then drove to the area behind the Rite Aid Pharmacy in Williamsport. The defendant split up the money and left.

The jury convicted the defendant of robbery, theft by unlawful taking, receiving stolen property, false imprisonment and possession of an instrument of crime. The jury acquitted the defendant of robbery of a motor vehicle, kidnapping, unlawful restraint and terroristic threats.

On April 29, 1998, the Court sentenced the defendant to undergo incarceration in a state correctional institution as follows: six to twelve years for robbery; a concurrent three to twelve months for possession of an instrument of crime; a consecutive two months to two years for false imprisonment; and a concurrent one to two years for theft. The aggregate sentence imposed was six years and two months to fourteen years. On the robbery conviction, the Court utilized the deadly weapon enhancement.

The defendant filed a timely notice of appeal. In a decision dated June 28, 1999, the Pennsylvania Superior Court affirmed the defendant's convictions.

On or about May 9, 2000, the defendant filed a pro se Post Conviction Relief Act (PCRA) petition. Kyle Rude was appointed to represent the defendant on May 11, 2000. On or about July 14, 2000, Mr. Rude withdrew his appearance and Matthew Zeigler

entered his appearance of counsel.

On November 9, 2000, Mr. Zeigler filed an amended PCRA petition on the defendant's behalf. In the petition, he raises four issues: (1) the defendant's sentence exceeded the lawful maximum; (2) the defendant's sentence was illegal in that the wrong enhancement was used; (3) trial counsel was ineffective for failing to appeal the defendant's sentence; and (4) counsel was ineffective for failing to request an instruction on a lesser crime than robbery.

The defendant first asserts that his sentence exceeded the lawful maximum. The defendant was convicted of: robbery, a felony of the first degree; possession of an instrument of crime, a misdemeanor of the first degree; false imprisonment, a misdemeanor of the second degree; and theft, a misdemeanor of the first degree. The maximum sentence for a felony of the first degree is twenty years incarceration. The maximum sentence for a misdemeanor of the first degree is five years incarceration. The maximum sentence for a misdemeanor of the second degree is two years incarceration. The Court sentenced the defendant to a maximum of twelve years for robbery, twelve months for possession of an instrument of crime, two years for false imprisonment and two years for theft. None of these maximum sentences exceed the statutory maximums.

Although the sentence for theft does not exceed the statutory maximum, the Court's sentence for theft is unlawful in that the theft would have merged with the defendant's robbery conviction. Commonwealth v. Humphreys, 367 Pa.Super. 154, 532 A.2d 836, 844 (1987). Therefore, the Court will vacate the concurrent one to two year sentence for theft.

The defendant also contends the Court utilized the wrong sentencing

enhancement. The Court cannot agree. The Court believes the defendant and/or his counsel are confusing the Court's ruling regarding the charging and grading of the possession of instrument of crime offense with its use of the deadly weapon enhancement for the robbery conviction.

AND NOW, this ___ day of _____ 2001, upon review of the record and pursuant to Pa.R.Crim.P. Rule 1507(a), it is the finding of this Court that Defendant's Petition for Post Conviction Relief filed in the above-captioned matter raises no genuine issue of fact and Petitioner is not entitled to post conviction collateral relief. The Court believes that the issues raised in the petition have been previously litigated or waived since Defendant previously filed a motion to withdraw his nolo contendere plea and appealed his sentence. As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this Court's intention to deny the Petition. Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an order dismissing the petition.

By The Court,

Kenneth D. Brown, J.

cc: Kenneth Osokow, Esquire (ADA)
Law Clerk