

**IN THE COURT OF COMMON PLEAS  
LYCOMING COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION**

<b>COMMONWEALTH</b>	:	
	:	
<b>v.</b>	:	<b>No.: 03-10,342</b>
	:	
<b>JOSEPH JENNINGS</b>	:	
<b>Defendant</b>	:	

**OPINION IN SUPPORT OF ORDER  
IN COMPLIANCE WITH RULE 1925(A)  
OF THE RULES OF APPELLATE PROCEDURE**

Defendant appeals from this Court's Dismissal of Post-Sentence Motions.

Defendant was ordered to file with this Court a concise statement of matters complained of on appeal within fourteen (14) days of the 1925(B) Order, signed September 30, 2004. No such statement was received by this Court. The present Opinion will attempt to anticipate and address the issues stemming from the dismissal of Defendant's Post Trial Motion.

Defendant was charged with Rape by Forcible Compulsion, Sexual Assault and Indecent Assault stemming from an incident that occurred on April 13, 2002. Following a jury trial, Defendant was found guilty of Sexual Assault and two counts of Indecent Assault. On April 8, 2004 this Court sentenced Defendant to five to ten years on the Sexual Assault charge and one to two years on the Indecent Assault charge, imposing an aggregate sentence of six to twelve years.

The Defendant's contentions in his Post Sentence Motion filed April 15, 2004 argue the propriety of his sentence. One issue raised in Defendant's Petition to Modify Sentence was that the sentence was unduly harsh since undue weight was given to previous convictions. However, the Prior Record Score is a mechanical application of previous convictions to determine the standard range for a present sentence. The Court did not abuse its discretion by following the procedures set forth in the sentencing guidelines.

Another contention in Defendant's Petition is that the Sexual Assault and Indecent Assault should have merged for sentencing purposes. The relevant inquiry in determining whether these two charges should have been merged is,

“whether the facts on which both offenses are charged constitute one solitary criminal act. If the offenses stem from two different criminal acts, merger analysis is not required. If, however, the event constitutes a single criminal act, a court must then determine whether or not the two convictions should **merge**. In order for two convictions to **merge**: (1) the crimes must be greater and lesser-included offenses; and (2) the crimes charged must be based on the same facts. If the crimes are greater and lesser-included offenses and are based on the same facts, the court should **merge** the convictions for sentencing; if either prong is not met, however, merger is inappropriate.”

*Commonwealth v. Gatling*, 570 Pa. 34, 48, 807 A.2d 890, 899 (2002) (plurality opinion); as cited in *Commonwealth v. Miller*, 2003 Pa.Super 395; 835 A.2d 377; (2003). In the present case, the charges were not based on the same facts. The Commonwealth had a factual basis for the charge of Indecent Assault separate and distinct from the charge of Sexual Assault since “indecent contact” as defined under the offense as, “any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person.” 18 Pa. C.S.A. § 3101. The Commonwealth's case included the Defendant's indecent contact with the victim prior to the intercourse required to find Sexual Assault.

The Commonwealth presented evidence of indecent contact sufficient to establish Indecent Assault, which occurred before the Defendant began commission of the second crime of Sexual Assault. Further, proof of Sexual Assault did not rely in any way on the facts necessary to prove the Indecent Assault.

The remainder of the Petition deals with the Court's discretion in sentencing. The sentence was within the guidelines and the Court recited ample reasoning for the sentence imposed. (N.T. 04/08/04 pp. 28-31).

By the Court,

\_\_\_\_\_  
Nancy L. Butts, Judge

xc: J. Cleland, Esq.  
M. Dinges, Esq  
Hon. Nancy L. Butts  
Gary Weber, Esquire  
Judges  
Law Clerk  
Mr. William J. Burd