

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

**COMMONWEALTH**

**v.**

**COLEY CROUSE,  
Defendant**

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**No.: 1537-2008  
CRIMINAL DIVISION**

**OPINION AND ORDER**

The Commonwealth filed a Motion for Reconsideration of Sentence on August 5, 2009, and the Defendant filed a Motion to Modify Sentence on August 6, 2009. Argument on both Motions was held on September 15, 2009. The issues raised by the Commonwealth were that the Offense Gravity Score should have been a 13 rather than an 11 on the Delivery of a Controlled Substance offense and that the Court's sentence was outside the standard range of the Sentencing Guidelines. The only issue raised by the Defendant is that the Court erred by determining that Counts 1 through 6 of the Information did not merge into Counts 8 and 9 of the Information. However, at the time of Sentencing and the Hearing on both Motions, the Commonwealth argued that the Recidivism Risk Reduction Incentive (RRRI) did not apply. An order granting the Commonwealth's Motion for Reconsideration of Sentence as it related to the OGS assigned to the lead offense by the Court and denying Defendant's Motion to Modify Sentence was issued on October 14, 2009. This opinion is written in support of that order and to dispose of the remaining issue raised by the Commonwealth that of the unreasonableness of Defendant's sentence.

## ***Background***

On May 14, 2009, Defendant pled guilty to one count of Possession with the Intent to Deliver (cocaine) at 35 P.S. § 780-113(a) (30), four counts of Delivery of a Controlled Substance (cocaine) at 35 P.S. § 780-113(a) (30), one count of Conspiracy to Deliver a Controlled Substance at 35 P.S. § 780-113(a) (30), one count of Criminal Use of a Communication Facility at 18 Pa.C.S. § 7512, and two counts of Corrupt Organizations at 18 Pa.C.S. § 911(b) (3) before the Honorable Kenneth D. Brown, President Judge, with sentencing to be determined by this Court.

On July 24, 2009, Defendant received an aggregate sentence of two (2) to four (4) years in a State Correctional Institution on a Delivery of a Controlled Substance charge and eight (8) years of consecutive supervision by the Pennsylvania Board of Probation and Parole. The Court also found the Defendant was eligible for RRRI, making his minimum sentence eighteen (18) months. All of the remaining counts would run concurrently to the lead sentence. In imposing this particular sentence, the Court initially determined that the offense gravity score for the lead offense, Count 2 Delivery of a Controlled Substance was 11, placing the standard range at 36 - 54 months.

## ***Discussion***

### ***The Court applied an incorrect Offense Gravity Score***

The Commonwealth asserts that the Court should have applied an offense gravity score (OGS) of 13, rather than 11 to the Delivery of a Controlled Substance offense. Specifically, the Commonwealth asserts that there was a stipulation that the amount of cocaine was over 1000 grams, which would require a finding of an OGS of 13. The Defendant asserts in opposition that

the Defendant and his Co-Conspirators may have purchased over 1000 grams of cocaine, but that a substantial portion of that was for personal use and was not resold. The Court finds that it erred in determining the OGS was an 11.

At Defendant's sentencing, the Commonwealth and Defense Counsel stipulated to the fact that over 1000 grams of cocaine was possessed and delivered by all parties to the Conspiracy. See Notes of Testimony 7/24/2009 at pg. 21. Furthermore, a summary of the Defendant's portion of the Grand Jury testimony as to the amounts of cocaine possessed and delivered was provided to this Court, which revealed that approximately 4740 grams of cocaine was possessed and delivered throughout the course of the Conspiracy by all parties involved. Therefore, the Court finds through the course of the conspiracy there is sufficient evidence to show the OGS should have been a 13 for the Delivery of a Controlled Substance offense. As such, the Court modified the Defendant's OGS to reflect a 13.

***Defendant's sentence imposed by the Court is too lenient***

On July 24, 2009, this Court imposed a sentence of 24-48 months state incarceration with a consecutive period of state supervised probation of 8 years. The Commonwealth believes that the Court has acted unreasonably by the imposition of this sentence; since the OGS has increased the Commonwealth's position is that the sentence should increase accordingly. The Court believes based upon the information known to it at the time of sentencing that it did not abuse its discretion and the sentence is still appropriate and should stand.

The discretion of the sentencing judge must be accorded great weight because he "is in the best position to weigh various factors such as the nature of the crime, the defendant's character, and the defendant's displays of remorse, defiance, or indifference." Commonwealth v.

Duffy, 491 A.2d 230, 233 (Pa. Super. Ct. 1985). Further, in imposing sentence, the sentencing court is to follow the general principle that the sentence imposed should be the minimum sentence consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. 42 Pa.C.S.A. § 9721(b); See also Commonwealth v. Edward, 450 A.2d 15, 23 (Pa. Super. Ct. 1982). Although the sentencing guidelines specify definitive ranges of minimum sentences, the adoption of the guidelines was not intended to preclude judicial discretion. Commonwealth v. Frazier, 500 A.2d 158, 161 (Pa. Super. Ct. 1985). The only constraints placed upon the trial court's discretion in sentencing matters are that the sentence imposed must be within statutory limits and the record must show that the court considered the sentencing guidelines and adhered to the standard set forth above (that the sentence imposed should call for confinement consistent with protection of the public, gravity of the offense, and the rehabilitative needs of the defendant). Commonwealth v. Stalnaker, 545 A.2d 886, 889 (Pa. Super. Ct. 1988). “Consistent with that principle, sentencing guidelines have been adopted which set forth standard, aggravated, and mitigated ranges of minimum sentences, taking into account and objectifying various factors relevant to sentencing such as the defendant's prior record and the gravity of the offense for which sentence is to be imposed.” Commonwealth v. Minott, 577 A.2d 928, 930 (Pa. Super. Ct. 1990) (citing 204 Pa. Code § 303.1 et seq.).

Further, according to 42 Pa.C.S. § 9781(d)(1) an appellate Court should use the following analysis when determining if a sentence is unreasonable:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
- (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.

(3) The findings upon which the sentence was based and the guidelines promulgated by the commission.

At the time of sentencing, the Court knew only that the Defendant had applied for Drug Court and was denied due to the Commonwealth's strong opposition to placement into the program. Other than the review of the transcript of the Guilty Plea, case file, and Pre-Sentence Investigation report prior to entering the courtroom, this Court was not aware of the extent to which this Defendant shared responsibility with a number of individuals and conspired to deliver (with those other individuals in their joint enterprise) a substantially large quantity of cocaine. The Court knew, by stipulation of the parties that the Defendant was involved in the purchase of over 1000 grams of cocaine, and those he worked with among them engaged in the delivery of more than 4500 grams of cocaine. The Commonwealth chose not to present any information regarding the investigation and apprehension of the Defendant. In addition, the Commonwealth failed to highlight any of the differences in the cases between the Defendant and his Co-Defendants. Specifically, the Commonwealth failed to establish a baseline of cooperation given by Defendant's conspirators with which to compare and contrast Defendant's assistance to the Commonwealth. The Court believes that this information would have enabled the Court to develop a true understanding of the Defendant's behavior in relation to the others charged in the same enterprise.

Instead, the Court was asked to consider almost exclusively the testimony by the Defense which highlighted the life of the Defendant in the throes of a raging cocaine and other controlled substances addiction. Defendant, after he was arrested, assisted the Commonwealth by cooperating with them by making admissions and giving truthful testimony before the Statewide Grand Jury. Witnesses revealed that he placed himself into a counseling program, and dedicated

himself not only to his own sobriety, but to the sobriety of others through a sincere and extensive commitment to the 12 step fellowship. Nine total witnesses testified to the Defendant's lack of prior record, reputation in the community as well as the change and commitment he has maintained to his "doing the right thing" over the 23 months or so until the conclusion of the case. Those called as character witnesses included a college professor in recovery, family members and a former Chief of the Williamsport Bureau of Police. Letters supplementing the testimony were also sent to the Court from employers establishing the Defendants exemplary work history. Defendant testified and showed what the Court believed was true remorse; he did not minimize his involvement but stood before the Court knowing that he was ready to pay whatever price was required for his crimes.

In considering the sentence, the Court believed that a sentence of anything less than total confinement would depreciate the seriousness of the crimes committed, and sentenced him to State prison. Because of the Defendant's addiction, the Court further believed that a lengthy period of supervision would be appropriate to enable Defendant to continue with his sobriety in a supervised setting. Moreover, the Court opined that the length of the sentence was substantial despite the sentencing guideline ranges, for someone who had absolutely no contacts with the criminal justice system. However, this Court cannot stress enough the failure of the Commonwealth to provide sufficient information to place the Defendant's behavior post arrest in context with his other Co-Conspirators, leaving the Court to evaluate the appropriate sentence based upon Defendants information alone. This Court imposed the sentence believing it to be appropriate in light of the un rebutted evidence of Defendant's complete absence of a prior record, cooperation, addiction history and efforts to rehabilitate himself on his own within the community.

***Counts 1 through 6 of the Information merge Counts 8 and 9 of the Information***

The Defendant asserts that the Court erred in finding that Counts 1 through 6 of the Information did not merge with Counts 8 and 9 of the Information. The Commonwealth asserts that the offenses of Corrupt Organizations are separate and distinct from the Delivery offenses.

According to Pennsylvania Law a person can be found guilty of Corrupt Organizations when that “person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.” 18 Pa.C.S. § 911(b)(3). Also prohibited under Pennsylvania law, is “the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act . . .” 35 P.S. § 780-113(a)(30).

“[I]n all criminal cases, the same facts may support multiple convictions and separate sentences for each conviction except in cases where the offenses are greater and lesser included offenses.” Commonwealth v. Davidson, 938 A.2d 198, 217 (Pa. 2007) quoting (Commonwealth v. Anderson, 650 A.2d 20, 22 (Pa. 1994)). According to the Anderson Court, “‘the same facts’ language means any act or acts which the accused has performed and any intent which the accused has manifested, regardless of whether these acts and intents are part of one criminal plan, scheme, transaction or encounter, or multiple criminal plans, schemes, transactions or encounters.” Davidson, 938 A.2d at 217 (quoting Anderson, 650 A.2d at 22). The Anderson Court further explained that

the merger doctrine is to ‘avoid giving criminals a ‘volume discount’ on crime’ and further explained that ‘[i]f multiple acts of criminal violence were regarded as part of one larger criminal transaction or encounter which is punishable only as one crime, then there would be no legally recognized difference between a criminal who robs someone at gunpoint and a criminal who robs the person and during the same transaction or encounter pistol whips him in order to effect the robbery.’

Davidson, 938 A.2d at 217 (quoting Anderson, 650 A.2d at 22).

The test used to determine a “sentencing merger is the same test utilized to decide whether more than one offense has been committed in the double jeopardy context.” Davidson, 938 A.2d at 218. However, according to the United States Supreme Court, “[e]ven if the crimes are the same[,] ... if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end.” Davidson, 938 A.2d at 218 (quoting Ohio v. Johnson, 467 U.S. 493, 499 n.8 (1984)).

While the Court could not locate any controlling authority as to whether the Corrupt Organizations charge merges with the Delivery of a Controlled Substance and Possession with the Intent to Deliver charges, the Court found Commonwealth v. Dennis, 618 A.2d 972 (Pa. Super. Ct. 1992), to provide guidance. In that case the Defendant was convicted of Corrupt Organizations, Delivery of a Controlled Substance, and Conspiracy. The Court sentenced the Defendant to a concurrent sentence on all three charges and the Superior Court affirmed the judgment of sentence, leading this Court to determine that the charges do not merge for sentencing. Id. See also Commonwealth v. Shaffer, 734 A.2d 840 (Pa. 1998) (Defendant received a concurrent sentence for delivery of a controlled substance, criminal conspiracy, and corrupt organizations).

The Court finds that its sentence was appropriate as Counts 1 through 6 do not merge with Counts 8 and 9. The Corrupt Organizations offense is a separate and distinct crime than that of Delivery of a Controlled Substance and Possession with the Intent to Deliver a Controlled Substance. While the Corrupt Organization was a drug delivery business, the separate deliveries and possession are distinct crimes. Furthermore, the Court finds that even if it sentenced the Defendant on the Felony 1 Corrupt Organizations charge only, based upon the quantity of drugs,



any sentence less than a state prison sentence would depreciate the seriousness of this offense. The sentence the Defendant received would still be within the guidelines of a 24 month sentence even if he was only sentenced under the Corrupt Organizations charge. As such, the Defendant's sentence shall stand.

***The Defendant is eligible for RRRI***

At the Sentencing Hearing and the Hearing on both Motions for Reconsideration, the Commonwealth asserted that RRRI did not apply to the Defendant's Sentence. At the Motion for Reconsideration, the Court also indicated that it may have erred when making the Defendant eligible for RRRI. The Defendant asserted that he is eligible for RRRI as he was not sentenced pursuant to the mandatory minimum provisions of 18 Pa.C.S.A. § 7508(a)(1)(iii).

Both Counsel for the Commonwealth and the Defendant submitted memorandums to the affect that the Defendant is eligible for RRRI. The Court agrees with Counsel and holds that the Defendant shall remain eligible for RRRI. No statutory provisions specifically preclude him from RRRI. He has no prior record; no prior convictions exist to render him ineligible. Therefore, the Defendant's sentence as pronounced on July 24, 2009, shall stand.

***Conclusion***

Based upon the foregoing, the Court finds no reason upon which to grant Defendant's Post-Sentence Motion. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4)(a), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of this Order to the Pennsylvania Superior Court; "(b) the right to assistance of counsel in the preparation of the appeal; (c) the rights, if the defendant is indigent, to appeal in

forma pauperis and to proceed with assigned counsel as provided in Rule 122; and (d) the qualified right to bail under Rule 521(B).”

**ORDER**

AND NOW, this 31<sup>st</sup> day of December, 2009, it is ORDERED AND DIRECTED that for the reasons stated above, the Commonwealth’s Motion to Reconsider Sentence on the grounds that the sentence imposed was manifestly outside the guidelines once the OGS was restored to 13 is hereby DENIED. All other issues raised by both the Commonwealth and Defendant were disposed of by this Court’s previously issued Order dated October 14, 2009.

By the Court,

Nancy L. Butts, Judge

xc: Patrick Leonard, Esq.  
Peter T. Campana, Esq.  
Trisha D. Hoover, Esq. (Law Clerk)  
Gary Weber, Esq. (LLA)