

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-249-2011
vs. : CP-41-CR-344-2011
: CRIMINAL DIVISION
MALINDA WHITE, :
Defendant : 1925(a) Opinion

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

This opinion is written in support of this court's judgment of sentence dated April 4, 2011. The relevant facts follow.

On February 12, 2011, Malinda White (hereinafter "White") was apprehended outside of Wegmans after leaving the store without paying for several items of merchandise in her possession. When White was searched incident to arrest, police discovered a pipe with a burnt tip, a burnt silver spoon with white powdery residue, a copper scrubber, and four small baggies containing a white powder residue. The police charged White with Retail Theft, a felony of the third degree and two counts of possession of drug paraphernalia, ungraded misdemeanors.

On February 24, 2011, the police charged White with sixteen (16) counts of forgery, felonies of the third degree, as a result of their investigation into White forging checks from the checkbooks of the wheelchair-bound woman for whom she was a caregiver and the woman's roommate. The checks were made to various area grocery stores, including Wegmans, between January 20, 2011 and January 28, 2011.

On April 4, 2011, White entered a guilty plea to the retail theft and forgery charges and waived her right to eligibility for a Recidivism Risk Reduction Incentive (RRRI) in exchange for a sentence of 4 to 8 years incarceration in a state correctional institution. The court accepted White's guilty plea and sentenced her in accordance with the plea agreement.

White filed a timely notice of appeal in which she has asserted three related issues: (1) whether the trial court issued an illegal sentence by failing to calculate and impose a RRRI minimum sentence as required by 61 Pa.C.S. §4501, et seq.; (2) whether RRRI eligibility is a waivable statutory right or a statutory mandate similar to limitations on maximum penalties or mandatory sentences; and (3) whether the district attorney abused his discretion by requiring White to waive RRRI eligibility as part of a negotiated plea agreement.

White first claims that the trial court issued an illegal sentence by failing to calculate and impose a RRRI minimum sentence. The court cannot agree. The negotiated plea agreement in this case contemplated an aggregate sentence of 4 to 8 years incarceration with White waiving any potential RRRI eligibility. The court simply imposed the sentence to which Appellant agreed. The court addressed RRRI by noting in its sentencing order that White waived her eligibility for RRRI. Given the parties' plea agreement, the court could not impose a RRRI minimum sentence. It could only accept the agreement and note that White waived her eligibility for RRRI or reject the plea agreement in its entirety, forcing White to either proceed to trial or agree to a longer sentence so that the RRRI minimum would be at least four years.¹ If the court did not make a mathematical error, a minimum

¹ From the District Attorney's comments, it appears he was only agreeable to a sentence that would result in White spending 4 years in prison before she became eligible for parole. See N.T., April 4, 2011, at p. 13.

sentence of 57 months and 18 days (4.8 years) would result in a RRRI minimum of 4 years. With White's prior record score, the number of felony charges she was facing and factual circumstances surrounding those charges, a sentence with a minimum of at least 57 months and 18 days was certainly possible. See N.T., April 4, 2011, at p. 16 ("I cannot give a lessor [sic] sentence even if I wanted to...actually I might be inclined to give a stiffer sentence..."). If the court had rejected the plea and imposed a sentence that would have had a RRRI minimum of 4 years, White's maximum would have increased from 8 years to 9.6 years (or 115 months and 6 days), because the minimum sentence cannot exceed one-half of the maximum sentence. 42 Pa.C.S.A. §9756(b)(1).

The sentence also did not exceed the statutory maximum. White pleaded guilty to 16 counts of forgery and one count of retail theft, which were graded as felonies of the third degree. The maximum sentence for a felony of the third degree is 7 years. 18 Pa.C.S.A. §1103. Therefore, absent the plea agreement, the court could have sentenced White to a minimum of 59 ½ years and maximum of 119 years by running each count consecutively and still not exceeded the statutory maximum.²

The next issue asserted by White is whether RRRI eligibility is a waivable statutory right or a nonwaivable statutory mandate similar to limitations on maximum penalties or mandatory sentences. The court finds RRRI eligibility is unlike maximum

² Although the court may have been inclined to give White a stiffer sentence, it would not have imposed consecutive sentences on every count. The court is only noting that doing so would not have resulted in an illegal sentence.

penalties or mandatory sentences and is subject to waiver. The court finds support for this finding in the RRRI statute as well as case law pertaining to waiver of credit for time served.

There is no discretion when it comes to maximum penalties and mandatory sentences. When an inmate reaches his or her maximum sentence, the Department of Corrections must release the inmate from incarceration. In comparison, the RRRI statute does not confer any right to be released on parole or even to participate in a recidivism risk reduction incentive program. 61 Pa.C.S.A. §4511.

The court and the prosecuting attorney also have some discretion in making an offender eligible for RRRI. For example, a prosecuting attorney can waive the eligibility requirements and the court, after considering victim input, may accept or refuse the waiver. 61 Pa.C.S.A. §4505(b). Similarly, although a defendant may meet the definition of eligible offender, if he or she has previously been sentenced to two or more RRRI minimum sentences, the court can only impose a RRRI minimum with the approval of the prosecuting attorney. See 61 Pa.C.S.A. §4505(c)(3).

A defendant also can relinquish his or her RRRI eligibility through his or her acts or omissions. If a defendant fails to successfully complete his or her individualized program plan or fails to maintain a good conduct record, the board or its designee has the discretion to do many things, including removing the individual from the program or denying parole to the individual at the expiration of his RRRI minimum. See 61 Pa.C.S. §§4506, 4511.

Even if the court determines a defendant is an eligible offender and imposes a RRRI minimum, such does not mandate that the defendant will remain an eligible offender on that sentence. Instead, the department must certify that the inmate continues to be an

eligible offender. See 61 Pa.C.S.A. §4506(a)(9).

The court does not consider a statute with this much discretion a statutory mandate akin to maximum penalties or mandatory minimums.

White seems to argue that the use of the word “shall” in section 4505(c)(2) renders the statute not subject to waiver. This section states, in relevant part: “If the court determines that the defendant is an eligible offender or the prosecuting attorney has waived the eligibility requirements under subsection (b), the court shall enter a sentencing order that does all of the following: ... (2) Imposes the recidivism risk reduction incentive minimum sentence.” 61 Pa.C.S.A. §4504(c)(2). The court cannot agree.

A similar argument was made in Commonwealth v. Byrne, 833 A.2d 729 (Pa. Super. 2003) with respect to credit for time served. In Byrne, the defendant elected to plead guilty to third degree murder for a sentence of ten to twenty years, which was the maximum sentence allowable by law,³ and waive his right to all but a year of credit for time served in exchange for the Commonwealth’s agreement to forego prosecution on first degree murder. He later tried to challenge his sentence and receive additional credit for time served by claiming his statutory right to credit was not subject to waiver and his sentence was illegal. In rejecting Byrne’s claims, the Superior Court noted the plethora of rights a defendant waives by pleading guilty, such as the right to a jury trial and the right to have the Commonwealth prove his guilt beyond a reasonable doubt, as well as the United States Supreme Court’s holding in United States v. Mezzanatto, 513 U.S. 196, 115 S.Ct. 797, 130

³ The homicide in Byrne occurred in 1991. At that time, third degree murder was a felony of the first degree, which carried a maximum of 20 years. See 18 Pa.C.S.A. §§1103, 2502(c). The maximum was raised to 40 years in 1995. See 18 Pa.C.S.A. §1102(d) and historical and statutory notes.

L.Ed.2d. 687 (1995)⁴ that “a defendant is permitted to waive expressly any right if that waiver is obtained pursuant to a knowing and voluntary agreement.” Byrne, 833 A.2d at 735-36. The court finds the reasoning in Byrne equally applicable to the case at bar.

White’s final argument is that the District Attorney abused his discretion by requiring her to waive RRRI eligibility as part of a negotiated plea agreement. The court believes this issue is waived because it was not properly raised and preserved at the trial court level. Pa.R.App.P. 302(a). White neither raised this issue at her sentencing nor did she file post sentence motions.⁵

White was subject to the possibility of a much higher sentence than the agreed upon 4 to 8 years without RRRI eligibility. The District Attorney was under no obligation to offer a defendant any plea agreement. Similarly, White was under no obligation to accept the plea offered. Moreover, there is nothing in the record to indicate that the District Attorney would have required White to waive RRRI as part of any negotiated plea agreement whereby White would spend at least 4 years in jail. From the District Attorney’s comments at sentencing, it appears that he wanted White to spend at least four years in a state correctional institution before she would be eligible for parole, due to the vulnerability of the victims of the forgeries, White’s prior record, and the fact she was on parole when the offenses were committed. See N.T., April 4, 2010, at p.13. This was not unreasonable considering all the circumstances in this case. The same result could be achieved by imposing a sentence of a

⁴ The right in Mezzanatto was a rule based right regarding the inadmissibility of statements made during plea negotiations.

⁵ Although she did not raise either of her first two issues in the trial court, those issues arguably raise a claim regarding the legality of her sentence, which cannot be waived.

4.8 years (or 57 months and 18 days) to 9.6 years (or 115 month and 6 days), and a RRRI minimum of 4 years. In such a scenario, White would not be required to waive RRRI eligibility; however, even if she were paroled at the expiration of her RRRI minimum, she would be under the supervision of the Pennsylvania Board of Probation and Parole for 19 months and 6 days more than the 8 year (or 96 month) maximum of the current plea agreement.

The court does not believe White should prevail on any of the issues raised in this appeal. Nevertheless, if she should prevail, the relief granted should not be the imposition of a RRRI minimum; instead the entire plea agreement should be vacated. The waiver of RRRI eligibility was a material aspect of the plea agreement. If the court had known that White could not lawfully waive her rights to RRRI eligibility, the court would have rejected the plea agreement and White would have been faced with the prospect of going to trial, entering an open plea or negotiating a different plea agreement with the District Attorney, i.e., one that would likely be considerably longer and result in a RRRI minimum of at least 4 years.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Eric Linhardt, Esquire (DA)
Trisha Hoover, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)

Superior Court (original & 1)