

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

: No. CR-605-2010

vs.

**HERRON MILLS,
Defendant**

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OPINION AND ORDER

Before the Court is Defendant's Post Sentence Motion filed on January 10, 2011.

Following a jury trial, on October 5, 2010, the Defendant was found guilty of Conspiracy to Possess Cocaine with Intent to Deliver it, Possession with Intent to Deliver Cocaine, Conspiracy to Possess Marijuana with the Intent to Deliver it, Possession with Intent to Deliver Marijuana, Possession of Cocaine, Possession of Marijuana, Possession of Drug Paraphernalia (packaging material for cocaine), Possession of Drug Paraphernalia (packaging material for marijuana) and Tampering with Physical Evidence.

On January 5, 2011, Defendant was sentenced to an aggregate term of two (2) to five (5) years incarceration in a state correctional institution, consisting of a one (1) year minimum to two and a half (2 ½) year maximum on Count 1, Conspiracy to Possess with Intent to Deliver Cocaine and a consecutive one (1) year minimum to two and a half (2 ½) year maximum on Count 2, Possession with Intent to Deliver Cocaine. Defendant also received a consecutive five (5) year probationary term with respect to Court 3, Conspiracy to Possess with Intent to Deliver Marijuana.

The Defendant was recommended for, and deemed eligible for, the State Motivational Boot Camp Program. The Court, however, declined to find the Defendant eligible

for the Recidivism Risk Reduction Incentive (RRRI) program, because of his disciplinary violations while incarcerated, which included incidents of assault and/or fighting.

Defendant filed a Post Verdict Motion for a Mistrial contending that he was entitled to a mistrial based of juror misconduct. He further argued that the evidence was insufficient to support the jury's verdict or in the alternative, the verdict was against the weight of the evidence.

The Court issued an Opinion and Order dated December 20, 2010 denying Defendant's Post Verdict Motion for a Mistrial.

Defendant subsequently filed a Post Sentence Motion on January 10, 2011. In his written Post Sentence Motion, Defendant raises four issues:

- (1) His consecutive period of probation was excessive;
- (2) The verdict of guilt was against the weight of the evidence;
- (3) The verdict of guilt was based on insufficient evidence; and
- (4) The Court erred in denying the Defendant's Motion for a Mistrial based on juror misconduct.

A hearing and argument on Defendant's Post Sentence Motion was held before the Court on February 2, 2011. With leave of Court, Defendant was permitted to orally amend the Post Sentence Motion to add an additional issue that the Court erred in declining to make Defendant RRRI eligible.

With respect to the weight of the evidence, insufficient evidence and juror misconduct mistrial issues, the Court denies Defendant's Post Sentence Motion for the reasons as set forth in the Court's December 20, 2010 Opinion and Order.

Defendant contends that the five (5) year consecutive probationary sentence is excessive. The Superior Court recently addressed the issue of excessiveness in connection with consecutive sentences in the case of Commonwealth v. Prisk, 2011 PA Super 22 (January 28, 2011).

Pennsylvania law “affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed.” Commonwealth v. Pass, 914 A.2d 442, 446-447 (Pa. Super. 2006), quoting Commonwealth v. Marts, 889 A.2d 608, 612 (Pa. Super. 2005).

According to § 9721 (b) of the Sentencing Code, “the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.” 42 Pa. C.S. § 9721 (b).

Defendant concedes that the consecutive probationary sentence is at the bottom of the standard guideline range and not inconsistent with any specific provision of the Sentencing Code. Further Defendant cannot point to how, if at all, the consecutive probationary term is contrary to the fundamental norms which underlie the sentencing process. Accordingly, the Court will not conclude that the sentence is excessive in light of the criminal conduct of the Defendant. See Prisk, supra.

The Court will next address the Defendant’s RRRRI eligibility issue. The RRRRI program was established a few years ago by the legislature in order to among other things,

encourage inmate participation in evidence-based programs that reduce the risks of future crime. 61 Pa. C.S.A. § 4502.

An eligible offender under the program is, among other things, a defendant convicted of a criminal offense who will be committed to the custody of the Department of Corrections and who does not demonstrate a history of present or past violent behavior. 61 Pa. C.S.A. § 4503.

If the Court is sentencing a defendant to incarceration in a state correctional institution, the Court must determine if the Defendant is eligible for an RRRI minimum sentence. See 42 Pa. C.S.A. § 9756; 61 Pa.C.S.A. §4503. “The RRRI statute offers, as an incentive for completion of the program, the opportunity for prisoners to be considered for parole at the expiration of their RRRI minimum sentence.” Commonwealth v. Robinson, 7 A.3d 868, 872 (Pa. Super. 2010).

The legislature clearly intended to disqualify from RRRI eligibility a defendant who has demonstrated a history of present or past violent behavior. 61 Pa. C.S.A. § 4503. The Court is convinced that the Defendant’s assaultive behavior while incarcerated at the Lycoming County Prison, which included fighting with other inmates, precludes him from being RRRI eligible under the clear language of the statute.

Defendant contends in order for the Court to find that he has a history of present or past violent behavior he must have a conviction of a violence related crime. The Court cannot agree.

Various provisions of the Statutory Construction Act would be violated by Defendant’s interpretation. For example, the Act provides: “The object of all interpretation and

construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.” 1 Pa.C.S.A. §1921(a). “In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: ... (2) that the General Assembly intends the entire statute to be effective and certain.” 1 Pa.C.S.A. §1922(2).

The definition of eligible offender already excludes any individual convicted of a personal injury crime. 61 Pa.C.S.A. 4503. Violence related crimes fall within the definition of personal injury crime. 18 P.S. §11.103. Restricting the interpretation of “a history of present or past violent behavior” to convictions of a violence related crime would render that paragraph mere surplusage, since crimes of violence are already covered by the paragraph concerning personal injury crimes. Such a result would violate the quoted provisions of the Statutory Construction Act. See Commonwealth v. Ostrosky, 589 Pa. 437, 909 A.2d 1224, 1231-1232 (2006)(finding Commonwealth’s interpretation of the retaliation of witness statute would render a portion of the statute surplusage in violation of sections 1921(a) and 1922(2)). Furthermore, it is readily apparent from the other paragraphs of the definition of eligible offender and provisions of the sentencing code that if the General Assembly intended that the definition be limited to a “conviction” or a “crime of violence” it would have used those terms. See 61 Pa.C.S. §4503; 42 Pa.C.S.A. §9714.

ORDER

AND NOW, this 4th day February 2011 for the reasons set forth in this Opinion,
the Court **DENIES** Defendant's Post Sentence Motion.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: Jeana A. Longo, Esquire (PD)
DA
Gary Weber, Esquire (Lycoming Reporter)
Work File