

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

vs.

BILAL SABUR,
Defendant

: No. **CR-196-2011;**

: **CR-630-2011**

:

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:

OPINION AND ORDER

This matter came before the court on Defendant Bilal Sabur's Post Sentence Motion. The relevant facts follow.

196-2011

On January 28, 2011, Defendant and Ryan Smith got into a disagreement concerning Smith's girlfriend when they were at a local bar. Defendant, Smith, Dawine Jeffreys, and Bernard Daniels left the bar and went into a nearby alley. While these individuals were in the alley, Defendant pulled out a gun and fired several shots. As a result, Dawine Jeffreys sustained gunshot wounds to his leg.

On January 31, 2011, police charged Defendant with two counts of criminal attempt – homicide, one count of possession of an instrument of crime (weapon), four counts of aggravated assault, two counts of recklessly endangering another person, three counts of simple assault, one count of possession of a firearm without a license, and one count of persons not to possess a firearm. The Magisterial District Judge dismissed the one count of attempted homicide, two counts of aggravated assault, one count of recklessly endangering another person and one count of simple assault that named Ryan Smith as the alleged victim. The remaining counts, which either listed Dawine Jeffreys as the victim or involved Defendant's possession of a firearm, were held for court.

630-2011

After Defendant was arrested and placed in the county prison in case number 196-2011, he made a phone call from the prison to his girlfriend asking her to call another individual to get rid of the gun. As a result of this phone call, Defendant was charged with conspiracy to tamper with physical evidence.

The cases were consolidated for trial, but the persons not to possess a firearm charge was severed because it required proof of Defendant's prior record, which generally would not be admissible in a trial on the other charges.

On January 23, 2012, a jury acquitted Defendant of attempted homicide, but convicted him of possession of an instrument of crime, aggravated assault – attempt to cause serious bodily injury, aggravated assault – cause bodily injury with a deadly weapon, recklessly endangering another person, simple assault – cause bodily injury, simple assault – by physical menace, possession of a firearm without a license and conspiracy to tamper with physical evidence. On that same date, Defendant waived his right to a jury trial on the severed charge of person not to possess a firearm. The court considered the evidence presented at trial, as well as additional evidence the Commonwealth introduced regarding Defendant's prior criminal record. On January 26, 2012, the court found Defendant guilty of person not to possess a firearm.

On May 7, 2012, the court sentenced Defendant to an aggregate term of 18 to 38 years of incarceration in a state correctional institution consisting of 7 to 14 years for aggravated assault – attempt to cause serious bodily injury, a consecutive 1 to 2 years for simple assault by physical menace, a consecutive 1 to 2 years for possessing an instrument of crime, a consecutive 1 to 2 years for recklessly endangering another person, a consecutive 5 to 10 years for person not to possess a firearm, and a consecutive 3 to 6 years for possessing a firearm without a license.

On May 17, 2012, Defendant filed his post sentence motion. The court began an argument on Defendant's motion on June 14, 2012, but during the hearing when the parties disagreed about what the record would show, it was directed that trial transcripts be prepared to address some of the issues presented. For a variety of reasons, the remainder of the argument was rescheduled twice, but was ultimately held on August 30, 2012. Due to the delay necessitated by the preparation of the transcripts and the rescheduling of the continued argument, the court granted defense counsel's request for a thirty-day extension of the time for deciding the post sentence motion.

Discussion

Defendant first asserts that the court erred in denying his motion in limine to exclude his statement based upon intoxication and voluntariness without a hearing. The court cannot agree.

As the court explained in its Order dated January 18, 2012 and docketed January 26, 2012, this portion of Defendant's motion in limine was, in reality, an untimely suppression motion.

The Pennsylvania Rules of Criminal Procedure state that, unless the opportunity to raise the issue did not previously exist or the interests of justice otherwise require, a suppression motion must be contained in the omnibus pretrial motion and be filed within 30 days of arraignment. Pa.R.Cr.P. 579 and 581(B).

Defendant's formal court arraignment was held on March 21, 2011 in case number 196-2011 and on June 6, 2011 in case number 630-2011. Defendant did not file any motion to exclude his statements until January 17, 2012, which was the day before the jury trial started. Defendant was represented by the same counsel from the inception of this case.

Defendant was aware in May of 2011 that the police videotaped the statement he made while he was in police custody immediately following his arrest. Defendant did not file any motion to compel or produce the videotape. The court found it would be extremely prejudicial to address a suppression motion at such a late date when both the Commonwealth and Defendant were prepared to proceed to trial, had subpoenaed numerous witnesses and a jury had already been selected.

Furthermore, based on the argument of counsel, the merits of the suppression motion were not so apparent that the interests of justice would require the court to hear it the day before trial was scheduled to commence. Defendant claimed that the statement was involuntary because he was allegedly under the influence of controlled substances. Other than a urine screen from a Tioga County detention center that revealed the presence of marijuana and methamphetamine metabolites, which can stay in the body for several days or weeks depending on the substance, there was no evidence to establish that Defendant was intoxicated or under the influence at the time he gave his statement or that his alleged intoxication was to such a degree that it would render his statements involuntary.

A claim of intoxication alone does not preclude a valid waiver of one's Miranda rights or automatically render a statement involuntary. See Commonwealth v. Culbertson, 467 Pa. 424, 358 A.2d 416, 417 (1976) (“intoxication is a factor to be considered, but it is not sufficient, in and of itself, to render the confession involuntary”); Commonwealth v. McFadden, 384 Pa. Super. 444, 559 A.2d 58, 60 (1989) (evidence of alcohol consumption does not render a confession inadmissible, it only affects the weight to be accorded to the confession.”). Moreover, no facts were alleged nor were any arguments made that the police conduct was overly coercive, threatening, or intimidating.

Defendant next contends that the court erred by ruling that the Commonwealth's ballistic expert could testify that the .45 casings found at the scene came from the same weapon to the exclusion of all others after the findings of the National Academy of Sciences report in 2009 discouraged such a declaration. The court cannot agree.

The court believes defense counsel misapprehends the import of the National Academy of Sciences report. The report is not akin to a binding judicial decision. It does not preclude any witness from testifying to any specific opinion or conclusion. Rather, it makes suggestions and recommendations. The court found that Defendant's objections did not relate to the admissibility of the opinion testimony, but the weight that should be accorded thereto. The court indicated that Defendant was free to cross-examine the Commonwealth's expert on this issue.

The court also does not believe this ruling prejudiced Defendant. The Commonwealth's expert did not testify. Instead, the parties reached a stipulation regarding the expert's testimony. See N.T., January 20, 2012, at pp. 120-121.

Defendant also alleges that the court erred by admitting recordings of his jail calls and visits. Again, the court cannot agree.

The admissibility of evidence is within the sound discretion of the trial court, and such rulings will not form a basis for relief absent an abuse of discretion. Commonwealth v. Baumhammers, 599 Pa. 1, 960 A.2d 59, 84 (2008), citing Commonwealth v. Mitchell, 588 Pa. 19, 902 A.2d 430, 459 (2006). "Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is the result of partiality, prejudice,

bias or ill will.” Baumhammers, 960 A.2d at 86, quoting Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745, 753 (2000).

The court does not believe it abused its discretion when it admitted recordings of Defendant’s jail calls and visits.¹

Several of Defendant’s statements could be construed as consciousness of guilt. All the calls and visits at the prison are recorded and the parties are informed of such via a message at the beginning of each call or visit. N.T., January 23, 2012, at pp. 92-93. The prison logs each inmate’s calls and visits through the use of telephone ID numbers. Id. at p. 4. Defendant thought he beat the system by using another inmate’s number. See id. at pp. 6-8. Defendant explained this in one of his conversations with his niece. Defendant also admitted that sometimes he was putting other people’s names on the letters he was writing and sending from the prison.

Defendant also told his niece to tell another individual who was coming for the trial that Defendant was the only person in the hotel room when a person from the Comfort Inn came to his room to kick him out. When this conversation is compared to the evidence presented at trial that Defendant was not alone in the hotel room, it appeared as if Defendant was trying to get his niece to convince the individual to lie for him.

In their conversations, Defendant and his niece also labeled people who were going to testify against Defendant as rats and bitches, and said that they had “something” for them when they come around. Not only did this evidence tend to show consciousness of guilt, it

¹ The court’s conference with the attorneys about the recordings can be found in the January 20, 2012 transcript at pages 89 to 109. The tapes were played for the jury throughout the trial. N.T., January 22, 2012, at pp. 52-58; N.T., January 23, 2012, at pp. 9-17.

also tended to corroborate some of the witnesses' testimony that they were afraid or concerned about testifying because of the way "snitches" are treated.

The court also gave appropriate cautionary or limiting instructions regarding the proper use of this evidence. N.T., January 23, 2012, at pp. 13-14.

Defendant next contends the court erred by allowing the victim to testify to statements of Ryan Smith, who was initially a victim, but refused to testify at trial; the court found that the statements admitted were not for the truth of the matter asserted.

Ryan Smith borrowed the victim's phone to talk to his girlfriend. When he got off the phone, Smith told the victim that his girlfriend had been raped while Smith was in jail. The court overruled defense counsel's objection to this testimony, and gave the jury a cautionary instruction about the use of this testimony. N.T., January 18, 2012, at pp. 54-56. The court admitted this evidence because it was not offered for the truth of the matter asserted; therefore it was not hearsay. See Pa.R.E. 801(c). This testimony also explained Smith's disagreement with Defendant and why they were going into the alley to fight. Smith borrowed a small knife from the victim before he went outside to fight Defendant. Unfortunately, Defendant brought a gun to the fight, and the victim Jeffreys was between Smith and Defendant. This evidence also provided a motive for the altercation in the alley, which ultimately resulted in Jeffreys getting shot, and was part of the history or natural development of this case.

Defendant also asserts the court erred by allowing the Commonwealth to elicit testimony from the victim about "snitching" and its ramifications. On cross-examination, defense counsel confronted the victim with a letter that he wrote stating he was bribed and threatened by the police and the District Attorney to identify Defendant as the person who shot him. N.T., January 18, 2012, at p. 83. On re-direct examination, the Commonwealth elicited

testimony from the victim that although he was not concerned for his safety, he didn't want to testify in this case. Id. at p. 84. The victim initially said he didn't want to testify because he didn't really know who shot him. Id. Given the tapes from Defendant's phone calls and visits, the Commonwealth sought to explore whether being labeled a "snitch" and the ramifications of such a designation also contributed to the victim's reluctance to testify against Defendant. The victim explained that a snitch tells on another person, and it is not good to be known as a snitch on the street. Id. at 86, 87. Snitches get threatened; they are shunned or looked down upon; and there's a possibility that people won't associate with them. Id. at 87.

Later in the trial, the victim was recalled as a witness. He explained that what he said in the letter to defense counsel was not true and he wrote the letter because he was threatened and bullied in prison by the block runner, who knew Defendant from the neighborhood in Philadelphia. N.T., January 19, 2012, at pp. 176-177. After he wrote the letter, it seemed like everything that was happening to him at the prison stopped. Id. at 178.

The court finds this evidence was relevant and admissible to rebut defense counsel's use of the letter on cross-examination and to explain why the victim was reluctant to testify in this case.

Defendant avers the court erred by permitting the Commonwealth to cross-examine Defendant about his prior convictions for possessing a firearm without a license.

During Defendant's testimony, he claimed he ran away from the scene of the shooting incident because he had been shot several times in the past. N.T., January 23, 2012, at p. 35. On cross-examination, the Commonwealth asked Defendant if he carried a gun, whether he had a gun at the time of the shooting and whether he carried a gun because he had been shot three times in the past. Id. at 38-39. Defendant answered each question in the negative. At that

point, the prosecutor requested a sidebar conference. The prosecutor argued that, by lying about not carrying a gun, Defendant opened the door to the introduction of his prior convictions for possession of a firearm without a license. The court permitted the Commonwealth to cross-examine Defendant about his prior convictions, and gave the jury a cautionary instruction that it could only consider this evidence to determine Defendant's credibility. Id. at pp. 41-42. As a result of this cross-examination, Defendant admitted that he possessed a gun in the past, but claimed it was not to protect himself because he had been shot in the past, but to protect his drugs. Defendant also admitted that he was involved in drugs around the date of the shooting, but claimed that he did not have a gun to protect his drug business at that time. Id. at 43.

The interests of justice would not be furthered by permitting Defendant to lie on the witness stand. Furthermore, if the Court precluded the Commonwealth from introducing evidence regarding Defendant's prior convictions, the defense could have argued in closing that a reasonable inference from Defendant's direct testimony was that he stayed away from guns as a result of being shot multiple times in the past. Therefore, this evidence was relevant. Furthermore, in light of the above reasons, the court finds the probative value outweighs any prejudice.

The court also found that the relevance was not outweighed by the danger of unfair prejudice. Defense counsel was afraid that the jury would convict Defendant just because he had committed the same or similar firearm crimes in the past. The court, however, gave the jury a cautionary instruction that this evidence could only be used to determine the credibility of Defendant's testimony that he did not carry a gun immediately after this evidence was introduced. The jury is presumed to follow the court's instructions. Commonwealth v. Miller, 572 Pa. 623, 819 A.2d 504, 513 (2002).

Defendant also alleges the court erred in permitting the Commonwealth to introduce portions of a letter written by Defendant stating that he spent his 20's behind bars. Defendant wrote a letter to his girlfriend telling her what to say to try and convince another individual (Eazy) to take the rap for the shooting, because that individual would face substantially less time in prison than Defendant and would likely receive a county sentence. Defendant also indicated that he lost of all his 20's behind bars and he deserved a break so he didn't spend his 30's there, too. Defense counsel argues that the court did not need to include the statement that Defendant spent his 20's in jail. The court cannot agree. The portions of the letter that the court admitted showed consciousness of guilt and showed why Defendant was asking Eazy to take the rap for this offense.

Defendant also raises several sentencing issues. First, Defendant submits that the trial court abused its discretion by sentencing him consecutively for simple assault by physical menace. Defendant, however, does not indicate how or why its consecutive sentence for simple assault was an abuse of discretion. Given Defendant's prior record score of 5 and his use of a deadly weapon in the commission of his crimes, the standard guideline range for Defendant's minimum sentence on this simple assault conviction was 12 to 22 months. The court, however, could not impose a sentence in excess of 12 months, because the maximum sentence for simple assault is two years and the minimum sentence cannot exceed one-half of the maximum sentence imposed. See 42 Pa.C.S.A. §9756(b)(1).

While the court could not impose a minimum sentence of more than 12 months, the court had the discretion to impose a concurrent or a consecutive sentence. See 42 Pa.C.S.A. §9721(a); Commonwealth v. Prisk, 13 A.3d 526, 533 (Pa. Super. 2011). The court found that a consecutive sentence was appropriate in this case. The facts and circumstances of this case as

well as Defendant's criminal history show that a lengthy sentence of incarceration was needed to protect society. Despite having numerous prior convictions for weapon offenses and being statutorily ineligible to obtain a firearm license, Defendant continued to commit crimes with firearms. There was no legitimate reason for Defendant to take the disagreement with Mr. Smith into the alley, let alone fire six shots.² Mr. Jeffreys, who did not have any words with Defendant, suffered a gunshot wound to his leg as a result of Defendant's behavior. Furthermore, the phone calls and visits Defendant had with his niece show his consciousness of guilt, his disdain for anyone who would dare to testify against him and his schemes and manipulations to try to get individuals to either lie for him or at least not testify against him. The facts of this case, Defendant's criminal history, and his statements in his trial testimony admitting he is a drug dealer that carries a gun to protect his drugs show that he is a common street thug, from whom our communities need protection for as long as possible. Although Defendant is relatively young and may have rehabilitative needs, he obviously has not taken advantage of his previous opportunities for rehabilitation, because he continues to commit crimes while possessing a firearm.

Defendant next asserts that his conviction for recklessly endangering another person merges with simple assault by physical menace and aggravated assault. The court notes that the charges listing Ryan Smith as the alleged victim were dismissed following the preliminary hearing in this case. Since Dawine Jeffreys is the victim of both the aggravated assault and the recklessly endangering another person, the court agrees that recklessly endangering another person merges with Defendant's conviction for aggravated assault. See Commonwealth v. Calhoun, 2012 PA Super 138 (July 9, 2012); Commonwealth v. McCalman,

² Defendant stipulated to the testimony of the Commonwealth's ballistic expert that all six shell casings were from the same unknown weapon.

795 A.2d 412, 417 (Pa. Super. 2002); Commowalth v. Dobbs, 682 A.2d 388, 391 (Pa. Super. 1996). Therefore, the court will vacate its sentence for recklessly endangering another person.

Defendant also contends the court should have sentenced the persons not to possess charge and carrying a firearm without a license concurrently based on the circumstances of this case, as the reason Defendant did not have a license to carry a firearm was because he had an enumerated offense that precluded him from obtaining a license. These offenses do not merge. Commonwealth v. Coppedge, 984 A.2d 562 (Pa. Super. 2009); Commonwealth v. Williams, 920 A.2d 887 (Pa. Super. 2007). Therefore, the court had the discretion to sentence these convictions consecutively or concurrently. For many of the same reasons set forth in the discussion regarding the consecutive sentence for simple assault by physical menace, the court believes 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 all justified a lengthy sentence in this case. Obviously, the shorter periods of probation, incarceration and parole Defendant had served in the past proved inadequate to change Defendant's behaviors. Thus, a lengthy period of incarceration and parole supervision were necessary in this case.

Finally, Defendant submits that his sentence was manifestly excessive, and therefore an abuse of discretion. The court finds this claim is not sufficiently specific for the court to address it. To the extent the specifics are provided by Defendant's previous claims, the court has already addressed them.

ORDER

AND NOW, this ____ day of October, 2012, the court GRANTS IN PART and DENIES IN PART Defendant's post sentence motion. The Court GRANTS Defendant's post

sentence motion with respect to his claim that the recklessly endangering another person conviction merges with aggravated assault. The court will issue a separate amended sentencing order, so that all the offices that need a copy of the amended sentencing order do not need to be burdened with reading this entire Opinion and Order. In all other respects, Defendant's post sentence motion is DENIED.

By the Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Nicole Spring, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)