

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-979-2010
:
v. :
:
DAWN BALL, :
Defendant : Post-Sentence Motion

OPINION AND ORDER

By way of background, the charges were filed against the Defendant on April 1, 2010. Reaching trial was a long and tortured process. The case has and continues to be complicated by Defendant’s institutional behaviors, Defendant’s demands on counsel, Defendant’s relationship with counsel, Defendant’s mistrust of counsel, Defendant’s barrage of written correspondence to the Court, a plethora of motions relating in large part to representation of the Defendant, and the Court seeking information from appropriate professionals with respect to Defendant’s mental health.

Admittedly, the Court has deferred to a great extent to many of Defendant’s requests. Whether this has allowed the proceedings to proceed in a more orderly fashion or whether this has ultimately benefited the expeditious and fair resolution of these matters is open to debate.

On September 21, 2012 following a jury trial, the Defendant was found guilty of aggravated harassment by a prisoner,¹ a felony of the third degree, and simple assault,² a misdemeanor of the second degree. The Court found Defendant guilty of harassment,³ a summary offense. The court issued an order dated September 21, 2012, entering the verdicts.

¹ 18 Pa.C.S.A. §2703.1.

² 18 Pa.C.S.A. §2701.

³ 18 Pa.C.S.A. §2709.

Sentencing was originally scheduled for January 31, 2013 but the Court directed that the Defendant be transferred to Norristown State Hospital pursuant to 50 P.S. § 4410 and §7405 for aid in sentencing. The Court directed that an examination be made of the Defendant for any mental illness.

Unfortunately, and for various reasons, the first sentencing hearing did not take place until December 24, 2013. Following that hearing and in order that the Court could obtain further information deemed relevant with respect to sentencing, the Court scheduled an additional and/or final sentencing hearing for April 29, 2014.

On April 29, 2014, the Court sentenced Defendant to an aggregate period of state incarceration, the minimum of which was 21 months and the maximum of which was 42 months. The sentence amounted to a time served sentence as the Court gave the Defendant credit for time served from June 17, 2010 through April 28, 2014.

The Commonwealth filed a timely for Motion to Reconsider in which it asserted that the award of credit for time served was illegal and the sentence was too lenient. Argument on the Commonwealth's motion was subsequently held before the Court. By Order of Court dated June 9, 2014, the Court granted in part the Commonwealth's motion, agreeing that Defendant was not entitled to credit for time served because she was already serving a state sentence and was not entitled to duplicate credit. As the removal of credit, however, substantially altered the Court's sentencing scheme and the amount of time that Defendant would be required to spend in a state correctional institution, the Court held another sentencing hearing on June 11, 2014.

By Order of Court dated June 11, 2014, the Court sentenced the Defendant to a period of state incarceration, the minimum of which was nine months and the maximum of

which was 18 months with respect to Count 1, aggravated harassment by a prisoner (spitting on a correctional officer), a felony of the third degree. The sentence was split and the Defendant was sentenced to serve an additional period of three years under the supervision of the Pennsylvania Board of Probation and Parole. The sentence of the Court with respect to Count 2, simple assault (throwing an unknown liquid attempting to cause bodily injury to a corrections officer), a misdemeanor of the second degree, was for the Defendant to undergo a period of state incarceration, the minimum of which was six months and the maximum of which was one year. This sentence was to run concurrent to the sentence imposed with respect to Count 1. The sentence of the Court with respect to Count 3, harassment, a summary offense, was guilt without further punishment. The effective date of the sentence was June 11, 2014 although Defendant was given credit for time served from April 29, 2014 to June 10, 2014. The Court noted that the April 29, 2014 date was the date the Defendant was first sentenced on the charges.

By Order of Court dated August 1, 2014, the Court amended its June 11, 2014 Order to clarify some patent and obvious errors. The Court directed that the sentence was to run consecutive to any and all sentences that the Defendant was presently serving but that the effective date remained April 29, 2014.

Defendant filed a post-sentence motion nunc pro tunc on June 26, 2014. Argument on said motion was subsequently held before the Court. Following said argument, the Court requested that the transcript of the trial be prepared and provided to the parties.

In its August 29, 2014 Order, the Court noted that it received limited argument with respect to the issues raised in the motion and that once the transcript was provided to counsel, they could provide to the Court a written brief, via a hard copy or email, supporting their respective positions. The Court also noted that it expected to render its decision within 120

days from June 26, 2014, but Defendant could request an additional 30 days to allow additional time for briefing and a decision, if she submitted a request to the Court.

The transcripts have been provided to the Court and counsel, but the Court has not received a brief from any party. Furthermore, the Defendant has not requested an additional 30 days.⁴ Accordingly, this matter is ripe for a decision.

In Defendant's post-sentence motion, she first asserts that the evidence was insufficient to establish beyond a reasonable doubt the crimes of aggravated harassment by a prisoner and simple assault. With respect to aggravated harassment by a prisoner, Defendant argues that the evidence was insufficient to prove that she intended that another come into contact with bodily fluid or that the fluid was indeed bodily fluid. With respect to the simple assault charge, Defendant argues that there was no evidence that she caused, attempted to cause or recklessly caused bodily injury to the victim.

In reviewing the sufficiency of the evidence, the Court considers whether the evidence and all reasonable inferences that may be drawn from that evidence, viewed in a light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. *Commonwealth v. Davido*, 582 Pa. 52, 868 A.2d 431, 435 (2005); *Commonwealth v. Murphy*, 577 Pa. 275, 844 A.2d 1228, 1233 (2004). "Circumstantial evidence can be as reliable and persuasive as eyewitness testimony and may be of sufficient quantity and quality to establish guilt beyond a reasonable doubt." *Commonwealth v. Tedford*, 523 Pa. 305, 567 A.2d 610, 618 (1989) (citations omitted).

⁴ The Court notes, however, that it has received on behalf of Defendant a motion for bail pending appeal, which is scheduled for a hearing on October 16, 2014. Subsequent to the filing of that motion, defense counsel filed a motion to withdraw/motion to have Defendant deemed to have forfeited counsel and the Commonwealth filed a motion for finding of forfeiture of counsel. These motions are also scheduled for October 16, 2014.

In order for the Defendant to be convicted of aggravated harassment by a prisoner in this case, the Commonwealth needed to prove that the Defendant was confined in a State Correctional Institution and that she intentionally or knowingly caused or attempted to cause another to come in to contact with saliva by spitting. 18 Pa.C.S.A. §2703.1.

Defendant's argument that the Commonwealth failed to produce evidence that the Defendant intended that another come into contact with bodily fluid or that the fluid was indeed bodily fluid is both perplexing and misapprehends the applicable law. All that the Commonwealth needed to prove was that the Defendant spit saliva onto another person while the Defendant was confined in a State Correctional Facility.

The evidence at trial clearly supports this conclusion. On December 2, 2009 while Correctional Officer George was handing out and collecting meal trays in the Restrictive Housing Unit (RHU) at the state correctional institution in Muncy, the Defendant spit on her through the wicket on the cell door. N.T., 09/20/12, at 36. The spit landed on her shirt. *Id.* at 38. After doing so, the Defendant verbally lashed out at Correctional Officer George by lodging insults, racial slurs and threats. *Id.*, at 37.

With respect to the simple assault charge, in order to find the Defendant guilty, the Commonwealth needed to prove that the Defendant attempted to cause or intentionally, knowingly or recklessly caused bodily injury to another person. 18 Pa.C.S.A. § 2701. Bodily injury is defined as impairment of physical condition or substantial pain. 18 Pa.C.S.A. §2301; *Commonwealth v. Kirkwood*, 360 Pa. Super. 270, 520 A.2d 451, 452 (1987).

Defendant's argument that there was no evidence that she caused or attempted to cause bodily injury to the victim again fails.

Correctional Officer George testified that on December 7, 2009 she was also working in the Restrictive Housing Unit. While passing Defendant's cell, she was hit in the face with a liquid which got in her eyes, nose and mouth. N.T., 09/20/12, at 41. The liquid came from a gap on the right side of the wicket on Defendant's cell door. *Id.*, at 41, 42. After she got hit by the liquid, the Defendant again verbally lashed out at Correctional Officer George. *Id.*, at 43. As with the December 2 incident, the Defendant was the only person in the cell. *Id.*, at 39, 43. As well, the Defendant had access in her cell to various liquids. *Id.*, at 43,44.

Correctional Officer Pickering also testified with respect to the December 7, 2009 incident. He was behind Correctional Officer George while she was picking up trays and witnessed an unknown liquid come out of Defendant's cell door and hit Correctional Officer George. *Id.*, at 111-113. He also witnessed the verbal assaults on Correctional Officer George by Defendant. *Id.*, at 111-112.

With respect to injuries, Correctional Officer George testified that she immediately experienced burning pain and irritation for "quite a while" in her eyes. *Id.*, at 44. Her pain lasted for more than a week and she also missed work. *Id.*, at 44, 45. As well, she testified that her vision was affected. *Id.*, at 60. Clearly, this testimony, as believed by the jury, satisfied the elements of simple assault. The Defendant either attempted to cause or did in fact intentionally cause bodily injury to Correctional Officer George.

For the same reasons Defendant claims that the evidence was insufficient to find her guilty of the aggravated harassment by a prisoner and simple assault charges, Defendant claims that the guilty verdict on these charges was against the weight of the evidence.

An allegation that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. *Commonwealth v. Sullivan*, 820 A.2d 795, 805-806 (Pa.

Super. 2003). A new trial is awarded “only when the jury’s verdict is so contrary to the evidence as to shock one’s sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.” *Id.* at 806 (citation omitted). The evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. *Id.*

Clearly and in light of the above-referenced evidence, the verdict did not shock the conscience of the Court. Contrary to Defendant’s contentions, the verdict was not against the weight of the evidence. The jury obviously found the testimony of the Commonwealth’s witnesses to be credible. Credibility is within the sole province of the trier of fact who is free to believe all, part, or none of the evidence presented. *Commonwealth v. VanDivner*, 599 Pa. 617, 962 A.2d 1170, 1178 (2009); *Commonwealth v. Cooper*, 596 Pa. 119, 130, 941 A.2d 655, 662 (2007). The jury credited the testimony of the Commonwealth’s witnesses, which was within their province. Therefore, the verdict was not against the weight of the evidence.

Finally, Defendant avers that her sentence was excessive “to perform the duties that sentences are designed to perform pursuant” to law. (Post-Sentence Motion, Paragraph 20). Candidly, the Court finds Defendant’s assertion to be inexplicable.

Indeed, it appears that Defendant is claiming that she should have received probation rather than incarceration in light of numerous sentencing factors. Defendant essentially argues that the Court should have arrived at a different sentence.

Determinatively, Defendant has not claimed that the Court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

“Imposition of a sentence is vested in the discretion of the Sentencing Court and will not be disturbed absent a manifest abuse of discretion.” *Commonwealth v. Smith*, 543 Pa.

566, 673 A.2d 893, 895 (1996). An abuse of discretion is not a mere error in judgment; it will only be found when the record discloses that the judgment exercised by the trial court was manifestly unreasonable, or the result of the partiality, prejudice, bias or ill will. *Id.*

In imposing a sentence, a court shall follow “the general principle that the sentence imposed should call for confinement that is consistent with 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.A. § 9721 (b).

In an exhaustive exercise, the Court considered all of the relevant sentencing factors and imposed a sentence consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the Defendant. The Court considered the sentencing guidelines and applied them. Indeed, the sentence was below the standard range. The Court considered the particular circumstances of the offense and the character of the Defendant. The Court referenced the Defendant’s prior criminal conduct, her prior criminal record, her personal characteristics and any potential for rehabilitation. The Court weighed the considerations along with mitigating and/or aggravating factors. The Court considered everything presented by the defense, the prosecution, the victim, and the Department of Corrections, as well as information contained in the Pre-Sentence Report. The Court explained that it took into account all of the relevant sentencing factors and weighed them accordingly.

Indeed, the clearest evidence of such consideration and weighing is set forth in the Court’s Opinion and Order dated June 9, 2014.

Accordingly, the Court rejects Defendant’s claim that her sentence was excessive.

ORDER

AND NOW, this ___ day of October 2014, following a hearing and argument,
Defendant's post-sentence motion is **DENIED**.

By the Court,

Judge Marc F. Lovecchio

cc: DA (MW)
PD (RC)
Gary Weber, Esquire (Lycoming Reporter)
Work file