IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-979-2010**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
DAWN M. BALL,	:	
Appellant	:	**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 August 1, 2014, which became final when the court denied Appellant's post sentence motions. The relevant facts follow.

Appellant is an inmate at the state correctional institution at Muncy. On December 2, 2009, while Corrections Officer George was handing out and collecting meal trays in the Restrictive Housing Unit (RHU), Appellant spit on her through the wicket of the cell door. The spit landed on C.O. George's shirt sleeve. Appellant also verbally assaulted C.O. George with insults, racial slurs, and threats.

On December 7, 2009, C.O. George was also working in the RHU. As C.O. George passed Appellant's cell door, Appellant threw a liquid at C.O George through the gap on the right side of the wicket of her cell door and verbally lashed out at her. The liquid hit C.O. George in the face and went into her eyes, nose and mouth. C.O. George immediately experienced burning and irritation in her eyes. She went to the prison infirmary and then to Muncy Valley Hospital, where her eyes were washed out and treated. She missed some work

and had pain in her eyes for over a week

As a result of these incidents, Appellant was charged with aggravated harassment by a prisoner, a felony of the second degree; simple assault, a misdemeanor of the second degree; and harassment, a summary offense.

A trial was held on September 20-21, 2012, and Appellant was convicted of all of the charges. Due to Appellant's mental health issues and personality disorders, the court directed that she be transferred to Norristown State Hospital for an examination to aid in sentencing.[1]

On April 29, 2014, the court sentenced Appellant to 21 to 42 months' incarceration in a state correctional institution with three and a half years' consecutive probation to be served concurrent to any sentence she was already serving. The court also gave Appellant credit for time served from June 17, 2010 to April 29, 2014.

The Commonwealth filed a motion for reconsideration of sentence in which it asserted that the award of credit for time served was unlawful because Appellant was serving another sentence and therefore was not entitled to any credit. The Commonwealth also claimed that sentence imposed was too lenient, as it was for all practical purposes a sentence of probation which depreciated the seriousness of the offense and jeopardized the security of the guards because it would encourage other inmates to engage in similar conduct against corrections officers without fear of facing heavy criminal consequences.

In an opinion and order entered June 9, 2014, the court granted in part the Commonwealth's motion for reconsideration. On June 11, 2014, the court vacated the original sentencing order and sentenced Appellant to 9-18 months' incarceration in a state

correctional institution with three years' consecutive probation. The court stated that the sentence was to be served partially concurrent and partially consecutive to the sentence Appellant was already serving and gave Appellant credit for time served from April 29, 2014, because that was the date of her original sentence.

On June 26, 2014, Appellant filed a post sentence motion nunc pro tunc, in which she challenged the weight and sufficiency of the evidence and claimed that her sentence was excessive.

On August 1, 2014, the court *sua sponte* amended the re-sentencing order to correct illegal provisions and typographical errors. The court struck the provision running the sentence in part concurrently and in part consecutively to any and all sentences Appellant was already serving. Relying on *Commonwealth v. Ward*, 524 Pa. 48, 568 A.2d 1242 (1990), the court noted the sentence had to be either consecutive or concurrent to the sentence Appellant was already serving; it could not be both concurrent and consecutive. The court then ran the 9-18 month sentence consecutively to the 1-8 year sentence Appellant was already serving. The court noted that, as a matter of law, the sentence aggregated with Appellant's previous sentence.

The court denied Appellant's post sentence motion in an opinion and order dated October 15, 2014. In an order dated October 16, 2014, the court also denied additional issues that Appellant claimed counsel failed to raise in the written motion.

Appellant filed a timely notice of appeal.

Appellant first contends that her constitutional rights under equal protection were violated when the court relied on *Commonwealth v. Tilghman*, 543 Pa. 578 (1996),

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[1] Unfortunately, there was a waiting list and a bed did not become available until over nine months later.

Commonwealth v. Harris, 620 A.2d 1175 (Pa. Super. 1993) and 42 Pa.C.S.A. §9761 in its order dated August 1, 2014.

The court questions whether this issue has been properly preserved for appellate review. The court does not know why Appellant is claiming that her equal protection rights were violated because she never raised this issue in her written or oral post sentence motions. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a).

The court also notes that it did not rely on 42 Pa.C.S.A. §9761 in its order dated August 1, 2014; it relied on 42 Pa.C.S.A. §9757. Instead, the court believes Appellant is relying on section 9761(b) to argue that she should have received credit for time served from the date the charges were filed against her and/or that her sentences should not have aggregated. Appellant's reliance on section 9761(b), however, is misplaced because none of her sentences were imposed by a federal court or a court from another state. Section 9761 permits, but does not require, a Pennsylvania court to impose a sentence concurrent to a sentence imposed by another sovereign. Where, as here, consecutive sentences were imposed by two courts of common pleas, the sentences aggregate as a matter of law.

The court suspects that Appellant's equal protection claim revolves around the fact that if one of her sentences was imposed by a federal court or a court from another state her sentences would not have aggregated and she would have been transferred to the Lycoming County Prison to serve this sentence. Therefore, she claims that she is being treated differently and unfairly when her sentences from two separate courts of common pleas are being aggregated. The court cannot agree.

In *Commonwealth v. Albert*, 563 Pa. 133, 758 A.2d 1149 (2000), the

Pennsylvania Supreme Court stated:

> The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. However, it does not require that all persons under all circumstances enjoy identical protection under the law. The right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, and does not require equal treatment of people having different needs. The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear reasonable relationship to the object of the legislation. In other words, a classification must rest upon some ground of difference which justifies the classification and have a fair and substantial relationship to the object of the legislation. Judicial review must determine whether any classification is founded on a real and genuine distinction rather than an artificial one. A classification, though discriminatory, is not arbitrary or in violation of the equal protection clause if any state of fats reasonably can be conceived to sustain that classification. In undertaking its analysis, the reviewing court is free to hypothesize reasons the legislature might have had for the classification. If the court determines that the classifications are genuine, it cannot declare the classification void even if it might question the soundness or wisdom of the distinction.

758 A.2d at 1151(citations omitted).

Appellant is not in like circumstances as individuals who have been sentenced by other sovereigns and the different treatments regarding aggregation of sentences are not only justified, but necessary. The Pennsylvania legislature can require Pennsylvania courts to aggregate Pennsylvania sentences. It cannot, however, tell the federal government or other states what to do with their inmates or their prison systems. Requiring aggregation would do just that. It would either require those entities to house their inmates in Pennsylvania prisons or require those entities to house Pennsylvania inmates in their prisons.

Appellant next contends that the court erred in its opinion and order dated July 18, 2012, by determining that C.O. George's eye pain constituted substantial pain as required by the statute when there was no evidence that the liquid involved in the incident or

the subsequent three eye washings caused the irritation.

This issue is moot. The opinion and order dated July 18, 2012 addressed Appellant's petition for writ of habeas corpus. The evidence presented at trial was sufficient to sustain Appellant's conviction for simple assault. See Opinion and Order, 10/15/2014, at 5-6. Therefore, any alleged deficiency in the evidence presented at the preliminary hearing was harmless. *Commonwealth v. Thomas*, 498 A.2d 1345, 1348 (Pa. Super. 1985).

In the alternative, this issue lacks merit for the reasons set forth in the opinion and order dated July 18, 2012 and the opinion and order dated October 15, 2014.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Jerry Lynch, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)