

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1293-2013
: CR-293-2014
vs. :
: :
: **Opinion and Order Re**
DA' RAN SEARS, : **Defendant's Post Sentence Motion**
Defendant :

OPINION AND ORDER

Under Information of No. 1293-2013 filed on August 23, 2013, Defendant was charged with involuntary manslaughter, receiving stolen property, simple assault and recklessly endangering another person all arising out of an incident that occurred on June 13, 2013 in which Defendant shot and killed Donte Marks.

Under Information 293-2014 filed on March 6, 2014, Defendant was charged with third degree murder arising out of the same shooting incident on June 13, 2013.

On February 10, 2015, Defendant, with the consent of the Commonwealth, waived his right to a jury trial. The nonjury trial took place before this court on March 2, 2015 and March 3, 2015. Following the trial, the court found Defendant guilty of all of the charges as set forth in both Informations.

Defendant's sentencing took place on August 17, 2015. Under Information No. 293-2014 with respect to the third degree murder conviction, Defendant was sentenced to 20 to 40 years of incarceration in a state correctional institution. Under Information 1293-2013 with respect to the receiving stolen property count, Defendant was sentenced to a consecutive one to ten years in a state prison. The total aggregate sentence was a period of state incarceration, the minimum of which was 21 years and the maximum of which was 50

years. The remaining counts merged for sentencing purposes.

Defendant filed a timely post-sentence motion on August 27, 2015. The court held a hearing and argument on the motion on September 23, 2015. In the motion, Defendant asserts three claims: (1) he is entitled to a new trial because the court erred in denying his motion to suppress statements he allegedly made to Gage Wood; (2) he is entitled to an arrest of judgment on the third degree murder conviction because the evidence was insufficient to establish malice; and (3) his sentence should be reconsidered because it was unduly harsh and manifestly excessive based upon all of the relevant sentencing factors.

Defendant filed a motion to suppress the statements that he allegedly made to Gage Wood while they were both incarcerated at the Lycoming County Prison. In an opinion and order dated February 9, 2015, the court denied Defendant's motion. While the court has revisited this issue, it will not reverse itself. The court relies on its previous opinion and believes that the decision is consistent with the facts and controlling law.

Defendant next asserts that the evidence adduced at trial was insufficient to establish malice, which is an element necessary to convict Defendant of third degree murder. To establish third degree murder, the Commonwealth must prove malice. *Commonwealth v. Morris*, 958 A.2d 569, 576 (Pa. Super. 2008), appeal denied, 605 Pa. 711, 991 A.2d 311 (2010). Malice is not just ill-will, but also is a wickedness of disposition, hardness of heart, recklessness of consequences and a mind regardless of social duty. *Id.* Malice may be inferred from the use of a deadly weapon on a vital part of the victim's body. *Commonwealth v. Garland*, 63 A.3D 339, 345 (Pa. Super. 2013)(citations omitted); see also *Commonwealth v. Briggs*, 608 Pa. 430, 456, 12 A.3d 291, 306-307 (2011).

In this case, the evidence overwhelmingly established that Defendant pointed a gun at the victim and pulled the trigger not knowing if the gun was loaded.

The physical evidence was consistent with Defendant handling the gun, standing up, pointing the gun at the victim, and pulling the trigger when he was within only a few feet of the victim. One witness heard arguing, with words to the effect of “I am going to fucking kill you” or “you motherfucker I am going to kill you” and then within seconds heard a bang. Another witness saw Defendant standing in front of the victim. After leaving the room, the witness heard a “gunshot.” He came back in and saw that the victim was shot. He also saw Defendant take the gun and hide it. Still another witness testified that while incarcerated together, Defendant admitted pointing the gun at the victim and pulling the trigger after Defendant and victim got in an argument.

Perhaps most telling, however, were Defendant’s admissions to law enforcement. Defendant was interviewed on June 13, 2013. The interview was both video and audio taped. The tape was played during the trial.

Defendant conceded that the words between him and the victim might be “misconstrued” as “they was arguing.” He admitted to holding the gun in his hand. He also admitted that while holding it in his hand “it went off and Donte got hit.” Furthermore, he was “pretty sure” that he pointed the gun at Donte. He could not remember if the clip was in the gun or if it was loaded.

He indicated that he did not remember pulling the trigger because “it happened so fast” but conceded that he “had to squeeze the trigger...there aint no other way... .” When asked whether the gun went off because he squeezed the trigger, he answered

“had to.”

To corroborate Defendant’s statement that he had to pull the trigger, the Commonwealth presented evidence that the weapon could not discharge without the trigger being pulled. Specifically, the Commonwealth conducted a “trigger pull” test and a “shock and drop” test, both of which confirmed that the gun could not discharge without the trigger being pulled.

Even if the evidence is viewed in a light most favorable to Defendant, it would demonstrate that Defendant pointed the gun at his friend, Donte Marks, and pulled the trigger without knowing whether the gun was loaded. This, according to Defendant, was an accident.

Under Pennsylvania law, however, if an individual points a gun at another individual not knowing for certain whether the gun is loaded, that individual “exhibits that type of cruel and wanton conduct which legal malice is made.” *Commonwealth v. Seibert*, 424 Pa. Super. 242, 622 A.2d 361, 366 (1993)(citing Commonwealth v. Young, 494 Pa. 224, 431 A.2d 230, 232 (1981)).

As the Pennsylvania Supreme Court specifically noted in Young:

[Defendant] intentionally pointed a loaded gun at the victim and shot him in the chest. Under these circumstances, whether the gun discharged accidentally or was fired intentionally is irrelevant for the purpose of determining the existence of malice. Even if, as [defendant] claims, he did not know that the gun was loaded and intended only to “scare” the victim, his conduct nevertheless unjustifiably created an extremely high degree of risk, thereby evincing a wanton and reckless disregard for human life. By intentionally aiming a gun at [the victim] without knowing for a certainty that it was not loaded, [defendant] exhibited the type cruel and wanton conduct of which legal malice is made.

Young, supra.

In reviewing the sufficiency of the evidence, however, 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 a 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). Clearly, the evidence was sufficient to establish malice.

Defendant's final argument centers on the court's sentence. Defendant argues that, under all of the circumstances, the sentence was unduly harsh and excessive. Defendant does not argue that the court failed to consider the relevant sentencing factors or considered improper factors. Rather, Defendant argues that given his poor upbringing, his young age, extreme remorse and the alleged accidental nature of this incident, that the 21 to 50 year sentence is unduly harsh and excessive. Defendant requests that the court strike a more reasonable balance in light of all of the relevant sentencing factors which, according to the Defendant, would result in a significantly lower minimum sentence.

“Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed...absent a manifest abuse of discretion.” *Commonwealth v. Bricker*, 41 A.3d 872, 875 (Pa. Super. 2012) (quoting *Commonwealth v. Cunningham*, 805 A.2d 566, 575 (Pa. Super. 2002). “[A]n abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless ‘the record disclosed that the judgement exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.’” *Commonwealth v. Walls*, 592 Pa. 557, 926 A.2d 957, 961 (2007)(quoting *Commonwealth v. Smith*, 543 Pa. 566, 673 A.2d 893, 895 (1996)).

When imposing a sentence, the sentencing court must consider the protection of the public, gravity of offense in relation to the impact on the victim and community, and the rehabilitative needs of the defendant. *Commonwealth v. Fullin*, 892 A.2d 843, 847 (Pa. Super. 2006). As well, the court must consider the sentencing guidelines. *Id.* at 848. The court is also guided by section 9781 (d) of the Judicial Code, which requires appellate courts in reviewing a sentence to determine from the record whether the court considered: “(1) The nature and circumstances of the offense and the history and characteristics of the defendant; (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation; (3) The findings upon which the sentence was based; and (4) The guidelines promulgated by the commission.” 42 PA. CONS. STAT. ANN. §9781(d).

The standard guideline range for third degree murder with a prior record score of zero and an offense gravity score of fourteen is 72 months (or six years) to the statutory limit, which is 20 years. The standard guideline range for receiving stolen property with a prior record score of zero and an offense gravity score of eight is 9-16 months. The court imposed a standard guideline sentence.

The court ordered, received, and reviewed an extensive pre-sentence investigation report. At the time of sentencing, Defendant was 20 years old and had obtained his GED. He had been incarcerated since June 13, 2013.

Unfortunately, through February of 2015, Defendant’s incarceration was replete with write-ups and sanctions. From July 11, 2013 through February 11, 2015, he received seven write-ups, three of which related to fighting and one of which related to refusing orders. As a result of his write-ups, he received a total of 115 days of disciplinary

lock-up. In addition, he received 28 warnings on other occasions from correctional staff. Just one month into his incarceration, he was removed from the AA Program for not attending. Subsequent to that, he attended no treatment programs whatsoever.

Defendant's version of the event fairly mirrored his statement to police. He indicated that he and the victim were talking. He had the gun in his hand and the victim told him he was crazy for holding a gun and watching cartoons at the same time. According to Defendant, "the last thing" he remembered is that they were talking about girls. He did not remember pulling the trigger. "It all seemed to happen so fast."

Defendant has a long history of juvenile offenses which "were of a violent nature and often involved other students, teacher's aides, or teachers being physically assaulted." During sentencing, the court approximated that Defendant was involved in these various juvenile offenses at the ages of 9, 10, 11, 12, and 13. He was 18 years old at the time of the present offense.

When he was approximately seven years old, Defendant was placed in foster care due to his mother's addiction to controlled substances and her inability to handle his "aggressive behaviors." During his "school years" he worked with a therapeutic support specialist, along with a behavioral specialist.

A significant concern of the reporting officer was that Defendant exhibited a pattern of behavior over several years involving assaults and that with respect to this particular incident, Defendant had little if any remorse or regret.

At sentencing, the court also reviewed a comprehensive behavioral health evaluation prepared by Dr. Denise Feger of Crossroads Counseling, Inc. Dr. Feger was

retained by defense counsel to complete “an objective assessment regarding Mr. Sears’ level of remorse.” Dr. Feger outlined Defendant’s tragic childhood. Considering his childhood as well as the lack of therapeutic intervention and progress in the past, Dr. Feger concluded that Defendant “has not even begun to complete any work regarding emotional improvement as a result of the trauma he was exposed to as a child.” Importantly, she noted that “this has resulted in a young man who is impulsive, aggressive and hostile, shows little investment in others, isn’t trusting of others and tends to lack awareness of how his past has impacted his current circumstances.” She noted that Defendant has little trust in the “system” and will likely make very slow progress. She suggested that “sentencing should be considered with a more significant supervision requirement as this will allow for follow through and requiring such.”

Dr. Feger concluded that there are significant underlying factors that have impacted Defendant’s ability to make appropriate decisions. Defendant struggles to “connect, bond, feel empathy, and express emotion appropriately.” She set forth diagnoses of reactive attachment disorder, conduct disorder, and oppositional defiant disorder. She noted that “considering his placements in group homes and foster homes, an absent relationship with his father, and his mother’s challenges in remaining sober to care for him and his siblings adequately, this is not uncommon to meet criteria for the above-mentioned” diagnoses.

The court also had an opportunity to question Dr. Feger at sentencing. She confirmed her conclusions and observations as set forth in the report. She noted that Defendant did, in fact, feel remorse over the killing of his friend. She noted, unfortunately, that without significant intervention, given Defendant’s history, symptomology and lack of

treatment, Defendant might continue to engage in criminal, aggressive or even assaultive behaviors as a means to survive his environment. Furthermore, and perhaps more unfortunately, she noted that Defendant was not likely to get the necessary therapeutic intervention until he was released from prison.

Admittedly, the court struggled with an appropriate sentence before, during and now after Defendant's sentencing. Unfortunately, it appears that Defendant is paying for the sins of his parents and perhaps the failures of society in not appropriately addressing Defendant's needs while he was younger. Regardless, at this point, Defendant is who he is. The court cannot and, under the circumstances of this case, should not mitigate a sentence because of why Defendant turned out to be an impulsive, aggressive, hostile, untrusting and unaware young man.

The circumstances of the offense were dreadful and appalling. Out of anger and impulse, Defendant pointed a gun at his apparent best friend and pulled the trigger. The court does not find credible Defendant's excuse that it was purely an accident and that he had no idea what was happening. Rather, the court finds credible the statements of the witnesses regarding Defendant's expressions of anger. Simply put, Defendant could not control himself and, because he was being made fun of, he shot and killed his best friend. Defendant is clearly a danger to the public. He has been a danger since he was approximately 10 years old. He was in possession of a stolen firearm, playing with it while watching cartoons and then, with only the slightest of provocation, he shot and killed a young man. Incarceration for a lengthy period of time is not only advisable, but essential.

The impact on the victim, his family members and the community was

remarkable. A young man with a bright future was taken forever from his family and friends. Society lost a potentially valuable contributing member. The public's right and expectation of a safe community was again shattered by inexplicable gun violence.

In specifically addressing Defendant's concerns raised in the post-sentence motion, the court acknowledges Defendant's young age, his tragic upbringing and the lack of therapeutic intervention to help Defendant with his problems. The court also acknowledges that Defendant expressed some remorse to Dr. Feger and, perhaps soon after the shooting occurred, realized the impact of his actions. The court acknowledges that while in jail Defendant conformed his behavior to that as expected, but only after a series of misconducts. The court acknowledges that with supports in place Defendant fared better.

Still, Defendant is extremely dangerous. The court will not take the risk of Defendant being released earlier than 21 years, especially in light of the fact that he may very well not get appropriate treatment while incarcerated or afterwards. Unfortunately, we live in a society that has provided less and less for those in need over the past decades. We live in a society that has provided less mental health care and less therapeutic services for those with similar problems as Defendant. In fact, given Defendant's aggressive and violent tendencies and the lack of medications and/or diminishing treatment resources available for individuals like Defendant who suffer from personality disorders, the only appropriate place for Defendant to be is in a state prison.

ORDER

AND NOW, this ___ day of October 2015, following a hearing and argument and for the reasons set forth in this opinion, the court denies Defendant's Post-Sentence Motion.

By The Court,

Marc F. Lovecchio, Judge

cc: DA (KO)
PD (NS)
Work file
Gary Weber, Esquire (Lycoming Reporter)