

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

| | |
|---------------------------|---------------------------------------|
| COMMONWEALTH | : No. CR-1643-2010 |
| | : |
| vs. | : |
| | : Opinion and Order Dismissing |
| MARKALE A. SOWELL, | : Defendant's PCRA petition |
| Defendant | : |

OPINION AND ORDER

This opinion is written to address Defendant's response to the court's opinion and order providing Defendant with notice of the court's intent to dismiss his Post Conviction Relief Act (PCRA) petition without holding an evidentiary hearing. In Defendant's response, he claims that the court did not address the claim that his sentence was excessive.

The court did not address the merits of Defendant's excessive sentence claim, because the court found that this claim was waived. Although Defendant filed a "MOTION FOR RECONSIDERATION, TO ARREST JUDGMENT, AND TO ACQUIT" on December 1, 2011, Defendant never claimed that his sentence was excessive in this or any other post sentence motion.

A petitioner is not eligible for relief if the allegation of error has been previously litigated or waived. 42 PA. CONS. STAT. ANN. §9543(a)(3). An issue is waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 PA. CONS. STAT. ANN. §9544(b).

Defendant could have raised the claim that his sentence was excessive on the record immediately after the court imposed his sentence or in a timely filed motion for

reconsideration of sentence or a post sentence motion. In fact, he was required to do so in order to preserve such an issue for his direct appeal. *Commonwealth v. Griffin*, 65 A.3d 932, 935 (Pa. Super. 2013), *appeal denied* 76 A.2d 538 (Pa. 2013). He did not do so. Therefore, this issue is waived.

Appellate counsel could not be ineffective for failing to raise the issue during Defendant's direct appeal, because Defendant, while representing himself, never properly preserved the issue. Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

The court understands that Defendant represented himself at the time of sentencing and the filing of post sentence motions. This, however, does not excuse Defendant's waiver of this claim. When Defendant waived his right to counsel, the court warned Defendant that he would be subject to the same requirements as an attorney. If he failed to make timely and appropriate objections or motions, his issues would be waived, despite the fact that he was not learned in the law. At some point the court even advised Defendant that he would not be able to raise an ineffectiveness claim if the error occurred during Defendant's self-representation. The court is not retaliating against Defendant for representing himself. Defendant had a constitutional right to represent himself. The court is treating Defendant no differently than if the issues and arguments were being asserted by counsel.

Even if Defendant's excessive sentence claim had not been waived, it lacks merit.

The court imposed an aggregate sentence of 8 ½ to 17 years, consisting of 5 to

10 years for person not to possess a firearm, 1 to 2 years for simple assault, 1½ to 3 years for fleeing and eluding, and 1 to 2 years for recklessly endangering another person.¹

Defendant specifies three reasons why his sentence was excessive: (1) the simple assault should have been concurrent with the firearms charges because it arose from the incident with a firearm; (2) fleeing and eluding should have been graded as a misdemeanor of the second degree, and not a felony of the third degree, because there was insufficient evidence and circumstances for the crime to be categorized as a high speed chase; and (3) the imposition of consecutive sentences was excessive. None of these claims have any merit.

The court found that a concurrent sentence for simple assault and the firearms charges was not warranted in this case. First, Defendant had an extensive criminal history from New Jersey for assault and weapon offenses. Second, Defendant's prior record score did not reflect the full extent of his prior criminal history. The prior record score is capped at 5. But for that cap, Defendant's true prior record score would be 9. The court is permitted to consider at sentencing previous convictions or dispositions not counted in the calculation of the prior record score. 204 Pa. Code §393.5(d)(Adequacy of Prior Record Score). Third, the firearm and simple assault charges were arguably separate crimes involving separate victims. Due to Defendant's extensive criminal history, he was prohibited from possessing any firearm whatsoever, let alone a loaded one. This prohibition was designed to protect the public by keeping convicted felons from legally obtaining firearms and committing crimes of violence in the future. In the simple assault, Defendant put a specific individual, Tamika

¹The court imposed a sentence of 3 ½ to 7 years for carrying a firearm without a license and a sentence of 1 to 2 years for the other count of recklessly endangering another person, but these sentences were concurrent to the

Moore, in imminent fear of imminent serious bodily injury when he threatened her with the firearm.

Defendant also contends that his conviction for fleeing and eluding should have been graded as a misdemeanor of the second degree. The court cannot agree.

Although fleeing and eluding is generally graded as a misdemeanor of the second degree, it constitutes a felony of the third degree if the driver while fleeing or attempting to elude a police officer endangers a law enforcement officer or member of the general public due to the driver engaging in a high-speed chase. 75 Pa.C.S.A. §3733(a.2).

The Commonwealth presented ample evidence to prove that Defendant led the police on a high speed chase. Both Lieutenant Timothy Miller and Officer Jeffrey Paulhamus of the Williamsport Bureau of Police testified concerning how Defendant fled from them at a high rate of speed on residential streets with a posted speed limit of 35 miles per hour in the Williamsport.

Officer Paulhamus testified that he was going well in excess of 60-65 miles per hour in an effort to catch up to Defendant's vehicle but he was unable to do so. N.T., at 49. When he was following Defendant on Park Avenue, Officer Paulhamus was able to look at his speedometer and he was going 75-85 miles per hour. N.T., at 50. Defendant was going between 75-80 miles per hour and ran numerous red lights and stop signs. N.T., at 51-52. Defendant was going too fast at the intersection of Fourth and Campbell Streets where the road becomes one-way and he was forced to turn either left or right. Defendant veered to the right to go around stopped cars then tried to turn left onto Campbell Street, but he lost

sentences on the other charges.

control of his vehicle, struck a tree and came to rest between the tree and a building. N.T., at 53. Two pedestrians standing at the intersection of Fourth and Campbell Streets had to jump out of the way to avoid being struck by Defendant's vehicle. N.T., at 54.

Lt. Miller provided similar testimony, and specifically noted in his crash report that Defendant was traveling at times in excess of 85 miles per hour in a 35 mile per hour zone. N.T., at 138-139, 171.

Based on this evidence, Defendant's conviction for fleeing and eluding was properly graded as a felony of the third degree.

Finally, Defendant argues that the imposition of consecutive sentences was excessive. Again, the court cannot agree.

"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 more than 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 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 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.A. §9721(b). The court also has the discretion to impose concurrent or consecutive sentences. 42 Pa.C.S.A. §9721(a); *Commonwealth v. Prisk*, 13 A.3d 526, 533 (Pa. Super. 2011).

The court did not abuse its discretion in imposing an aggregate sentence of 8½ years to 17 years of incarceration in a state correctional institution. A lengthy state sentence was necessary in this case for the protection of the public. Defendant had an extensive prior criminal record of assault and weapon offenses from New Jersey. Despite being incarcerated for most of his adult life, Defendant did not change his criminal ways. He continued to possess weapons and engage in assaultive behaviors. He also endangered the police officers, two female pedestrians, and the public in general when he took the police on a high speed chase and ran numerous red lights and stop signs on busy streets in Williamsport at approximately 6:00 p.m. on a Sunday evening. His most recent conviction was on January 27, 2006 for attempting to elude police and possession of a weapon in New Jersey and he was sentenced to five years confinement. Defendant must have received credit for time served or early release from prison, because he committed the current offenses on September 26, 2010. From a review of the pre-sentence investigation, it was obvious that the only time the public was safe from Defendant's criminal tendencies was when he was incarcerated. Given the fact that Defendant had previously received sentences of 7 years of confinement, 3 years of confinement, and multiple sentences of 5 years of confinement in New Jersey, it was apparent to the court that a longer sentence was necessary to protect the public and to rehabilitate Defendant.

ORDER

AND NOW, this _____ day of September 2015, after review of Defendant's response to the court's order giving notice of its intent to dismiss Defendant's Post Conviction Relief Act (PCRA) petition, the court dismisses Defendant's PCRA petition.

Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirements set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Defendant may lose forever his right to raise these issues.

The Clerk of Courts shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Markale Sowell, KH 2090 (certified mail)
SCI Smithfield, 1120 Pike Street, PO Box 999, Huntingdon, PA 16652
Work file
Suzanne Fedele, Prothonotary/Clerk of Courts