IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**:**	**No's. CR-2134-2013; CR-2148-2013**
	:	**CR-45-2014; CR-547-2015**
DAWN BALL,	**:**	
Appellee	**:**	**1925 (a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925 (a) OF THE PENNSYLVANIA RULES OF APPELLATE PROCEDURE

This Opinion in written in support of this court's judgment of sentence dated December 1, 2015. The relevant facts follow.

Under Information 2134-2013, Appellee was charged with one count of aggravated harassment by a prisoner arising out of an incident on November 16, 2013. Appellee was in a videoconferencing room in the State Correctional Institution at Muncy ("SCI-Muncy") being arraigned by Magisterial District Judge (MDJ) Kemp. Trooper Matthew Sweet arrived with a warrant for Appellee's arrest in another case. Appellee wanted to leave the hearing and return to her cell. When she was told she was not free to leave, she became uncooperative and combative. She screamed profanities and she spat on the left side of Correction Officer Sergeant James McElroy's face.

Under Information 2148-2013, Appellee was charged with two counts of aggravated harassment by a prisoner, two counts of aggravated assault, and two counts of simple assault arising out of an incident on September 15, 2012. Corrections Officers were conducting an inspection of Appellee's cell in the Restrictive Housing Unit (RHU). Appellee allegedly became "non-compliant," so corrections officers placed Appellee against

a wall outside her cell. At that point, Appellee began spitting and kicking at the corrections officers. Appellee spat at Corrections Officer Fogelman, and her saliva hit his right arm. She spat at Corrections Officer Wright and her saliva hit the pocket of his uniform on the right side of his chest. She also kicked Corrections Officers Fogelman and Ficks in their legs. Neither the affidavit of probable cause nor the Information state what injuries, if any, were suffered by Officers Fogelman and Ficks. Instead, it appears that these charges were filed based on the theory that Appellee attempted to cause injury to these corrections officers.

Under Information 45-2014, Appellee was charged with aggravated harassment by a prisoner because she spat at Corrections Officer Johnson twice during a transport on November 18, 2013. Her saliva struck him on the right side of his face and on his right forearm.

Under Information 547-2015, Appellee was charged with aggravated harassment by a prisoner arising out of an incident on December 16, 2014. Corrections officers were searching and removing items from Appellee's cell in the RHU. Appellee was escorted back to her cell before the corrections officers had finished their search, so Appellee was held outside her cell door. As Corrections Officer Beckley exited Appellee's cell, Appellee spat at him, striking him on the left side of his face.

On August 18, 2015, following a hearing, the court accepted as knowing intelligent and voluntary Appellee's no contest pleas to the following charges:

- Under Information CR-2134-2013 - count 1, aggravated harassment by a prisoner, a felony of the third degree;

- Under Information CR-2148-2013 - count 1, aggravated harassment by a prisoner, a felony of the third degree; count 2, aggravated harassment by a prisoner, a felony of the third degree;[1] and count 4, aggravated assault, a felony of the second degree;

- Under Information CR-45-2014 - count 1, aggravated harassment by a prisoner, a felony of the third degree; and

- Under CR-547-2015 - count 1, aggravated harassment by a prisoner, a felony of the third degree.

The court directed that a Pre-Sentence Investigation (PSI) report be prepared in connection with sentencing. The court also granted Appellee's request to appoint a psychiatrist to conduct an independent evaluation of Appellee in preparation for sentencing.

On December 1, 2015, following an extensive sentencing hearing, the court sentenced Appellee to an aggregate term of five years of probation under the supervision of the Pennsylvania Board of Probation and Parole, consisting of: two years of probation with respect to count 1, aggravated harassment by a prisoner under information 2134-2013; one year of probation with respect to count 1, aggravated harassment by a prisoner under information 2148-2013;[2] one year of probation with respect to count 1, aggravated harassment by a prisoner under information 45-2014; and one year of probation with respect to count 1 aggravated harassment by a prison under information 547-2015, to be served consecutive to each other. The court also noted in its sentencing order that Appellee was required to comply with special conditions of supervision that included, but were not limited to, being assessed by the Northampton County Mental Health Adult Services and

[1] The Information and the plea order list the grading of this offense as a felony of the second degree, but the only grade for this offense is a felony of the third degree. 18 PA. CONS. STAT. ANN. §2703.1.
[2] The court's sentence with respect to counts 2 and 4 under information 2148-2013 was guilt without further punishment.

complying with all recommendations with respect to that assessment; undergoing intensive case management with Northampton Services; and arranging and completing group and individual counseling through Valley Youth House or an appropriate counselor.

The Commonwealth filed a motion to reconsider, which the court granted in part on December 15, 2015. The court amended its sentencing order and directed that Appellee be placed on a GPS unit for a period of six months. The court noted that Appellee need not be restricted to her home. Instead, the purpose of the GPS unit was to ensure that Appellee complied with the other conditions of her supervision, especially the mandated assessment and treatment.

The Commonwealth filed a notice of appeal on December 29, 2015. On January 4, 2016, the Commonwealth filed its concise statement of errors complained of on appeal, in which it asserted the following issues: (1) the trial court abused its discretion by imposing a sentence below the mitigated range of the sentencing guidelines, which was unreasonably lenient under all of the circumstances; (2) the trial court abused its discretion by imposing a sentence of probation despite the fact that the factors under 42 Pa. C.S. § 9722 did not weigh in favor of an order of probation; and (3) the trial court abused its discretion by not imposing a sentence of total confinement, when the same was necessary pursuant to 42 Pa. C.S. § 9725.

Perhaps the most difficult duty of a trial judge is to impose a sentence on another human being. "In no other judicial function is the judge more alone; no other act of his carries greater potentialities for good or evil than the determination of how society will

treat its transgressors." Kaufman, *Sentencing: The Judge's Problem*, Atlantic Monthly, January 1960.

Pennsylvania's procedure of indeterminate sentencing necessitates the granting of broad discretion to the trial judge, who must determine, among the sentencing alternatives and the range of permissible penalties, the proper sentence to be imposed. ***Commonwealth v. Martin***, 351 A.2d 650, 656 (Pa. 1976).

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in a judgment. Rather, the [appellant] must establish, by reference to the record, that the sentencing 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.

Commonwealth v. Hyland, 875 A.2d 1175, 1184 (Pa. Super. 2005)(quoting ***Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa. Super. 1999)(en banc)(internal quotation marks and citations omitted)), appeal denied, 586 Pa. 723, 890 A.2d 1057 (2005).

Our Supreme Court has specifically explained that the "concept of unreasonableness…is inherently a circumstance-dependent concept that is flexible and understanding and lacking precise definition." ***Commonwealth v. Walls***, 592 Pa. 557, 926 A.2d 957, 963 (2007). "Moreover, even though the unreasonableness inquiry lacks precise boundaries, …rejection of a sentencing court's imposition of sentence on unreasonableness grounds [will] occur infrequently, whether the sentence is above or below the guideline ranges, especially when the unreasonableness inquiry is conducted using the proper standard of review." 926 A.2d at 964.

The Commonwealth first contends that the court abused its discretion by imposing a sentence below the mitigated range of the sentencing guidelines, which was unreasonably lenient under all of the circumstances. The court cannot agree.

Contrary to the Commonwealth who is only considering the grading of the offense and retribution or punishment, the court considered **all** of the circumstances in this case, which also included the rehabilitative needs of Appellee and her mental health issues.

In arriving at a sentence, the court is guided by certain factors that it must consider and principles that it must follow. A court is required to consider the particular circumstances of the offense and the character of the defendant. ***Commonwealth v. Griffin***, 804 A.2d 1, 10 (Pa. Super. 2002), appeal denied, 868 A.2d 1198 (Pa. 2005), cert. denied, 545 U.S. 1148, 125 S. Ct. 2984 (2005). "In particular, the court should refer to the defendant's prior criminal record, [her] age, personal characteristics and [her] potential for rehabilitation." ***Id***.

The court must consider the nature and circumstances of the offense and the history and characteristics of the defendant, and the observations of the defendant including any presentence investigation and the guidelines promulgated by the Commission. 42 PA. CONS. STAT. ANN. § 9781 (d). Furthermore, in selecting from sentencing alternatives, the 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. CONS. STAT. ANN. § 9721 (b).

Clearly, the court deviated from the guidelines in this matter. The guidelines on each case called for a period of confinement. In determining whether a sentence outside the sentencing guidelines is manifestly unreasonable, the appellate court must consider the factors set forth in 42 PA. CONS. STAT. ANN. § 9781.

There is little if any doubt that the Commonwealth vehemently disagrees with the exercise of this court's discretion in imposing a probationary sentence. Nonetheless, the Commonwealth's disagreement should not render the court's sentence unreasonable. The court painstakingly reviewed and considered all of the relevant sentencing factors and imposed a sentence in its judgment which reflected the gravity of the offense to the extent it related to the impact on the victims and on the community, addressed the rehabilitative needs of Appellee and, most importantly, was consistent with the protection of the public. All of the aforesaid factors were considered and discussed at length during Appellee's sentencing hearing.

Appellee's sentence in this case was not the product of a limited focus on one or even two of the factors required to be considered. It was not a perfunctory exercise based on bias or sympathy. Moreover, and contrary to what is claimed by the Commonwealth, it was far from a sentence that failed to reflect the gravity of the offense or created a greater risk of harm to the public. Indeed, the sentence was structured to best protect the public, as well as the correctional officers at SCI-Muncy.

The Commonwealth's position from the inception of this case was shortsighted. It failed to recognize the reality of the circumstances surrounding the case and

Appellee. The Commonwealth's position seemed to be based more on a perception and an inexplicable conclusion that the more time that Appellee is placed in solitary confinement, the more she will conform her behavior to societal norms. The Commonwealth's theory of sentencing, however, presupposed that Appellee was a normal, rational-thinking human being who would change her behavior in the face of escalating penal consequences, while she clearly was not.

Appellee has been evaluated by numerous professionals over many years including psychiatrists at Danville State Hospital, Norristown State Hospital, Torrance State Hospital and SCI – Muncy.

The evidence adduced both prior to and at the sentencing hearing established beyond all doubt that Appellee suffers from Post-Traumatic Stress Disorder (PTSD), Obsessive Compulsive Disorder (OCD), depressive disorder not otherwise specified, and anti-social disorder with narcissistic and borderline traits.

The evidence was also crystal clear that disorders such as those suffered by Appellee are very, very difficult to treat. In the prison setting, and especially in the restrictive housing unit, treatment is essentially non-existent. Moreover, the disorders and the systems of such disorders are exacerbated in such a setting.

Dr. Terri Calvert provided to the court a psychiatric evaluation of Appellee and testified at her sentencing hearing. Dr. Calvert has extensive psychiatric training and experience involving inmates in correctional facilities. Significantly, Dr. Calvert diagnosed Appellee primarily with PTSD, OCD and depression. Dr. Calvert noted that Appellee has

been housed "for more than eight years in the restrictive housing unit at SCI – Muncy." Dr. Calvert explained in great detail why Appellee's behavior while in the restrictive housing unit was aggressive. She concluded within a reasonable degree of psychiatric certainty that Appellee's behaviors were the product and effects of the trauma and abuse experienced by Appellee during her lifetime "combined with increased depression after the death of her grandfather in 2013 and the deprivation filled and sometimes psychologically abusive environment of the restrictive housing unit." Dr. Calvert noted that there has been much research regarding solitary confinement. The research shows that solitary confinement is both ineffective as a rehabilitation technique and indelibly harmful to the mental health of those detained. She opined that continued incarceration would serve only to maintain or escalate the confrontations with the officers and exacerbate Appellee's symptoms, thus "contributing to her aggressive behaviors." Dr. Calvert noted that this would be deleterious not only for Appellee but for the correctional officers and staff. Dr. Calvert concluded that Appellee does not pose a significant risk of danger to others in the community "as her assaultive behavior has occurred almost entirely in the solitary confinement environment."

The court found Dr. Calvert's conclusions to be credible and determinative. Dr. Calvert previously worked at SCI-Muncy as its treating psychiatrist. She presently contracts with numerous county correctional facilities.

The only other doctor employed by the Department of Corrections who provided information regarding this case is Dr. Frank Daly, Jr. He conducted a psychiatric evaluation of the Appellee. Of significant note, he concluded that Appellee's prominent

diagnosis is Anti-Social Personality Disorder. He explained that Appellee "seems to know the rules, but consistently breaks the rules." He further noted that although Appellee is competent, she "repeatedly acts in a manner that affects her terribly." He concluded that this is pathologic.

He advised that there was no mechanism to correct Appellee's problems "within the auspices of the prison." He concluded that the restrictive housing unit has not improved Appellee's behaviors but rather "made them worse." The antagonism between Appellee and the correctional officers was described as terrible and "getting worse."

Dr. Daly noted that Appellee would do better in a therapeutic setting. He noted that "everything has been tried at Muncy Prison," yet, the "course has been quite rocky."

Dr. Daly's conclusions are echoed by much of the relevant literature regarding the effects of solitary confinement on individuals who suffer from PTSD, OCD and/or Anti-Social Personality Disorder. The court reviewed reports from the National Alliance on Mental Illness, the US Department of Justice, the American Association of Forensic Psychiatrists, as well as numerous scholarly articles on the subject which were all referenced at the sentencing hearing.

It is without question that solitary confinement has been found to have a profound impact on the health and wellbeing of inmates, particularly for those with pre-existing health disorders. In such a confined and restricted setting, it may be nearly impossible to provide appropriate or effective therapy. Moreover, continuing isolation in a

restrictive housing unit presents what has been described as a much greater danger of post isolation or post release behavior discontrol and aggression. It may appear a sound strategy to punish an individual who consistently breaks the rules; however, with respect to those suffering from Anti-Social Personality Disorder and/or PTSD, it has been proven not to be an effective way to correct or conform behavior; in fact, it makes it worse.

These conclusions have been borne out during Appellee's incarceration at SCI-Muncy. In the face of escalating sanctions over several years, her behaviors have not improved. Rather, they have gotten only worse. She has received hundreds of write-ups and years of restrictive housing unit disciplinary time. Indeed, as long as Appellee remained incarcerated at SCI – Muncy, she would remain in the restrictive housing unit serving her disciplinary lockup time as she has accrued disciplinary lockup time through the year 2040.

As well, when Appellee was previously incarcerated, her behavior was extremely dysfunctional. She served the vast majority, if not her entire sentence, in the restrictive housing unit.

When she was released from SCI-Muncy to a far more supportive environment with appropriate treatment, she was doing well. In fact, one psychotherapist specifically noted in a letter to Appellee's then sentencing judge that Appellee was compliant in treatment and cooperating with therapy and her doctor. The psychotherapist specifically noted that Ms. Ball's symptoms "will exacerbate if she is made to serve time in jail."

In evaluating all of the relevant circumstances, the court was greatly concerned that continued incarceration of Appellee, which would continue to be in the

restrictive housing environment, would jeopardize the safety and well-being of all prison staff that come in contact with her. The PTSD or Anti-Social Personality prism through which Appellee views her incarceration and those in authority who control virtually all aspects of her daily living, causes her to believe that she is continually unfairly victimized and to react spontaneously and aggressively. Moreover, the court was concerned that the longer that Appellee remained in this setting, being isolated for potentially decades without appropriate treatment and without support, the greater danger she will be to the public. As the literature noted and as the court noted during its sentencing, while on its face punishing one who continued to misbehave may appear to be effective, it is actually counter-effective in circumstances such as these. This is not a situation, as the Commonwealth seems to suggest, that Appellee's misbehaviors can be punished "out of her."

The Commonwealth appeared somewhat disgruntled by the fact that the court sentenced Appellee to probation in this case because, in a recent case preceding these, the court sentenced Appellee to a period of incarceration. What differed between then and now is Dr. Calvert's intervention and her diagnoses. Clearly, Appellee was misdiagnosed as having only an Anti-Social Personality disorder. As Dr. Calvert noted and as is confirmed through the literature, many survivors of domestic violence or child abuse have mistakenly been diagnosed with a personality disorder because they developed persistent and wide-ranging post traumatic symptoms which were misread as part of their basic personality.

The court's decision to place Appellee on probation was by no means an easy decision. The court evaluated and reevaluated the relevant factors many, many times. The

court reviewed Appellee's records from SCI-Muncy, the mental health evaluations and reports, the PSI report, and all of the letters of recommendation. The court also read countless articles submitted to it by Appellee, reviewed transcripts of prior hearings both in this court and other jurisdictions, and had countless opportunities to interact with Appellee. Any suggestion that the court did not consider the relevant sentencing factors is absurd as is any suggestion that this court did not thoroughly consider the purposes of sentencing.

Appellee is a 45 year old woman who suffers from significant mental health issues. The evidence is clear that when she is in a community structured program, she gets the treatment that she needs and has the appropriate structure to conform her behaviors without being a significant danger to the public. The evidence was also clear that when Appellee is incarcerated in a State Correctional facility, not only do her behaviors escalate, but her mental health condition also significantly deteriorates.

In the end, it came down to one question that the court had to consider. If the court continued to incarcerate Appellee knowing that she would remain in the restrictive housing unit at SCI – Muncy, would society be better protected? The answer, in this court's judgment, was no as someday Appellee would be released. On the day of her release, Appellee would have had no reentry programming, the court would have had no control over her therapy or treatment and Appellee would have had absolutely no tools to address societal pressures. Appellee would never be paroled, but she would be released following the expiration of her maximum sentence. Accordingly, the only way to protect the community and to rehabilitate Appellee would be to place her on probation as the court did.

In the past year, the Pennsylvania Department of Corrections (DOC) as a result of a Department of Justice investigation into the DOC's treatment of inmates with mental illnesses made significant changes in the treatment of said inmates including but not limited to developing new specialized mental health units in lieu of restrictive housing. The DOC acknowledged that improvements needed to be made. As State Representative Thomas Caltagirone of Berks County, a member of the Judiciary Committee, noted, "When people with mental illnesses are put in prisons where their needs aren't met, 'you're asking them to act out, and they will, and they do.'" *Report Criticizes Treatment of Mentally Ill Pa. Prisoners*, Pittsburgh Post-Gazette, Post-Gazette.com, February 24, 2014.

The failure of Appellee's decade of incarceration bespeaks a different sentencing approach. People without mental illnesses abstain from criminal misconduct because they have a lot to lose if they get caught. The reasoning of a mentally ill person is likely quite different. To such a person, momentary gratification is far more reliable than future detriments. An individual like Appellee is far less likely to exercise restraint than a "normal adult."

Simply to survive in her perceived environment, Appellee developed characteristics selected for survival such as impulsiveness, cruelty, coldness, indifference and aggression. Nothing suggests that Appellee will be rehabilitated or specifically deterred by further incarceration.

The DOC has firmly indicated that every day Appellee spends incarcerated at SCI – Muncy will be in the restrictive housing unit. They will not provide any resources to

her for education or job training. The continued experience of incarceration will give Appellee nothing more than further opportunities to develop anti-social behavior patterns and attitudes and sharpen whatever criminal skills she has so far acquired.

To follow the guidelines as suggested by the Commonwealth would mean sending Appellee to prison for possibly over 20 years at which point she would emerge in her 60's with no hope of a productive or law abiding life.

The Commonwealth's assertion that the sentence is manifestly unreasonable is perplexing for many reasons. In essence, the Commonwealth asserts that the court's sentence obviously was beyond the limits of acceptability and not guided or based on good sense. A reading of the transcript clearly reveals how the court arrived at its decision through a carful weighing of the relevant factors. The court formed its judgment in a well thought out and logical manner.

As well, the Commonwealth's position is blatantly contrary to the position it has previously taken in numerous other cases decided by the trial court. In numerous other instances when the court has imposed severe sanctions well in excess of the guidelines, the Commonwealth has vigorously argued the reasonableness of said sentences. This partisanship is disturbing and reflects a lack of judgment on the Commonwealth's part. See for example, ***Commonwealth v. Sears***, Lycoming County No. 1293-13; Lycoming County No. 293-14 (21 to 50 years for third degree murder and receiving stolen property); ***Commonwealth v. Segraves***, Lycoming County No. 548-2009 (71 to 142 years for rape of a child); ***Commonwealth v. Taylor***, Lycoming County No's. 125-2014 and 892-2014 (40

months to 10 years for two retail thefts); ***Commonwealth v. Webster***, Lycoming County No. 2055-09 (7 to 14 years for conspiracy to deliver controlled substances); and ***Commonwealth v. Trapp***, Lycoming County No. 866-11 (32 ½ to 65 years for an attempted homicide where the Commonwealth offered a negotiated plea for a decade shorter sentence).

Finally, the Commonwealth's position represents an unyielding and intractable adherence to the outdated and failed philosophy of retributive and punitive criminal justice with respect to all criminals. This theory of justice is based on the thinking that those who commit wrongs morally deserve to suffer a proportionate punishment and that if proportionately punished, the individual will respond accordingly in the future by becoming law abiding. Unfortunately, this theory has proven to be an abject failure with respect to the mentally ill. The mentally ill are not rational thinking individuals and by definition are not capable of rational thought. Furthermore, said individuals cannot by definition be found equally morally culpable for their wrongdoings.

The court approached the grave responsibility of sentencing Appellee with all the thoughtfulness, insight, nuance and knowledge that it could muster. The court looked closely at all of the relevant facts and circumstances. A searching inquiry was made into Appellee's history and circumstances, the offenses for which she was convicted, and all of the other relevant sentencing factors in order that this court could appreciate the conditions which led to her criminal behavior.

The Commonwealth also contends the trial court abused its discretion by imposing a sentence of probation, despite the fact that the factors under 42 Pa.C.S. §9722 did

not weigh in favor of an order of probation. The court cannot agree.

Section 9722 states:

> The following grounds, **while not controlling the discretion of the court**, shall be accorded weight in favor of an order of probation:
>
> (1) The criminal conduct of the defendant neither caused nor threatened serious harm.
>
> (2) The defendant did not contemplate that his conduct would cause or threaten serious harm.
>
> (3) The defendant acted under strong provocation.
>
> (4) There were substantial grounds tending to excuse or justify the criminal conduct of the defendant, though failing to establish a defense.
>
> (5) The victim of the criminal conduct of the defendant induced or facilitated its commission.
>
> (6) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he has sustained.
>
> (7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime.
>
> (8) The criminal conduct of the defendant was the result of circumstances unlikely to recur.
>
> (9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime.
>
> (10) The defendant is particularly likely to respond affirmatively to probationary treatment.
>
> (11) The confinement of the defendant would entail excessive hardship to him or his dependents.
>
> (12) Such other grounds as indicated the desirability of probation.

42 PA. CONS. STAT. ANN. § 9722 (emphasis added).

The Commonwealth seems to be arguing that if all or most of these factors do not weigh in favor of probation, it is an abuse of discretion for the court to impose a sentence of probation. Such is clearly not the case. By its express terms, the grounds listed in the statute do not control the discretion of the court. In other words, the court would neither be bound to impose probation if the listed factors tended to weigh in favor of probation nor precluded from imposing probation if all or most of the listed factors did not weigh in favor

of probation. While the guidelines and statutory factors such as the ones listed in section 9722 are helpful, they are starting points and considerations; they are not the "be all and end all" that the Commonwealth makes them out to be. Despite being imminently competent, the legislature cannot possibly list every factor that could weigh in favor of probation or every circumstance that would "trump" the grounds listed in section 9722. The legislature clearly recognized such when it included both the language that the listed grounds would not control the discretion of the court and the catch-all factor in paragraph 12.

Contrary to the Commonwealth's argument, the court also finds that several of the factors or grounds listed in section 9722 weigh in favor of probation in this case. Although aggravated harassment by a prisoner is graded as a felony of the second degree, Appellee's conduct did not cause or threaten serious harm in this case. The court is not by any means condoning Appellee's actions. The bottom line, however, is that the aggravated assault charges were based on an attempt to cause injury to an enumerated official. There is nothing in the record to show that any of the corrections officers were actually injured in this case. Appellee also doesn't have any communicable diseases that would be transmitted to the corrections officers through her saliva. Instead, she has mental illnesses that need treatment that cannot be effectively provided to her in the RHU setting.

Appellee also did not contemplate that her conduct would cause or threaten serious harm. Appellee suffers from mental illnesses. She doesn't contemplate her actions or their consequences. She gets frustrated and acts out, especially in situations where she has no notice or control over her situation or where she is being physically touched by a corrections officer, such as during cell inspections and transportation to hearings. For

example, in a previous case (CP-41-CR-979-2010), Appellee was not aware that she was coming to court for a jury selection until the guards appeared at her cell. She did not want to leave her cell. Not surprisingly, she was uncooperative. She was brought to the courthouse handcuffed in a wheelchair with a spit hood over her head. By the time she got to the courtroom, she was so worked up that she could not sit up straight in the wheelchair. Instead, she was bent over, drooling, and hysterically saying non-stop "leave me alone." This conduct continued for approximately thirty (30) minutes!

The court also believes that Appellee's mental illness is a substantial ground tending to excuse or justify her criminal conduct, though failing to establish a defense. Although Appellee is not legally insane, it is undisputed that she suffers from several mental health disorders. The Commonwealth wants the court to punish Appellee as if she does not suffer from any mental illness. Modern sentencing, however, is individualized, not one size fits all. See ***United States v. Grayson***, 438 U.S. 41, 45-46 (1978)(explaining the history of how the fixed system of punishment in the early days of the Republic gave way to the current system of an individualized, flexible approach to sentencing, with discretion vested in the sentencing court); ***Commonwealth v. Walls***, 592 Pa. 557, 926 A.2d 957, 961-62 (2007)("the sentencing court is 'in the best position to determine the proper penalty for a particular offense based upon the individual circumstances before it.'"). The facts and circumstances in this case are unique.

The court also believes that Appellee is particularly likely to respond affirmatively to probationary treatment. This belief is supported by Dr. Calvert's expert opinion. Furthermore, both this court and the judge in Northampton County in prior cases

tried the incarceration approach advocated by the Commonwealth. It was not successful by any means. Appellee's behaviors and mental health deteriorated because she not only maxed out her sentences but she served all of those years in the RHU. As found by the studies referenced during the sentencing hearing, prolonged confinement in such restrictive settings exacerbates an individual's mental illness.

Along this same vein, confinement would entail an excessive hardship on Appellee. The reality of the situation, if the court accepted the Commonwealth's approach and sentenced Appellee to a period of incarceration either within the standard or mitigated guideline ranges, is that Appellee would serve every day of the sentence imposed in the RHU.

The standard range for most of these offenses was 21 to 27 months and the mitigated range was 15 to 21 months. The minimum sentence cannot exceed one-half of the maximum sentence imposed. 42 PA. CONS. STAT. ANN. § 9756 (b). Therefore, even if the court imposed the lowest sentence in the mitigated range, the sentence would be 15 to 30 months of incarceration in a state correctional institution.

Given Appellee's mental health disorders and incarceration history, Appellee would end up spending another 30 months (or 2 ½ years) in the RHU. That alone would be a hardship on Appellee. The hardship, however, would not end there. The Commonwealth is as doggedly persistent in its prosecution of Appellee for these types of offenses as it is insistent that she deserves incarceration in this case. It is utterly unrealistic to think that Appellee could endure another 2 ½ years of confinement in the RHU without being involved in another incident with the corrections officers. Instead, the cycle would continue, and

Appellee would end up serving a life sentence on the installment plan because she has mental health disorders that are exacerbated by the RHU.

The Commonwealth also asserts that the trial court erred by not imposing a sentence of total confinement when such was necessary pursuant to 42 Pa.C.S. § 9725. Again, the court cannot agree.

Section 9725 states:

> The court shall impose a sentence of total confinement if, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that the total confinement of the defendant is necessary because:
> (1) there is an undue risk that during a period of probation or partial confinement the defendant will commit another crime;
> (2) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
> (3) a lesser sentence will depreciate the seriousness of the crime of the defendant.

42 PA. CONS. STAT. ANN. § 9725.

The court considered the nature and circumstances of the crime and the history, character and condition of the defendant when it imposed the probationary sentence. The court was not of the opinion that there was an undue risk that the defendant would commit another crime during a period of probation or partial confinement. Instead, the court was of the opinion that, under the unique facts and circumstances of this case, continued incarceration in the RHU at SCI-Muncy would result in the undue risk that Appellee would commit another crime. The court understands that in the typical case a defendant who is incarcerated is generally unable to commit a new crime. In this case, however, Appellee's crimes arise out of her interactions with corrections officers as she views them through the prism of her mental illness. As noted by Dr. Calvert and Dr. Daly, there was less likelihood

that Appellee would commit a new crime if she was given probation and she received treatment than if she remained incarcerated in the RHU at SCI-Muncy.

The court also was not of the opinion that Appellee was in need of correctional treatment that could be provided most effectively by her commitment to an institution. Incarcerating Appellee has not helped anything; it has been an abject failure. It has resulted in Appellee's condition deteriorating, her behavior worsening, and additional criminal charges arising out of her interactions with the guards being filed against her.

The court found Dr. Calvert's testimony both credible and compelling. Given Appellee's years of confinement in the RHU and its exacerbation of her mental health issues, the last thing Appellee needed was further confinement. Rather, the cycle needed to be broken. The opinions of the mental health experts, which the court found to be credible, were that Appellee's behaviors were much more likely to improve if she was not confined, but was released from incarceration with supervision and mental health treatment.

Finally, the court disagreed with the Commonwealth's assessment that a lesser sentence would depreciate the seriousness of Appellee's crimes and would encourage others to commit crimes against the guards. The court was concerned with the appropriate sentence for this particular defendant and how to protect the corrections officers from her. The sentence imposed was the one that best addressed Appellee's rehabilitative needs and the protection of the corrections officers.

The Commonwealth was more concerned with the message that the court's sentence was sending to other inmates without mental health problems than the history,

character and condition of Appellee and the nature and circumstances of these particular crimes. This concern was misplaced. If an incident happened with a typical inmate without mental health issues, the sentencing factors would not be the same; therefore, the sentence would not be the same. The typical inmate at SCI-Muncy would not have the same mitigating circumstances as Appellee. Escalating consequences and penalties generally have the desired deterrent effect on a normal, rational thinking individual, whereas several mental health experts have opined that they do not have the desired effect on Appellee due to her mental health disorders.

Since the court was not of the opinion that total confinement was necessary, but rather that total confinement in this case would be counterproductive, the court did not sentence Appellee in violation or disregard of section 9722.

For the foregoing reasons, the court does not believe that its probationary sentence was an abuse of discretion under the unique facts and circumstances of this case.

Date: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Superior Court (original and 1)
Jerry Lynch, Esquire
Martin Wade, Esquire (ADA)
Work File

Gary Weber, Lycoming Reporter