

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-598-2015  
vs. :  
 :  
MESSIAH BURRELL, :  
Appellant : Rule 1925 (b) Opinion

**OPINION IN SUPPORT OF ORDER IN  
COMPLIANCE WITH RULE 1925 (b) OF  
THE RULES OF APPELLATE PROCEDURE**

Appellant Messiah Burrell (herein after “Burrell”) appeals from the judgment of sentence dated June 8, 2016. The court sentenced Burrell to serve a period of state incarceration the minimum of which was 15 years and the maximum of which was 30 years.

By way of background, on February 13, 2015, a criminal complaint was filed against Burrell charging him with delivery of a controlled substance, possession with intent to deliver a controlled substance, possession of a controlled substance and possession of drug paraphernalia. Burrell was taken into custody pursuant to a warrant and incarcerated.

On October 6, 2015, defense counsel filed a petition for nominal bail pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure. A hearing was held on November 4, 2015, and following the hearing the court granted Burrell’s motion for release. The court advised Burrell in open court and in a written order that Burrell’s pretrial was scheduled for December 8, 2015 with the call of the list scheduled for January 5, 2016.

Burrell appeared as directed for jury selection in January of 2016. Burrell’s jury trial was scheduled for January 28, 2016.

Burrell failed to appear because he was in a hospital in Philadelphia to address complaints of chest pains. Accordingly, the jury was discharged and Burrell was directed to

next appear for call of the list on February 16, 2016.

Burrell appeared for the call of the list and a jury was selected. In Burrell's presence, the court advised the jury and Burrell that trial would proceed on March 7, 2016 in Courtroom No. 4 of the Lycoming County Courthouse.

Burrell failed to appear on March 7, 2016 for his jury trial. The court issued a bench warrant for Burrell's arrest and directed the parties to proceed to the jury trial in his absence.

Following the jury trial on March 7, 2016, the jury returned a verdict, finding Burrell guilty on all counts. The court scheduled Burrell's sentencing for June 8, 2016. A copy of the court's March 7, 2016 order entering the jury's verdict and scheduling sentencing was sent to Burrell at his address of record, but it was returned with a notation from the Post Office as "unable to forward."

Burrell failed to appear for sentencing on June 8, 2016. The court sentenced Burrell to 15 to 30 years' incarceration and gave Burrell credit for the time he served in jail before being released on nominal bail.

Defense counsel filed post-sentence motions on Burrell's behalf on June 17, 2016 in the nature of motion to vacate the verdict, a motion for a new trial, a motion to vacate the sentence for disproportionality in violation of Defendant's Eighth Amendment rights, and a motion for reconsideration of sentence.

Argument on Burrell's post-sentence motion was held before the court on August 17, 2016. Prior to said argument, however, Burrell was arrested in Medford, Oregon and extradited to Lycoming County on August 5, 2016. As a result, the bench warrant

previously issued was vacated.

On appeal, Burrell first argues that the Commonwealth failed to prove by a preponderance of the evidence that Burrell's absence at trial was without good cause. Accordingly, Burrell argues that his trial was held in violation of his due process rights under Article 1, § 9 of the Pennsylvania Constitution and the Sixth Amendment of the United States Constitution. In conjunction with this argument, Burrell also argues that the Commonwealth violated Pennsylvania Rule of Procedure 602 when it failed to prove by a preponderance of the evidence that Burrell's absence at trial was without good cause. Finally, and in conjunction with the first two issues raised by Burrell on appeal, he argues that since the Commonwealth failed to show that Burrell's absence at trial was without good cause, the court erred when it denied Burrell's post-sentence motion on the grounds that he was a fugitive at the time the motion was filed.

This court will deal with all three issues together.

Burrell is correct that the Commonwealth bears the burden of proving that his absence was without cause. Pursuant to Rule to 602, a defendant's absence without cause at the time scheduled for the start of trial shall not preclude proceeding with the trial, including the return of the verdict and the imposition of sentence. Pa. R. Crim. P. 602. Burrell is entirely incorrect, however, in his assertion that the Commonwealth could only meet this burden by presenting testimony that it engaged in an exhaustive search and discovered that Burrell was not unavailable because of causes outside of Burrell's control.

It is crystal clear from all of the cases that the Commonwealth meets that burden and a defendant's presence is deemed to be waived when the defendant is given

notice of his trial date and fails to appear. *Commonwealth v. Wilson*, 551 Pa. 593, 712 A.2d 735 (1998); *Commonwealth v. Sullens*, 533 Pa. 99, 619 A.2d 1349 (1992). In fact, “a defendant owes the court an affirmative duty to advise it if he or she will be absent.” *Wilson*, 712 A.2d at 738.

In this particular case, Burrell was present for his jury selection. During jury selection as well as immediately thereafter, the court advised Burrell and defense counsel that the jury trial would be held on March 7, 2016. Despite said notice, Burrell failed to appear. As is evidenced by his conduct after the first jury selection, Burrell was aware that he needed to contact the court and counsel to advise if he would be absent for reasons beyond his control. Burrell has never offered any valid excuse or justification for his failure to appear for trial. Moreover, and in violation of his bail conditions, Burrell left Pennsylvania and traveled at some point to Oregon where he was apprehended. Clearly, Burrell’s flight to Oregon is further circumstantial evidence of Burrell’s fugitive status. Based on the record as a whole, the Commonwealth proved Burrell’s “absence without cause” by more than a preponderance of the evidence.

Burrell argues that because he was returned to Lycoming County while his post-sentence motions were pending, this court should consider the motions and not deny them on the basis that Burrell was a fugitive from justice.

During the argument in this matter, Burrell relied on *Commonwealth v. Doty*, 997 A.2d 1184 (Pa. Super. 2010). Contrary to Burrell’s assertions, however, and as noted by this court in its prior opinion, the decision in *Doty* as well as one of the cases it relies upon, *Commonwealth v. Deemer*, 550 Pa. 290, 705 A.2d 827 (1997), support the Commonwealth’s

position.

In *Deemer* the defendant was present for his trial but failed to return to court when the jury announced its verdict. He also failed to appear for a post-verdict presentence investigation appointment. He was sentenced in absentia. His counsel filed post-sentence motions, which were dismissed due to his fugitive status. Once Deemer was apprehended, he filed a pro se motion to reinstate his post-verdict motions nunc pro tunc.

Both the trial court and the Superior Court, following the then Supreme Court precedent, denied defendant's motion to reinstate. The courts held that a defendant's voluntary escape acted as a per se forfeiture of his right of appeal where the defendant was a fugitive at any time after post-trial proceedings were commenced. Such a forfeiture was irrevocable and continued despite the defendant's capture or voluntary return to custody.

In *Deemer*, however, the court determined that the per se rule of forfeiture was no longer valid. While a returned fugitive should not benefit from his fugitive status, returned fugitives should not be punished additionally by forfeiture of their appellate rights when they return to the jurisdiction within the time period for filing post-sentence motions or an appeal.

Specifically, the Court held that "a fugitive who has returned to the jurisdiction of the courts should be allowed to exercise his post-trial rights in the same manner he would have done had he not become a fugitive. If he returns in time for post-trial motions, he should be allowed to file them. If he returns after the time for post-trial motions has expired, his request to file post-trial motions or to reinstate post-trial motions should be denied." 705 A.2d at 829.

The decision in *Doty* did not hold otherwise. As in *Deemer*, the Court in *Doty* held that a fugitive who has returned to the jurisdiction of the court should be allowed to exercise his post-trial rights in the same manner he would have done had he not become a fugitive. *Doty* 997 A.3d at 1188 (quoting *Deemer*, 705 A.2d at 829). In order for a fugitive to be able to exercise his right to file a post sentence motions or appeal, the fugitive must return to the jurisdiction within the time for filing said motions or appeal.

As the *Deemer* court noted, a defendant who deliberately chooses to bypass the orderly procedures afforded one convicted of a crime for challenging his convictions is bound by the consequences of his decision. *Deemer* at 1187 (citing *Commonwealth v. Passaro*, 504 Pa. 611, 476 A.2d 346, 348 (1984)). The *Deemer* court noted “it would be unseemly to permit a defendant who has rejected the appellate process in favor of escape to resume his appeal merely because his escape proved unsuccessful.” *Id.* (citing *Passaro*, 476 A.2d at 349).

Accordingly, because Burrell was a fugitive from justice during his trial, at the time of his sentencing, and, most importantly, at the time that his post-sentence motions were required to be filed, he has forfeited his right to file post-sentence motions and his post-sentence motions were properly dismissed on that ground.

Burrell next argues that the court abused its discretion when it sentenced him to “a manifestly excessive sentence of a minimum of 15 years and a maximum of 30 years well above the aggravated range” for the delivery of less than one gram of heroin. In conjunction with this, Burrell argues that his constitutional rights against cruel and unusual punishment were violated when he was sentenced to the statutory maximum allowable by

law, which was “clearly disproportional.”

“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.” *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 judgement; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment 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)).

Burrell does not allege that the court’s sentence was the result of partiality, prejudice, bias or ill will. Burrell alleges that it was manifestly excessive or unreasonable.

In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court’s discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant’s character, and the defendant’s display of remorse, defiance, or indifference.

*Commonwealth v. Colon*, 102 A.3d 1033, 1043 (Pa. Super. 2014)(quoting *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa. Super. 2003)).

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 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 objectively weighed these considerations and imposed a sentence that it decided was appropriate under all of the circumstances. The sentence was consistent with the protection

of the public and reflected the substantial impact of the crime on the community. While the court considered Burrell's rehabilitative needs, it found the other interests to be far more compelling.

As the court specifically noted in its sentencing order, it was aware that the sentence was well above the aggravated range. The court set forth the following reasons for doing so:

However, and as the Court indicated, the Court must consider the impact of the offense on the community and any victim, the Defendant's rehabilitative needs, and the need to protect the community. For the last ten years, Defendant has menaced the community by selling heroin. Nothing has stopped him. The Defendant does not care about rehabilitation, the Defendant does not care about abiding by the law, and the Defendant does not care about anyone other than himself. The direct and indirect consequences of his behaviors have led to the utter destruction of families and communities. The purpose of this sentence is crystal clear. While the Appellate Court might disagree with this Court, this Court must impose a sentence that warehouses the Defendant and protects the community for as long as possible under the circumstances.

Sentencing Order, at 1-2.

At some point, the interests of the community become paramount if not determinative. At some point, Burrell must be accountable to the greatest extent permitted by law when he has refused for a decade to comply with the law and has continued to menace the community.

The court was candid during the argument on the Post-Sentence Motions when it said:

I mean I hammered the guy. I mean I am going to be honest with you, Mr. Burrell knows this, I gave him the most I could have given him and yes, it had to do with the nature of the offense, it had to do with what I thought was his manipulation, and it had a lot to do with the fact that I believe that he was just going to menace society. That he was just going to continue to sell drugs, as he has done for the last ten years, and that he was going to continue to do it after he absconded...



Transcript of Post-Sentence Motions, August 17, 2016, at 27-28.

Burrell also argues that the sentence is disproportionate and constitutes cruel and unusual punishment under the Pennsylvania and United States Constitutions. Burrell argued during the post-sentence hearing that the sentence was disproportional to other sentences that were given in Lycoming County, sentences that were given in other counties and sentences that were reported by the Pennsylvania Sentencing Commission. Burrell argued that the average was around 2 ½ to 5 years as a minimum and maximum versus 15 to 30 years. Burrell was not able, however, to point to the facts and circumstances of those cases other than the crime committed.

A claim that a sentence violates an individual's right to be free from cruel and unusual punishment is a challenge to the legality of the sentence. *Commonwealth v. Howard*, 540 A.2d 960, 961 (Pa. Super. 1988). Because this sentence was within the statutory maximum, it is clearly legal. Furthermore, there was no evidence whatsoever that it was constitutionally infirm or disproportional. Arguments of counsel are not evidence. *Commonwealth v. Puksar*, 597 Pa. 240, 951 A.2d 267, 280 (2008); *Commonwealth v. LaCava*, 542 Pa. 160, 666 A.2d 221, 231 (1995).

When examining the proportionality of the sentence, the court is to begin with the acknowledgement that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is properly within the province of the legislatures, not courts. *Commonwealth v. Parker*, 718 A.2d 1266, 1269 (Pa. Super. 1998).

By The Court,

Date: 12-13-2016

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Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esq., ADA  
Joshua Bower, Esq., APD  
Gary Weber, Esquire (Lycoming Reporter)  
Work File