

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-499-2010
	:
vs.	:
	:
	: Post-Sentence Motion
PAUL COLEMAN,	:
Defendant	:

**OPINION AND ORDER**

Before the court is the post-sentence motion filed by Defendant on May 26, 2016. Preceding the filing of this Motion, there was a long history of criminal litigation.

A criminal complaint was filed against Defendant on March 2, 2010. Following a preliminary hearing on March 25, 2010, all of the charges were held for court. By Information filed on May 7, 2010, Defendant was charged with: two counts of persons not to possess, felonies of the second degree; two counts of receiving stolen property, felonies of the third degree; three counts of possession with intent to deliver controlled substances, ungraded felonies; three counts of possession of a controlled substances, ungraded misdemeanors; and three counts of possession of drug paraphernalia, ungraded misdemeanors.

On October 26, 2010, the persons not to possess counts were severed for trial purposes. All of the charges arose out of the alleged discovery of two handguns, heroin, cocaine and marijuana when police executed a search warrant at 517 Stevens Street, Apt. 2, the apartment that defendant was leasing in Williamsport.

On September 20, 2011, Defendant waived his right to a jury trial. Defendant's non-jury trial was held before the court on October 12, 13 and 14, 2011.

Because Defendant chose to proceed with in a non-jury trial, the persons not to possess charges were again consolidated with the remaining charges.

Following the non-jury trial, the court found Defendant guilty of count 4, possession with intent to deliver heroin (PWID-heroin), an ungraded felony; count 5, possession of heroin, an ungraded misdemeanor; count 6, possession of drug paraphernalia, an ungraded misdemeanor; count 7, possession with intent to deliver cocaine (PWID-cocaine), an ungraded felony; count 8, possession of cocaine, an ungraded misdemeanor; count 9, possession of drug paraphernalia, an ungraded misdemeanor; count 10, persons not to possess, a felony of the third degree; and count 12, possession of a controlled substance, marijuana, an ungraded misdemeanor. Defendant was found not guilty of the remaining charges.

On October 21, 2012, the court sentenced Defendant to an aggregate sentence of 12 to 25 years of incarceration in a state correctional institution, which consisted of 7 to 15 years for PWID-heroin and a consecutive 5 to 10 years for persons not to possess firearms. The minimum sentence for PWID-heroin included a five-year mandatory minimum for a firearm in close proximity to the heroin pursuant to 42 Pa.C.S. §9712.1 and a two-year mandatory minimum for the weight of the heroin pursuant to 18 Pa.C.S. §7508(a)(2)(i). The court imposed a concurrent sentence with both a minimum and a maximum of 10 years for PWID-cocaine, which also included a five-year mandatory minimum for the firearm in close proximity and a five-year mandatory for the weight of the cocaine.<sup>1</sup>

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<sup>1</sup>Count 5 merged with Count 4 and Count 8 merged with Count 7. The sentence for Count 6, as well as Count 9, was guilt without further punishment.

The Commonwealth filed a timely motion to modify the sentence in which it asserted that the weight mandatory for PWID-heroin was 3 years, not 2 years. The court granted the Commonwealth's motion on August 16, 2012. Accordingly, the sentence for Count 4, PWID-heroin was amended to a minimum of 8 years and a maximum of 15 years and the aggregate sentence was amended to a minimum of 13 years and a maximum of 25 years.

Defendant had also filed a timely post-sentence motion, which the court denied in its order dated August 16, 2012.

Both Defendant and the Commonwealth filed appeals to the Pennsylvania Superior Court. The Commonwealth's cross appeal was withdrawn on June 19, 2013. The Superior Court affirmed Defendant's judgment of sentence on October 9, 2013.

On November 8, 2013, Defendant filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on April 4, 2014.

Defendant subsequently filed a pro se Post Conviction Relief Act (PCRA) petition on November 10, 2014. Counsel was appointed and given an opportunity to amend the pro se petition or file a "no merit" letter. Counsel amended defendant's petition. The issues asserted in the amended petition related solely to the imposition mandatory sentences for the weights of the controlled substances possessed with intent to deliver and for the possession of a firearm in close proximity to the controlled substances, which were ruled unconstitutional while Defendant's case was still on direct appeal.

After considering the testimony presented, the arguments of the attorneys, and the relevant case law, the court found that Defendant was entitled to relief in the form of a

new sentencing hearing. On May 16, 2016, the court re-sentenced Defendant. The court imposed a 5 to 10 year sentence on the persons not to possess charge followed by two consecutive sentences of 2 ½ to 5 years on the PWID-heroin and PWID-cocaine charges. The remaining charges either merged or the sentence was guilt without further punishment.

Defendant's post-sentence motion asserted that the court abused its discretion in imposing an aggregate sentence of 10 to 20 years, that the court applied inappropriate sentencing guidelines and enhancements and that the sentence fashioned was "harsh and unreasonable." It also included a motion for permission to file post-verdict motions *nun pro tunc* and a motion to have the sentencing proceedings transcribed.

The argument on Defendant's motion was held on August 26, 2016. Defendant limited his argument to the sentencing issues. Defendant asserted that because the court initially imposed the concurrent sentence on the possession with intent to deliver charges, it was bound to impose a concurrent sentence on re-sentencing. Defendant also claimed that he was deprived of an "individualized" sentence. Furthermore, Defendant indicated that the court should have considered his good prison behavior and completion of prison programming between the time of his original sentence and re-sentencing.

Defense counsel, however, was unable to point to even one case that supported his positions. Indeed, it appears to the court that defendant grasped at certain sentencing concepts and raised them as objections without any legal or factual basis whatsoever.

For example, defendant claims that the court applied inappropriate sentencing guidelines and enhancements. Not surprisingly, defense counsel did not argue this during the

post-sentence motion oral argument. Indeed, each of the sentences that the court imposed with respect to the possession with intent to deliver charges were within the standard range. The standard range on PWID-heroin was 24 to 30 months while the standard range on PWID-cocaine was 27 to 33 months.

The Commonwealth argued that the deadly weapon possessed enhancements should apply to both of the PWID charges because a weapon was possessed “in close proximity to the drugs.” (Transcript, 5-16-16, at 6). The Commonwealth argued that the standard ranges with that enhancement were as follows: 30 to 36 months on PWID-heroin and 33 to 39 months on PWID-cocaine. (Transcript, 5-16-16, at 5). The court imposed a minimum of 30 months on each PWID count. These sentences were within the standard ranges without any enhancements.

With respect to defendant’s argument that the sentence was harsh and unreasonable, it was difficult to decipher defendant’s reasoning, if any, in support of such. Essentially raising an ineffectiveness of counsel claim, Defendant argued that the court did not consider his progress while he was in State prison. Contrary to what defendant claims, the court referenced during the re-sentencing hearing that it did not receive “anything from the state prison” and hoped “he’s doing well.” (Transcript, 5-16-16, at 19-20). Moreover, defense counsel failed to provide to the court any argument or documentation in support of such a claim.

“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 judgment; thus, a sentencing court will not have abused its discretion unless ‘the record disclosed that the judgment exercise 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 court must consider “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); *Commonwealth v. Baker*, 72 A.3d 652, 663 (Pa. Super. 2013). The court considered each of these factors, as well as the Pre-Sentence Investigation (PSI) report before imposing the aggregate sentence of 10 to 20 years of incarceration. The court further reviewed Defendant’s letters of support, the court’s prior sentencing notes, and a portion of the prior sentencing transcript. (Transcript, 5-16-16, at 4-5).

Defendant’s main argument centered on his claim that because the court initially imposed a concurrent sentence with respect to the PWID-cocaine charge, it was essentially required to impose a concurrent sentence again. Defendant, in fact, argued at sentencing “we’re not here on a completely new sentencing.” (Transcript, 5-16-16, at 10).

This argument is clearly erroneous.

Where one, convicted of several crimes, successfully challenges his judgment of sentence..., remand for sentencing may be just under the circumstances as it may further the sentencing court’s plans for protection of society for future criminal activity and rehabilitation of the criminal and reduce the possibility of disparate and irrational sentencing. When a defendant challenges one of several independent sentences, he, in effect, challenges the entire sentencing plan.

*Commonwealth v. Goldhammer*, 512 Pa. 587, 517 A.2d 1280, 1283 (1283), citing *United States v. Busic*, 639 F.2d 940, 947 (1981), cert. denied, 452 U.S. 918, 101 S. Ct. 3055 (1983).

Defendant was clearly “caught up in some very dangerous and serious criminal activities.” (Transcript, 5-16-16, at 19). The gun was found hidden in defendant’s apartment in a location that was difficult to access but was near the controlled substances, some of which were identical in kind and packaging to those located in defendant’s coat found in his bedroom.

The controlled substances were secreted in hidden areas throughout the apartment including a jacket, inside a pair of boots and in a kitchen cabinet. The evidence was overwhelming that defendant was the sole occupier of the residence and that the boots and jacket was his. The evidence strongly supported the inference that it was Defendant who placed the items in his shoes and his jacket.

There was expert testimony that the controlled substances were possessed with the intent to deliver. This opinion was based on a myriad of factors.

The number and weight of the controlled substances involved was significant. There were 78 glassine packets of heroin weighing 4.3 grams and 20 packets of cocaine weighing 19.3 grams. At Defendant’s re-sentencing the court noted that it was crystal clear that Defendant’s “drug activities” created “a substantial hazard to the community.” (Transcript, 5-16-16, at 19).

As the court concluded at Defendant’s initial sentencing, Defendant “got caught up” in some very dangerous and some very serious criminal misconduct. The court

also noted that the reality of these types of activities destroys lives. “They ruin lives in countless ways.”

Even at defendant’s original sentencing, the court considered a scheme in the lower range of 10 to 20 years, which was in fact, the sentence imposed at Defendant’s re-sentencing.

**ORDER**

**AND NOW**, this \_\_\_ day of September 2016, following a hearing and argument on Defendant’s post-sentence motion, the court concludes that Defendant has withdrawn and/or waived his motion for permission to file post-verdict motions *nun pro tunc*. Defendant’s motion to have the sentencing proceedings transcribed is deemed moot. The motion for re-sentencing is **DENIED**.

By The Court,

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Marc F. Lovecchio, Judge

cc: Eric Linhardt, Esquire (DA)  
Robert Cronin, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work file