

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-1643-2010
vs. :
: CRIMINAL DIVISION
MARKALE A. SOWELL, :
Appellant : 1925(a) Opinion

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

This opinion is written in support of this court's order denying Markale Sowell's PCRA petition.

On September 26, 2010, at approximately 1:00 p.m. Tamika Moore and some of her female relatives were fighting with some other females, including one or more of Sowell's female relatives. The fight broke up and the group of females dispersed. Sowell, who resided in Harrisburg, came to Williamsport in his aunt's vehicle, arriving in the late afternoon.

Ms. Moore was in a residence cooking dinner when her son ran into the house and said, "Ma, Aunt Fe is getting jumped." As Ms. Moore went to go outside to see what was going on, she was met at her front screen door by Sowell, who had a gun in the front of his waistband. Sowell pulled a revolver with brown grips from his waistband, pointed it at Ms. Moore's hip and said, "Bitch, you are coming to the other side." Ms. Moore took this to mean that Sowell wanted her to fight on the side of his wife and relatives, instead of with her relatives, who were now engaged in a second fight. Ms. Moore grabbed her eleven year old

son who was standing near her, and slammed the front door shut. She called the police, and then she went outside. She saw Sowell leaving in a silver sedan just as a police officer was arriving in the area in an unmarked maroon police vehicle. She recognized the vehicle and began yelling and gesturing to the officer that Sowell was leaving in the silver sedan. The officer activated his lights and sirens, but Sowell sped off.

Sowell took the police on a high speed chase through busy intersections in the City of Williamsport. He ran numerous red lights and stop signs. When he attempted to turn left from Fourth Street onto Campbell Street, Sowell lost control of the silver sedan, striking a tree and the Weightman apartment building. Two pedestrians, Emily Moon and Alicia Binado, had to jump out of the way to avoid being hit by the vehicle. Although the vehicle was disabled, Sowell continued to flee from the police. He jumped out of the vehicle and ran away on foot. The police yelled for him to stop, but Sowell did not. The police chased him on foot, and ultimately apprehended him by utilizing their tasers.

The police received consent from the owner of the vehicle and searched the vehicle. They found a .22 caliber H&R revolver with brown grips wrapped in a gold scarf. The police ran the serial number on the gun and discovered that it had been reported stolen. The police also ran a criminal history check on Sowell and discovered that he had a robbery conviction from New Jersey, which made it unlawful for him to possess a firearm and that rendered him ineligible to obtain a license to do so.

Following a jury trial, Sowell was convicted of Fleeing or Attempting to Elude a Police Officer,¹ Persons Not to Possess or Control Firearms,² Firearms Not to be

¹ 75 PA. CONS. STAT. ANN. § 3733.

² 18 PA. CONS. STAT. ANN. § 6105.

Carried Without a License,³ two (2) counts of Recklessly Endangering Another Person (REAP),⁴ Simple Assault by Physical Menace,⁵ Reckless Driving,⁶ and Driving Without a License.⁷ On November 30, 2011, the court imposed an aggregate sentence of 8 ½ to 17 years of incarceration in a state correctional institution. On December 1, 2011, Sowell filed post sentence motions, which the court denied in an opinion and order entered on March 30, 2012.

On April 26, 2012, Sowell appealed his judgment of sentence. The Pennsylvania Superior Court rejected Sowell's claims and affirmed his judgment of sentence on November 26, 2013. Sowell filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on July 30, 2014.

On September 29, 2014, Sowell filed a Post Conviction Relief Act (PCRA) petition. As this was Sowell's first PCRA petition, the court appointed counsel and gave counsel an opportunity to file an amended PCRA petition or a no merit letter pursuant to *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley*, 379 Pa. Super. 390, 550 A.2d 213 (1988). PCRA counsel filed a motion to withdraw which included a no merit letter. When Sowell received PCRA counsel's no merit letter, he decided that he wanted to represent himself. The court conducted a colloquy with Sowell and granted his request to represent himself. After giving Sowell an opportunity to argue his PCRA petition and after Sowell raised additional issues in other motions (which the court treated as amendments or additions to Sowell's PCRA petition), the court issued an opinion and order

³ 18 PA. CONS. STAT. ANN. § 6106.

⁴ 18 PA. CONS. STAT. ANN. § 2705.

⁵ 18 PA. CONS. STAT. ANN. § 2701.

⁶ 75PA. CONS. STAT. ANN. § 3736.

on August 4, 2015 giving Sowell notice of the court's intent to dismiss his PCRA petition without holding an evidentiary hearing. Sowell filed a response to the proposed dismissal, which asserted several additional claims. Since the one year time limit for filing a PCRA petition had not yet expired, the court issued another opinion and order on September 9, 2015, which addressed Sowell's response and denied his PCRA petition.

On September 18, 2015, Sowell filed a notice of appeal.⁸ Sowell raised six (6) issues in his concise statement.

The court notes that none of these issues were asserted in Sowell's PCRA petition, in his response to the court's notice of intent to dismiss his PCRA petition or any of the other motions Sowell filed after he filed his PCRA petition. It is well-settled that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." PA. R. APP. P. 302(a); *Commonwealth v. Rainey*, 593 Pa. 67, 928 A.2d 215, 226 (2007)(issues not raised in the PCRA petition cannot be considered for the first time on appeal); *Commonwealth v. Strunk*, 953 A.2d 577, 579 (Pa. Super. 2008)(even issues of a constitutional dimension cannot be asserted for the first time on appeal). Furthermore, although challenges to the legality of a defendant's sentence cannot be waived, they must be raised in a timely PCRA petition or the court lacks jurisdiction to grant relief. *Commonwealth v. Fahy*, 558 Pa. 313, 737 A.2d 214, 223 (1999); *Commonwealth v. Concordia*, 97 A.3d 366, 372 (Pa. Super. 2014). Therefore, none of Sowell's issues have been properly preserved for appellate review.

⁷ 75 PA. CONS. STAT. ANN. § 1501.

⁸ Unfortunately, the court did not receive a copy of Sowell's notice of appeal until approximately December 8, 2015. The court directed Sowell to file a concise statement of errors complained of on appeal on December 11, 2015. Sowell filed his concise statement on December 23, 2015.

In the alternative, Sowell's issues lack merit.

In his first and second issues, Sowell asserts that the trial court erred and imposed an illegal sentence when it sentenced him to 18 to 36 months incarceration for the charge of fleeing and eluding. Sowell contends that since this was his second conviction for that offense, the maximum sentence the court could impose was 6 months incarceration pursuant to section 6503 of the Vehicle Code, 75 PA. CONS. STAT. ANN. § 6503. This argument is clearly without merit. The Superior Court rejected such a claim and found that the enhanced penalties for fleeing and eluding when the crime involved a high speed chase trumped the provisions of section 6503. *Commonwealth v. Bowen*, 55 A.3d 1254 (Pa. Super. 2012), appeal denied, 64 A.3d 630 (Pa. 2013).

In his third issue, Sowell contends the court erred in sentencing him to a mandatory minimum sentence for person not to possess a firearm "where at the time of his sentencing mandatory minimum sentences were authorized, but while this matter was still pending before the court the rule changed and authorized re-sentencing." In his fourth issue, Sowell contends the court erred in failing to correct this sentence when it had the matter before it. The court believes Sowell is attempting to assert claims pursuant to *Alleyne v. United States*, 133 S.Ct. 2131 (U.S. 2013). These claims are patently frivolous.

Although the court did impose a sentence of 5 to 10 years of incarceration for persons not to possess a firearm, the court did not impose a mandatory minimum in this case. Sowell was charged with persons not to possess a firearm, which was graded as a felony of the second degree, because he had a prior conviction for robbery from New Jersey. 18 PA. CONS. STAT. ANN. § 6015(a.1)(1). The offense gravity score for this offense was 10 and

Sowell's prior record score was capped at 5. Therefore, the standard guideline range for his minimum sentence was 60 to 72 months (or 5 to 6 years). Sentencing Transcript (11/30/2011), at 14. A felony of the second degree carries a maximum sentence of 10 years. 18 PA. CONS. STAT. ANN. § 1103. The minimum sentence cannot exceed one-half of the maximum sentence. 42 PA. CONS. STAT. ANN. § 9756(b)(1). Due to this limit, the court imposed a minimum sentence at the bottom of the standard guideline range. Since the court imposed a guideline sentence and not a mandatory minimum, Sowell's issue is frivolous.

In his fifth issue, Sowell contends the court erred in sentencing him on the recklessly endangering another person conviction where neither of the victims appeared at the trial or any proceedings and all testimony relating to the charges was hearsay, which violated Sowell's confrontation rights guaranteed by the United States and Pennsylvania Constitutions. In his direct appeal, Sowell asserted that his confrontation rights were violated. This claim was rejected by the Pennsylvania Superior Court on pages 10-11 of its decision entered on November 26, 2013.⁹ Therefore, this claim lacks merit because it was previously litigated. 42 PA. CONS. STAT. ANN. § 9543(a)(3)(To be eligible for relief under the PCRA, a petitioner must plead and prove that the allegation of error has not been previously litigated or waived).

In his sixth and final issue, Sowell avers that "the trial court erred when it held the verdict for the charges of [REAP], where one of the essential elements was not met, that being the element of fear of death or bodily injury, as neither of the victims ever appeared at any proceedings and were otherwise available to do so."

⁹The dockets numbers for Sowell's direct appeal were 832 MDA 2012 and 845 MDA 2012.

To the extent this issue is based on a violation of Sowell’s confrontation rights, it is previously litigated.

To the extent that the issue is attempting to assert a claim that the evidence was insufficient to support the verdicts because the element of fear of death or bodily injury was not proven, Sowell misunderstands the elements for REAP. Fear of death or bodily injury is not an element of REAP. *Commonwealth v. Weigle*, 949 A.2d 899, 907 (Pa. Super. 2008)(“bodily injury need not actually occur nor does any person need to be placed in fear of such injury in order to be convicted of REAP”).

The Crimes Code defines the offense as follows: “A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another in danger of death or serious bodily injury.” 18 PA. CONS. STAT. ANN. § 2705.

Sowell’s high speed flight from the police caused him to lose control of the vehicle and crash into a tree and the Weightman apartment building on Campbell Street. The dash-cam video from the police officer’s cruiser was played for the jury. It showed two pedestrians who were about to cross Campbell Street jumping out of the way to avoid being struck by the vehicle Sowell was driving. Although neither pedestrian was actually struck, Sowell’s conduct clearly placed these pedestrians in danger of death or serious bodily injury.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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