

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

: CR-396-2018

vs.

: CRIMINAL ACTION - LAW

TRAMANE MOORE,
Defendant.

: *Post-Sentence Motion*

OPINION AND ORDER

On August 12, 2019, Defendant filed a Post-Sentence Motion, followed by a supportive brief filed on September 13, 2019. The Commonwealth filed a responsive brief on September 27, 2019. The Court held argument on the Post-Sentence Motion on October 7, 2019.

Background

On February 14, 2018, Defendant Tramane Moore was charged by Criminal Complaint with the three following counts: 1. Retail Theft (F3); 2. Receiving Stolen Property (F3); and 3. Theft by Deception (M2). The Commonwealth alleged that on February 11, 2018, the Defendant and another unnamed individual entered a Game Stop store, placed store merchandise into a bag, and then "returned" the items for \$148.34 in store credit. Defendant then utilized the store credit to purchase other merchandise worth \$136.69.

The Defendant filed an Omnibus Pretrial Motion on May 21, 2018. Following argument, on July 13, 2018, the Court issued an Opinion denying the Defendant's Motion to Dismiss and Motion to Suppress and granting Defendant's Motion to reduce the grading of Counts 1 and 2 to misdemeanors of the second degree.

At the commencement of trial, the Commonwealth withdrew Count 1 – Retail Theft (M2). Following trial by jury, on March 21, 2019, the jury returned a verdict finding Defendant guilty of Count 2 – Receiving Stolen Property (M2) and Count 3 – Theft by Deception (M2).

On May 17, 2019, the Defendant filed a Motion to Recuse Prior to Sentencing. The Motion to Recuse asserted that because this Court had previously served as the

Lycoming County District Attorney during a period when the Defendant had been charged with multiple prior offenses, to have the Judge preside over sentencing would create an appearance of impropriety.¹ Following briefing and argument, on July 2, 2019, the Court issued an Order denying Defendant's Motion to Recuse. Subsequently, on August 1, 2019, the Court held a sentencing hearing and issued an Order sentencing the Defendant to 12-24 months on counts 2 and 3 to run consecutively, for an aggregate sentence of two to four years in a state correctional institution.

The Defendant filed a Post-Sentence Motion on August 12, 2019. In the Brief in Support of Defendant's Post-Sentence Motion, Defendant characterized the factors that the Court provided supporting sentencing in the aggravated range as "doubtful," and asserted that sentencing within the top of the aggravated range was "excessive and unduly harsh," creating a further appearance of bias on the part of the Court.² At the hearing on Defendant's Post-Sentence Motion, Defendant's counsel asserted that, after weighing all the factors, the Court's decision to sentence Defendant at the top of the aggravated range for the two counts was an abuse of discretion.

Discussion

The Court first addresses the validity of the factors that it relied upon to sentence within the aggravated range. During sentencing, the Court provided five bases for implementing an aggravated-range sentence: 1. The Defendant committed the offense while on probation; 2. The Defendant's Prior Record Score (PRS) of 5 underestimated the defendant's prior record and recidivist history; 3. The Defendant continues to commit similar types of crimes involving theft by deception; 4. The Defendant violated the conditions of his bail; and 5. The Defendant committed perjury.

A sentencing judge is permitted to consider any legal factor when deciding whether to sentence a defendant in the aggravated range.³ The judge must state the factors supporting the aggravated range sentence on the record.⁴ The sentencing

¹ *Com. v. Moore*, CP-41CR-396-2018, Defendant's Motion to Recuse Prior to Sentencing 1-2 (May 17, 2019).

² *Com. v. Moore*, CP-41CR-396-2018, Brief in Support of Defendant's Post-Sentence Motion 5 (September 13, 2019).

³ *Com. v. Hoover*, 492 A.2d 443, 444 (Pa. Super. 1985).

⁴ 204 PA ADC § 303.13(c) ("When the court imposes an aggravated or mitigated sentence, it shall state the reasons on the record and on the Guideline Sentencing Form[.]").

judge's decision to sentence in the aggravated range will not be disturbed absent a manifest abuse of discretion.⁵

The Pennsylvania Superior Court has recognized probation violations,⁶ a criminal record not fully reflected in the PRS and a history of recidivism,⁷ a history of committing similar types of crimes,⁸ and bail violations⁹ as valid factors supporting an aggravated range sentence. Additionally, the Supreme Court in *United States v. Grayson* established that a defendant's perjury is a permissible factor to consider during sentencing.¹⁰ However, this right is not unlimited. The sentencing court must first satisfy the six-factor test established by the Pennsylvania Superior Court in *Commonwealth v. Thurmond* before considering perjury as a factor during sentencing.¹¹ The six factors established under *Thurmond* include:

1. The misstatement of fact must be willful.
2. The misstatement must be of material importance. The misstatement must sufficiently bear on the defendant's character to justify enhancing the punishment.
3. The verdict of guilt must necessarily establish beyond a reasonable doubt that the defendant lied, and not merely that the jury did not believe his testimony.
4. The verdict must be supported by sufficiently credible evidence that has a rational foundation in evidence of record.
5. The trial court must observe the allegedly false testimony.

⁵ *Hoover*, 492 A.2d at 444.

⁶ *Com. v. Bowen*, 975 A.2d 1120, 1127 (Pa. Super. 2009) (holding that defendant's probation violation was a valid factor supporting the imposition of an aggravated-range sentence).

⁷ *Com. v. Shugars*, 895 A.2d 1270, 1275 (Pa. Super. 2006) (holding that the court may refer to a defendant's prior criminal record not reflected in his PRS to sentence within the aggravated range, so long as the prior criminal record is not the sole factor supporting the aggravated sentence); *Com. v. P.L.S.*, 894 A.2d 120, 131 (Pa. Super. 2006) ("Not only does the caselaw authorize a sentencing court to consider unprosecuted criminal conduct, the sentencing guidelines essentially mandate such consideration when a prior record score inadequately reflects a defendant's criminal background."); *Bowen*, 975 A.2d at 1127 (holding that defendant's recidivist history was a valid factor supporting the imposition of an aggravated-range sentence).

⁸ See *Com. v. Lawson*, 650 A.2d 876, 882 (Pa. Super. 1994) (holding that defendant's history of committing similar crimes was an aggravating factor that supported sentencing above the sentencing guidelines).

⁹ *Com. v. Simpson*, 829 A.2d 334, 339 (Pa. Super. 2003) (finding that an offense was committed while the offender was on "probation, parole, or some other form or type of supervised release" is an appropriate aggravating factor).

¹⁰ *U.S. v. Grayson*, 438 U.S. 41, 55 (1978) ("A defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitude towards society and prospects for rehabilitation and hence relevant to sentencing.").

¹¹ See *Com. v. Thurmond*, 407 A.2d 1357, 1359-60 (Pa. Super. 1979).

6. The court may consider the defendant's misstatement as only one factor among many bearing on the sentence.¹²

In the instant case, at trial several witnesses testified that Defendant entered the Game Stop accompanied by an unnamed accomplice, discreetly took items off the shelves and put them into an empty bag while his accomplice attempted to distract store personnel, and then returned those stolen items for store credit. Prior to trial, the Defendant signed a written statement presented to Officer Hagemeyer confessing to these actions. However, at trial Defendant took the stand and testified that when he entered the Game Stop, he was carrying a bag full with items legitimately purchased by his accomplice, and that he returned these legitimately purchased items on behalf of his accomplice. He further testified that his signed confession was false and obtained by Officer Hagemeyer through coercion.

The Court finds that Defendant's trial testimony consisted of self-interested misstatements of fact, which were not feasibly the result of mistake or misunderstanding. The misstatements were material to whether the defendant was guilty of the counts of Receiving Stolen Property and Theft by Deception. In finding the Defendant guilty of these counts, the jury necessarily determined that the Defendant willfully lied, as Receiving Stolen Property¹³ and Theft by Deception¹⁴ are specific intent crimes. In other words, the jury would not have found the Defendant guilty if they determined that he returned property that he did not *believe* to be stolen. The jury's verdict was supported by the testimony of multiple credible witnesses and Game Stop surveillance footage from the date of the theft. This Court presided over both the trial proceeding and the subsequent sentencing proceeding. Finally, the Defendant's perjury was just one of five factors that the Court relied upon in sentencing within the aggravated range. Therefore, the Court was justified in considering Defendant's perjury as factor supporting an aggravated range sentence.

¹² *Id.*

¹³ 18 Pa.C.S.A. § 3925(a) ("A person is guilty of theft if he *intentionally* receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner.") (emphasis added).

¹⁴ 18 Pa.C.S.A. § 3925(a) ("A person is guilty of theft if he *intentionally* obtains or withholds property of another by deception.") (emphasis added).

The case law supports the Court's imposition of an aggravated range sentence. Defendant's Post-Sentence Motion fails to provide countervailing precedent demonstrating that the Court committed an abuse of discretion by relying on the aforementioned five factors.

The Defendant's Post-Sentence Motion further asserts that the Court erred in considering information provided in Defendant's social history assessment as an aggravating factor. While the Court did consider the Defendant's social history assessment as a factor during sentencing, it explicitly stated at sentencing that the Defendant's social history assessment was not a factor supporting the Court's imposition of an aggravated range sentence.

Additionally, Defendant's Post-Sentence Motion asserts that the Court erred by sentencing the Defendant above the range established in the Sentencing Guidelines. The Post-Sentence Motion characterizes a statement made by the Court at sentencing that the Defendant's PRS 5 was an "artificial cap" that underrepresented his full criminal history as signifying that the Court sentenced the Defendant as a PRS 7, or Repeat Felony 1/Felony 2 offender (RFEL) range. This misapprehends the Court's statement. For a PRS 5, the standard sentencing guideline range for each count is 1-9 months, with an aggravated/mitigated adjustment of +/-3 months. The Court identified the fact that the Defendant had a criminal record not fully reflected in his PRS as a factor supporting an *aggravated* range sentence. The Court did not sentence the Defendant above the PRS 5 range provided in the Sentencing Guidelines.

Defendant further asserts in his Post-Sentence Motion that the Court erred in not merging Count 2 – Receiving Stolen Property (M2) and Count 3 – Theft by Deception (M2). The question of whether two counts should be merged is a legal determination not subject to the discretion of the Court.¹⁵ In determining whether two offenses should merge, a court must determine whether the crimes "necessarily involve one another . . . [and] were so intimately bound up in the same wrongful act that, as a practical matter, proof of one crime necessarily proves the other, so they must be treated as the same

¹⁵ See 42 Pa.C.S.A. § 9765 ("No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.").

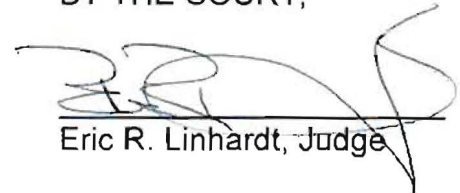
offense."¹⁶ The Court determined at sentencing that Counts 2 and 3 involved separate criminal acts. Count 2 – Theft by Deception involved Defendant taking merchandise from Game Stop's shelves and "returning" those items to a Game Stop employee for store credit. Count 3 – Receiving Stolen Property involved the Defendant subsequently using that store credit to illicitly purchase additional merchandise from a separate Game Stop employee. That one crime directly precipitated the other does not inherently require merger.¹⁷ Therefore, the Court was justified in determining that the two counts should not merge.

Lastly, Defendant argues that the imposition of an aggravated range sentence further evidences the appearance of bias on the part of the Court. For the reasons stated in this Court's July 2, 2019 Opinion and Order, the issues raised by the Defendant do not warrant recusal. That the Court has now imposed an aggravated range sentence that is both legally justified and warranted by the facts and circumstances of this case does not change that fact.

Based on the foregoing, the Post-Sentence Motion is hereby DENIED.

IT IS SO ORDERED this 25th day of October 2019.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/cp

cc: Jessica M. Feese, Esq., 48 West Third St., Williamsport, PA 17701
Joseph C. Ruby, Esq., 48 West Third St., Williamsport, PA 17701
Gary Weber

¹⁶ *Com. v. Presidge*, 539 A.2d 439, 440-41 (Pa. Super. 1988) ("A two-pronged test for determining the merger of offenses has been adopted by our appellate courts: '[t]o determine whether merger should occur, a court must first determine whether the separate statutory offenses arose out of the same criminal act, transaction or episode. When courts decide under the merger doctrine that two crimes 'necessarily involve' one another, it does not always mean that all the elements of one crime are included in the other. It means that on the facts of the case the two crimes were so intimately bound up in the same wrongful act that as a practical matter, proof of one crime necessarily proves the other, so that they must be treated as the same offense.'") (quoting *Com. v. Williams*, 496 A.2d 31, 40 (Pa. Super. 1985)).

¹⁷ *Com v. Ousley*, 21 A.3d 1238, 1243 (Pa. Super. 2011), *appeal denied* 30 A.3d 487 (Pa. 2011) ("The threshold question is whether Appellant committed one solitary criminal act. The answer to this question does not turn on whether there was a break in the chain of criminal activity. Rather, the answer turns on whether the actor commits multiple criminal acts beyond that which is necessary to establish the bare elements of the additional crime. If so, then the defendant has committed more than one criminal act.") (internal citations omitted).