

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CR-413-2018**
 :
 v. :
 :
 :
 PAUL LOWMILLER, : **POST SENTENCE MOTION**
 Defendant :

OPINION AND ORDER

Paul Lowmiller (Defendant), through Counsel, filed Post Sentence Motions on July 17, 2020. A hearing on the motion was held on July 31, 2020. In his motion, Defendant alleges the Court impermissibly implemented a minimum mandatory sentence pursuant to 42 Pa. C.S. § 9718.2 and his sentence was unreasonable and excessive. For the following reasons Defendant’s motion is denied.

Background¹

On March 2, 2018, Defendant was charged with Statutory Sexual Assault,² Involuntary Deviate Sexual Intercourse,³ Aggravated Indecent Assault,⁴ two counts of Corruption of Minors,⁵ and Indecent Assault.⁶ The charges arose from a series of sexual acts Defendant committed against a fourteen year old female on February 26, 2018. A one-day jury trial was held on March 10, 2020, after which a jury found Defendant guilty of all charges.

At the trial, it was established that on February 26, 2018 Defendant elicited a meet-up with the victim at the K-Mart in Loyalsock Township in Lycoming County through Facebook.

¹ The Court will only provide a brief recitation of the facts presented at trial, as neither the weight nor sufficiency of evidence presented at trial is being challenged in Defendant’s motion.

² 18 Pa. C.S. § 3122.1(b).

³ 18 Pa. C.S. § 3123(a)(7).

⁴ 18 Pa. C.S. § 3125(a)(8).

⁵ 18 Pa. C.S. § 6301(a)(1)(ii). One count was added later as Count Six, which merged with Count Four, the original Corruption of Minors charge, for purposes of sentencing.

⁶ 18 Pa. C.S. § 3126(a)(8).

The victim's age was displayed on her Facebook page and the victim told Defendant she was fourteen. After meeting at K-Mart, Defendant and the victim then walked to an area near the Loyalsock Fire Department where Defendant removed his penis from his pants and asked the victim to rub it, which she did. Defendant was also rubbing the victim's vagina through her clothing. The victim and Defendant then walked further to a wooded area near Saint Ann Catholic Church where they both laid down. Defendant then inserted his fingers into the victim's vagina and performed oral sex on her. Defendant also rubbed his penis on the victim's vagina, before she performed oral sex on him until ejaculation. Some of Defendant's semen got on the victim's sweatshirt and at multiple occasions during the interaction Defendant asked and the victim told Defendant her age.

After Defendant was convicted, the Commonwealth informed Defendant of its intention to request he be sentenced pursuant to 42 Pa. C.S. § 9718.2 on March 12, 2020. Defendant then issued a Response to Commonwealth's Notice Regarding Mandatory Sentencing on July 7, 2020. Prior to Defendant's sentencing on July 7, 2020, parties were given time to argue the applicability of 42 Pa. C.S. § 9718.2 to Defendant. Defendant was then sentenced following argument and in conjunction with 42 Pa. C.S. § 9718.2. On Count One, Statutory Sexual Assault, Defendant was sentenced to twenty-five years minimum to fifty years maximum. On Count Two, Involuntary Deviate Sexual Intercourse, he was sentenced to six years minimum to twelve years maximum. On Count Three, Aggravated Indecent Assault, he was sentenced to four years minimum to eight years maximum. On Count Four, Corruption of Minors, he was sentenced to fifteen months minimum to thirty months maximum. On Count Five, Indecent Assault, he was sentenced to six months minimum to twelve months maximum. All counts were ordered to run consecutive to one another giving the Defendant an aggregate

total sentence of four hundred and forty-one months minimum to an eight hundred and eighty-two months maximum, or thirty-six years and nine months to seventy-three years and six months.⁷

Discussion

Whether this Court Improperly Applied 42 Pa. C.S. § 9718.2 to Defendant

Legislators have enacted mandatory minimums and maximums for repeat offenders who commit certain sexual offenses:

(a) Mandatory sentence.—

(1) Any person who is convicted in any court of this Commonwealth of an offense set forth in section 9799.14 (relating to sexual offenses and tier system) shall, if at the time of the commission of the current offense the person had previously been convicted of an offense set forth in section 9799.14 or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction, be sentenced to a minimum sentence of at least 25 years of total confinement, notwithstanding any other provision of this title or other statute to the contrary.

* * * * *

(b) Mandatory maximum.--An offender sentenced to a mandatory minimum sentence under this section shall be sentenced to a maximum sentence equal to twice the mandatory minimum sentence, notwithstanding 18 Pa.C.S. § 1103 (relating to sentence of imprisonment for felony) or any other provision of this title or other statute to the contrary.

42 Pa. C.S. § 9718.2(a)(1), (b).

Additionally, a sentencing court does have “authority . . . to impose on an offender to which this section is applicable any lesser sentence than provided for in subsections (a) and (b)[, but] . . . [n]othing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section.” 42 Pa. C.S. § 9718.2(d). The legislators have made clear that the “[s]entencing guidelines promulgated by the Pennsylvania Commission on

⁷ Defendant was also sentenced on a probation violation that was a direct result of these charges. The sentence for the violation is irrelevant to Defendant’s current claims.

Sentencing shall not supersede the mandatory sentences provided” in the statute. *Id.* Pursuant to 42 Pa. C.S. § 9799.14(c), both Indecent Assault on a person less than the age of sixteen and Statutory Sexual Assault when the defendant is eleven years older are Tier II sexual offenses, therefore making them both eligible for the mandatory provisions. *See* 42 Pa. C.S. § 9718.2(a)(1).

Under Defendant’s previous case CR 1660-2012, his charge of Indecent Assault merged with the lead charge Statutory Sexual Assault. He now argues that because his predicate offense triggering the mandatory provisions is his previous charge of Indecent Assault, merged with Statutory Sexual Assault, which is not a tiered offense under 42 Pa. C.S. § 9799.14, the mandatory minimum statutes should not apply. More specifically, Defendant argues because 42 Pa. C.S. § 9718.2 has been found to be based on “recidivist philosophy,” his situation would not satisfy legislative intent. This Court adamantly disagrees. The case Defendant cites to bolster his position, *Commonwealth v. Helsel*, involved a defendant who had pled guilty and had been sentenced on two prior rapes. *Commonwealth v. Helsel*, 53 A.3d 906, 917 (Pa. Super. 2012). Both rapes were disposed of at a single guilty plea hearing and sentencing. *Id.* The defendant served his sentences for the offenses consecutively and upon being released committed another rape. *Id.* The court attempted to sentence the defendant to life in prison as a third time offender under 42 Pa. C.S. § 9718.2(a)(2). *Id.* The Pennsylvania Superior Court reversed the decision finding that the defendant “only had one opportunity to reform, not two” and therefore was only subject to the mandatory twenty-five year minimum under 42 Pa. C.S. § 9718.2(a)(1). *Id.* The facts here are clearly distinct and *Helsel* only harms Defendant’s position. Defendant had a clear opportunity to reform for a similar previous offense, which factually aligns with the current offense. To disallow the application of 42 Pa.

C.S. § 9718.2(a)(1), because Defendant plead guilty to an applicable offense that merged with a non-applicable greater offense, would greatly frustrate the legislative intent and is directly against the clear language of 42 Pa. C.S. § 9718.2. Therefore, there is no error in the application of the mandatory provisions and Defendant's first post sentence motion is denied.

Whether the Court's Sentence was Unreasonable and Excessive

Defendant contends that this Court's sentence of four hundred and forty-one months minimum to an eight hundred and eighty-two months maximum was unreasonable and excessive. Defendant reaches this conclusion of the theory that his sentence was cruel and unusual, claiming that the charges occurred from a single incident, they were non-violent, and did not include force. Sentencing has been found to be within the sound discretion of the trial court judge. *Commonwealth v. Allen*, 24 A.3d 1058, 1065 (Pa. Super. 2011). It also is well established it is within the sound discretion of the sentencing court whether to make sentences consecutive or concurrent under 42 Pa. C.S. § 9721(a). *Commonwealth v. Pass*, 914 A.2d 442, 446-47 (Pa. Super. 2006).

Factually, the Court disagrees with Defendant as the offenses are not of a singular incident. The offenses were a series of actions comprised of factually/elementally distinct sexual offenses, which took place in multiple locations throughout an evening. The Court had the benefit of a presentence investigation report prior to sentencing and considered all relevant factors in fashioning its sentence. Defendant automatically had a minimum sentence of twenty-five years to fifty years, which this Court could not lower and imposed on Count One. 42 Pa. C.S. § 9718.2(d). Permissibly the Court could have imposed the mandatory minimum and maximum on every offense, except for Count Six, as all offenses fall under 42 Pa. C.S. § 9799.14 as tiered offenses. *See Commonwealth v. Golson*, 189 A.3d 994, 995-96 (Pa. Super.

2018) (the defendant was sentenced to fifty to one hundred years based on two consecutive mandatory minimums under 42 Pa. C.S. § 9718.2(a)(1)); *see also Commonwealth v. Baker*, 78 A.3d 1044, 1046 (Pa. 2013) (imposing 42 Pa. C.S. § 9718.2(a)(1) is not unconstitutional). Yet instead of imposing what this Court would believe is a disproportionate sentence, it sentenced Defendant to the remainder of his charges with the minimum being within the standard range. *See Commonwealth v. Raven*, 97 A.3d 1244, 1254-55 (Pa. Super. 2014) (sentencing a defendant within the standard range after considering all evidence at sentencing is not unreasonable or excessive). This Court imposed those sentences consecutively, based on the position that if it were to make Defendant's sentences concurrent it would diminish the seriousness of the separate offenses Defendant committed on the victim. In making this determination, the Court considered the following facts: Defendant does not take responsibility for his actions, as he still denies knowing the age of the victim; he has a previous sexual offense as a juvenile; he has a previous factually similar sexual offense as an adult, which he was on probation for during this offense; and his probability of recidivism was found to be greater than ninety percent. Therefore, Defendant's sentence was neither unreasonable nor excessive and his second post sentence motion is denied.

ORDER

AND NOW, this 13th day of August, 2020, based on the foregoing opinion, Defendant's Post Sentence Motions are hereby **DENIED**.

Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of entry; (b) the right to assistance of counsel in the preparation of the appeal; (c) if indigent, the right to appeal *in forma pauperis* and to proceed with assigned counsel as provided in Pennsylvania Rule of Criminal Procedure 122; and (d) the qualified right to bail under Pennsylvania Rule of Criminal Procedure 521(B).

BY THE COURT,

Nancy L. Butts, P.J.

cc: DA (MW)
Helen Stolin, Esq.

NLB/kp