COMMONWEALTH OF PENNSYLVANIA VS. DARRELL G. FLEMING, JR., DEFENANT, Franklin County Branch, Criminal Action - Law No. 909 of 1990, No. 910 of 1990

CRIMINAL LAW- SENTENCING- DEVIATION FROM GUIDELINES

1. Where the Superior Court remands a case for resentencing because the use of an incorrect prior record score resulted in sentences outside the standard range of the sentencing guidelines, and the trial court did not provide reasons to support the deviation, the trial court will impose the same sentences on remand if the trial court determines the original sentences fit the crimes, and will provide the rationale for the deviation.

2. The trial court will resentence a defendant to sentences outside the standard range where the defendant used guns and knives to threaten the victims, the defendant has a prior record of assaultive behavior, all the victims were known to the defendant to be members of a religious sect dedicated to nonviolence, the defendant clearly evidenced intent to continue victimizing members of the sect even after arrest, the defendant threatened revenge on his codefendants, the defendant evidenced little remorse until resentencing, and defendant's conduct in the robberies was particularly shocking.

3. A judge will give relatively little weight on resentencing to remorse shown by a defendant for the first time over four years from the date of the last crime committed, where the defendant has shown no remorse prior to this, and the court had previously commented adversely on defendant's failure to show remorse.

John F. Nelson, Esquire, District Attoney
Stephen D. Kulla, Esquire, Counsel for Appellant

OPINION

KELLER, S.J., October 9, 1995

By Memorandum Opinion filed April 18, 1995, the Superior Court of Pennsylvania in No. 00543HBG1994 vacated the judgment of sentence imposed by this Court on March 27, 1991 and remanded the case for re-sentencing because we were supplied with an incorrect prior record score and in part considered the prior record score in our sentencing deliberations. As a result of the prior record score being "1" rather than "3", the sentences we imposed were in the aggravated range rather than the standard range and because we did not recognize that fact, we did not on the sentencing guideline forms state our reasons for our guideline departures. During the sentencing colloquy and as a part of our explanation of sentences we imposed, we said to appellant:

> Your sentences as far as the Court is concerned are within the sentence guidelines as we intend them, but we recognize Mr.

> Adams' objection, and we will say for the record and to you that without any hesitation and without regard to the sentence guidelines the sentence would not be less than those that we intend to impose upon you. (3-27-91, N.T. 14, L. 25; 15, L. 1-5).

In its Memorandum Opinion the Superior Court stated in its next to the last paragraph:

> While we may affirm a sentence that is outside the guidelines provided that it is reasonable, "it is imperative that the sentencing court determine the correct starting point in the guidelines before sentencing outside them." *Commonwealth v. Brown*, 402 Pa. Super. 369, _, 587 A.2d 6, 7 (1991). As the lower court was supplied with an incorrect prior record score, we are required to vacate the sentence and remand for re-sentencing. *Commonwealth v. Brown, supra* at , 587 A.2d at 8. If, upon remand, the court finds it appropriate to reimpose the same sentence, it may do so by placing sufficient reasons on the record.

On May 17, 1995, the Honorable John R. Walker, P.J. entered an Order directing the Sheriff of Franklin County to transport Darrell G. Fleming, Jr. to the Franklin County Prison on June 14, 1995, for the purpose of sentencing and return him to the State Correctional Institution Rockview, Bellefonte, Pennsylvania, on completion of the case. The Franklin County Probation Department was directed to prepare an updated Pre-Sentence Investigation Report to supplement the Pre-Sentence Investigation Report dated March 5, 1991, which was prepared and filed prior to the earlier sentencing procedure. The updated Pre-Sentence Investigation Report dated May 19, 1995 was prepared and filed. Copies of the March 5, 1991, Pre-Sentence Investigation Report and the May 19, 1995, updated report are attached hereto and made part hereof.

On June 14, 1995, the appellant appeared before the undersigned judge for resentencing. We heard counsel for appellant's extended excellent argument for clemency; the statement of the appellant and the statement of one of the co-defendants directly and actively involved in the commission of the three robberies the appellant had entered guilty pleas to after an extended guilty plea colloquy. The Court then advised the

appellant in detail of the Court's rationale for the sentences it intended to impose including incorporating by reference the transcript of the sentencing proceeding of March 27, 1991 and specifically pages 9, 10, 11, 12, 13, 14, 15 and 16 of the notes of testimony of that proceeding. After the sentences were imposed, the Court explained the sentences and read into the record what we had written on the sentencing guideline forms as our reasons for going outside the guidelines for sentencing in the aggravated range.

The sentences imposed on June 14, 1995, were:

> No. 909 of 1990: Pay the costs of prosecution, pay a fine of $500.00 and undergo imprisonment in a state correctional institution for a period of not less than 63 months nor more than 240 months to be computed from May 22, 1990. The defendant was also directed to have no contact with the victim or his family; that he should participate in drug, alcohol and mental health programs as directed by prison and/or probation authorities; and that upon his ultimate release a hearing should be held to establish a payment plan.
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> No. 910 of 1990, Count 1: Pay the costs of prosecution, pay a fine of $500.00 and undergo imprisonment in a state correctional institution for a period of not less than 53 months nor more than 240 months to be computed from the expiration of No. 909 of 1990. The provisions in No. 909 of 1990 concerning non-contact with victims and family; drug, alcohol and mental health treatments and development of a payment plan were incorporated by reference.
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> No. 910 of 1990, Count 5: Pay the costs of prosecution, pay a fine of $500.00 and undergo imprisonment in a state correctional institution for a period of not less than 60 months nor more than 120 months to be computed from the expiration of No. 910 of 1990 - Count 1. The provisions in sentence No. 909 of 1990 concerning non-contact with victim and family; drug, alcohol and mental health treatments and development of a payment plan were incorporated.

On the sentencing guideline forms we indicated that the sentence to No. 909 of 1990 was in the aggravated range, the sentence in No. 910 of 1990, Count 1, was a guideline departure, and the sentence in No. 910 of 1990, Count 5 was in the

aggravated range. We set forth on the sentencing guideline forms as our reasons for departure from the standard range:

1. Defendant used or exhibited a gun and knife to victims in this crime and a knife in the other two robberies.

2. For the first time on this date the defendant has expressed regret that he committed these three robberies.

3. Defendant has a prior record of assaultive behavior.

4. Defendant has previously been incarcerated and was parole when these crimes were committed.

5. Defendant told Trooper Ridge he would get revenge on his codefendants Marlin Fleming and Tina Coons.

6. Defendant told Trooper Ridge he would never be taken alive by the police if he gets out of jail.

7. Defendant threatened to kill Benjamin Beiler and his family, Aaron Beiler and his wife, and Samuel Beiler.

8. Defendant fired a rifle in the presence of Samuel Beiler and theatened to shoot him.

9. While in custody of Trooper Davis and while passing a fruit stand operated by an Amish family, defendant stated that if he had not been caught, that family would have been next - thus evidencing a continuing plan to rob Amish families.

10. Defendant was 24 years old at the time of these offenses; his co-defendants Marlin Fleming and Tim Anderson were 18 years old.

11. The three victims/families were Amish families living in the Path Valley area of Franklin County. The Amish are well known as peaceful nonviolent people.

12. Benjamin Beiler was wheelchair bound but attacked by defendant in his bed.

Counsel for appellant filed his client's Notice of Appeal dated June 15, 1995, in the Office of the Clerk of Courts of Franklin

County on June 21, 1995. On June 21, 1995, the Clerk of the Courts entered an Order granting appellant leave to appeal informa pauperis. On July 6, 1995, the undersigned judge entered an Order pursuant to Pa.R.A.P. 1925(b) directing the defendant to file an accurate and concise statement of the matters complained of on appeal, and submit to the Court a copy thereof together with citations of any authorities relied upon in the form of a brief. The Order included: "The statement of matters complained of shall be filed within fourteen (14) days from this date and a copy of the statement and brief submitted to the undersigned judge within the same fourteen (14) days." Appellant's counsel's letter enclosing the statement of matters complained of on appeal dated August 2, 1995, was not received by the undersigned judge until sometime after August 2, 1995.

Defendant/Appellant's statement of matters complained of on appeal asserts that the Court improperly sentenced the appellant on June 14, 1995. He then recites the sentences of March 27, 1991, the incorrect guideline figures provided the Court at that time and assumes the sentencing court believed all of the sentences were at the top of the standard range of sentences. He then sets forth the proper sentencing guidelines and the sentences imposed on June 14, 1995. He then states:

> It is the Appellant's position that if the Court when originally sentencing the Appellant felt his sentences should have been at the top of the standard range, the Court cannot now, upon re-sentencing the Appellant, punish him to a greater extent and place him at the top of or above the aggravated range.

The sole issue on appeal is whether the discretion of the sentencing Court is limited on re-sentencing to the same sentencing guidelines, i.e. the standard ranges that were applied at the original sentencing procedure even if the sentences imposed on re-sentencing had the same or lower minimum sentences and identical maximum sentences.

As we stated in our comments to the appellant, we did consider his case anew and invested a rather substantial amount of time reviewing the records of the case, the original Pre-Sentence Investigation Report, the transcripts of the guilty pleas and the sentencing procedure and the papers filed in the case

including our several opinions. (Sentencing Transcript, N.T. 15). We also considered the updated supplemental Pre-Sentence Investigation Report.

Counsel for the appellant argued to the Court that the "aggravated reasons, numbers 1, 2, 3, 4 and 9 set forth on the "Franklin County Probation Department Reasons/Justification for Prison Sentence" attached to the updated Pre-Sentence Report should not be considered as justification for applying the aggravated range of the sentencing guidelines. "We did not agree with counsel's argument as to reasons 1,2, 3 and 4, but did agree we would disregard reason number 9 because it would be hearsay. (Sentencing Transcript, N.T. 9-10). We advised the appellant what we were taking into account and congratulated him on the fact that he had scored very good on his inmate progress reports and work report from 1994 through March 27, 1995. We advised him that we accepted his counsel's statement that although he was written up for four class 1 misconducts and two class 2 misconducts only two of those write-ups led to convictions or violation determinations and that the most serious was possession of a tattooing gun. We indicated we accepted and were pleased to learn that he had not been involved in any violent conduct at the State Correctional Institution and that contrary to the updated Pre-Sentence Investigation Report, he was having monthly sessions with a psychiatrist. (Sentencing Transcript, N.T. 23, 24). After the imposition of the sentences, we advised the appellant that we had reduced the minimum sentence in No. 909 of 1990 from 63 months to 60 months and stated: "that's a reduction of three months from the prior sentence because we thought you should be given some credit for the progress you have made." (Sentencing Transcript, N.T. 24, L. 7-11).

We note that there are some rather serious typographical errors and omissions in our reading into the record, our Supplemental Opinion filed October 25, 1994. We will reiterate those eleven items:

1. The three victims/families were Amish farm families living in a rural area of Franklin County generally known as the Path Valley area. The Amish are well-known as a peaceful nonviolent people.

2. Fleming was 24 years of age at the time of the commission of these crimes.

3. Fleming masterminded the criminal activities and enlisted his cousin, Marlin Fleming, age 18, to participate in the robberies with him. He also enlisted Timothy Lee Anderson, age 18, to provide transportation to the scene of the May 22,1990, robbery and we will say parenthetically at this point we know that your cousin Marlin today came forward and said you weren't the one that masterminded the crime that, in fact, he and Tina Coons came to you and enlisted you so we will accept that as a modification.

We don't know who masterminded then. We accept Marlin's word for it, if he wants to be the mastermind or Tina, but the fact remains that you were 24 years old and your two male co-defendants were six years younger.

4. At approximately 12:30 a.m. on May 18, 1990 Fleming and his cousin entered the Benjamin Z. Beiler residence through an unlocked door. Benjamin Z. Beiler was wheelchair bound. Fleming jumped on Beiler's chest and placed a knife against his throat while he was lying in bed and demanded money. He threatened to kill Beiler and his children if he did not give the money. Both intruders were wearing masks.

5. At approximately 2:00 a.m. Fleming and his cousin, again wearing masks, entered the home of Aaron Z. Beiler by cutting a screen door. They went to the bedroom occupied by Aaron Z.Beiler and his wife, Katy. Fleming went to the side of the bed and grabbed Aaron Beiler by his beard and placed a long handled knife to his throat and demanded to know where the greenhouse money was kept. He put sufficient pressure on the knife to cause a small cut on Aaron Beiler's throat. He threatened to cut Mrs. Beiler's throat. They ransacked drawers in other rooms and took two wallets.

6. At approximately 12:30 a.m. on May 22,1990, Fleming and his cousin, again wearing masks. broke through two locked doors at the home of Samuel Yoder Beiler. They went upstairs to the children's bedroom where the Beiler family had sought refuge. Fleming poked Samuel Beiler in the ribs with a hunting style knife and demanded money. Taking Samuel Beiler with them, they ransacked the residence and punched and kicked Beiler. They forced Beiler to go outside to his

shoemaker and harness shop, where Fleming took possession of a .22 caliber rifle; fired a shot into the wall; reloaded the weapon and threatened to shoot Beiler if he did not tell him where they money was. While in the shop, they beat Beiler again and then tied him to a chair with shoelaces. In addition to the .22 rifle, they took a .12 gauge shotgun, a .308 Winchester rifle, two pairs of boots and two pairs of work gloves.

7. While in the custody of Pennsylvania State Police Trooper Davis, and while passing a fresh fruit stand operated by an Amish family, Fleming made the remark that if he hadn't been caught that family would have been next.

8. Fleming told Trooper Ridge of the Pennsylvania State Police that he would get revenge on his co-defendant Marlin Joseph Fleming and Tina Coons. He also said he would never be taken alive by the police if he gets out of jail.

9. He has shown no remorse for his actions. I will amend that in that you did today, as far as we know this is the first time that you have evidenced any indication of remorse - today. You did say you're sorry. We certainly do take note of that.

10. As previously indicated, Fleming did have a prior criminal record, had served sentences in the Franklin County and Huntingdon County Prisons and had been subject to parole supervision upon release from those prisons.

11. Fleming was apparently still on parole on the March 14, 1989, sentence of the Huntingdon County Court of Common Pleas at the time of the commission of these crimes hereunder considerations. (Sentencing Transcript, N.T. 19 - 23).

Since we had commented adversely on the defendant's failure to exhibit any remorse in our Opinions, we are not surprised to find Mr. Fleming expressing sorrow for what he had done and his assurance that it would not happen again. (Re-sentencing Transcript, N.T. 11-12). At the risk of sounding cynical, his statement sounds much like a "foxhole conversion". We did consider it, but we did not give it a great deal of weight.

As previously indicated, we did take into account the testimony of co-defendant Marlin Joseph Fleming that the appellant was not the ringleader in these robberies. However, a review of the March 5, 1991, Pre-Sentence Investigation Report statements of the "defendant's version" and "victim's statement" demonstrates that the appellant was the primary aggressor in each of the robberies.

During the procedure on March 27, 1991, we advised the appellant that:

> The three robberies that you entered guilty pleas to are rather unique in that they are more terrible than most that we can recall over 22 years. The conduct of a robber is always extremely offensive to any law abiding citizen, but your conduct went far beyond that of robberies that I have been involved with, and that certainly does not speak well for you in your involvement. (Sentencing Transcript, March 27, 1991, N.T. 9, L. 20-25, 10, L. 1-7).

Our experience as a Common Pleas trial judge and senior judge since March 27, 1991, has not changed our opinion. These robberies were unique in that they remain more terrible than we can recall over all those years. The violence and the overt threats of violence were uniquely outrageous.

While mercifully none of the victims, and we include their families, suffered any real injuries during these three robberies, we must attribute that to the fact that the victims offered no resistance and accepted the treatment accorded them by the appellate and his cousin. The statements attributed to the appellant and to his victims in the first Pre-Sentence Investigation Report clearly indicate the robber's violent aggressive intentions.

As previously noted, we did advise the appellant when he was first sentenced that "...without regard to the sentence guidelines the sentence would not be less than those that we intend to impose upon you." (Original Sentencing Transcript, 3-27-91, N.T. 14, L. 25; 15, L. 1-5).

When the appellant appeared before the Court for re-sentencing, we had before us the original Pre-Sentence Investigation Report and the updated Pre-Sentence Investigation

Report and had considered both of those documents. *In Commonwealth v. Devers*, 519 Pa. 88, 546 A.2d 12, 18 (1980) the Supreme Court held:

> We emphatically reject, therefore, interpretations of our law in this area which call for separate, written opinions embodying exegetical thought. Where presentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. In order to dispel any lingering doubt as to our intention of engaging in an effort of legal purification, we state clearly that sentencers are under no compulsion to employ checklists or any extended or systematic definitions of their punishment procedure. Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed. This is particularly true, we repeat, in those circumstances where it can be demonstrated that the judge had any degree of awareness of the sentencing considerations, and there we will presume also that the weighing process took place in a meaningful fashion. It would be foolish, indeed, to take the position that if a court is in possession of the facts, it will fail to apply them to the case at hand. For that reason, *Wicks* in its voluminous progeny represent an intolerable deviation from our original intent on this issue.

As previously observed, the Superior Court in its Memorandum Opinion filed April 18, 1995, stated: "If, upon remand, the court finds it appropriate to reimpose the same sentence, it may do so by placing sufficient reasons on the record." We respectfully submit the sentences imposed on June 14, 1995, were amply justified and sufficient reasons for them were placed upon the record at the time of sentencing, on the sentence guideline forms and in this Opinion.