award with the right of plaintiff to apply for additional sums when the case is completed, that the award of $100 per week shall be retroactive to July 21, 1981, and that such sums awarded shall be paid to the Domestic Relations section of the Court which shall then distribute the payments to plaintiffs as soon as possible after receipt.

COMMONWEALTH v. BAUGHMAN, C.P. Franklin County Branch, No. 467 of 1970

Criminal Law - Flat Sentence - No minimum sentence

1. The Sentencing Code requires imposition of a minimum sentence.

2. Where defendant is sentenced a flat sentence with no minimum, the sentence is upheld because the minimum is presumed to be one day.

John F. Nelson, Assistant District Attorney, Counsel for the Commonwealth

Blake E. Martin, Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., July 14, 1983:

Dennis Baughman was charged with robbery by assault and force. On February 22, 1971, an order was entered finding that the defendant had voluntarily and understandingly offered to enter a plea of guilty and it was accepted. On March 17, 1971, the defendant was sentenced to pay the costs of prosecution and undergo imprisonment in a State Correctional Institution for a period of 10 years flat to be computed from the expiration of No. 519 - 1968. The defendant's petition under the Post Conviction Hearing Act was presented to the Honorable George C. Eppinger on December 21, 1982, and an order entered appointing Blake E. Martin, Esq. as counsel for the defendant, and granting a rule upon the Commonwealth to show cause why hearing should not be granted. On December 22, 1982, the Court found that the only fact germane to the disposition of the case is the legality of the sentence imposed in 1971. Counsel were ordered to confer and notify the Court of the time for legal argument on the matter.

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Briefs were exchanged and arguments heard on July 7, 1983. The matter is now ripe for disposition.

The petitioner/defendant contends that the flat sentence imosed on March 17, 1971 is an illegal sentence because the Act of June 19, 1911 P.L. 1055, Sec. 6 as amended; 19 P.S. 1057 provides inter alia:

> "Whenever any person, convicted in any court of this Commonwealth of any crime punishable by imprisonment in a state correctional penitentiary, shall be sentenced to imprisonment therefor in any penitentiary or other institution of this state..., the court, instead of pronouncing upon such convict a definite or fixed term of imprisonment, shall pronounce upon such convict a sentence of imprisonment for an indefinite term: stating in such sentence the minimum and maximum limits thereof; and the maximum limit shall never exceed the maximum time now or hereafter prescribed as a penalty for such offense; and the minimum limit shall never exceed one-half of the maximum sentence prescribed by any court."

He notes that the present Sentencing Code formerly 18 Pa. C.S.A. Sec. 1356(b) and enacted as 42 Pa. C.S.A. Sec. 9756(b) provides:

> "MINIMUM SENTENCE.--The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed."

The Sentencing Code is the Act of December 6, 1972.

The petitioner also cites *Commonwealth v. Aeschbacher,* 276 Pa. Super. 554, 419 A. 2d 596 (1980); *Commonwealth v. Shoemaker,* 303 Pa. Super. 242, 449 A. 2d 669 (1982) (allocatur granted), and *Commonwealth v. Craig,* Pa. Super. , 457 A. 2d 1310 (1983). In each of these cases a flat sentence was imposed and it was imposed after the effective date of the Sentencing Code. In *Aeschbacher* the Superior Court held:

> 'It seems to us that the better interpretation of the sentencing statutes is to require the fixing of a minimum sentence (even one day) as well as a maximum. In addition, the *Keller* line of cases which we follow construe the only sentencing statute in effect at the time of sentencing in this case. This interpretation is more in keeping with the policy of having the full sentencing responsibility lodge with the trial court and it eliminates any 'construction' of sentences by appellate courts. We are mindful that resentencing may under certain circumstances create issues caused by the enhancement of a sentence but that is not now before us..." (At page 557)

In *Craig* the Superior Court held:

> "By interpreting the sentencing statute to require the fixing of a minimum, as well as a maximum, sentence, we specifically disavowed earlier cases which presumed a one-day minimum on a flat sentence, i.e., a sentence with a maximum term only."
> At page 1311)

The Commonwealth concedes the accuracy of the contentions posed by Mr. Baughman but contends that the controlling authority in the case at bar is the decision of the Supreme Court of Pennsylvania in *Commonwealth v. Ulbrick,* 462 Pa. 257, 341 A. 2d 68 (1975) wherein the highest court in the Commonwealth of Pennsylvania was called upon to determine whether the flat sentence of 20 years imposed on July 22, 1971 was an illegal sentence justifying the discharge of the defendant on his petition under the Post Conviction Hearing Act. The Court noted that no minimum sentence was stated as required by the Act of June 19, 1911 P.L. 1055, supra, but affirmed the sentence holding:

> "However, imposition of a flat sentence benefits the defendant for the minimum is then presumed to be one day and he thus becomes immediately eligible for parole...Since the minimum is implied, the sentence is legal and the appellant has incurred no harm." (Page 259)

In our judgment the position taken by the Commonwealth is correct, for this case is factually on all fours with *Ulbrick* and we consider ourselves to be bound by the expressed decision of our highest court.

Parenthetically, we feel it appropriate to note that in the several years preceding the date of Mr. Baughman's sentence both of the judges of this Judicial District had had frequent requests from penal authorities to consider imposing flat sentences because it was felt that such sentences provided penal authorities and the State Board of Probation and Parole with an invaluable rehabilitation tool in that it permitted the sentenced resident to be presented with the proposition that he was eligible for parole at any time he demonstrated by his conduct, his attitude, and his participation in available programs his rehabilitation. This, of course, was expected to encourage improved conduct, attitude and participation on the part of residents justifying an early parole. This was in our mind at the time of sentencing as evidenced by the following comment during the sentencing colloquy with Mr. Baughman:

"Mr. Baughman, the Court will in due course receive a request for comments and recommendations from the State Board of Probation and Parole, and the Court will include a statement, so there is no misunderstanding, in its comment to the effect that it is the Court's intention to give to the State Board full discretion as to the time and date when they feel you have indicated full rehabilitation and are ready to be released. So when you will be released is entirely up to you and your conduct..." (N.T. 4)

ORDER OF COURT

NOW, this 14th day of July, 1983, the Petition of Dennis Lee Baughman for relief under the Post Conviction Hearing Act is dismissed.

Exceptions are granted the petitioner.

GREEN V. INSURANCE COMPANY OF NORTH AMERICA, C.P. Franklin County Branch, No. A.D. 1982 - 321

Assumpsit - No-Fault Benefits - Psychiatric Examination - Tape Record Examination

1. An insurance carrier may require an injured party to submit to a psychiatric examination under Pa. R.C.P. 4010 and Section 401 of the No-Fault Motor Vehicle Act.

2. Where the psychiatrist selected by the insurance carrier is both a physician and attorney, the attorney for the injured party may tape record the examination to ensure the examination is limited to a medical inquiry and does not involve legal advocacy.

Robert L. McQuaide, Esquire, Attorney for Plaintiff

Robert A. Lerman, Esquire, Attorney for Defendant

MEMORANDUM AND ORDER

Eppinger, P.J., September 15, 1983:

Plaintiff was injured in an automobile accident early in 1979.

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