Franklin County Legal Journal
Vol. 21, Issue 36, pages 185 -195
Commonwealth v. Ward

COMMONWEALTH OF PENNSYLVANIA v. JOSEPH WARD JR., Defendant

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch

Criminal Action No. 987-2002

Merger of crimes; Three strikes rule

I. In determining if crimes merge for purposes of sentencing, a court must determine (1) whether the same facts supported convictions for the crimes at issue and (2) whether the crimes were greater and lesser included offenses.

2. The same facts mean any act or acts which the accused has performed and any intentwhich the accused has manifested, regardless of whether these acts and intents are part of one criminal plan, scheme, transaction or encounler or multiple criminal plans. schemes, transactions or encounters.

3. To determine if the crimes were greater and lesser included offenses, a court determines whether the elements of the lesser crime are all included within the elements of the greater crime, and the greater offense included at least one element which is different, in which case the sentences merge, or whether both crimes require proof of at least one element which the other does not, in which case the sentences do not merge.

4. Where the person had at the time of the commission of the current offense previously been convicted of two or more such crimes of violence arising from separate transactions, the person shall be sentenced to the minimum sentence of at least 25 years of total confinement, not withstanding any other provision of this title or other statute to the contrary. 42 Pa.C.S.A. §9714(11)(2).

5. In determining whether an out-of-state crime is equivalent to a crime in Pennsylvania, a court is to compare not only the elements of the crimes but also the conduct to be prohibited and the underlying public policy of the two statutes.

Appearances:
John M. Lisko, Esq., *Assistant District Attomey*
R. Paul Rockwell, Esq., *Counsel for Defendant*

OPINION

Van Horn J., January 29, 2004

Factual Background

1. In the early hours of May 18, 2002, Defendant, Joseph Ward, Jr., during the commission of a robbery, shot the victim in the mouth.

2. The victim and Defendant did not know each other before becoming acquainted at a bar on May 17, 2002. After socializing together for a period of time, the victim, Defendant and a third party went to the Carson's Motel.

3. The victim, Defendant and the third party continued to socialize together at the Carson's Motel until Defendant revealed a .25 caliber handgun at which point the third party left the room.

4. Defendant pointed the handgun at the victim and ordered him to place his jewelry, cash, and Zippo on the bed in the hotel room.

5. The victim complied with Defendant's demands.

6. Defendant then placed the victim in a headlock, inserted the handgun in the victim's mouth and pulled the trigger.

7. The victim suffered serious bodily injury as a result of the gunshot wound.

8. The police found Defendant soon after the incident and Defendant had the victim's belongings in his possession.

Procedural Background

1. On September 12, 2003, Joseph Ward, Jr., Defendant, was found guilty by a jury of the following offenses:

A. Attempted Murder - (18 Pa. C.S.A. §901, 18 Pa. C.S.A. §2502(a));

B. Aggravated Assault - Causing Serious Bodily Injury - (18 Pa. C.S.A. §2702(a)(l))

C. Robbery, Inflicts Serious Bodily Injury upon Another(18 Pa. C.S.A. §370l(a)(l)(i));

D. Theft - (18 Pa. C.S.A. §3921)

E. Receiving Stolen Property -(18 Pa. C.S.A. §3925)

F. Fireanns Not to be Carried Without a License - (18 Pa.C.S.A. §6106(a)(1))

G Possession of a Firearm with Altered Manufacturer's Number - (18 Pa. C.S.A. §6110.2)

2. On October 29, 2003, Defendant was sentenced on the following charges: Attempted Murder, Robbery, Receiving Stolen Property, Fireanns Not to be Carried without a License and Possession of a Firearm with Altered Manufacturer's Number. Defendant was not sentenced for Aggravated Assault as it merges into Attempted Murder, nor was Defendant sentenced for Theft as it merges into Receiving Stolen Property.

3. On November 10, 2003, Defendant filed post-sentence motions.

4. On November 12, 2003, Defendant was also sentenced pursuant to his earlier nolo contendre plea for Possessing a Fireann as a Former Convict pursuant to 18 Pa.C.S.A. §6105.

5. On November 13, 2003, a rule was issued on the Commonwealth to show cause why the relief sought by Defendant should not be granted.

6. On December 12, 2003, Defendant filed a Brief in Support of Defendant's Post-Sentence Motions.

7. On December 19, 2003, the Commonwealth filed a Brief in Opposition to Defendant's Post-Sentence Motions.

8. On January 5, the Court heard oral argument on Defendant's PostSentence Motions.

Discussion

This matter is before the Court on Defendant's Post-Sentence Motions. The Motions are as follows: (1) Whether the Court erred in not finding a merger of Attempted Criminal Homicide with Robbery and in imposing separate sentences instead of imposing only one sentence for Robbery, and (2) Whether the Court erred in finding that Defendant's New York conviction established a "crime of violence" required for application of 42 Pa.C.S. §9714 and resulting in a first strike under that section.

Whether the Court erred in not finding a merger of Attempted Criminal Homicide with Robbery and in imposing separate sentences instead of imposing only one sentence for Robbery.

The Court did not err in finding that attempted criminal homicide does not merge with robbery and in imposing separate sentences instead of imposing only one sentence for robbery.

Our Supreme Court has recognized:

> The question of when sentences should merge is not an easy question ... Analytically, the problem concerns whether a single criminal plan, scheme, transaction or encounter, which may or may not include many criminal acts, may constitute more than one crime, and if it may constitute several crimes, whether each criminal conviction may be punished separately or whether the sentences merge. Commonwealth v. Anderson, 538 Pa. 574, 576-577, 650 A.2d 20, 21 (1994), modified, 539 Pa. 476, 653 A.2d 615 (1994).

In Anderson[1], the defendant shot a woman in the neck as she stood at the kitchen sink preparing dinner. Id. at 575, 20. The defendant was convicted of aggravated assault, attempted murder, and possession of instrument of crime. Id. at 575-576, 20. In determining that the crimes of aggravated assault and attempted murder merged for purposes of sentencing, our Supreme Court held that "in all criminal cases, the same facts may support multiple

1 We note the Supreme Court's decision in Commonweath v. Gatling. 570 Pa. 34, A.2d 890 (2002). In Gatling the court clarifies new rules regarding merger or crimes for sentencing purposes. However, rbe opinion is a pluralily. As Gatling is therefore not binding authorily, we follow !he rules established by prior precedent, which has not been overturned.

convictions and separate sentences for each conviction except in cases where the offenses are greater and lesser included offenses." Id. at 579,22.

In the present case, what occurred on May 17, 2002, at the Carson motel was a single criminal encounter, which included multiple criminal acts, which constituted more than one crime. Therefore, a merger analysis was appropriate at the sentencing stage for all the crimes that occurred.

Based on the holding in Anderson, this Court had to determine (1) Whether the same facts supported convictions for the crimes at issue and (2) Whether the crimes were greater and lesser included offenses. The same crimes that were at issue in Anderson, aggravated assault and attempted murder, were also at issue in the present case. Because this Court, as well as the court in Anderson, answered both posed questions in the affirmative in regards to aggravated assault and attempted murder, both courts merged those two crimes[2]. Id. at 583, 24.

The question now before the Court is whether robbery should merge into attempted murder. Again, the Anderson test is employed and the Court has to determine (1) Whether the same facts supported convictions for aggravated assault and attempted murder, and (2) Whether the crimes were greater and lesser included offenses.

The court in Anderson defined "the same facts" to mean "any act or acts which the accused has performed and any intent which the accused has manifested, regardless of whether these acts and intents are part of one Criminal plan, scheme, transaction or encounter or multiple criminal plans, schemes, transactions or encounters." Id. at 579, 22. The court went on to say:

> It does not matter for purposes of merger whether one regards [a Defendant] striking [a] customer and kidnapping him as one encounter or as two encounters, for the same facts, i.e., striking the victim with a gun, may be used to satisfy the force requirements of at least two crimes, kidnapping and aggravated assault, and the sentences for each crime will not merge because these crimes are not greater and lesser included offenses. Id.

Similarly, in our case, it does not matter for merger purposes whether one regards Defendant shooting and robbing the victim as one encounter or as two encounters, for the same facts, i.e., sticking a gun in the victim's mouth, may be used to satisfy the act requirement of both crimes.

The Court finds that the convictions for attempted homicide and robbery are supported by the same facts, facts derived from the occurrence at the Carson Motel on May 17, 2002.

The next determination the Court must make is whether the two crimes are greater and lesser included offenses. The court in Anderson set forth the following inquiry regarding that matter:

> Whether the elements of the lesser crime are all included within the elements of the greater crime, and the greater offense includes at least one additional element which is different, in which case the sentences merge, or whether both crimes require proof of at least one element which the other does not, in which case the sentences do not merge. Id. at 582, 24.

Again, the two crimes at issue are attempted homicide and robbery. A person is guilty of attempted homicide if, with a specific intent to kill, he does any act which constitutes a substantial step toward the commission of the murder. 18 Pa.C.S. §§90l(a), 2502(a). A person is guilty of robbery if, "in the course of committing a theft, he inflicts serious bodily injury upon another." 18 Pa.C.S. §370l(a)(l)(i).

Defendant asserts that the two offenses are greater and lesser included because every element of attempted murder is included in robbery and robbery has the added element of theft. Both parties acknowledge the, the offense of robbery requires the additional element of theft. Therefore, is is undisputed that robbery requires proof of at least one element which attempted homicide does not.

However, the dispute is regarding whether attempted homicide requires proof of at least one element which robbery does not. Defendant asserts that attempted homicide does not require anything more than robbery does and thus should merge into robbery.

Defendant argues that because the jury found him guilty of attempted murder and that finding required a finding of a specific intent to kill then necessarily the intent required for the robbery was a specific intent to cause serious bodily injury. Therefore, because one cannot kill without having the specific intent to commit serious bodily injury, the crimes should merge because the defendant's intent to kill was the same as and equal to his intent to inflict serious bodily injury.

In making the above statement, Defendant seems to be confusing which offense is merging into the other.

2 In the present case, at the senrencing stage, the Court also merged Theft into Receiving Stolen Property.

The specific intent to kill, as required for attempted homicide, cannot merge into the specific intent to cause serious bodily injury, as required for robbery. Conversely, the specific intent to cause serious bodily injury, as required for robbery, may merge into the specific intent to kill, as required for attempted murder, BUT does not do so as robbery requires the added element of theft.

Defendant's confusion as to which crime is merging into which is further evidenced as he quotes Anderson which dealt with merging aggravated assault into attempted murder as saying "it is tautologous that one cannot kill without inflicting serious bodily injury." Id. at 583, 24. Defendant says, "if that is true, then it is true that one cannot attempt to kill without attempting to inflict serious bodily injury." (Defendant's Memo at 3.) Defendant's statement is true but incorrectly stated in regards to the argument Defendant is trying to make. To be consistent in his argument that attempted murder merges into robbery, Defendant would have to be arguing that and it would have to be true that one cannot attempt to inflict serious bodily injury (robbery) without attempting to kill (attempted murder). This is not a true statement and is the root of Defendant's problem in arguing that the above two offenses merge.

While Defendant says that it does not make sense to say that Defendant acted with two different intents at the same time with regard to the one act of shooting, courts are saying exactly that when they determine that numerous offenses arose from the same facts but do not merge for purposes of sentencing. The bottom line is that the convictions that arose out of the one act of shooting contain elements that do not merge.

The Court adopts the following reasoning of the court in Anderson regarding merger in stating that it has correctly decided that the crimes of attempted homicide and robbery do not merge and therefore the separate sentences were correctly imposed.

> Our concern ... is to avoid giving criminals a "volume discount" on crime. If multiple acts of criminal violence were regarded as part of one larger criminal transaction or encounter which is punishable only as one crime, then there would be no legally recognized difference between a criminal who robs someone at gunpoint and a criminal who robs the person and during the same transaction or encounter pistol whips him in order to effect the robbery. But in Pennsylvania, there is a legally recognized difference between these two crimes. The criminal in the latter case may be convicted of more than one crime and sentences for each conviction may be imposed where the crimes are not greater and lesser included offenses. Id., at 579-580, 22.

Whether the Court erred in finding that Defendant's New York conviction established a "crime of violence,, required for application of 42 Pa.C.S. §9714 and resulting in a first strike under that section.

The Court did not err in finding that Defendant's New York conviction for robbery establishes a "crime of violence" as required for application of 42 Pa.C.S. §9714. Therefore, Defendant's New York conviction constitutes a first strike under 42 Pa.C.S. §9714.[3]

We initially note that "the purpose of §9714 is to deter violent criminal acts by imposing harsher penalties on those who commit repeated crimes of violence." Commonwealth v. Taylor, 831 A.2d 661, 665 (Pa. Super. 2003), quoting Commonwealth v. Eddings, 721 A.2d I 095, 1100 (Pa. Super. 1998).

Section 9714 (g) defines the term "crime of violence" to include "robbery as defined in 18 Pa.C.S. §3701 (a)(1)(i), (ii), or (iii), or an equivalent crime in another jurisdiction."

The New York conviction can be detennined a first strike for purposes of sentencing pursuant to §9714 only if it falls within the "equivalent crime" section of the statute.

In detennining whether an out-of-state crime is equivalent to a crime in Pennsylvania, the Supreme Court has said to compare not only the elements[4] of the crimes but also "the conduct to be prohibited and the underlying

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3 42 Pa.C.S.A. §9714(2)(2)
Where the person had at the time of the commission oflhe current offense previously been convicted of two or more such crimes of violence arising from separate criminal transactions, the person shall be sentenced to the minimum sentence of at least 25 years or total confinement, notwithstanding any other provision of this title or other statute to the contrary. Proof that the offender received notice of or otherwise knew or should have known of the penalties under this paragraph shall not be equired. Upon conviction for a third or subsequent crime of violence the court may, if it determines that 25 years of total confinement is insufficient to protect the public safely, sentencc the offender to life imprisonment without parole.

4 In determining whether the elements of the crimes are equvalent:
A sentencing court (shall) carefully review the elements of the foreign offense in terms of the classification of the conduct proscribed, its definition of the offense, and the requirements of culpability. Accordingly, the court may want to discern whether the crime is *malum in se* or *malum prohibitium*, or whether the crime is inchoate or specific. If it is a specific crime, the court may look to the subject matter sought 10 be protected by the statute, e.g. protection of the person or protection of the propeny. It will also be necesary to exnmine the definition of the conducl proscribed. In doing so, the court should identify the requisite elements of the crime- the *actus reus* and *mens rea* - which form the basis of liability. Having identified these elements of the foreign offense, the court should turn to the Pennsylvania Crimes Code for the purposes of detmnining the equivalent Pennsylvania offense. Commonwealth v Bolden. 367 Pa. Super. 333, S32 A.2d 1172 (1987).

public policy of the two statutes[5]." Commonwealth v. Robertson, 555 Pa. 72, 76, 722 A.2d I 04 7, I 049 (1999).

Recently, the Superior Court has reiterated that "[a]n equivalent offense is that which is substantially identical in nature and definition as to the out-of-state or federal offense when compared to the Pennsylvania offense. Id. at 666 quoting Commonwealth v. Miller, 787 A.2d 1036, 1039 (Pa. Super. 2001) (citations omitted).

We begin our analysis by considering the elements and definition of the New York offense.

The New York robbery statute provides as follows:

§ 160.15. Robbery in the first degree

A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

1 . Causes serious physical injury to any person who is not a participant in the crime; or

2. Is armed with a deadly weapon; or

3. Uses or threatens the immediate use of a dangerous instrument; or

4. Displays what appears to be a pistol, revolver, rifle shotgun, machine gun or other firearm.

New York Penal Code§ 10.00(13) provides the definition of "dangerous instrument" as used in Subsection 3 above: "Any instrument, article or substance, including a "vehicle" as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury."

By way of comparison, the Pennsylvania robbery statute provides as follows:

§3701. Robbery

(a) Offense defined

A person is guilty of robbery if, in the course of committing a theft, he:

i. inflicts serious bodily injury upon another;

ii. threatens another with or intentionally puts him in fear of immediate serious bodily injury;

iii. commits or threatens immediately to commit any felony of the first or second degree.

Omitted from §9714's reach are the final two subsections of §3701:

iv. inflicts bodily injury upon another or threatens another with or intentionally puts in fearofimmediate bodily injury;

or

v. physically talces or removes property from the person of another by force however slight.

Both parties agree that Defendant was found guilty pursuant to §160.15(3) of the New York statute in 1976. Therefore, in determining whether the Pennsylvania statute for robbery is equivalent, the Court must determine whether the Pennsylvania statute is equivalent to § 160.15(3). This analysis is limited to determining whether§ 160.15(3) is equivalent to 18 Pa.C.S.A. §3701(a)(l)(ii) as the Court finds that the other subsections of Pennsylvania's statute are not equivalent.

In Taylor, the federal robbery statute[6] was compared to Pennsylvania's robbery statute. While the statutes are not identical, the court said the crimes were "equivalent within the meaning and purpose of 42 Pa.C.S.A. §9714. Id. at 666.

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5 In Commonwealth v. Whisnant 390 Pa.Super. 192. 568 A.2d 259 (1990), tbe court applied the Borden approach to determine that the defendant was a repeat offender under a Pennsylvunia statuie regarding driving under the influence recidivists when a prior offense occurred in New Jersey. In addition to finding that the elements of the crimes in each jurisdiction were similar, tbe court reasoned that: "The prohibited conduct, as well as the underlying public policy, of the ... criminal statutes at issue in this case are the same." Id. at 195, 261. Consequently, the court did not err in
treating them as equivalent offenses for purposes of sentencing. To hold otherwise would go against tbe purpose of a recidivist statute as "the appellant would be treated as a first offender only because he had commited his previous crimes in another jurisdiction." Id.

6 18 U.S.C. §2113

(a) Whoever. by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, and bank, credit union, or any savings and loan association;

...

Shall be fined under this title or imprisoned not more than twenty years, or both.

...

(d) Whoever, in committing or attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person by the use of a dangerous weapon or devise, shall be fined under this title or imprisoned not more than twenty-five: years or both.

In saying this, the court looked first at the elements of the crimes. The court said, "the elements of both include an individual's resort to force or intimidation in the presence of another to talce that which does not belong to the individual." Id. The same could be said about both the New York and Pennsylvania statutory provisions at issue.

The second step in determining if crimes are equivalent is to examine the conduct prohibited by both statutes and the public policy behind them. The court in Taylor says, in regards to the Pennsylvania and federal statutes for robbery, that the "conduct prohibited by both statutes, the resort to such force and intimidation to accomplish the individual's purpose of taking, is the same." Id.

This Court adopts the reasoning of Taylor in saying that the conduct prohibited by both the New York and Pennsylvania subsections are the same. Furthermore, in saying that the conduct prohibited by both provisions are the same, the Court notes the difference in the conduct prohibited by §370 I (a)(1)(ii) and § 160.15(3) as compared to the subsections of Pennsylvania's statute that are excluded from §9714(g) as crimes of violence which do not involve serious bodily injury. Both of the provisions at issue address conduct involving the potential for serious bodily injury while not requiring that a serious bodily injury actually be inflicted.

The public policy behind both provisions in question is identical. Not only did the legislatures of both states intend that a serious bodily injury not occur during an unlawful taking as is evidenced by subsections of the statutes not presently at issue, but they also intended that there not even be the potential for serious bodily injury during an unlawful taking as is evidenced by the subsections of the statutes presently at issue.

The Court finds that the crimes at issue are equivalent after examining thoroughly the elements, the conduct to be prohibited and the public policy underlying the statutes. Again, the Court reiterates that the purpose of §99714(g) is to punish a defendant more severely for violent crimes. To rule in favor of Defendant would effectuate an absurd result as surely it is a crime of violence to "use or threaten to use any instrument, article or substance ... readily capable of causing death or other serious physical injury." §610.15(3), §10.00(13).

Defendant is concerned that Commonwealth's Exhibit "K" not be considered by the sentencing court as it is not an official document. Neither party disputes that Defendant was convicted of robbery in New York in 1976 pursuant to New York Penal Code§ 160.15(3). Therefore, whether or not Exhibit "K" is an official document, the Court need not consider it and the words in question on it ("did throw Clorox into complainants eyes, causing serious physical injury") because to make the necessary decision, all that needs to be reviewed is the statutory provision under which Defendant was previously convicted and Pennsylvania's alleged equivalent statute.

Conclusion

The Court did not err in finding that attempted criminal homicide does not merge with robbery and in imposing separate sentences instead of imposing only one sentence for robbery.

In making such a determination, the Court found that while the same facts supported convictions for the crimes at issue. the crimes are not greater and lesser included offenses. Attempted homicide and robbery are not greater and lesser included offenses because each crime requires proof of an element that the other does not.

The Court did not err in finding that Defendant's New York conviction for robbery establishes a "crime of violence" as required for application of 42 Pa.C.S. §9714. Therefore, Defendant's New York conviction constitutes a first strike under 42 Pa.C.S. §9714.

In making such a determination, the Court found that the statutory provisions at issue are substantially similar based on a review of the elements, conduct to be prohibited and the underlying public policy of the two statutes.

ORDER OF COURT

And now this 29th day of January, 2004, this matter having come before the Court on Defendant's Post-Sentence Motions, the Court having considered the relevant documents and having heard Oral Argument, hereby orders that Defendant's Post-Sentence Motions are both denied.