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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Commonwealth of Pennsylvania, v. James W. Vines, III, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Criminal Action No. 1246-2014

HEADNOTES

Sentencing; Trial Court's Discretion

1. As a sound matter vested in the trial court, sentencing issues will not be disturbed by an appellate court absent an abuse of discretion. *Commonwealth v. Rodda*, 723 A.2d 212, 214 (Pa. Super. 1999).
2. To support reversing a sentence imposed by the trial court, there must be more than simply an error in judgment. Instead, “the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.” *Id.*
3. Trial court’s decision not to sentence defendant to an intensive, long-term treatment facility for addiction and rather impose a sentence of the standard range of 48 to 96 months of incarceration on first degree felony burglary was not an abuse of discretion based on defendant’s prior record score and the harm he had inflicted on the community.

Sentencing; Prior Record Score for Out-of-State Conviction

1. Pursuant to Pa. Code. § 303.8(f)(1), an out-of-state conviction is scored as its current equivalent Pennsylvania offense for purposes of calculating a defendant’s prior record score.
2. In examining what Pennsylvania offense an out-of-state conviction is equivalent to, the trial court should determine whether the crime is inchoate or specific. If specific the court should look at the purpose of the statute and what it sought to protect. The court should also look at the proper *actus reus* and *mens rea* of the offenses “which form the basis of liability.” *Commonwealth v. Bolden*, 532 A.2d 1172, 1175-1176 (Pa. Super. 1987).
3. For purposes of calculating a defendant’s prior record score, a defendant’s conviction for third degree burglary in Maryland pursuant to MD Code, Criminal Law, § 6-204, was equivalent to Pennsylvania first degree burglary codified at 18 Pa. C.S. § 3502(a)(1)-(2).

Appearances:

Kristen Nicklas, Esq., *Counsel for Defendant*

Gerard N. Mangieri, Esq., *Assistant District Attorney*

OPINION AND ORDER OF COURT

Before Van Horn, P.J.

STATEMENT OF THE CASE

On May 5, 2014, three individuals, including the above captioned Defendant, James Vines, III, committed a robbery at a WalMart on 12751

Washington Township Boulevard, Waynesboro, Pennsylvania. Following his arrest, the Defendant was automatically appointed the Franklin County Public Defender's Office as counsel because he was incarcerated. On June 17, 2014, the Public Defender's Office filed a Petition for Appointment of Outside Counsel because of a conflict of interest. That same day, this Court ordered that Attorney Matt Stewart be appointed to represent the Defendant. At Call of the Trial List on December 22, 2014, the Defendant expressed his dissatisfaction with Attorney Stewart and after an extensive colloquy on the record, the Court granted the Defendant's request to proceed *pro se*. On February 12, 2015, the Defendant signed a Waiver of Counsel Pursuant to Pa. R. Crim. P. 121 and pled guilty to robbery.¹ Sentencing was scheduled for March 18, 2015.

On March 6, 2015, the Defendant filed a Memorandum: Prior Record Score, contesting a calculation of a prior 2005 burglary conviction in Maryland as being the equivalent of a burglary in Pennsylvania of the first degree which made his prior record score repeat felony offender. (RFEL). The Commonwealth filed a Sentencing Memorandum in response on that same day asserting that the Defendant's argument was meritless. At sentencing, this Court agreed with the Commonwealth's recommendation that the Defendant be considered a RFEL and sentenced the Defendant to the standard range of 48 to 96 months in a State Correctional Institution. On March 26, 2015, Defendant filed a Petition for Reconsideration, Post-Sentence Motion to Modify Sentence and Motion for Appointment of Counsel. As the Defendant has a right to counsel on appeal pursuant to Pa. R. Crim. P. 720(4)(b), this Court appointed Attorney Kristin Nicklas as counsel and ordered her to file an Amended Post Sentence Motion within 10 days. On April 10, 2015, Defendant filed a Motion for Extension of Time to file his Amended Post-Sentence Motion which this Court granted. On May 15, 2015, Defendant's filed his counseled Amended Post Sentence Motion.

In his Amended Post-Sentence Motion Defendant avers that he does not wish to add any additional claims. Instead, the Defendants ask this Court to reconsider claims brought in both his Petition for Reconsideration and Post-Sentence Motion to Modify Sentence. Specifically, Defendant requests this Court resentence him based on a prior record score of 5 instead of RFEL. Further, Defendant asks to be resentenced to an intensive, long-term treatment facility such as Teen Challenge or alternatively lessening his period of incarceration and including a provision that he must be paroled to an inpatient treatment facility.

DISCUSSION

¹ 18 Pa. C.S. § 3701(a)(1)(iv).

Both claims raised by the Defendant challenge the discretionary aspects of his sentence. “Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.” *Commonwealth v. Rodda*, 723 A.2d 212, 214 (Pa.Super. 1999).

In his Post-Sentence Motion, Defendant argues that this Court miscalculated his prior record score during sentencing. Specifically, Defendant argues that his Maryland third degree burglary conviction in 2005 should not be graded as the equivalent of a Pennsylvania first degree burglary conviction for purposes of calculating his prior record score. Instead, Defendant asserts in his Memorandum: Prior Record Score that the more equivalent offense to his Maryland third degree burglary conviction is Pennsylvania criminal trespass.² Therefore, Defendant concludes that his prior record score should be 5 rather than RFEL. With this reduced prior record score, Defendant asserts that the guideline sentence for his conviction is 36-42 months making the 48 to 96 months sentence imposed by this Court in the aggravated range. For various reasons, this Court does not agree.

For purposes of sentencing, this Court must determine a defendant’s prior record score in order to ascertain the appropriate sentencing guideline. 204 Pa. Code § 303.2(a)(2). The prior record score is then used in conjunction with the “offense gravity score” to determine the proper sentencing guideline range. 204 Pa. Code § 303.2(a)(1)-(3). Questions often arise when calculating a defendant’s prior record score when he has an out of state conviction. To address such issues, 204 Pa. Code § 303.8(f) (1) states “[a]n out-of-state, federal or foreign conviction or adjudication of delinquency is scored as a conviction for the current equivalent Pennsylvania offense.” As properly highlighted by the Commonwealth, the Superior Court in *Commonwealth v. Bolden*, 532 A.2d 1172, 1175-1176 (Pa. Super. 1987), recommended that the sentencing court:

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 for culpability. Accordingly, the court may want to discern whether the crime is *malum in se* or *malum prohibitum*, or whether the crime is inchoate or specific. If it is a specific crime, the court may look to the subject matter sought to be protected by the statute, e.g. protection of the person or protection of

² 18 Pa. C.S. § 3503.

property. It will also be necessary to examine the definition of the conduct or activity 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 next turn its attention to the Pennsylvania Crimes Code for the purpose of determining the equivalent Pennsylvania offense. An equivalent offense is that which is substantially identical in nature and definition as the out-of-state or federal offense when compared with Pennsylvania offense.

This Court agrees with the analysis outlined by the Commonwealth in its Sentencing Memorandum. Defendant was convicted in 2005 of third degree burglary in Maryland pursuant to MD Code, Criminal Law, § 6-204. The statute states:

Prohibited

(a) A person may not break and enter the dwelling of another with the intent to commit a crime.

Penalty

(b) A person who violates this section is guilty of the felony of burglary in the third degree and on conviction is subject to imprisonment not exceeding 10 years.

At the time of Defendant’s conviction, *Poff v. State*, 241 A.2d 898, 900 (Md. Spec. Ct. App. 1968), defined the test for dwelling as “whether or not a building is used regularly as a place to sleep.” (overruled in part by *Mckenzie v. State*, 962 A.2d 998, 1007 (Md. 2008) which held that an unoccupied apartment that is between rentals, but is suitable for occupancy, is a dwelling for purpose of statutory burglary). In Pennsylvania, first degree burglary occurs when, with the intent to commit a crime, an individual:

(1) enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense any person is present;

(2) enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense no person is present

18 Pa. C.S. § 3502(a)(1)-(2).

Pursuant to *Bolden*, this Court must “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 for culpability.” *Bolden*, 532 A.2d at 1175-1176. In place of dwelling, Pennsylvania’s burglary statute uses the phrase “building or occupied structure that is adapted for overnight accommodations.” To determine this Pennsylvania Courts look to whether the building is utilized to store personal items, whether it contains furniture necessary for living and sleeping purposes, and whether it is habitable. *Commonwealth v. Rivera*, 983 A.2d 767, 771 (Pa. Super. 2009). Therefore, the definition of dwelling under § 6-204 at the time of the Defendant’s 2005 Maryland Burglary conviction appears analogous to the definition of the phrase building or occupied structure adapted for overnight accommodations present in 18 Pa. C.S. 3502. Additionally, both statutes in question define “enter” essentially the same. See *Hebron v. State*, 627 A.2d 1029, 1038 (Md. 1993) (holding that the term entry “requires that some part of the body of the intruder or an instrument used by the intruder crosses the threshold, even momentarily, of the house”) See also *Commonwealth v. Gordon*, 477 A.2d 1342 (Pa. Super. 1984) (If any part of the body of the intruder entered the premises, an entry is proven).

Next, it should be noted that Pennsylvania’s burglary statute requires only an unauthorized entry, not a breaking like its Maryland counterpart. See 18 Pa. C.S. § 3502(b). However, the Maryland statute does provide for both an actual breaking and a constructive breaking. An actual breaking is any “unloosing, removing or displacing any covering or fastening of the premises. It may consist of lifting a latch, drawing a bolt, raising an unfastened window, turning a key or knob, pushing open a door kept closed merely by its own weight.” *Jones v. State*, 909 A.2d 650, 663 (Md. 2006) quoting *Dorsey v. State*, 189 A.2d 623, 624 (Md. 1963). In contrast, constructive breaking “involves entry gained by artifice, fraud, conspiracy or threat.” *Hobby v. State*, 83 A.3d 794, 811 (Md. 2014) quoting *Dorsey*, 189 A.2d at 119. Either type of these breakings would satisfy an unauthorized entry pursuant to Pennsylvania’s burglary statute. Furthermore, the official comment to 18 Pa. C.S. § 3502 explains that “[t]he ‘breaking’ requirement was eliminated since it had become merely a symbolic element which gave rise to illogical distinctions. For example, raising a closed window was a breaking, but raising a partly open window was not a breaking.” Therefore, the fact that Pennsylvania’s burglary statute does not feature a “breaking” requirement is immaterial.

Additionally, as the Commonwealth points out, both Maryland and Pennsylvania categorize burglary as a crime against property. Further, both statutes feature a *mens rea* requirement to commit a crime at the time of entry into the dwelling or building. Both the Maryland statute and subsection (a)(2) of 18 Pa. C.S. § 3502 also do not require that a person be present in

the dwelling at the time of the offense.

Defendant argues that the two statutes in question are not equivalent because for third degree burglary in Maryland, unlike Pennsylvania, the conviction is not considered a crime of violence and is Maryland's lowest possible felony related to burglary. Initially, it should be noted that Maryland features four degrees of burglary. In contrast, burglary in Pennsylvania is either a first or second degree felony. Furthermore, in Pennsylvania, burglary is a first degree felony in all cases except when an individual enters a building that is not adapted for overnight accommodations and no one is present. *See* 18 Pa. C.S. § 3502(a)(4). As this Court has identified, the Defendant's conviction under Maryland's third degree burglary statute required him to break into a dwelling and Maryland's definition of a dwelling is analogous to Pennsylvania's definition of what constitutes a building or occupied structure used for overnight accommodations. Simply put, the fact the two states have different degrees related to burglary is irrelevant; the Defendant's conduct that led to his 2005 Maryland conviction is only equivalent to first degree burglary in Pennsylvania because it involved breaking into a dwelling. Further, this Court finds it more crucial that both crimes are considered crimes against property rather than the fact that Maryland does not consider burglary a crime of violence.

Defendant's assertion that Maryland third degree burglary is instead equivalent to Pennsylvania criminal trespass pursuant to 18 Pa. C.S. § 3503 is also misguided. In Pennsylvania a person commits criminal trespass when, without license to do so, he:

- (i) enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof; or
- (ii) breaks into any building or occupied structure or separately secured or occupied portion thereof.

18 Pa. C.S. § 3503(a)(1)(i)-(ii).

There is no mention in the statute of any requirement that the building or structure be suitable for overnight accommodation or that the individual intends to commit a crime inside. By contrast, the Maryland burglary statute in question requires the building be a dwelling and the individual intend to commit a crime when entering. Consequently, the two statutes are clearly not equivalent for purposes of calculating Defendant's prior record score. In fact, Maryland's fourth degree burglary statute actually appears quite analogous and equivalent to Pennsylvania's criminal trespass statute as it also does not require an individual to intend to commit a crime at entry and is not limited to a dwelling. *See* Md. Code Ann., Crim. Law §

6-205. Based on all of the reasons mentioned, Defendant's 2005 Maryland burglary conviction is equivalent to first degree burglary in Pennsylvania pursuant to Section 3502(a)(2) and is a three point offense for purposes of calculating the Defendant's prior record score.

The Commonwealth also identified in its Sentencing Memorandum that it had previously made an error when calculating the Defendant's prior record score regarding a separate 1998 burglary conviction in Maryland. The Commonwealth had originally graded the 1998 first degree burglary conviction of the Defendant as being equivalent to second degree burglary in Pennsylvania pursuant to 18 Pa. C.S. § 3502(a)(4). This Court agrees with the Commonwealth that in light of the analysis outlined above, the Defendant's 1998 first degree burglary conviction is equivalent to Pennsylvania first degree burglary pursuant to 18 Pa.C.S. § 3502(a)(2). At the time of the Defendant's 1998 conviction the statutory definition of first degree burglary was "a person may not break and enter the dwelling of another with the intent to commit a theft or crime of violence." *Winder v. State*, 765 A.2d 97, 124 (Md. 2001); Maryland Code Article 27 § 29 (repealed and replaced by Md. Code Ann., Crim. Law § 6-202). Having concluded that third degree burglary in Maryland is equivalent to a first degree felony burglary in Pennsylvania, this Court has little trouble finding that first degree burglary in Maryland is also equivalent to a first degree felony burglary in Pennsylvania. As such, Defendant's 1998 Maryland first degree burglary conviction should also be considered a three point offense in Pennsylvania for purposes of calculating his prior record score.

Pursuant to 204 Pa. Code § 303.4 there are eight prior record score categories. One of these categories is RFEL which is defined as an offender who has "previous convictions or adjudications for Felony 1 and/or Felony 2 offenses which total 6 or more in the prior record, and who do not fall within the Repeat Violent Offender Category, shall be classified in the repeat Felony 1 and Felony 2 Offender Category." 204 Pa. Code § 303.4(a)(2) As this Court has determined that the Defendant's two burglary convictions in Maryland are the equivalent to first degree felony burglary in Pennsylvania pursuant to 18 Pa. C.S. § 3502(a)(2), each conviction is a three point offense. Consequently, with a prior record score of 6 resulting from two felony 1 offenses, this Court properly determined that the Defendant met the criteria to be categorized as a RFEL and he was sentenced accordingly.

Finally, in his Petition for Reconsideration, the Defendant requests to be resentenced to an intensive, long-term treatment facility such as Teen Challenge or alternatively have his period of incarceration lessened and have a provision included that Defendant must be paroled to an inpatient treatment facility. Defendant contends that the Teen Challenge Program

would help him confront his addiction issues and teach him to control “his impulses to use drugs and alcohol by teaching him how to avoid behaviors that lead to such, and in turn, help him to become a more productive member of society.” Def.’s Pet. for Reconsideration at 2. This Court did consider this request by the Defendant at sentencing. However, while the Court acknowledges that the Defendant struggles with addiction that does not excuse his criminal conduct or absolve him of its consequences. At sentencing this Court stated:

The Court: You’ve made choices that are disastrous not only to yourself but society. When I read the affidavit of probable cause for this offense and see the words on paper that you haven’t addressed at all victims [sic], not just the two individuals from the store who confronted you about shoplifting and faced a knife that you pulled, but others in the parking lot, families with children nearby seeing this incident and being scared to death. You have inflicted a lot of harm on our community now here in Pennsylvania.

I do find it appropriate to impose a sentence that has been recommended within that standard range. Hopefully, your words will translate to action while you’re incarcerated and you will avail yourself of the programs available in our Pennsylvania system upon your release on a decision made by the Pennsylvania Board of Probation and Parole. You’ll follow the supervision requirements again and get the treatment that you need so you can adjust to society when you no longer have supervision.

N.T. 3/18/15 at 13-14.

Therefore, this Court did not ignore or misapply the law, or exercise judgment on the basis of partiality, prejudice, bias or ill will, or arrive at a manifestly unreasonable decision. *See Rodda*, 723 A.2d at 214. The Defendant’s sentence was based on the recommended standard range and this Court determined that a sentence to an intensive, long-term treatment facility such as Teen Challenge would be inappropriate given the nature of the Defendant’s conviction.

CONCLUSION

For the abovementioned reasons, the Court finds it did not abuse its discretion when it sentenced the Defendant. Pursuant to the attached Order, Defendant’s Amended Post-Sentence Motion is denied.

ORDER OF COURT

AND NOW THIS 19th day of June, 2015, the Court having reviewed and considered the Defendant's Amended Post-Sentence Motion and upon review of the applicable law;

IT IS HEREBY ORDERED THAT the Defendant's Amended Post-Sentence Motion is **DENIED**.

YOU ARE HEREBY ADVISED THAT Pursuant to Rule 720(4) of the Pennsylvania Rules of Criminal Procedure:

1. You have the right to appeal from the Court's decision disposing of your motion [Pa. R. Crim. P. 720(4)(a)];
2. If you choose to exercise that right, you must do so within thirty (30) days of the date of this order [Pa. R. Crim. P. 720(4)(a); Pa. R. App. P. 903(a)];
3. You have the right to assistance of counsel in the preparation of your appeal [Pa. R. Crim. P. 720(4)(b)];
4. If you are indigent, you have the right to appeal in forma pauperis and to have counsel appointed to represent in your appeal [Pa. R. Crim. P. 720(4)(c); Pa. R. Crim. P. 122];

Pursuant to Pa. R. Crim. P. 114, the Clerk of Courts shall immediately docket this Opinion and Order of Court and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Opinion and Order of Court, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.