

COMMONWEALTH OF PENNSYLVANIA  
v. KIRK M. GRIFFITH, Defendant  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Criminal Action, No. 270 of 2002

*Deadly weapon enhancement; 42 Pa.C.S.A. §9712(a)*

1. An unarmed accomplice to robbery shall be sentenced to 5 years minimum imprisonment under the deadly weapon enhancement if he knew that his co-felon visibly possessed the weapon during the commission of the crime.
2. The unarmed accomplice need not know about the weapon before the crime began; the mandatory minimum sentence under the statute applies if it can be established that the accomplice knew that the weapon was visibly possessed during the crime's commission.

Appearances:

John F. Nelson, Esq., *District Attorney*

Stephen D. Kulla, Esq., *Counsel for Defendant*

OPINION

Walker, P.J., March 2, 2005

Before the Court is Mr. Griffith's appeal of his resentencing. Mr. Griffith alleges that the court erred in imposing a mandatory sentence of five years imprisonment on him and also erred with its failure to consider Mr. Griffith's post-conviction conduct during the re-sentencing hearing.

Mr. Griffith was convicted of robbery. During the course of the robbery, Mr. Griffith's accomplice pulled a gun and fired while Mr. Griffith was demanding money from the robbery victim. Mr. Griffith was sentenced on December 11, 2002, and a deadly weapon enhancement was factored into the sentencing because a firearm was used in the commission of the robbery. He appealed this sentence, and the Superior Court held that the application of the deadly weapon enhancement was erroneous and remanded for re-sentencing. A new sentencing hearing was held on November 11, 2004, and this Court sentenced the defendant to 60 to 180 months of incarceration, in accordance with 42 Pa.C.S.A. §9712(a), giving a mandatory sentence of five years if a person possesses a firearm during the commission of a violent crime. Mr. Griffith appeals this sentence.

The defendant argues that the five-year mandatory sentence was applied improperly because he did not "possess" a firearm during the commission of the robbery. However, for purposes of §9712(a), an unarmed accomplice to the crime shall be sentenced in accordance with the statute if it is shown that the unarmed accomplice had knowledge that his co-felon visibly possessed a firearm during the commission of the crime. Commonwealth v. Williams, 509 A.2d 1292, 1295 (Pa.Super. 1986). In Williams, the Superior Court found that it would be anomalous to sentence an armed felon in accordance with the minimum, but not the unarmed accomplice who is otherwise legally accountable for the acts of the armed co-felon. Id.

Because the accomplice pulled the gun during the robbery, it is clear that Mr. Griffith had the

requisite knowledge that his co-felon visibly possessed a firearm during the robbery. It is not necessary that the defendant have knowledge of the gun prior to the start of the robbery; all that is required for the mandatory sentencing is that he has knowledge that the firearm was visibly possessed during the commission of the crime. Commonwealth v. Walker, 562 A.2d 373, 375 (Pa.Super. 1989). Mr. Griffith had knowledge that his accomplice visibly possessed a gun during the robbery, therefore the mandatory five-year sentence in 42 Pa.C.S.A. §9712(a) applies to him.

Mr. Griffith also argues that the sentencing court did not start afresh when it undertook the resentencing and should have considered Mr. Griffith's post-incarceration conduct while in prison. It is true that when a sentence is vacated and the case is remanded for resentencing, the sentencing judge should start afresh. Commonwealth v. Losch, 535 A.2d 115 (Pa.Super. 1987). Resentencing is not a mechanical exercise, and the resentencing judge should consider any relevant evidence that the defense presents that was not available at the original hearing. Id. at 122-123. This includes the defendant's behavior since the original sentencing hearing. Id. The judge must take note of this new evidence and re-evaluate what term of imprisonment is appropriate. Id.

Mr. Griffith submitted documents to the court illustrating his remedial behavior while incarcerated, and the court noted Mr. Griffith's remorse and his feelings that prison was like torture to him. The court also considered the factors that prompted its original judgment of sentence, namely Mr. Griffith's involvement with drugs and firearms and his prior record score of 5. Because Mr. Griffith's crime involved the visible possession of a firearm, the mandatory minimum sentence of five years applies. 42 Pa.C.S.A. §9712(a).

The fact that Mr. Griffith has been well behaved in prison does not alter the fact that the crime he committed comes with a mandatory minimum sentence. The new sentence of 60 to 180 months of incarceration stands.