

COMMONWEALTH OF PENNSYLVANIA

v. JASON BOBBETT, Defendant

Court of Common Pleas of the 39th Judicial District of Pennsylvania,

Franklin County Branch

Criminal Action No. 2008–383

Appeal from sentence at upper end of aggravated range under the Sentencing Guidelines; Restitution portion of sentence challenged

1. In exercising its sound discretion in imposing sentence, the court weighs all relevant factors, including the protection of the public, the gravity of the offense, the circumstances of the crime, the impact on the victim and the community, the defendant's character, previous record and rehabilitative needs. The court balances these against any mitigating statutory factors. 42 Pa.C.S.A. §9721(b).
2. The court placed its reasons for sentencing the defendant at the upper end of the aggravated range under the Sentencing Guidelines onto the record in open court at the time of sentencing.
3. The court's reasons for sentencing as it did were clearly appropriate in this case involving a lengthy high-speed motorcycle chase through heavily traveled residential and commercial sections of the Borough of Chambersburg, the defendant's role in creating a high risk that death or serious bodily injury would be visited upon the general public and the dispatched police officers, and the fact that the defendant was driving with a suspended license and the cycle he was driving was uninspected and uninsured; in addition, the court considered the actual harm which ensued — the death of one of the other participants in the motorcycle chase, and injury to an innocent third party occupying a nearby car.
4. The defendant already received the benefit of being able to avoid the consequences of a felony conviction when the court accepted his offer to plead guilty to Fleeing or Attempting to Elude Officer insofar as that offense was downgraded during the plea negotiations from a third-degree felony to a second-degree misdemeanor.
5. The court must impose restitution as part of the sentence where the victim suffered personal injury directly resulting from the crime; the victim's loss must flow from the conduct which forms the basis for the crime for which the defendant is being held accountable; the purpose of restitution is to impress upon the defendant that his actions damaged the victim.
6. Where the defendant pleads guilty, it is the court which has the responsibility to determine the factual basis for the plea and the sentence; the court found that the defendant's poor judgment and reckless behavior was a substantial factor in causing the crash which resulted in damage to the victim's car and/or neck injury and this

factual nexus was sufficient to warrant restitution.

Appearances:

Franklin County District Attorney's Office

Michael O. Palermo Jr., Esq., *Counsel for Defendant*

OPINION SUR Pa.R.A.P. 1925(a)

Herman, J., July 31, 2008

Introduction

The defendant was charged with Fleeing or Attempting to Elude an Officer and Recklessly Endangering Another Person in connection with a high speed motorcycle chase in the Borough of Chambersburg. He appeared before the court on April 9, 2008 and pursuant to counseled plea negotiations entered a guilty plea to Fleeing or Attempting to Elude (F3) as an M2. The maximum penalty for this crime rated as an F3 is 7 years incarceration and the maximum penalty as an M2 is 2 years incarceration. 18 Pa.C.S.A. §§1103, 1104. He signed a written plea colloquy and engaged in an oral colloquy with the court that same date.

The court sentenced the defendant on May 14, 2008 to serve 3-23 months at the Franklin County Jail to be computed from that date. This was a sentence at the upper end of the aggravated range which is up to 3 months incarceration. He was to be paroled at the expiration of his minimum sentence. The court directed him to make restitution to the victim Judith Kopsch of Chambersburg in the amount of \$545 and to State Farm Automobile Insurance Company in the amount of \$13,179.21. The charge of Recklessly Endangering was later nol-prossed pursuant to the plea agreement.

The defendant filed a notice of appeal on June 11, 2008 and a concise statement of matters complained of on appeal as directed on July 2, 2008. He makes two claims. The first is the court abused its discretion in sentencing him (he has a prior record score of zero) at the top end of the aggravated range of the sentencing guidelines "without adequate reasons or consideration of mitigating circumstances." The second claim is the court erred in ordering him to pay restitution to an individual whose damages lacked a factual nexus to the defendant's admitted criminal acts.

Background

Police responded on October 15, 2007 to a motor vehicle accident which occurred in the Borough of Chambersburg. The incident began at approximately 7:30 p.m. when a State Police Trooper in a marked vehicle tried to stop four motorcyclists who had gone through a steady red traffic signal. The Trooper activated his lights and siren but three of the motorcyclists fled and attempted to elude him while traveling at high speed, then proceeded through a four-way intersection without stopping and eventually lost control of their motorcycles as

they tried to negotiate a curve in the road. Two motorcyclists left the roadway and the third struck a passenger car. The three motorcyclists were the defendant, Randall McNair, and Kenyatta Edwards. Mr. Edwards died from injuries he sustained in the crash. Judith Kopsch, the passenger car occupant, sustained minor neck injuries when the motorcycle driven by Mr. Edwards crashed into her car. The investigation later revealed the defendant's license was suspended and the motorcycle he was driving was neither inspected nor insured.

Discussion

Issue #1

The first claim on appeal is the court abused its discretion in sentencing the defendant, who has a prior record score of zero, at the top end of the aggravated range of the sentencing guidelines without adequate reasons or consideration of mitigating circumstances.

Sentencing is within the sound discretion of the sentencing judge. The defendant must prove the 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. The court must consider various factors in determining the appropriate sentence. The sentence must be consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community and the defendant's rehabilitative needs. In addition to taking into account the sentencing guidelines, the court must place on the record in open court at the time of sentencing the reasons for imposing a particular sentence. The court should weigh all relevant information about the defendant's character and circumstances and balance those considerations against any mitigating statutory factors. 42 Pa.C.S.A. §9721(b); Commonwealth v. Fullin, 892 A.2d 843 (Pa.Super.2006)(citations omitted).

The defendant cites without discussion Commonwealth v. Felmlee, 828 A.2d 1105 (Pa.Super.2003) in his concise appeal statement. The defendant in that case was given a sentence in the aggravated range under the guidelines pursuant to his guilty plea to Fleeing or Attempting to Elude an Officer. His conduct resulted in a car crash which caused serious and permanent injuries to his son. Felmlee was on parole at the time of the offense, had two juvenile adjudications for burglary and many summary offenses involving reckless conduct with a motor vehicle. He alleged the sentencing court failed to give appropriate consideration to certain mitigating factors such as his educational aspirations and the fact that he was employed. The appellate court affirmed the sentence because the record showed the sentencing court balanced the dangerous nature of the crime, the public's need for protection, the defendant's prior record and his rehabilitative needs against those mitigating factors and had explained its reasoning on the record.

We believe the defendant cites Felmlee for two reasons. First he cites it as general support for the proposition that he has raised a substantial question for appellate review. He also cites it because he believes his case is factually distinguishable from Felmlee because Felmlee had a significant prior record which included reckless conduct with a motor vehicle whereas the instant defendant has no prior record. Although we agree the defendant has raised a substantial question for appellate review, the Felmlee decision in no way undermines the sentence this court imposed on him.

The record shows the court explained at the sentencing its reasons for sentencing the defendant at the upper end

of the aggravated range under the guidelines. Those reasons were (1) the length of the pursuit by the officer; (2) the defendant created a high risk that death or serious bodily would occur to the general public and the police officers giving chase; and (3) the defendant was driving with a suspended license and the motorcycle he was driving was uninspected and uninsured. The court took into account the defendant's relatively young age (23), his employment as a mason and that his fiancée was then pregnant with his child and he was his family's sole breadwinner. Nevertheless we also considered that by pleading guilty to this charge as an M2 the defendant avoided a felony conviction as this charge is normally graded as an F3. Indeed the plea agreement to this offense as an M2 did not in itself capture the serious nature of the incident, particularly the grave risk posed to the general public and the police officers and also the actual harm which resulted — injury to an innocent third party and the death of one of the actors, precisely the kind of harm which the Vehicle Code was crafted to prevent.

We accepted this plea agreement in part based on the desire of the defendant to avoid a felony conviction. The Commonwealth also supported this request at the time the plea was entered. A felony conviction would have placed the defendant in a substantially different position with regard to the sentencing guidelines, specifically there would have been an offense gravity score of 5 which produces a standard range sentence of RS-9. This standard range more accurately reflects the seriousness of the defendant's conduct. However, the defendant now seems to argue that despite this substantial mitigation we should further discount the sentence by ignoring the potential for harm the defendant created.

It is clear from the transcript of the oral plea colloquy the defendant understood the court viewed this matter very seriously from the start and that it was within our discretion to impose a sentence which reflected the dangerous nature of his conduct. The defendant did testify at the plea proceeding he tried to signal to Mr. Edwards to stop his flight but was unsuccessful. He also testified he did not see the actual crash and did not know about Judith Kopsch until the next day. However it was also clear the defendant, Mr. McNair and Mr. Edwards met up and decided to act in concert from the beginning of this incident and the defendant's participation was more than merely passive insofar as he was initially the driver at the front of the group. (N.T. Proceedings of Guilty Plea Hearing, April 9, 2008, p. 13). The record also shows he had an opportunity to disengage himself from the action but nevertheless chose to continue his flight and his conduct contributed in no small measure to the dangerous atmosphere of this chase through a heavily traveled section of the Borough encompassing commercial establishments and residential neighborhoods. (N.T. Proceedings of Sentencing Hearing, May 15, 2008, pp. 13-14). The sentence imposed was clearly squarely within the court's discretion and was clearly appropriate under all the circumstances of the case.

Issue #2

The defendant's second claim is "whether the...court erred in ordering restitution to an individual [whose] damages lacked a factual nexus to the admitted criminal acts of the defendant." Mrs. Kopsch was the occupant of the car which was struck by the motorcycle Mr. Edwards was driving. The court ordered the defendant to pay her \$545 in restitution.^[1] Based on testimony at the plea and sentencing proceedings, it appears the defendant is challenging this order of restitution because he was not the driver who directly crashed into Mrs. Kopsch.

The sentencing court must impose restitution as part of a defendant's sentence when the value of a victim's property has been substantially decreased as a direct result of the defendant's crime or where the victim suffered personal injury directly resulting from the crime. 18 Pa.C.S.A. §1106(a); 42 Pa.C.S.A. §9721(b). Restitution can only be imposed as a component of a defendant's sentence where the victim's loss flows from the conduct

which formed the basis for the crime for which the defendant is being held accountable. Commonwealth v. Harriott, 919 A.2d 234 (Pa.Super.2007). Where a defendant pleads guilty, it is the court which has the responsibility of determining the factual basis for the plea and the resulting sentence. Commonwealth v. Walker, 666 A.2d 301 (Pa.Super.1995). Restitution is not a civil award of damages but is rather an aspect of the sentencing. Its primary purpose is not to compensate the victim but to rehabilitate the offender by impressing on him the fact that his actions damaged the victim. Commonwealth v. Pleger, 934 A.2d (Pa.Super. 2007).

The defendant cites Commonwealth v. Micklege, 2008 Pa.Super. 65, 2008 Pa.Super. LEXIS 266 (2008). Micklege was convicted of DUI by a jury arising from an accident which resulted in injuries to occupants of another vehicle. A second jury later acquitted him of aggravated assault while DUI. The Superior Court held the trial court erred by ordering him to pay restitution as to the occupants' medical bills because the acquittal on the charge of aggravated assault while DUI constituted an explicit finding by the jury that the defendant's conduct was not the substantial factor in causing the occupants' injuries and therefore the record lacked a factual nexus between the conduct the defendant **was** found guilty of (DUI alone) and the occupants' injuries. In other words, the record did not establish the victims' losses flowed from conduct by the defendant which formed the basis of a crime for which the defendant was being held criminally accountable or responsible. The appellate court therefore vacated the restitution component of Micklege's sentence and remanded for resentencing.

Micklege in no way undermines the restitution imposed in the case at bar. Unlike Micklege, the instant defendant's conviction was based on his plea of guilty to Fleeing or Attempting to Elude. It was our responsibility to determine the factual basis for his plea and the appropriate sentence. Walker, *supra*. At the plea and sentencing proceedings the defendant resisted taking full responsibility for the crash because it was Mr. Edwards and not himself who directly collided with Mrs. Kopsch's car and also (at least according to the defendant's version of events) the defendant had tried to discourage Mr. Edwards from continuing to flee the police. We expressly addressed this contention when we explained that by acting in concert with the other motorcyclists for a significant period of time even before he allegedly tried to stop Mr. Edwards, the defendant necessarily bore some measure of responsibility for creating the highly dangerous atmosphere of this episode in the first place. This court determined the defendant's poor judgment and reckless behavior was a substantial factor in causing the crash which resulted in damage to Mrs. Kopsch's car and/or her minor neck injury for which she obtained hospital treatment and this factual nexus was clearly sufficient to warrant restitution.

Not only is this case at bar distinguishable from Micklege for the reasons we have set forth, but also we must point out it is currently unpublished. Our LEXIS research indicates the Superior Court withdrew its Opinion and granted a petition for reconsideration on May 14, 2008. Therefore any help that case might offer to the defendant in challenging the order of restitution we imposed is questionable as of this time.

We submit no error was committed in any aspect of these proceedings and respectfully request the sentencing Order of May 14, 2008 be affirmed in its entirety.

ORDER OF COURT

Now this 31st day of July 2008, pursuant to Pennsylvania Rule of Appellate Procedure 1931(c), it is hereby ordered that the Clerk of Courts of Franklin County shall promptly transmit to the Prothonotary of the Superior Court the record in this matter along with the attached Opinion sur Pa.R.A.P. 1925(a).

[1] The court also ordered him to pay \$13,179.21 to State Farm Automobile Insurance Company which was the insurance carrier providing coverage on both the motorcycle driven by Mr. Edwards and also the motorcycle which the defendant was operating. The defendant's fiancée Amanda owned both motorcycles. (Her full name does not appear in the record.) The plain language of the concise appeal statement refers to "an **individual** [whose] damages..." and this leads us to conclude he is challenging only the restitution pertaining to Mrs. Kopsch and does not take issue with the restitution ordered in connection with reimbursing State Farm because that company is not "an individual."