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Commonwealth v Rouzer

Commonwealth of Pennsylvania
v. Gregory Allen Rouzer, Defendant
Court of Common Please of the 39th District of Pennsylvania
Fulton County Branch
Criminal Action No. 20-2008

HEADNOTES

Criminal Law: Sentencing and Punishment: Legality of Sentence

1.A challenge to the legality of a sentence cannot be waived, and may be raised for the first time in a timely filed petition under the Post Conviction Relief Act. 42 Pa. C.S. §§ 9543(a)(2(vii); 9545(b).

Criminal Law: Sentencing and Punishment: Merger of Sentences

1.Under Pennsylvania law, no crimes merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. 42 Pa. C.S. § 9765.

2.If each of two crimes requires proof of at least one element which other does not, sentences imposed for convictions of those crimes do not merge. 42 Pa. C.S. § 9765.

3.Under Pennsylvania law, courts look strictly to statutory elements in determining whether offenses merge.

Criminal Law: Sentencing and Punishment: Merger of Sentences: Homicide and Aggravated Assault

1.Aggravated assault by causing serious bodily injury is a lesser included offense of attempted murder. 18 Pa. C.S. §§ 901; 1102(c); 2502(a); 2702(a)(1).

2.The creation of the separate crime of attempted murder with resulting serious bodily injury does not affect the merger analysis for aggravated assault by causing serious bodily injury and attempted murder. 18 Pa. C.S. §§ 901; 1102(c); 2502(a); 2702(a)(1).

3.The crime of aggravated assault by causing serious bodily injury merges with general attempted murder even if the defendant is not charged with attempted murder with resulting serious bodily injury. 18 Pa. C.S. §§ 901; 1102(c); 2502(a); 2702(a)(1).

4.Defendant's act of shooting victim and causing serious bodily injury could not lead to separate sentences for aggravated assault by causing serious bodily injury and general attempted murder. Aggravated assault is a lesser included offense of attempted murder, and the sentences therefore merge.

Criminal Law: Sentencing and Punishment: Modification or Correction

1.If an appellate court determines that a sentence must be corrected, and the correction may upset the sentencing scheme envisioned by the trial court, the appellate court should remand for resentencing.

2.If a PCRA court determines that a portion of a multiple-count sentence is illegal and must be corrected, and the correction may upset the sentencing scheme envisioned by the trial court, the better practice is to vacate the entire sentence and resentence the defendant.

Appearances:
Travis L. Kendall, Esq., District Attorney
Mark F. Bayley, Esq., Counsel for Defendant
Gregory Allen Rouzer, Defendant

OPINION

Before Walker, S.J.

MEMORANDUM OPINION

This Court sentenced Defendant Gregory Allen Rouzer to serve consecutive prison sentences for attempted murder and aggravated assault. The jury had convicted Rouzer of aggravated assault (causing serious bodily injury). It was not asked to find whether Rouzer caused serious bodily injury as a result of the attempted murder. The novel question presented in this Post Conviction Relief Act petition is whether those two convictions merge for sentencing purposes.

BACKGROUND

Rouzer and his family had a longstanding feud with Marian Wertz. Years ago, she was to be married to Rouzer's brother, but ended the engagement in 1992. N.T., 8/27/08, 48-50. Rouzer's brother attempted to commit suicide, something for which the Rouzer family blamed Wertz. *Id*. at 50-52.

One night around Christmas in 2007, Rouzer appeared at Wertz's door, claimed that he had car trouble, and asked for a tow. *Id*. at 51-52. Wertz's boyfriend, Randall Waters, obliged. *Id*. at 11. Rouzer noticed that Waters was a carpenter and asked him for help on some odd jobs. *Id*. at 11-14, 52. Waters eventually performed some remodeling work for Rouzer. Id. at 13-15. Wertz was suspicious, did not want her boyfriend to help Rouzer, and did not like Rouzer hanging around her home. *Id*. at 52-53. Waters called Rouzer's mother and said that he could not work for Rouzer anymore, and that Rouzer was no longer welcome at Wertz's home. *Id*. at 15-16, 52-53.

Wertz awoke on the morning of February 7, 2008 and noticed that someone was hiding behind a shed on her property. *Id*. at 54. At Wertz's bidding, Waters got out of bed, threw on jeans and a pair of shoes, grabbed a shotgun, and went to investigate. *Id*. at 16-17, 54. He discovered Rouzer, in grey coveralls and hat, crouched behind the shed with a gun in hand. *Id*. at 23-24. Waters yelled at Rouzer, and then to his girlfriend that it was Greg Rouzer and to call state police. *Id*. at 25, 54-55. Waters was pointing the shotgun at the ground. *Id*. at 24-25. He yelled at Rouzer again, called him crazy, and turned around to yell to Wertz again. *Id*. Waters turned back to face Rouzer, and Rouzer pointed the .22 caliber bolt-action rifle at his head. *Id*.

Rouzer stood up and shot Waters. *Id*. at 26-28. The shots struck Waters three times in the arm and neck. *Id*. at 27, 31-32, 87, 89. During the commotion, Waters discharged the shotgun at least once, hitting Rouzer in the leg. *Id*. at 26; N.T., 8/28/08, at 78. Rouzer then slunk away. N.T., 8/27/08, at 29. Though he was badly bleeding and seriously injured, Waters survived the attack.

For his part, Rouzer claimed that he had met Waters the day before, and Waters invited him to hunt small game. N.T., 3/28/08, at 72-74, 77-80. He contended that he was trying not to be seen by Wertz, and that Waters found him behind the shed and shot him first while he was trying to fetch some rifle shells that he had dropped. *Id*. at 77-80. Waters said he fired in self-defense and "took off." *Id*. at 80-84.

Police eventually apprehended Rouzer and charged him with numerous crimes related to the shooting. At trial, the jury convicted Rouzer on all charges: criminal attempt to commit murder, two counts of aggravated assault, possessing an instrument of crime, and two counts of simple assault.[1] The Court found Rouzer guilty of summary defiant trespass.[2] On October 1, 2008, the Court sentenced Rouzer as follows:

- Count 1 (criminal attempt to commit murder): 8 – 20 years;

- Count 3 (aggravated assault (causing serious bodily injury)): 5.5 – 20 years, consecutive to Count 1;

- Count 4 (aggravated assault (causing bodily injury with a deadly weapon)): 1 year and 1 month – 10 years, consecutive to Count 3;

- Count 8 (defiant trespass): 90 days of probation.

The aggregate sentence is 14 years and 7 months to 50 years.[3]

Two facts about Rouzer's sentence are critical. First, the sentence for Count 1 has a statutory maximum of 20 years. If the jury had found that serious bodily injury resulted from the attempted murder (it was not asked), the Court could have sentenced Rouzer to a maximum of 40 years. *See* 18 Pa. C.S. § 1102(c). Second, the sentence for Count 3 was for

causing serious bodily injury—as opposed to attempting to cause serious bodily injury.

Rouzer appealed to the Superior Court, challenging only the sufficiency of the evidence. The Superior Court affirmed. *Commonwealth v. Rouzer*, 990 A.2d 52 (Pa. Super. 2009) (unpublished memorandum). Rouzer then filed a pro se PCRA petition, and the Court appointed counsel. In the amended petition filed by PCRA counsel, Rouzer claimed, among other things, that his previous lawyer had been per se ineffective for failing to petition the Supreme Court for allowance of appeal. By stipulation the Commonwealth agreed, and the Court granted Rouzer leave to file a petition for allowance of appeal *nunc pro tunc* and held the remaining claims in abeyance pending action by the Supreme Court. The court eventually denied the petition for allowance of appeal. *Commonwealth v. Rouzer*, 56 A.3d 397 (Pa. 2012).

On November 15, 2012, Rouzer filed a Motion to Ratify Defendant's Amended Motion for Post Conviction Collateral Relief Filed October 27, 2011. In the motion, Rouzer sought to bring before the Court his sole remaining claim. He argued that the Court should have merged the attempted murder and aggravated assault (causing serious bodily injury) convictions for purposes at sentencing. Both parties have submitted briefs, and the issue is now ripe for disposition.

DISCUSSION

The Court will briefly discuss whether the merger claim is properly before the Court. Then, I will turn to the merits.

I. A Petitioner May Raise a Sentence-Merger Claim in the PCRA for the First Time

First, Rouzer argues that his challenge to the legality of his sentence is properly before the Court. The Commonwealth does not dispute this point.

A petitioner may seek relief under the Post Conviction Relief Act if he is serving a sentence greater than the lawful maximum. 42 Pa. C.S. § 9543(a)(2)(vii). Challenges to the legality of a sentence cannot be waived, *Commonwealth v. Jones*, 932 A.2d 179 (Pa. Super. 2007), though they are subject to the PCRA's time limits, *Commonwealth v. Fahy*, 737 A.2d 214, 222 (Pa. 1999).[4]

A sentence is illegal if a defendant receives consecutive sentences for offenses that merge. Because a merger claim challenges a sentence's legality, a defendant may raise a merger claim for the first time in a PCRA petition. *See, e.g., Commonwealth v. Lehr*, 583 A.2d 1234 (Pa. Super. 1990) (granting PCRA relief by holding that sentence for DUI merged with homicide by vehicle while DUI). Thus, Rouzer may challenge the legality of his sentence.[5]

II. Aggravated Assault (Causing Serious Bodily Injury) Merges with Attempted Murder

Rouzer argues that *Commonwealth v. Anderson*, 650 A.2d 20 (Pa.), *decision modified per curiam*, 653 A.2d 615 (Pa. 1994), controls. In *Anderson*, the Supreme Court held that attempted murder and aggravated assault merge for sentencing purposes. Under *Anderson*, Rouzer contends that the Court lacked the power to issue consecutive sentences for his two convictions. *Anderson* involved the same factual scenario, according to Rouzer: the defendant shot at, and struck, the victim, and he was convicted of both attempted murder and aggravated assault. On those facts, the Supreme Court held that Anderson's convictions for aggravated assault and attempted murder merged.

The Commonwealth argues that the two crimes at issue in this case are mutually exclusive. It argues that in this case, Rouzer was convicted of the specific crimes of attempted murder (without a finding that serious bodily injury (SBI) resulted) and aggravated assault (causing SBI). Those offenses, the Commonwealth contends, do not merge because each offense requires proof of an element that the other does not. Attempted murder requires proof of specific intent to kill, and aggravated assault requires proof of infliction of SBI. The Commonwealth argues that the merger statute, 42 Pa. C.S. § 9765, precludes merger.

Responding to the Commonwealth's argument, Rouzer contends that an aggravated assault can occur whether there is bodily injury or not, and an attempted murder can occur whether there is bodily injury or not. Quoting *Anderson*, 650 A.2d at 24 ("one cannot kill without inflicting serious bodily injury"), Rouzer argues that one cannot intend to kill without intending to cause serious bodily injury. Thus, he argues that every attempted murder is also an aggravated assault.

> Under Pennsylvania law,
>
> No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa. C.S. 9765. Prior to the passage of § 9765, the Supreme Court described the merger test thusly:

> Our inquiry… is 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.

Anderson, 650 A.2d at 24. Subsequent courts have noted that § 9765 is a legislative codification of the *Anderson* merger test. *See Commonwealth v. Baldwin*, 985 A.2d 830 (Pa. 2009); *Commonwealth v. Jones*, 912 A.2d 815, 819 n.6 (Pa. 2006) (plurality opinion). Furthermore, the § 9765/*Anderson* merger test is identical to the inquiry as to whether consecutive sentences constitute double punishment, and therefore violate the federal Double Jeopardy Clause. [6] *See Anderson*, 650 A.2d at 23.

Merger is a question of statutory interpretation. *Id*. at 21. Where the legislature does not specifically provide for merger, courts must compare the two offenses by using the merger statute. There are several ways to determine whether offenses merge. *Jones*, 912 A.2d at 817-18 (describing the methods). Pennsylvania follows the elements test, which looks at the statutory elements of the two offenses. *Baldwin*, 985 A.2d at 834-35. "The statute makes the legislature's intent with respect to merger manifest. That intent focuses solely on the elements of the offenses for which a criminal defendant has been convicted." *Id*. at 835; *see also Commonwealth v. Coppedge*, 984 A.2d 562 (Pa. Super. 2009) (applying the elements test and holding that simple assault and endangering the welfare of children do not merge).

In *Anderson*, the Supreme Court determined that aggravated assault (causing SBI) is a lesser included offense of attempted murder, because

> every element of aggravated assault is subsumed in the elements of attempted murder. *The act necessary to establish the offense of attempted murder—a substantial step towards an intentional killing—includes, indeed, coincides with, the same act which was necessary to establish the offense of aggravated assault, namely, the infliction of serious bodily injury.* Likewise, the intent necessary to establish the offense of attempted murder—specific intent to kill—is greater than and necessarily includes the intentional, knowing, or reckless infliction of serious bodily injury, the intent required for aggravated assault. It is tautologous that one cannot kill without inflicting serious bodily injury. Inasmuch as aggravated assault, the lesser offense, contains some, but not all the elements of the greater offense, attempted murder, the two offenses merge for purposes of sentencing. The sentence for aggravated assault must therefore be vacated.

Anderson, 650 A.2d at 24 (internal citation omitted) (emphasis added). The court held that Anderson, who had shot the victim in the neck resulting in permanent paralysis, could not receive consecutive sentences for attempted murder and aggravated assault (causing SBI).

Since the Supreme Court decided *Anderson*, the law has changed in one relevant way. In 1995, the General Assembly increased the penalty for attempt, conspiracy, and solicitation to commit murder resulting in SBI to a maximum of 40 years. Act of March 9, 1995, P.L. 964, No. 3 (Pa. 1st Spec. Sess. 1995). [7] The legislature did so by adding 18 Pa. C.S. § 1102(c). Because § 1102(c) increases the statutory maximum punishment for attempted murder, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a jury—and not the sentencing judge—must find that SBI results for the 40-year maximum to apply.[8] *Commonwealth v. Johnson*, 910 A.2d 60, 67-68 (Pa. Super. 2006). This requirement applies even if the jury also convicts the defendant of aggravated assault (causing SBI). *Id*. at 68 n.10 ("The fact that the jury may have considered the question of [SBI] when they were evaluating the Commonwealth's evidence supporting the charge of aggravated assault is not relevant to a sufficiency analysis on the separate charge of attempted murder 'where [SBI] results.'").

Applying all of the above factors to Rouzer's case, the Court holds that the attempted murder and aggravated assault (causing SBI) convictions merge. Simply put, this case is nearly identical to *Anderson*. The only difference is the existence of 18 Pa. C.S. § 1102(c)—unused in this case—which does not affect the merger analysis. Rouzer and Anderson were convicted of identical crimes: attempted murder and aggravated assault (causing SBI). See *Anderson*, 650 A.2d at 24 n.3 ("In the case at bar, an actual injury was suffered, and so we are concerned with that subsection of the aggravated assault statute which concerns actual injury."). On the same facts as here, the *Anderson* court held that

aggravated assault (causing SBI) is a lesser included offense of attempted murder. The *mens rea* requirement of attempted murder (specific intent to commit an intentional killing) subsumes the mens rea requirement of aggravated assault (intentional, knowing, or reckless infliction of serious bodily injury). *Id*. at 24. And, as the *Anderson* court held, the act requirements are also subsumed: "The act necessary to establish the offense of attempted murder—a substantial step towards an intentional killing—includes, indeed, coincides with, the same act which was necessary to establish the offense of aggravated assault, namely, the *infliction* of [SBI]." Id. (emphasis added).

The Commonwealth argues that the two crimes do not merge, because each includes exclusive elements. Attempted murder requires proof of a specific intent to kill and aggravated assault requires proof of SBI. Accepting that argument, however, requires the Court to reject *Anderson*. As noted in the previous paragraph, the *infliction* of serious bodily injury is subsumed by the substantial step toward an intentional killing. *Anderson*, 650 A.2d at 24. The Supreme Court's decision is binding, on-point precedent that this Court cannot ignore. *Commonwealth v. Tilghman*, 673 A.2d 898, 903 (Pa. 1996).

The addition of the increased sentence for attempted murder with SBI does not affect the Court's analysis. Section 1102(c) does not affect the statutory definition of attempted murder. Indeed, it is in an entirely different chapter of the Crimes Code. Rather, section 1102(c) merely provides for an increased punishment if SBI results from the attempt, conspiracy, or solicitation to commit murder. Furthermore, it does not factor into the Court's analysis, because Rouzer was convicted of the same type of attempted murder as Anderson.

The Court's decision is unfortunate for two reasons, but I think that *Anderson* compels this result. First, anyone can see that Rouzer clearly caused SBI to Waters through the attempted murder. He shot Waters three times with a hunting rifle, nearly killing him, and permanently damaging his elbow. *See* N.T., 8/27/08, at 32 (describing Water's injuries); N.T., 8/28/08, at 7-10 (same); 18 Pa. C.S. § 2301 (defining SBI); *see, e.g., Commonwealth v. Payne*, 868 A.2d 1257, 1261 (Pa. Super. 2005) (noting that shooting a person once in the back is SBI). If shooting someone three times does not constituted inflicting SBI, then the legislature ought to delete the term from the Crimes Code. It is extremely likely that the jury would have found that the attempted murder caused SBI, which would have subjected Rouzer to the same punishment that he received. Of course, the Court cannot impose the enhanced punishment now. Second, and frankly, Rouzer is a dangerous individual who deserves to serve the maximum sentence permitted. At sentencing, the Court characterized Rouzer's attack as an ambush. Rouzer, having failed to kill Waters the first time, tried again by hiring a hit-man from jail. That the Court's decision will shorten Rouzer's sentence is regrettable, but the Court is bound by the law, and I take responsibility for my ignorance of § 1102(c) at the time of trial.

As the *Anderson* court stated, one cannot kill without inflicting serious bodily injury. *Anderson*, 650 A.2d at 24. Therefore, one cannot commit attempted murder without also committing aggravated assault (causing SBI). Id. Subsequent changes to the maximum sentence for attempted murder do not affect the analysis or the outcome.

Finally, Rouzer has asked that his conviction for aggravated assault (causing SBI) be vacated. However, the Court's holding disrupts its sentencing scheme. Therefore, the Court will vacate Rouzer's entire judgment of sentence, and set the case for resentencing on all counts.[9] *See, e.g., Johnson*, 910 A.2d at 68 ("[S]ince the vacation of the sentence on this conviction obviously affects the original sentencing scheme of the trial judge, we must also vacate the entire sentence and return this case to the trial court for resentencing."). The Court will require either party to move for a date for resentencing. However, the Court is unlikely to set resentencing for sooner than 30 days, because I believe an appeal is likely. No prejudice will accrue to Rouzer by any delay, because his minimum sentence-length, even without the aggravated assault sentence, does not expire for years.

CONCLUSION

The Court holds that aggravated assault (causing serious bodily injury) merges with attempted murder (without a finding that serious bodily injury resulted). The Supreme Court's decision in *Commonwealth v. Anderson* requires this result. A defendant cannot receive consecutive sentences for crimes that merge. Therefore, the sentence imposed upon Gregory Rouzer is illegal and must be vacated. Rouzer is entitled to the relief requested in his PCRA petition.

An Order follows.

ORDER OF COURT

AND NOW THIS 29th DAY OF April, 2013, for the reasons in the foregoing Opinion,

IT IS HEREBY ORDERED THAT Defendant's petition under the Post Conviction Relief Act is GRANTED. The Court finds that Count 3 (aggravated assault (causing serious bodily injury)) merges with Count 1 (attempted murder). Because the merger disturbs the Court's sentencing scheme, the judgment of sentence imposed in this case on all convictions is

hereby VACATED. Defendant shall remain in the custody of the Department of Corrections until further Order of Court. Resentencing shall be scheduled upon motion by either party.

This Order is a final order for purposes of appeal. Pa. R. Crim. P. 910.

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.

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[1]18 Pa. C.S. §§ 901(a) and 2502(a); 2702(a)(1); 2702(a)(4); 907(a); 2701(a)(1); 2701(a)(3).

[2]18 Pa. C.S. § 3503(b)(1)(i).

[3]In the Franklin County Branch of this Court, Rouzer was sentenced to a consecutive term of five to ten years in prison under a plea of nolo contendere to criminal solicitation to commit murder. While incarcerated and awaiting trial on this case, Rouzer hired a hit-man to kill Waters. The hit-man was actually an undercover Pennsylvania State Police trooper.

[4]Rouzer raised his merger claim independently as affecting sentence legality and as a derivative, ineffective-assistance-of-counsel claim. After the Supreme Court denied allocatur, this Court issued an order directing the Commonwealth to file a response if it believed that Rouzer's merger claim could only be raised as ineffective assistance of counsel. The Commonwealth elected not to respond, meaning that it agrees that the claim survives independent of any alleged ineffective assistance of counsel.

[5]Furthermore, because Rouzer did not challenge the legality of his sentence on direct appeal, the claim is also not previously litigated. See 42 Pa. C.S. § 9544(a)(2).

[6]In Commonwealth v. Wade, 33 A.3d 108 (Pa. Super. 2011) the Superior Court held that § 9765 does not violate the state Double Jeopardy Clause, Article I § 10.

[7]The Act quadrupled the maximum punishment for attempt, conspiracy, and solicitation to commit murder. Prior to 1995 (and at the time Anderson was decided), attempt, conspiracy, and solicitation to commit murder or a first-degree felony were graded as only second-degree felonies, punishable by a maximum of 10 years. This resulted in the abnormal situation whereby attempted murder carried a lesser punishment than aggravated assault. See Anderson, 650 A.2d at 26 (Castille, J., concurring). In response, the legislature raised the grading of inchoate murders and first-degree felonies to a first-degree felony. See 18 Pa. C.S. § 905(a).

[8]At the time of trial, the Court was unaware of 18 Pa. C.S. § 1102(c) or of the need to have the jury determine whether SBI resulted from the attempted murder.

[9]Rouzer has not raised the issue of whether his conviction of aggravated assault (causing bodily injury with a deadly weapon) merges with the aggravated assault (causing SBI) or attempted murder convictions. Aggravated assault (causing SBI), 18 Pa. C.S. § 2702(a)(1) and aggravated assault (causing bodily injury with a deadly weapon), id. § 2702(a)(4), contain disparate elements and therefore do not merge. Commonwealth v. Rhoades, 8 A.3d 912, 916 (Pa. Super. 2010). To the Court, it would appear that aggravated assault (causing serious bodily injury with a deadly weapon) does not merge with attempted murder, because the former requires the use of a deadly weapon and the latter requires the specific intent to kill. Cf. Commonwealth v. Johnson, 874 A.2d 66, 71-72 (Pa. Super. 2005) (holding that attempted murder and aggravated assault of a police officer, 18 Pa. C.S. § 2702(a)(2), do not merge).