IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVE M. MONCAVAGE,	)	
	)	No. 97, 2010
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for Sussex County
	)	
STATE OF DELAWARE,	)	Cr. A. Nos. 09-05-0993, 09-05-0994
	)	Cr. ID No. 0905019689
Plaintiff Below,	)	
Appellee.	)	

Submitted: September 29, 2010
Decided: October 19, 2010

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 19th day of October, 2010, it appears to the Court that:

(1) In this appeal, David Moncavage argues that the prosecutor mischaracterized his earlier, unrelated assault conviction and improperly explained the facts surrounding that conviction in the sentencing record in this case. He also contends that his sentencing judge relied on impermissible factors and had a closed mind while considering and imposing his sentence. Because we find the prosecutorial misconduct claim unpersuasive, the sentence appropriate, and no evidence of a closed mind, we **AFFIRM**.

(2) On May 22, 2009, Corporal Troy Pezzuto arrested motorcyclist David Moncavage. After Pezzuto saw Moncavage execute a "wheelie," change lanes without signaling, and remove his hands from the handlebars of his motorcycle on State Route 1, Pezzuto attempted to pull Moncavage over. Moncavage, in an attempt to evade Pezzuto, sped through a crowded Wawa parking lot, crashed his motorcycle, and tried, but failed, to remount his motorcycle and flee. The State charged Moncavage with (1) resisting arrest, (2) failing to stop at the command of a police officer, (3) reckless driving, (4) criminal mischief under $1000.00, (5) failing to maintain his hands on the grips of his motorcycle, (6) inattentive driving, (7) keeping his signal flashing improperly, and (8) failing to have possession of his insurance card. As part of a plea arrangement, on November 9, 2009, Moncavage waived his right to a jury trial and pleaded guilty to failing to stop at the command of a police officer and no contest to resisting arrest with force. The judge ordered a pre-sentence report. On January 8, 2010, after a hearing, the judge sentenced Moncavage to a total of four years in prison, suspended immediately for 60 days Level IV probation to be served at the Violation of Probation Center and followed by one year of probation.

(3) With respect to his claim of prosecutorial misconduct, Moncavage argues that the prosecutor committed reversible error by mischaracterizing one of his earlier convictions from 2004 as second degree assault when in fact it was for

third degree assault. He also argues that the prosecutor misstated the circumstances surrounding the 2004 convictions. Moncavage did not object to the prosecutor's remarks at the hearing, so we review for plain error.[1] As a first step in plain error review, we examine the record *de novo*.[2] If we determine prosecutorial misconduct did not occur, our analysis ends.[3] Here, there was no prosecutorial misconduct and therefore no plain error.

(4) The prosecutor misspoke and described Moncavage's earlier conviction as second degree assault when it was actually third degree assault.[4] Moncavage's defense attorney quickly corrected this mistake for the judge, however.[5] Also, the judge had independent access to the pre-sentence report as well as the criminal docket, which clearly identifies Moncavage's earlier conviction as third degree assault.[6] While the prosecutor erred, he did not commit misconduct. He simply misspoke, an error corrected immediately by both the record and opposing counsel.

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[1] *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

[2] *Id.* at 150.

[3] *Id.* at 150.

[4] Appendix to Op. Br. at A-18; Appendix to Ans. Br. at B-7.

[5] Appendix to Op. Br. at A-21.

[6] Appendix to Ans. Br. at B-7.

(5) Also, the prosecutor's characterization of the circumstances surrounding Moncavage's 2004 convictions was consistent with the record before the judge. Specifically, Moncavage labels as unsupported hyperbole the prosecutor's statement to the judge that Moncavage's 2004 convictions resulted from an incident in which he "got into a prolonged physical fight with a Delaware State trooper where he attempted to remove the officer's firearm."[7] However, the police report from the incident that gave rise to the 2004 convictions clearly establishes this fact.[8] Since the prosecutor accurately portrayed the circumstances underlying Moncavage's 2004 convictions—information the judge has discretion to consider for purposes of sentencing[9]—this description did not constitute prosecutorial misconduct.

(6) With respect to his claim of judicial error, Moncavage argues that the judge relied on impermissible factors and had a closed mind in his consideration and imposition of a sentence. Specifically, Moncavage argues that the judge should not have relied upon the prosecutor's allegedly improper

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[7] Op. Br. at 5.

[8] Appendix to Ans. Br. at B-14 ("During one point, the defendant repeatedly grabbed at the officer in an attempt to gain control of him and force him onto the ground. While [Officer] Trestka attempted to restrain [Moncavage] from behind, [Moncavage] reached back with his right hand and grabbed the grip of Trestka's holstered weapon.").

[9] *See Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).

mischaracterization of the facts and circumstances surrounding his earlier convictions from 2004.[10] He also argues that the judge improperly failed to articulate aggravating factors at the sentencing hearing to justify sentencing him more harshly than recommended by the sentencing guidelines.[11] We review a sentence determination on appeal only to determine whether it is within the applicable statutory limits and whether it is based upon factual predicates which are false or impermissible, or which lack minimal reliability, judicial vindictiveness or bias, or a closed mind.[12] A judge sentences with a closed mind when he bases the sentence on a preconceived bias without consideration of the nature of the offense or the character of the defendant.[13]

(7) Because the prosecutor presented a proper characterization of the facts and circumstances underlying Moncavage's 2004 convictions to the judge, the prosecutor's proffered facts and circumstances were not impermissible factors for the judge to consider at sentencing. In addition, there is no evidence that the judge had a closed mind. In fact, before determining Moncavage's sentence in this case,

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[10] Op. Br. at 8–9.

[11] Op. Br. at 9.

[12] *Weston v. State*, 832 A.2d 742, 746 (Del. 2003).

[13] *Id.*

the judge listened to his attorney's pleas for lenience and Moncavage's own expression of sorrow and regret.[14]

(8) Finally, the sentence is appropriate and the judge did not need to articulate aggravating factors verbally at the sentencing hearing. Moncavage admits that aggravating factors must be set forth "with particularity . . . using the forms provided by the [Sentencing Accountability] Commission."[15] Here, according to Commission rules, the judge listed two aggravating factors in the sentencing order. Specifically, he found both lack of amenability and undue depreciation of offense to be aggravating factors,[16] and he adjusted the Commission's presumptive sentence accordingly. Moncavage does not dispute the aggravating factors, nor does he argue that the sentence improperly exceeded the Sentencing Accountability Commission's guidelines, but rather he simply argues that the judge articulated the aggravating factors improperly by only writing them in the sentencing report without verbally communicating them when delivering the sentence from the bench. This argument is unpersuasive, since the judge did all he was required to do by listing them on the proper forms. Also, the sentence—four years in prison, suspended immediately for 60 days Level IV probation to be

[14] Appendix to Op. Br. at A11–A18.

[15] Op. Br. at 9–10.

[16] Exhib. A to Op. Br. at 7.

served at the Violation of Probation Center, and followed by one year of probation—was within the statutory range for each of the charges.[17] Therefore, the sentence was within prescribed statutory limits and there is no evidence the judge sentenced Moncavage on the basis of impermissible factors or with a closed mind.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

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[17] 11 *Del. C.* §§ 1257(a), 4205(b)(7); 21 *Del. C.* § 4103(b).