18-P-344 Appeals Court

COMMONWEALTH vs. ANTHONY C. WILLIAMS.

No. 18-P-344.

Suffolk. March 7, 2019. - December 2, 2019.

Present: Vuono, Ditkoff, & Wendlandt, JJ.

Practice, Criminal, Postconviction relief, Sentence.

Complaint received and sworn to in the Brighton Division of the Boston Municipal Court Department on March 15, 2004.

Complaint received and sworn to in the Central Division of the Boston Municipal Court Department on June 2, 2004.

A motion to correct illegal sentences, filed on October 4, 2017, was heard by Michael J. Coyne, J.

Helle Sachse, Assistant District Attorney, for the Commonwealth.
Stanley W. Norkunas for the defendant.

DITKOFF, J. Over a decade after the defendant, Anthony C. Williams, completed serving consecutive sentences resulting from a revocation of probation, he filed a motion in the Boston Municipal Court under Mass. R. Crim. P. 30 (a), as appearing in

435 Mass. 1501 (2001) (rule 30 [a]), to alter the sentences on the ground that their consecutive nature was unlawful. The defendant, who was awaiting sentencing for a Federal drug conviction, argued that the alleged error prejudiced him by exposing him to a significantly longer sentence under the Federal sentencing guidelines. As the sentencing judge had retired, a different Boston Municipal Court judge heard the motion and granted it. Concluding that rule 30 (a) is not available where, as here, the defendant has completely served the challenged sentences, we reverse the order allowing the defendant's motion.

1. Background. On March 15, 2004, the defendant, Anthony C. Williams, was charged in the Brighton Division of the Boston Municipal Court Department with operating a motor vehicle after the suspension of his license, G. L. c. 90, § 23 (operation charge). This complaint was later amended to allege that the operation charge was a subsequent offense and to add a charge of carrying a dangerous weapon, a knife, G. L. c. 269, § 10 (b) (dangerous weapon charge).[1] On June 2, 2004, the defendant was charged in the Central Division of the Boston Municipal Court

[1] Nothing in the record reflects how these amendments occurred, and nothing in this appeal turns on their propriety.

Department with distribution of a class B substance, G. L. c. 94C, § 32A (a) (2004 drug charge), and three other charges.[2]

On September 29, 2004, the defendant pleaded guilty to the Brighton charges and the 2004 drug charge in a single proceeding. The plea judge imposed a sentence of sixty days, suspended for two years, on the operation and dangerous weapon charges. She imposed a sentence of eighteen months, also suspended for two years, on the 2004 drug charge. The judge did not state whether the suspended sentences were to be served concurrently or consecutively. The probationary period was the same for all of the charges.

The defendant subsequently violated the terms of his probation and, on July 27, 2005, the same judge imposed the suspended sentences. The judge imposed the sixty-day sentences for the operation and the dangerous weapon charges concurrent with each other. The judge imposed the eighteen-month sentence for the 2004 drug charge consecutive to the sixty-day sentences.

In March 2016, the defendant was indicted in the United States District Court for the District of Massachusetts for possession of cocaine with the intent to distribute, 21 U.S.C.

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[2] The other charges were a school zone violation, G. L. c. 94C, § 32J; conspiracy to violate the drug laws, G. L. c. 94C, § 40; and inducing a minor to distribute a controlled substance, G. L. c. 94C, § 32K. The Commonwealth ultimately dismissed these charges.

§ 841(a)(1) (2012). On April 3, 2017, the defendant pleaded guilty to this offense. Under the Federal sentencing guidelines, the defendant's prior drug conviction counted for the career offender sentencing enhancement. See U.S. Sentencing Guidelines Manual §§ 4A1.2(e), 4B1.1 (2016).[3] On September 29, 2017, the United States filed its sentencing memorandum, requesting a sentence of ninety-six months.[4]

On October 4, 2017, the defendant filed a motion under rule 30 (a) to correct what he claims is an illegal consecutive sentence on the 2004 drug charge. The defendant asserted that the sentence brought his drug conviction within consideration for Federal sentencing. The defendant requested that the disposition for the 2004 drug charge be retroactively changed to "Guilty filed." See generally Commonwealth v. Simmons, 448 Mass. 687, 692-697 (2007) (describing guilty-filed procedure). The defendant then successfully moved in Federal court to continue his sentencing to the end of November.

At the hearing in the Boston Municipal Court on November 8, 2017, the defendant again asked that the sentence "be listed now

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[3] Under the guidelines, the conviction would not count in the instant Federal case in the absence of a sentence. See U.S. Sentencing Guidelines Manual § 4A1.2(e) (2016).

[4] Even though the government was asking for ninety-six months, or eight years, the defendant's exposure was much higher. According to the government's memorandum, the guideline range was 188 to 235 months.

as guilty filed." The Commonwealth opposed the motion on the ground that rule 30 (a) was not applicable because the defendant had already served his sentence and that the sentencing judge had had the discretion to impose a consecutive sentence in 2005. The motion judge (who was not the plea and sentencing judge) found otherwise. At the conclusion of the hearing he stated, "Motion is allowed," and then marked the motion allowed, thus changing the disposition to guilty-filed. But see Mass. R. Crim. P. 28 (e), 453 Mass. 1501 (2009) (Commonwealth's consent required for guilty-filed); Commonwealth v. Powell, 453 Mass. 320, 328-329 (2009) (same). The docket, however, reflected that the 2004 drug charge had been dismissed.

On November 29, 2017, the United States filed a new sentencing memorandum. The government stated that "[t]he impact of [the municipal court's] order could not have been more significant" and lowered its recommendation to thirty-six months. The next day, the United States District Court judge sentenced the defendant to thirty-six months in prison.

The Commonwealth filed a timely notice of appeal from the order allowing the defendant's rule 30 (a) motion and a motion for written findings. On January 24, 2018, the motion judge clarified that the guilty finding was not vacated and that the sentence on the 2004 drug charge should be retroactively altered

"to show concurrent sentencing as opposed to on and after sentencing." The Commonwealth noted its continuing objection.

2. Applicability of rule 30 (a).[5] Rule 30 (a) provides: "Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of" Federal or State law. By its use of the terms "who is imprisoned" and "then being served," the rule is facially inapplicable where the sentence and probationary period have already run. See Commonwealth v. Bergquist, 51 Mass. App. Ct. 53, 55 (2001) ("Since the defendant has already served his sentence, rule 30[a] is not an option"). Accord Rodwell v. Commonwealth, 432 Mass. 1016, 1018 (2000) (where defendant "has completed serving the sentence[,] . . . it is unlikely that he may seek to have the sentence vacated pursuant to rule 30 [a]"); Reporter's Notes to Rule 30, Massachusetts Rules of Court, Rules of Criminal Procedure, at 200 (Thomson Reuters 2019) ("a rule

[5] The defendant's motion was properly captioned as a motion under rule 30 (a). We do not, however, rely on the caption, as a motion is reviewed according to its substance, not its caption. See Commonwealth v. Thompson, 431 Mass. 108, 121 n.15 (2000); Commonwealth v. Ferrer, 68 Mass. App. Ct. 544, 546 n.3 (2007).

30[a] motion is not available to contest the legality of a sentence that the defendant has already completed").

The Supreme Judicial Court has held that the rule may be used where a restraint of liberty other than incarceration or probation is ongoing, such as where the sentence imposed contained a requirement that the defendant be subject to community parole supervision for life, see Commonwealth v. Parrillo, 468 Mass. 318, 320 (2014), or register as a sex offender, see Commonwealth v. Wimer, 480 Mass. 1, 3-4 (2018). The defendant here faces no such ongoing restraint from his sentence on the 2004 drug charge.

Furthermore, the Supreme Judicial Court has held that rule 30 (a) may be used to challenge a suspended sentence during the time period of its suspension. See Commonwealth v. Azar, 444 Mass. 72, 76-77 (2005). The court reasoned that "the defendant remains in jeopardy that an allegedly unlawful sentence may visit harm on him in the future" and that he "may be committed to prison on a suspended sentence the legality of which he challenges." Id. at 77. Thus, a direct challenge to an existing, if unexecuted, sentence is proper under rule 30 (a). As we have stated, the defendant is not facing any possibility of future sentencing for the 2004 drug charge, and therefore rule 30 (a) does not apply to the situation presented here.

The Supreme Judicial Court has also allowed the use of rule 30 (a) to challenge a (possibly) already served sentence where the defendant "currently is incarcerated under a 'from and after' sentence that is structurally related to the sentence" under review. Simmons, 448 Mass. at 692. The court reasoned that a ruling in the defendant's favor would allow "his erroneous time served [to] be credited against th[e] sentence" being served. Id. Here, no other sentence is "structurally related" to the sentence on the 2004 drug charge, nor can any time served be credited to a sentence currently being served.

Essentially, the defendant is asking us to extend the possibility of rule 30 (a) relief to any circumstance in which "future harm arises." This request, however, strays too far from the language of the rule, which limits relief to "[a]ny person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction," not to anyone who may suffer future harm from an expired sentence.

The Supreme Judicial Court's decision in Commonwealth v. Johnson, 482 Mass. 830 (2019), does not require such straying. There, the court found that a motion for forensic testing under G. L. c. 278A may be made by a person who was convicted of a sex offense in Massachusetts and is now incarcerated elsewhere for failure to register as a sex offender. Johnson, supra at 836. The statute in Johnson, however, uses substantially different

words and serves substantially different purposes. The court in Johnson focused on the words "as the result of a conviction" in G. L. c. 278A, § 2 (2), words that not do not appear in rule 30 (a). Johnson, supra at 835. Similarly, the remedy provided by G. L. c. 278A -- forensic testing -- is available when the original sentence already has been served, unlike with rule 30 (a), which merely authorizes "the trial judge to release [the defendant] or to correct the sentence then being served," both remedies unavailable after a defendant has served his sentence, related sentences, and is no longer under parole or probation supervision. Moreover, the but-for causation requirement of G. L. c. 278A, § 2 (2), see Johnson, supra at 836 n.12, would improperly cabin rule 30 (a), which presumably allows for the correction of an illegal sentence, even if it is concurrent with a legal sentence.

In reaching our conclusion, we acknowledge that the length of a prior sentence has consequences for a defendant who is later convicted of another crime. Rule 30 (a), however, cannot be interpreted so broadly as to permit relief when the only consequence is to influence a sentence for an unrelated crime committed at some point in the future. Cf. Commonwealth v. Padua, 479 Mass. 1004, 1005 (2018) (defendant "finished serving his sentences, rendering moot any error therein. . . . [O]nce the convictions were affirmed, no purpose could be served by

remanding the matter for resentencing, because no effective relief could be granted"). Accordingly, the motion judge erred.

3. Consecutive sentencing. Even if rule 30 (a) were applicable here, the defendant would fare no better. As a general rule, "the selection of either concurrent or consecutive sentences rests within the discretion of sentencing judges." Commonwealth v. Lucret, 58 Mass. App. Ct. 624, 628 (2003), quoting Campbell, Law of Sentencing § 9:12 (2d ed. 1991). Nonetheless, "[w]hen a judge orders sentences to be served concurrently, his order creates a sentencing scheme that establishes a relationship between, or among, the sentences." Commonwealth v. Bruzzese, 437 Mass. 606, 613 (2002). "The entire concurrent sentencing scheme [is] subject to the terms of [Mass. R. Crim. P.] 29 (a) . . . and '[can] not be changed' once the sixty-day deadline set forth by that rule ha[s] expired." Commonwealth v. Selavka, 469 Mass. 502, 512 (2014), quoting Bruzzese, supra at 614. In determining whether a sentencing order is concurrent, "we look to the intent of the judge." Bruzzese, supra at 615. Accord Commonwealth v. Howard, 81 Mass. App. Ct. 757, 760 (2012).

Here, there is simply no indication in the record that the plea judge intended the suspended sentences to be concurrent.[6]

[6] Contrary to the defendant's argument, the fact that the clerk in July 2005 described the revocation sentencing hearing

The two cases arose from different incidents, in different divisions of the Boston Municipal Court Department, and there is no indication that the judge, who was both the plea judge and the sentencing judge, expressed any intention that the suspended sentences be served concurrently. We cannot infer that intent merely from the fact that the probationary terms were the same. See Bruzzese, 437 Mass. at 615-616. Rather, when there is nothing other than the fact that the probationary terms are the same, a sentencing judge has the discretion to impose either concurrent or consecutive sentences. See id. at 616 (concluding that "when the . . . judge ordered concurrent probation in [the cases], he did not intend the sentences in those cases to be served concurrently, but instead manifested an intent to retain the option to impose consecutive sentences"); Marley v. Boston Mun. Court Dep't of the Trial Court, 428 Mass. 1023, 1024 (1999) ("We do not consider the fact that one judge set the term of probation on each offense to expire on the same day to be conclusive proof that when another judge considered the probation surrender, she would have to order that the sentences be served concurrently"). Accordingly, the motion judge erred in determining that the revocation sentences were illegal.

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as a "Revised Sentencing Hearing" provides no insight into the intent of the plea judge almost ten months earlier.

4. Conclusion. The order allowing the defendant's rule 30 (a) motion for relief from an illegally-imposed sentence is reversed and the original sentencing order is reinstated.

So ordered.