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SJC-12816

COMMONWEALTH vs. MARLANA L. ELLSWORTH.

Berkshire. January 7, 2020. - June 15, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher,
& Kafker, JJ.

Practice, Criminal, Continuance without a finding, Dismissal,
Appeal by Commonwealth, Sentence, Double jeopardy,
Duplicative punishment. Moot Question. Constitutional
Law, Double jeopardy.

Complaints received and sworn to in the Pittsfield Division of the District Court Department on November 17, 2017, and March 5, 2018.

A motion to revise or revoke sentence was considered by Robert T. Santanniello, J.

The Supreme Judicial Court granted an application for direct appellate review.

Megan L. Rose, Assistant District Attorney (Jeanne M. Kempthorne, Assistant District Attorney, also present) for the Commonwealth.

Cara M. Cheyette for the defendant.

KAFKER, J. In this companion case to Commonwealth v.

Beverly, 485 Mass. (2020), and Commonwealth v. Rossetti, 485

Mass. (2020), we conclude that the sentencing judge imposed illegal sentences by entering continuances without a finding and immediately dismissing criminal charges without imposing any terms and conditions, or probation. In the present circumstances, however, we nevertheless decline to remand this case for resentencing as to the illegal sentences.

1. Background. This case arises from three separate incidents involving the defendant. In the first incident, the defendant walked into her boyfriend's bedroom while he was asleep and began yelling and screaming at him. The boyfriend went into the bathroom and called police. The defendant kicked in the bathroom door and pushed her boyfriend into the bathtub. He sustained scratches to his neck and head. The defendant was charged with assault and battery on a household member, in violation of G. L. c. 265, § 13M (a).

In a second incident, police responded to a report of a man and woman fighting. Officers identified the woman as the defendant. Upon being approached by officers about the fight, the defendant began yelling and screaming at the officers, attracting the attention of passersby. The defendant was charged with disorderly conduct, in violation of G. L. c. 272, § 53.

The third incident took place in a public park. Officers observed the defendant kicking a woman who was on the ground in

the fetal position. Officers arrested the defendant and discovered that she was in possession of lorazepam and clonazepam, class C substances under G. L. c. 94C, § 31. The defendant was charged with assault and battery with a dangerous weapon, in violation of G. L. c. 265, § b); assault and battery, in violation of G. L. c. 265, § 13A (a); and possession of a class C substance, in violation of G. L. c. 94C, § 34.

On April 5, 2018, the defendant entered an Alford plea¹ on all charges, except for the disorderly conduct charge, to which she agreed there were facts sufficient for a guilty finding. The Commonwealth recommended that the defendant be found guilty of disorderly conduct with the charge placed on file. As to the remaining four charges, the Commonwealth recommended that the judge enter guilty findings, and sentence the defendant to ninety days in a house of correction for each conviction, to run consecutively. The Commonwealth noted that the defendant had a prior criminal record and had recently violated probation. The

¹ "Under Alford, a defendant who professes innocence may nevertheless plead guilty and 'voluntarily, knowingly and understandingly consent to the imposition of a prison sentence,' if the State can demonstrate a 'strong factual basis' for the plea." Commonwealth v. DelVerde, 398 Mass. 288, 297 (1986), quoting North Carolina v. Alford, 400 U.S. 25, 37-38 (1970). Here, the defendant entered Alford pleas as to the charges stemming from the first and third incidents. Defense counsel indicated that the defendant was intoxicated during the first incident and could not recall what had occurred. Defense counsel similarly indicated that the defendant had blacked out and did not recall the third incident.

Commonwealth also observed that the charges at issue in the instant case had been committed while the defendant was released on her own recognizance.

For the disorderly conduct and assault and battery on a household member charges, the defendant recommended entering continuances without a finding and immediate dismissals. As to the remaining three charges, the defendant requested entering a continuance without a finding, conditioned on her participation in a level-three community corrections program. Defense counsel represented that the defendant struggled with alcohol abuse that left her unable to recall two of the three incidents at issue. He further stated that continuances without a finding would be preferable because they would provide the defendant with the opportunity to "get out of this without . . . a felony on her record," such that she "might get a decent job." The defendant's boyfriend, the victim of the first incident, also gave a victim impact statement requesting that the court not sentence the defendant to incarceration. The probation department did not recommend the defendant as a candidate for probation due to her prior record.

The judge sentenced the defendant to thirty days in a house of correction for the charge of assault and battery, with credit for time served. The judge entered continuances without a finding and immediately dismissed all remaining charges. The

Commonwealth requested written findings as to the judge's decision to continue four of the charges without a finding.

On May 21, 2018, the Commonwealth filed a motion asking the judge to revise or revoke the continuances without a finding, arguing that the continuances without a finding, which were immediately dismissed without any terms and conditions, constituted illegal sentences under G. L. c. 278, § 18.

The judge denied the Commonwealth's motion on June 12, 2018. In his written decision, the judge indicated that he found the sentences to be appropriate in light of the defendant's prospects for future employment, and the fact that any guilty finding would "likely result in the potential for reduced opportunities for gainful employment." The sentencing judge also referred to the dispositions he had entered as "[continuances without a finding] for a period of one day," which he characterized as "tantamount to a finding of guilty and a sentence imposed as [thirty-one] days to the House of Correction, credit for time served."² The Commonwealth appealed.

² The sentencing judge's decision denying the Commonwealth's motion to revise or revoke makes repeated reference to the defendant serving a sentence of thirty-one days. Both the hearing transcript and the docket reflect, however, that the disposition was for thirty, not thirty-one days, with credit for time served.

We subsequently granted the defendant's application for direct appellate review.

2. Discussion. a. Mootness. We briefly address the issue of mootness.³ The defendant contends that the instant case is moot because the Commonwealth failed to seek a stay of execution of the sentences, and the defendant has finished serving her sentences. See Commonwealth v. Resende, 427 Mass. 1005, 1006 (1998) ("When the Commonwealth appeals from an order continuing a case without a finding, it may file a motion seeking to stay the probationary period pending appeal to prevent the appeal from becoming moot"). The issue of mootness arises somewhat unconventionally in the instant case. As a general matter, "litigation is considered moot when the party who claimed to be aggrieved ceases to have a personal stake in its outcome." Blake v. Massachusetts Parole Bd., 369 Mass. 701, 703 (1976). Our prior cases examining the legality of a particular sentencing disposition have typically arisen in the context of a defendant's motion to revise or revoke. In such instances, we examined whether the defendant had a "personal

³ We address this issue separately from our discussion of mootness in Beverly, 485 Mass. at , and Rossetti, 485 Mass. at , wherein the Commonwealth conceded the issue of mootness during oral arguments before the Appeals Court. This case, by contrast, was not argued before the Appeals Court, and the Commonwealth has not conceded the issue of mootness here. Accordingly, a separate discussion of the mootness issue is warranted in this case.

stake in the outcome of [the] litigation" to determine whether the case was moot. See Commonwealth v. Argueta, 73 Mass. App. Ct. 564, 566 (2009). Here, however, the Commonwealth moved to revise or revoke the defendant's sentences, not the defendant. The Commonwealth contends that the case is not moot because, if the sentences are found to be illegal, the defendant may be subject to resentencing. We agree and conclude that the instant case is not moot. However, for the reasons discussed infra, we nonetheless rule that resentencing would not be appropriate in the instant case.

b. Legality of sentences. We next examine whether the entry of the continuances without a finding in the instant case constituted illegal sentences. As explained in Beverly, 485 Mass. at , entry of a continuance without a finding, without imposing any terms and conditions, or probation, amounts to an illegal sentence in violation of G. L. c. 278, § 18.

In his denial of the Commonwealth's motion to revise or revoke, the sentencing judge asserted that the entry of the continuance without a finding was "tantamount to a finding of guilty and a sentence imposed as thirty-one days to the House of Correction, credit for time served." This is inaccurate on its face. The thirty-day sentence in a house of correction was for the assault and battery charge, not any of the charges for which the defendant received a continuance without a finding. The

continuances without a finding entered here corresponded to four separate offenses.

Entry of a continuance without a finding pursuant to G. L. c. 278, § 18, requires that the sentencing judge abide by the requirements of the statute. As we stated in Beverly, 485 Mass. at , one such requirement under the statute is that the sentencing judge impose terms and conditions, or probation, on the defendant, satisfaction of which will earn the dismissal of the criminal charge. Here, the sentencing judge imposed no such conditions. To the contrary, the record reflects that the sentencing judge declared, as to each of the continuances without a finding, "I'm going to continue without a finding and dismiss it." The judge does not appear to have contemplated, let alone announced, conditions that the defendant would be required to satisfy in order to warrant the dismissal. The fact that the defendant was sentenced and received credit for time served on one of the five charges did not alter the statutory requirements as to the other four charges -- namely, the imposition of terms and conditions, or probation, from the date of the finding of facts sufficient to warrant a guilty finding. See G. L. c. 278, § 18. As no such terms and conditions, or probation, were entered here, the sentences were illegal.

c. Double jeopardy. Finally, the defendant argues that, even if these sentences were illegal, remanding this case for

resentencing would violate principles of double jeopardy. Under the doctrine of double jeopardy, "[o]nce a defendant has served fully the proper sentence prescribed by law for the offense committed, the State may not punish him again." Aldoupolis v. Commonwealth, 386 Mass. 260, 272, cert. denied, 459 U.S. 864 (1982), S.C., 390 Mass. 438 (1983). When a defendant has finished serving such a sentence, "any resentencing therefore necessarily would violate principles of double jeopardy by increasing the aggregate punishment imposed under the original sentence" (quotation and citation omitted). Commonwealth v. Cole, 468 Mass. 294, 311 (2014). See Commonwealth v. Parrillo, 468 Mass. 318, 321 (2014). While this concept appears "seemingly straightforward" on its face, applying the doctrine has proved to be "far from clear." Commonwealth v. Selavka, 469 Mass. 502, 509 (2014).

Issues of double jeopardy in this context turn on the question of the defendant's legitimate expectation of finality. See Commonwealth v. Woodward, 427 Mass. 659, 687 (1998) ("If a defendant has a legitimate expectation of finality, then an increase in that sentence is prohibited" [citation and quotations omitted]). In making the determination regarding a defendant's legitimate expectation of finality, we have considered a number of different factors, including whether the original sentence was legal or illegal, see Selavka, 469 Mass.

at 513-514; the timeliness of the motion to revise or revoke, see Commonwealth v. Grundman, 479 Mass. 204, 207-208 (2018); whether a motion to stay the execution of the sentence was filed, see Resende, 427 Mass. at 1005; and whether the sentence has already been fully served, see Commonwealth v. Scott, 86 Mass. App. Ct. 812, 815 (2015). A sentence is considered final once the sixty-day window within which to file a motion to revise or revoke has expired. See Aldoupolis, 386 Mass. at 274. Consequently, if no motion to revise or revoke has been filed, even an illegal sentence will nonetheless "become final for the purposes of double jeopardy after the expiration of that time period" (citation omitted). Grundman, supra at 207-208.

Here, the Commonwealth had filed a timely motion to revise or revoke. Thus, the defendant did not have a fully realized expectation of finality at the time when the Commonwealth filed its motion. See Selavka, 469 Mass. at 508 (sixty-day window "reasonably balances the defendant's interest in finality against society's interest in law enforcement" [citation omitted]). The Commonwealth did not, however, move to stay the execution of the sentence. Resende, 427 Mass. at 1005. The defendant also had finished serving her sentences as to all of the charges stemming from the underlying incident before the motion to revise or revoke had even been filed. Selavka, supra at 506, 514 ("A defendant's expectation of finality in his

sentence increases once he has begun to serve that sentence" and "[w]e conclude that, although the judge was empowered to correct the defendant's sentence, he was not permitted to do so nearly one year after the defendant received that sentence, where the defendant already had served his entire period of incarceration and had a legitimate expectation of finality in the sentence as initially imposed").

We also are cognizant of a number of practical considerations in the instant case. First, it has now been two years since the continuances without a finding were initially entered and the charges dismissed, and, as mentioned, the defendant has long since finished serving her sentences as to all charges. Cf. Commonwealth v. Barclay, 424 Mass. 377, 380-381 (1997) (regardless whether rule 29 motion is timely, it must be ruled on within reasonable time). Given the brevity of the original sentences, it is also reasonable to conclude that, had the sentencing judge properly imposed terms and conditions, or probation, such terms likely would have been satisfied within a short period of time.

The defendants in the companion cases, Beverly, 485 Mass. at , and Rossetti, 485 Mass. at , have highlighted numerous instances of the District Court engaging in the practice of entering a continuance without a finding and immediately dismissing a charge, without imposing terms and

conditions, or probation. Singling out this particular defendant for resentencing at this point would therefore seem to serve little purpose. Thus, in these circumstances, "[w]e think it would be unfair to the defendant to vacate [a] disposition" reflecting what appears to be a not entirely uncommon practice so as to remand the case for resentencing on charges that were continued without a finding two years ago. See Commonwealth v. Norrell, 423 Mass. 725, 730 (1996). See also Selavka, 469 Mass. at 511-514. In light of these considerations, we apply our ruling in Beverly, 485 Mass. at , prospectively from the date of this decision. All defendants who have been sentenced to continuances without a finding absent any terms and conditions, or probation, prior to the issuance of this opinion, will be "allowed to retain those dispositions." See Norrell, supra. After the date of this opinion, however, no such dispositions shall be permissible.

3. Conclusion. For the reasons discussed in Beverly, 485 Mass. at , we rule that the continuances without a finding entered in the instant case constituted illegal sentences, as they contained no terms and conditions. We further conclude, however, that vacating these dispositions and ordering that the defendant be resentenced would not be just. Accordingly, the continuance without a finding dispositions entered without terms

and conditions in the instant case may be retained, and are thus affirmed, but cannot be imposed in any such future case.

So ordered.