

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
ROGER ALLEN,		
Appellant		No. 117 WDA 2012

Appeal from the Judgment of Sentence October 13, 2011
in the Court of Common Pleas of Cambria County,
Criminal Division, at No(s):
CP-11-CR-0000934-2011
CP-11-CR-0001873-2010

BEFORE: BENDER, ALLEN, and MUSMANNNO, JJ.

MEMORANDUM BY BENDER, J.:

Filed: March 1, 2013

Appellant, Roger Allen, appeals from the judgment of sentence of an aggregate term of 39 to 75 months' incarceration, imposed after he pled guilty to firearms not to be carried without a license, resisting arrest, and harassment. On appeal, Appellant solely challenges the sentence imposed for his firearm offense. For the following reasons, we are compelled to vacate Appellant's sentence and remand for further proceedings.

Appellant pled guilty to the above-stated charges on September 1, 2011. On October 13, 2011, he was sentenced to 36 to 72 months' imprisonment for his firearm offense, as well as a consecutive term of three to six months' for his conviction of resisting arrest. For his crime of harassment, Appellant received a sentence of 90 days' imprisonment, which

was imposed to run concurrently with his sentence for resisting arrest. Appellant filed a timely post-sentence motion challenging his sentence for his firearm conviction. That motion was subsequently denied, and Appellant filed a timely notice of appeal. Herein, he states one issue for our review:

- I. Whether the sentencing court misapplied the sentencing guidelines where it applied the higher offense gravity score for a subcategorized offense based on facts to which [Appellant] did not admit or stipulate to when he entered his guilty plea, resulting in [Appellant's] expectations of the initial plea bargain to be abrogated[?]

Appellant's Brief at 4.

While Appellant presents only one issue for our review, his argument really encompasses two distinct claims: (1) whether the court's imposition of an offense gravity score (OGS) of nine for his conviction of carrying firearm without a license violated the terms of his plea agreement; and (2) whether the trial court's determination that the appropriate OGS was nine was an abuse of discretion because the court considered hearsay evidence not of record.

Due to our disposition, *infra*, we only need to address Appellant's first argument. Before delving into the merits thereof, we begin by explaining that the offense of carrying a firearm without a license is defined as a "sub-categorized offense" under 204 Pa.Code. § 303.3. That section states:

- (b) *Subcategorized offenses.* Certain offenses are subcategorized and scored by the Commission according to the particular circumstances of the offense. The court determines which Offense Gravity Score, located in § 303.15, applies.

204 Pa.Code. § 303.3(b). Pursuant to 204 Pa.Code. § 303.15, for the offense of carrying a firearm without a license, if the firearm is loaded, or there is ammunition in the possession or control of the defendant, an OGS of nine applies. However, if the weapon is unloaded and the defendant is not in possession of ammunition, the assigned OGS is seven. *Id.*

Instantly, at Appellant's sentencing hearing, the court determined that the circumstances of his firearm offense warranted an OGS of nine. Appellant concedes that "[t]here is no dispute that the sentencing courts are to determine which OGS should apply for subcategorized offenses, since it is directly provided for in the sentencing guidelines." Appellant's Brief at 12. However, he argues that in this case, the court was precluded from altering the OGS because it was a negotiated term of his plea agreement with the Commonwealth that an OGS of seven would apply, resulting in a standard range minimum sentence of 18 to 24 months' incarceration. Even though the court accepted this plea, Appellant contends that it subsequently violated it by imposing an OGS of nine, resulting in the recommended standard range minimum sentencing being 36 to 42 months' imprisonment. Appellant argues that, consequently, this Court should vacate the trial court's invalid sentence and remand, directing the court to either resentence Appellant applying an OGS of seven, or to reject the entire plea agreement "and place [Appellant] in the same position he was before he entered his plea of guilty." *Id.* at 14.

In light of this Court's decision in *Commonwealth v. Parsons*, 969 A.2d 1259 (Pa. Super. 2009) (*en banc*), we are compelled to agree with Appellant that his sentence is invalid.¹ In *Parsons*, the defendant, who was approximately 20 years' old and mentally challenged, was charged with committing numerous sexual offenses against a 14 year old female, who was also mentally impaired. Parsons entered a negotiated plea agreement with the Commonwealth, pursuant to which "the Commonwealth agreed to pursue only one count of statutory sexual assault and one count of corruption of minors" in exchange for Parsons' agreeing "to plead guilty to these two counts and to accept imposition of a negotiated sentence of six (6) to twenty-three (23) months of county incarceration." *Id.* at 1261-62. Both the charging terms and sentencing agreement were stated in Parsons' written and signed plea colloquy, as well as at the guilty plea hearing. *Id.* at 1262. After conducting a thorough plea colloquy, during which the court informed Parsons that it was not bound to follow the plea agreement and if it chose not to, Parsons "would have the right to withdraw [his] guilty plea,"

¹ We note that in *Parsons*, we concluded that questions regarding "the court's authority to tinker with the negotiated plea bargain, once the court has accepted the plea," constitutes a challenge to the legality of sentence. *Id.* at 1266.

the court accepted the terms of the plea. *Id.* The court then scheduled a sentencing hearing.

At that proceeding, the Commonwealth reminded the court that the parties negotiated a term of six to twenty three months' imprisonment. *Id.* at 1264. Nevertheless, the court "simply refused to impose the agreed-upon fixed sentence" and, instead, sentenced Parsons to three months' electronic monitoring. *Id.* at 1265. However, the court upheld the plea deal as far as the reduced charges. *Id.* The Commonwealth immediately objected, but the court directed it to file a motion to withdraw its plea. *Id.* When the Commonwealth subsequently did so, the court denied that motion. *Id.*

On appeal before an *en banc* panel of this Court, the Commonwealth argued that "the parties reached an interdependent agreement both as to the charges and sentence" and, when the court accepted that plea, it "was then obligated to impose the agreed-upon sentence and no longer had the authority to impose a substantially lower sentence." *Id.* at 1266. The Commonwealth maintained that if the court was "dissatisfied with the sentencing aspects of the agreement, then the proper recourse would have been to reject the plea agreement and return the parties to parity." *Id.* Alternatively, the Commonwealth asserted that the court should have permitted it to withdraw the plea after the court altered Parsons' sentence. *Id.*

In assessing the Commonwealth's argument, we began by setting forth Pa.R.Crim.P. 590, which governs plea agreements and states, in relevant part:

Pleas and Plea Agreements

(A) Generally

(1) Pleas shall be taken in open court.

(2) A defendant may plead not guilty, guilty, or, with the consent of the judge, *nolo contendere*. If the defendant refuses to plead, the judge shall enter a plea of not guilty on the defendant's behalf.

(3) The judge may refuse to accept a plea of guilty or *nolo contendere*, and shall not accept it unless the judge determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. Such inquiry shall appear on the record.

(B) Plea Agreements

(1) When counsel for both sides have arrived at a plea agreement, they shall state on the record in open court, in the presence of the defendant, the terms of the agreement, unless the judge orders, for good cause shown and with the consent of the defendant, counsel for the defendant, and the attorney for the Commonwealth, that specific conditions in the agreement be placed on the record *in camera* and the record sealed.

(2) The judge shall conduct a separate inquiry of the defendant on the record to determine whether the defendant understands and voluntarily accepts the terms of the plea agreement on which the guilty plea or plea of *nolo contendere* is based.

Parsons, 969 A.2d at 1266 -1267 (quoting Pa.R.Crim.P. 590(A)-(B)).

We then explained that "Pennsylvania law allows a broad continuum in plea bargains," including plea agreements that "specify not only the charges

to be brought, but also the specific penalties to be imposed." *Id.* at 1267 (emphasis and citation omitted).

Where the plea bargain calls for a specific sentence that is beyond the prosecutor's narrowly limited authority in sentencing matters, the plea bargain implicates the court's substantive sentencing power, as well as its guardianship role, and must have court approval. ***Commonwealth v. Smith***, 444 Pa.Super. 652, 664 A.2d 622 (1995), *appeal denied*, 544 Pa. 683, 679 A.2d 229 (1996). Thus, the trial court has broad discretion in approving or rejecting plea agreements. ***Commonwealth v. Chazin***, 873 A.2d 732, 737 (Pa. Super. 2005), *appeal denied*, 585 Pa. 686, 887 A.2d 1239 (2005). The court may reject the plea bargain if the court thinks it does not serve the interests of justice. *Id.* If the court is dissatisfied with any of the terms of the plea bargain, it should not accept the plea; instead, it should give the parties the option of proceeding to trial before a jury. **See** Pa.R.Crim.P. 590(A)(3) and *Comment*. Assuming the plea agreement is legally possible to fulfill, when the parties enter the plea agreement on the record, and the court accepts and approves the plea, then the parties and the court must abide by the terms of the agreement. **See *Commonwealth v. Kersteter***, 877 A.2d 466, 470 (Pa. Super. 2005). **See also *Commonwealth v. Townsend***, 693 A.2d 980 (Pa. Super. 1997) (reiterating distinction between agreements in which parties have agreed upon specific sentence and agreements in which parties have left length of sentence to discretion of court); ***Commonwealth v. Coles***, 365 Pa.Super. 562, 530 A.2d 453 (1987), *appeal denied*, 522 Pa. 572, 559 A.2d 34 (1989) (holding court cannot unilaterally countermand specific sentence in plea bargain and reduce sentence without Commonwealth's consent).

Id. at 1268 (footnote omitted).

With these legal precepts in mind, this Court ultimately concluded in ***Parsons*** that the trial court did not have the authority to alter the sentencing term of Parsons' plea agreement, which it had previously accepted. We stressed that at the guilty plea hearing, the court was

informed of the “explicit negotiated terms” of the parties’ plea deal, including the agreed-upon sentence. *Id.* at 1269. The court’s accepting of Parsons’ plea “created legitimate expectations for both sides as to the sentence to be imposed.” *Id.* Nevertheless, the court unilaterally modified the plea deal by sentencing Parsons to “a lesser sentence than called for in the parties’ agreement.” *Id.* We concluded that in imposing this amended sentence, “the court overstepped its bounds, defeated the Commonwealth’s rightful expectations, and frustrated the *quid pro quo* of the plea bargain.” *Id.* at 1269-70. Accordingly, we vacated the judgment of sentence and remanded “for the imposition of the sentence contained in the parties’ plea bargain.” *Id.* at 1272.

In this case, after carefully reviewing the record, we are likewise compelled to vacate Appellant’s sentence and remand for resentencing. Admittedly, unlike in *Parsons*, here, at the guilty plea hearing, there was no mention of the parties’ agreement that an OGS of seven would apply to Appellant’s firearm conviction. However, the “Guilty Plea Explanation of Defendant’s Rights” form contained in the certified record, which was signed by Appellant and filed on September 1, 2011 – *i.e.* the same day his guilty plea hearing was conducted – stated that the OGS for Appellant’s firearm offense was seven. Furthermore, at the commencement of Appellant’s sentencing hearing, the parties and the court had the following discussion regarding the appropriate OGS:

[Appellant's Counsel]: Your Honor, I believe the [OGS] was assigned by the district attorney's office at the time of the plea as a seven, which would result in a guideline range of 18 to 24 months, plus or minus six months mitigated and an aggravated.

[The Court]: And [Commonwealth], that does appear to be noted on the guilty plea explanation form.

[The Commonwealth]: Yes, Your Honor. I also have notes in my file that indicated that at the time of the guilty plea that we had agreed to an offense gravity score of seven.

[The Court]: And why is that?

[The Commonwealth]: This matter was set for suppression. We had a full suppression hearing, and it was set for trial. And at the time of the negotiation, that is where we arrived as far as placing him in a guideline range of 18 to 24 months. That was agreed [to] by the officer and the district attorney at the time.

[The Court]: So the issue is that it's under the guidelines if it is a nine, but you negotiated it down to a seven?

[Appellant's Counsel]: Yes.

[The Court]: So that's acceptable to the Commonwealth?

[The Commonwealth]: That is acceptable to the Commonwealth, Your Honor.

N.T. Sentencing Hearing, 10/13/11, at 3-4.

Moreover, in speaking to Appellant just before imposing his sentence, the court acknowledged that "the *negotiated sentence that was agreed upon by the district attorney and your counsel* would require me to sentence you in the mitigated range...." *Id.* at 12 (emphasis added). Nevertheless, the

court proceeded to sentence Appellant applying an OGS of nine.² In doing so, the court stressed:

[The Court]: [H]ad there been some level of contrition or what I believe to be a sincere acceptance of responsibility, *I would have been more inclined to accept that deal* based on the fact that the district attorney doesn't object to it. However, frankly, I don't think your words are credible. I don't see you taking any responsibility for this, and I simply cannot justify the risk to society sentencing you in the mitigated range with a punishment that I don't think fits the crime.

Id. at 13 (emphasis added).

Clearly, this record demonstrates that Appellant and the Commonwealth negotiated that an OGS of seven would apply to his firearm offense, and the court was explicitly informed of this agreement prior to imposing Appellant's sentence. While acknowledging that pursuant to this "negotiated sentence," it was "required" to impose an OGS of seven, the court then stated it was not "accept[ing] that deal." *Id.* However, the court was not permitted to unilaterally decline to apply the sentencing portion of the plea deal; rather, if the court was displeased with the negotiated sentence, it should have *sua sponte* withdrawn the plea agreement and placed Appellant back in the position he was in before entering his guilty plea. **See** Pa.R.Crim.P. 591(A) ("[a]t any time before the imposition of

² While it did not so state at the sentencing hearing, in its opinion denying Appellant's post-sentence motions, the trial court acknowledges that it applied the higher OGS of nine. **See** Trial Court Opinion (T.C.O.), 12/22/11, at 2-4.

sentence, the court may, in its discretion ... direct, *sua sponte*, the withdrawal of a guilty plea”).

Therefore, in accordance with our decision in ***Parsons***, we conclude that the court overstepped the bounds of its authority in imposing an OGS of nine. Consequently, we vacate the court’s judgment of sentence and remand for resentencing.³ At the resentencing hearing, the court shall apply an OGS of seven to Appellant’s firearm conviction or, alternatively, *sua sponte* withdraw the plea deal and place Appellant back in the position he would have been had he not pled guilty.

Judgment of sentence vacated. Case remanded for further proceedings. Jurisdiction relinquished.

Judge Allen concurs in the result.

³ We conclude that our vacating Appellant’s sentence for his firearm conviction disrupts the court’s overall sentencing scheme, requiring us to also vacate Appellant’s sentences for his convictions of resisting arrest and harassment. ***See Commonwealth v. Williams***, 871 A.2d 254, 266, 267 (Pa. Super. 2005) (when our disposition disturbs the court’s overall sentencing scheme, we must remand for resentencing); ***Commonwealth v. Vanderlin***, 580 A.2d 820, 831 (Pa. Super. 1990) (“if a trial court errs in its sentence for one count in a multi-count case, then all sentences for all counts will be vacated so that the court can restructure its entire sentencing scheme”).