NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MERTON LOUIS NORTON, JR.,	:	No. 1359 WDA 2011
Appellant	:	

Appeal from the Judgment of Sentence, July 25, 2011,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0015176-2008

BEFORE: FORD ELLIOTT, P.J.E., BOWES AND DONOHUE, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: February 27, 2013

Merton Louis Norton, Jr., appellant, appeals from the judgment of sentence entered July 25, 2011 in the Court of Common Pleas of Allegheny County. We affirm.

Appellant's conviction arises out of a robbery and shooting that occurred at a restaurant in Carnegie on September 15, 2008. Appellant entered Ciao's Italian Café, pointed a gun at several restaurant employees, and stole approximately $1,000. Appellant left, ran with a black briefcase full of money and got into the back seat of an SUV; the vehicle sped away. The Carnegie Police were immediately notified and gave chase. During the chase, appellant abruptly stopped the vehicle, exited and began firing at Police Officer Samangy. Appellant began to run and was pursued by several officers, including Chief Jeffrey Harbin. During the chase, appellant fired

several shots at the pursuing officers. Appellant was eventually convinced to surrender.

Appellant was charged with four counts of criminal attempt (homicide), one count of robbery - serious bodily injury, four counts of aggravated assault, one count of person not to possess a firearm, one count of carrying a firearm without a license, one count of possessing instruments of crime, one count of theft by unlawful taking, nine counts of simple assault, six counts of recklessly endangering another person, and one count of fleeing or eluding a police officer. On November 17, 2009, appellant initially entered a plea of ***nolo contendere*** to the four charges of criminal attempt (homicide) and a guilty plea to the remaining 25 charges. The Commonwealth filed its notice of intention to seek the mandatory minimum, sentence of 10 years pursuant to 42 Pa.C.S.A. § 9714, the "three strikes" law.[1] On February 5, 2010, however, appellant filed a motion to withdraw his pleas and the motion was granted.

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[1] **§ 9714. Sentences for second and subsequent offenses**

> **(a) Mandatory sentence.-**
> (1) Any person who is convicted in any court of this Commonwealth of a crime of violence shall, if at the time of the commission of the current offense the person had previously been convicted of a crime of violence, be sentenced to a minimum sentence of at least ten years of total confinement nothwithstanding any other provision of this title or other statute to the contrary.

Counsel filed an omnibus pre-trial motion on July 29, 2010 and the court ordered a mental health evaluation on August 20, 2010. On October 7, 2010, the court issued an order for involuntary treatment of appellant. Counsel filed a motion to withdraw on October 8, 2010; the court granted the motion and appointed William E. Brennan, Esq., to represent appellant.

On May 12, 2011, appellant appeared before the Honorable Randal B. Todd to enter a plea of guilty but mentally ill. Before the proceeding, the Commonwealth withdrew 16 counts, including the four criminal attempt (homicide) charges. Thereafter, appellant entered a plea of guilty but mentally ill to one count of robbery-serious bodily injury, four counts of aggravated assault, one count of persons not to possess a firearm, carrying a firearm without a license, one count of possessing instrument of crime, four counts of simple assault, and one count of fleeing or eluding a police officer. An evidentiary hearing concerning appellant's plea was held and the plea was accepted.

Sentencing was deferred until July 25, 2011. Before the proceeding, the Commonwealth again filed its notice of intention to seek the mandatory minimum sentence of 10 years pursuant to Section 9714, explaining that appellant had previously been convicted of kidnapping. (Docket #31.)

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42 Pa.C.S.A. §9714(a) (effective from February 20, 2001 to September 5, 2011).

Appellant was sentenced to an aggregate sentence of 20 to 40 years' imprisonment. Specifically, appellant was sentenced to serve 10 to 20 years' imprisonment for robbery, 10 to 20 years' imprisonment for aggravated assault to be served consecutively to the robbery sentence, three sentences of 10 to 20 years' imprisonment for the remaining three counts of aggravated assault to run concurrently to each other and concurrently to the robbery sentence, and no further penalty was imposed on the remaining counts. (Notes of testimony, 7/25/11 at 10; docket #33.)

A timely notice of appeal was filed. (Docket #35.) Appellant filed a concise statement of errors complained on appeal pursuant to the court's order and the trial court filed an opinion on July 16, 2012. The sole issue presented for review is whether the trial court erred in imposing two consecutive mandatory sentences pursuant to Section 9714 for robbery and aggravated assault. No relief is due.

Appellant is challenging the legality of his sentence which is non-waivable. ***See Commonwealth v. Brice***, 856 A.2d 107, 111 n.5 (Pa.Super. 2004), ***appeal denied***, 581 Pa. 696, 864 A.2d 1202 (2005) (a challenge to the application of a mandatory sentencing provision implicates the legality of a sentence), citing ***Commonwealth v. Drummond***, 775 A.2d 849, 855 (Pa.Super. 2001).

We may quickly resolve this issue. A review of the sentencing hearing reveals that the trial court did not utilize the "three strikes" law when

sentencing appellant. Rather, as the Commonwealth points out, the trial court sentenced appellant consistent with the statutory limits for all first degree felonies and did not mention the enhancement provision of Section 9714. ***See*** 18 Pa.C.S.A. § 1103 ("In the case of a felony of the first degree, for a term which shall be fixed by the court at not more than 20 years.") In its Pa.R.A.P., Rule 1925(a), 42 Pa.C.S.A. opinion, the court indicated that it relied on the applicable penalties for first degree felonies, as explained to appellant during his guilty plea. (***See*** trial court opinion, 7/16/12 at 3.) While the sentencing guidelines specify that appellant could have been subject to the 10 year minimum sentence in the second strike provision under any one of his 5 convictions for crimes of violence (***see*** Docket #32), the trial court indicated it fashioned the sentence based on the particular circumstances of the case. (***Id.*** at 7.) Nor does the sentencing court's written order reference Section 9714 in relation to the sentences imposed. (***See*** Docket #33.) Additionally, the aggregate sentence imposed was not beyond the aggregate statutory maximum which appellant faced for his five first degree felonies.

Thus, appellant's claim is meritless as his sentence was not illegally enhanced using the second strike provision of the Three Strikes Law.

Judgment of sentence affirmed.