

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ROBERT HARRY THOMAS,	:	
	:	
Appellant	:	No. 1412 MDA 2012

Appeal from the Judgment of Sentence Entered February 29, 2012,
In the Court of Common Pleas of Franklin County,
Criminal Division, at No. CP-28-CR-0000837-2009.

BEFORE: SHOGAN, MUNDY and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED MAY 30, 2013

Appellant, Robert Harry Thomas, appeals from the judgment of sentence entered in the Court of Common Pleas of Franklin County on February 29, 2012. We affirm.

The record reveals that, in the early morning hours of May 10, 2009, Appellant broke into the home of his ex-girlfriend ("the victim"), bound her wrists, ankles and face in duct tape, threatened her with a knife, and caused her to fear for her life. After several hours, Appellant released the victim. She had minor injuries to her face, neck, and wrists. Later that morning, the victim went to a neighbor and reported the incident; the neighbor contacted the police. N.T., 8/30-31/10, at 48-76. Appellant was arrested

*Retired Senior Judge assigned to the Superior Court.

and charged with one count each of kidnapping, burglary, terroristic threats, and false imprisonment. Complaint, 5/10/09.

The trial court summarized the procedural history of this case as follows:

In a two-day trial on August 30 and August 31, 2010, [Appellant] was convicted by a jury of one count of burglary, one count of terroristic threats, and one count of false imprisonment. [Appellant] was also charged with one count of kidnapping on which the jury was hung. This Court sentenced [Appellant] on December 8, 2010¹ but vacated its sentence on January 19, 2012 after holding that the sentence imposed was illegal. The Court re-sentenced [Appellant] on February 29, 2012. Post-sentence motions were filed by [Appellant] on March 12, 2012 and a hearing was scheduled before this Court on March 30, 2012. On March 16, 2012, [Appellant] filed a *pro se* motion requesting new counsel be appointed to represent him in an appeal. The Court appointed new counsel for [Appellant] on March 23, 2012 and provided counsel twenty days to make any amendments to the post-sentence motion previously filed. New counsel filed an amended post-sentence motion on April 13, 2012. The Commonwealth filed an Answer to the original post-sentence motion on April 27, 2012 as well as an Answer to the amended post-sentence motion on May 3, 2012. The Court issued a Post-Sentence Opinion on July 9, 2012 denying [Appellant's] post-sentence motions.

Trial Court Opinion, 9/27/12, at 1-2 (original footnotes omitted). The record further reveals that, upon resentencing, the trial court reduced the length of Appellant's aggregate term of incarceration to 10 to 20 years and imposed

¹ Appellant was sentenced to incarceration for an aggregate term of 13 to 27 years: 10 to 20 years on the burglary conviction, a consecutive term of two to five years on the terroristic threats conviction, and a consecutive term of one to two years on the false imprisonment conviction. N.T., 12/8/10, at 29-31.

Laboratory User's Fees ("Lab Fees") totaling \$4,077.00, pursuant to 42 Pa.C.S.A. § 1725.3. Order of Court, 2/29/12.

Appellant raised two claims in his post-sentence motions. First, Appellant averred that his sentence was illegal because the trial court imposed Lab Fees, which the Commonwealth did not request at his first sentencing. Post-sentence motion, 3/12/12, at ¶¶ 10-13. Second, Appellant averred that the trial court's failure to colloquy the jury after "a fifty (50) day delay between the selection of his jury and his jury trial" resulted in prejudice. Amended Post-sentence Motion, 4/13/12, at ¶¶ 5-8. The trial court denied Appellant's post-sentence motions. Order of Court, 7/9/12. This appeal followed. Appellant and the trial court have complied with Pennsylvania Rule of Appellate Procedure ("Pa.R.A.P.") 1925(b).

On appeal, Appellant presents the following questions for our consideration:

1. Did the Honorable Sentencing Court err in ordering restitution paid to the Commonwealth for DNA testing that did not yield any inculpatory evidence and where the Commonwealth failed to request the same during the original sentencing hearing?
2. Did the Honorable Trial/Sentencing Court err in denying [Appellant's] request for a new trial where there was a 50-day delay between trial and jury selection when a colloquy regarding information learned by the jurors in the interim period was not conducted?

Appellant's Brief at 6.

Appellant first challenges the trial court's imposition of \$4,077.00 in Lab Fees, payable to the Commonwealth for DNA and fingerprint testing on the duct tape recovered from the victim's residence. Appellant's Brief at 10. According to Appellant, the order results in an illegal sentence because Lab Fees were not included in his original sentence and the Commonwealth did not use the DNA and fingerprint results to further its prosecution. *Id.* at 11. The Commonwealth counters that the trial court was required to impose Lab Fees and that the laboratory results were directly relevant to the prosecution for burglary and false imprisonment. Commonwealth's Brief at 3-4.

Our review of the record indicates that the trial court completed the "Financials" section of the December 8, 2010 sentencing form for Appellant's burglary conviction as follows:

- (xx) Court Costs
- (xx) RESTITUTION shall be made in the amount of \$ ----- to: NONE
- (xx) as determined by the District Attorney () attached List () separate Order
- () \$ _____ Laboratory User's Fee - 42 Pa.C.S.A. 1725.3
- () \$ _____ Substance Abuse Education and Demand Reduction Fund -
18 Pa.C.S.A. 7508.1
- () \$ _____ Pa. CAT Fund - 75 Pa.C.S.A. 6506
- () \$ _____ Emergency Medical Services Act - 35 Pa.S. 6934
- (xx) \$ 250 DNA testing - 44 Pa.C.S.A. § 2316^[2]
- (xx) \$ 25/mo Supervision Fee (Act 35) - 18 P.S. 11.1102
- () **PROBATION VIOLATORS:** () given credit for monies previously paid
() shall pay the balance due.
- () _____

Sentencing Form (Burglary), 12/8/10.

² § 2316. DNA sample required upon conviction, delinquency adjudication and certain ARD cases.

The trial court did not include Lab Fees on the December 8, 2010 sentencing forms for the terroristic threats or false imprisonment convictions either. At resentencing, the trial court sentenced Appellant only on the burglary conviction, reducing the term of incarceration and adding Lab Fees totaling \$4,077.00. Sentencing Order, 2/29/12.

The imposition of Lab Fees is governed by 42 Pa.C.S.A. § 1725.3, which provides, in relevant part, as follows:

(a) Imposition.--A person who is ... convicted of a crime as defined in 18 Pa.C.S. § 106 (relating to classes of offenses) ... **shall**, in addition to any fines, penalties or costs, in every case where laboratory services were required to prosecute the crime or violation, **be sentenced to pay a criminal laboratory user fee** which shall include, but not be limited to, the cost of sending a laboratory technician to court proceedings.

* * *

(d) Other laws.--The criminal laboratory user fee **shall be imposed** notwithstanding any other provision of law to the contrary.

42 Pa.C.S.A. § 1725.3(a) and (d) (emphasis added).

Initially, we disagree with Appellant's characterization of Lab Fees as restitution. Appellant's Brief at 10. An order of restitution is intended "to provide the victim with the fullest compensation for the loss." 18 Pa.C.S. § 1106(c)(1)(i). However, Lab Fees are a cost related to the prosecution of a criminal case. 42 Pa.C.S.A. § 1725.3. "Costs are 'penal sanctions' arising from a criminal conviction and, therefore, the imposition of costs [is] part of

the judgment of sentence.” **Commonwealth v. Garzone**, 993 A.2d 1245, 1255 (Pa. Super. 2010) (citation omitted).

Appellant does not argue that the amount of Lab Fees was excessive. Rather, he contends that the trial court lacked authority to impose Lab Fees, which is a legality-of-sentence claim. **Garzone**, 993 A.2d at 1255 (citation omitted).³ “The determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary.” **Commonwealth v. Nuse**, 976 A.2d 1191, 1193 (Pa. Super. 2009) (quoting **Commonwealth v. Love**, 957 A.2d 765, 767 (Pa. Super. 2008)).

Upon review, we conclude that Appellant is not entitled to relief. The imposition of Lab Fees is mandatory. 42 Pa.C.S.A. § 1725.3. Appellant’s first sentence was vacated, rendering it a legal nullity. **Commonwealth v. Wilson**, 594 Pa. 106, 114, 934 A.2d 1191, 1196 (2007). Moreover, when a sentence is vacated, the sentencing court starts afresh. **Commonwealth v. Jones**, 640 A.2d 914, 919–920 (Pa. Super. 1994). Here, the Commonwealth informed the trial court about the mandatory Lab Fees before resentencing. As the trial court observed, Lab Fees “would have been part of the original sentence if the Commonwealth had informed the

³ Thus, we reject the Commonwealth’s and the trial court’s analysis of the imposition of Lab Fees as an act of judicial vindictiveness and, therefore, a challenge to the discretionary aspects of Appellant’s sentence. Commonwealth’s Brief at 3-4; Trial Court Opinion, 7/9/12, at 14-15.

[trial c]ourt of those fees. Once the [trial c]ourt became aware of the omission of the fees, it had a duty to impose them.” Trial Court Opinion, 7/10/12, at 15 (citing 42 Pa.C.S.A. § 1725.3). We discern no error.

Next, Appellant argues that the trial court violated his due process rights by failing to colloquy the jury after a 50-day delay between the jury selection and the start of trial. Appellant’s Brief at 13. Relying on this Court’s decisions in ***Commonwealth v. Shirey***, 481 A.2d 1314 (Pa. Super. 1984), and ***Commonwealth v. Darush***, 420 A.2d 1071 (Pa. Super. 1980), Appellant argues that “a showing of actual prejudice [is required] **only after** the Court noted that the jury was colloquied as to their exposure to outside influence.” Appellant’s Brief at 14 (emphasis in original). Thus, Appellant concludes, prejudice should be presumed where the trial court did not inquire “whether any jurors or at that point potential jurors had become aware of facts or engaged in any discussion, which would disallow them from sitting fairly and impartially.” ***Id.*** at 14-15.

We reiterate that “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a); ***Commonwealth v. Pettersen***, 49 A.3d 903, 913 (Pa. Super. 2012), *appeal denied*, ___ Pa. ___, ___ A.3d ___, 630 MAL 2012 (filed March 13, 2013). Because Appellant did not preserve his due process issue in the trial court, we decline to address whether prejudice should be presumed where a trial court fails to conduct a hearing regarding outside influences on a jury. In

the case at hand, the jury was empanelled at the start of Appellant's trial on August 30, 2010, without Appellant objecting or requesting that the jury be questioned about outside influences during the 50-day delay. N.T., 8/30-31/10, at 6. Thus, we deem this issue to be waived. Pa.R.A.P. 302(a).⁴

Judgment of sentence affirmed.

Colville, J., Concur in the Result.

⁴ Even if we did not deem this issue to be waived, we would deny relief. Prejudice is presumed in certain criminal contexts where a structural error occurs. **See Arizona v. Fulminante**, 499 U.S. 279, 310 (1991) (defining a structural error as one "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."); **Commonwealth v. Johnson**, 600 Pa. 329, 966 A.2d 523, 538 n.6 (2009) (recognizing that this Court has presumed prejudice where a constitutional error has caused a total failure in the relevant proceeding). These limited circumstances involving structural errors include the right to counsel, **see Gideon v. Wainwright**, 372 U.S. 335 (1963); the right to a unanimous jury verdict beyond a reasonable doubt, **see Sullivan v. Louisiana**, 508 U.S. 275 (1993); and the right to represent one's self, **see McKaskle v. Wiggins**, 465 U.S. 168 (1984). The jury issue presented by Appellant does not implicate a structural error or a total failure in the relevant proceeding.

Furthermore, the Pennsylvania Supreme Court has held that "one who claims that he has been denied a fair trial because of pre-trial publicity must show actual prejudice in the empanelling of the jury." **Commonwealth v. Weiss**, 565 Pa. 504, 776 A.2d 958 (2007), *cert. denied*, 535 U.S. 1101 (2002). **Accord, Carter by Carter v. U.S. Steel Corp.**, 529 Pa. 409, 604 A.2d 1010 (1992) (relying on criminal cases to resolve a question of extraneous influence on a civil jury; "Once the existence of a potentially prejudicial extraneous influence has been established by competent testimony, the trial judge must assess the prejudicial effect of such influence."). Because Appellant presents no evidence of extraneous influences and no evidence that the jury empanelled in this matter was actually prejudiced, he would not be entitled to relief.

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Judgment Entered.

Mary A. Graybill

Deputy Prothonotary

Date: 5/30/2013