

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

SHAWN MICHAEL NEFF

Appellant

No. 1722 EDA 2012

Appeal from the Judgment of Sentence January 31, 2012
In the Court of Common Pleas of Carbon County
Criminal Division at No(s): CP-13-CR-0000886-2011

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J.

FILED MAY 01, 2013

Shawn Neff appeals from his judgment of sentence, entered in the Court of Common Pleas of Carbon County. Upon review, we affirm.

On October 23, 2011, Neff and Dietrik Hosier approached victim Daman Smith, asking if he was selling anything. N.T. Guilty Plea, 1/19/2012, at 5. The three then proceeded to a nearby alley where Neff struck and restrained Smith while Hosier took several items from him. *Id.* at 6. Neff subsequently pled guilty to one count of conspiracy to commit robbery¹ and one count of simple assault.² Neff received an 18 to 36-month

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. § 903; 18 Pa.C.S.A. § 3701.

² 18 Pa.C.S.A. § 2701(a)(1).

sentence for the conspiracy conviction, and a consecutive 6 to 24-month sentence for the assault conviction for an aggregate sentence of 24 to 60 months imprisonment. On February 8, 2012, Neff filed a motion for post-sentence relief, requesting the sentences run concurrently, which the trial judge denied. Neff filed this timely appeal.

On appeal, Neff argues that the assault conviction should merge with the conspiracy conviction because Neff's conspiracy liability is based on the assault also counting as the "overt act" in furtherance of the conspiracy to commit robbery. Appellant's Brief, 10/15/2012, at 10. Whether simple assault and conspiracy to commit robbery merge for purposes of sentencing is a question of law and as such, our scope of review is plenary and our standard of review is *de novo*. ***Commonwealth v. Williams***, 920 A.2d 887 (Pa. Super. 2007).

Section 9765 of the Sentencing Code governs merger:

§ 9765. Merger of sentences

No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only to the higher graded offense.

42 Pa.C.S.A. § 9765. Neff's assault on Smith was part of the act of robbing Smith, and thus there was a single criminal act.

We turn to the elements of the relevant offenses. The Pennsylvania Supreme Court has interpreted section 9765 as follows:

A plain language interpretation of Section 9765 reveals the General Assembly's intent to preclude the courts of this Commonwealth from merging sentences for two offenses that are based on a single criminal act unless all of the statutory elements of one of the offenses are included in the statutory elements of the other.

Commonwealth v. Baldwin, 985 A.2d 830, 837 (Pa. 2009).

Conspiracy is defined in relevant part as:

§ 903. Criminal conspiracy

(a) Definition of conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

* * *

(e) Overt act. No person may be convicted of conspiracy to commit a crime unless an overt act in pursuant of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

18 Pa.C.S.A. § 903.

Robbery is defined in relevant part as:

§ 3701. Robbery

(a) Offense defined.

(1) A person is guilty of robbery if, in the course of committing a theft, he:

* * *

(v) physically takes or removes property from the person of another by force however slight;

18 Pa.C.S.A. § 3701.

Simple assault is defined as:

§ 2701. Simple assault

(a) Offense defined. A person is guilty of assault if he:

- (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
- (2) negligently causes bodily injury to another with a deadly weapon;
- (3) attempts by physical menace to put another in fear of imminent serious bodily injury;

18 Pa.C.S.A. § 2701(a)(1).

A robbery clearly occurred, as Neff and Hosier assaulted Smith and deprived him of his property. In order to resolve the merger question, we turn to our case law addressing merger and conspiracy. It is longstanding law in Pennsylvania that the “crime of criminal conspiracy does not merge with the completed offense which was the object of the conspiracy.” ***Commonwealth v. Miller***, 364 A.2d 886, 886 (Pa. 1976). This rule is based on the rationale that the conspiracy and the substantive offense constitute distinct crimes, each deserving of punishment. As our Supreme Court has explained:

This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement - partnership in crime - presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally,

makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Id. at 887 n.5 (quoting **Iannelli v. U.S.**, 420 U.S. 770, 778-79 (1975) (internal citations omitted)).

We find that the logic of **Miller** and **Iannelli** is applicable to this case. If a conspiracy constitutes a distinct offense from the object of the conspiracy, then the conspiracy must also constitute a distinct offense from any collateral crime committed in furtherance of that conspiracy. **See Id.** Additionally, the actual assault on Smith was not the only action Neff took that could have constituted an overt act – the record indicates both he and Hosier followed Smith and convinced him to enter an alley with them, where the robbery occurred. N.T. Guilty Plea, 1/19/2012, at 5-6. Therefore, we hold that the elements of assault are not fully included in the elements of conspiracy for purposes of merger.

Judgment of sentence affirmed.

J-S01024-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 5/1/2013