

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
LAMONT FULTON,		
Appellant		No. 1898 WDA 2011

Appeal from the Judgment of Sentence July 14, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0001114-2003

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., and MUNDY, J.

MEMORANDUM BY STEVENS, P.J.

Filed: January 7, 2013

Appellant Lamont Fulton appeals the judgment of sentence entered by the Court of Common Pleas of Allegheny County when it resentenced Appellant to fifteen to thirty years imprisonment and gave him credit for time served. As we conclude Appellant's challenge to the discretionary aspects of his sentence does not fall within the scope of our limited remand from collateral appeal, we affirm.

Appellant was convicted of aggravated assault,¹ robbery,² and criminal conspiracy³ in connection with the shooting of a victim in a Pittsburgh parking garage which left the victim paralyzed from the neck down. On

¹ 18 Pa.C.S.A. § 2702(a)(1) (causing serious bodily injury).

² 18 Pa.C.S.A. § 3701(a)(1)(i) (with serious bodily injury).

³ 18 Pa.C.S.A. § 903(a)(1).

March 7, 2005, the trial court sentenced Appellant to five to ten years imprisonment on each count. As the trial court set the individual sentences to run consecutively, Appellant received an aggregate sentence of fifteen to thirty years imprisonment.

Appellant, with the assistance of new counsel, filed a timely post-sentence motion in which he challenged the sufficiency and the weight of the evidence supporting his convictions, claimed he should not have been tried jointly with his co-defendant, and contended that the trial court erred in denying his petition to transfer his case to juvenile court. The trial court denied the post-sentence motion. Appellant filed a timely appeal to this Court, raising the same claims he had presented in his post-sentence motion. This Court affirmed Appellant's judgment of sentence in an unpublished memorandum. ***Commonwealth v. Fulton***, 1078 WDA 2005 (Pa. Super. filed February 5, 2008) (unpublished memorandum). Appellant filed a Petition for Allowance of Appeal, which the Supreme Court denied.

Appellant subsequently filed a timely petition pursuant to the Post Conviction Relief Act. The PCRA court appointed Appellant counsel who filed an Amended Petition on his behalf, which claimed, *inter alia*, that Appellant was not granted appropriate credit for time served. The petition did not contain any other issue related to Appellant's sentence. The PCRA court filed a Notice of Intent to Dismiss Appellant's petition without an evidentiary hearing, but noted that it addressed Appellant's claim regarding his credit for

time served in a separate order. However, the certified record does not contain such an order. On March 22, 2010, the PCRA court entered an order dismissing Appellant's PCRA petition.

On collateral appeal, this Court affirmed the denial of Appellant's PCRA petition with respect to all of Appellant's claims except for the issue of Appellant's credit for time served. As noted above, the PCRA court did not address the credit issue in denying Appellant's petition, but claimed to have resolved the issue in a separate order which was never docketed. However, as the parties agreed that Appellant was not awarded the correct credit for time served, this Court remanded to the trial court for resentencing to establish the amount of credit that Appellant was entitled to, if any at all. ***Commonwealth v. Fulton***, 395 WDA 2010 (Pa. Super. filed October 29, 2010) (unpublished memorandum). This Court did not vacate Appellant's sentence but reversed the PCRA court's order insofar as it denied Appellant credit for time served.

Upon remand, the PCRA held a resentencing hearing on July 14, 2011. The PCRA court vacated Appellant's original sentence, imposed an identical aggregate sentence of fifteen to thirty years imprisonment, and gave Appellant credit for 297 days time served. Appellant filed a post-sentence motion on July 21, 2011 in which he requested that his sentence be reduced to ten to twenty years imprisonment in light of his good behavior in prison

since he was sentenced in 2005. Appellant's post-sentence motion was denied by operation of law. This timely appeal followed.

Appellant claims the trial court abused its discretion in resentencing Appellant without considering the factors contained in 42 Pa.C.S.A. § 9721(b) and Appellant's good behavior in prison since his original 2005 sentencing hearing. Specifically, Appellant claims the trial court erred in determining that purpose of the remand was solely to address the issue of credit for time served. To support his argument, Appellant relies on ***Commonwealth v. Losch***, 535 A.2d 115 (Pa. Super. 1987), to essentially claim that a trial court is always required to reconsider Appellant's entire sentence upon remand for resentencing. We disagree.

In ***Losch***, the defendant successfully argued on direct appeal that the trial court failed to state on the record its reason for sentencing Appellant more harshly than his co-defendants. This Court vacated Losch's sentence and remanded to the trial court for resentencing. Upon remand, Appellant attempted to introduce new evidence of his good conduct in prison since his original sentence. The trial court found that evidence of Appellant's good conduct in prison after his original sentence was irrelevant at the resentencing proceeding which was focused on the disparity between Appellant's sentences and his co-defendant's sentences. On Losch's second appeal, although this Court acknowledged that it had originally reversed the trial court on the basis of the trial court's failure to explain the disparity

between the sentences, this Court found the trial court erred in disregarding evidence of Appellant's good conduct as this Court had *vacated* Appellant's sentence. This Court provided that "[w]hen a sentence is vacated and the case remanded for resentencing, the sentencing judge should start afresh." ***Losch***, 535 A.2d at 121.

In contrast, in this case, this Court did not vacate Appellant's sentence on collateral appeal, but remanded to the trial court for resentencing for the limited purpose of determining the amount of time that Appellant should be awarded credit for time served. Moreover, this is not a case where Appellant challenges the trial court's sentencing discretion on direct appeal. Appellant's sentence of fifteen to thirty years imprisonment was affirmed on both direct appeal and collateral appeal. Appellant took issue with the discretionary aspects of his term of imprisonment for the first time after the case had been remanded from collateral appeal and this trial court had credited him 297 days time served. Appellant could have asked the trial court at his original sentencing hearing to take into account his good behavior during the eleven-month period he spent in prison before being convicted of these crimes. There is no precedent that entitles Appellant to another chance to file a challenge to the discretionary aspects of his sentence when he failed to raise this claim on direct appeal or on collateral appeal through an ineffectiveness claim.

Moreover, even if we accept Appellant's contention that the trial court should have considered Appellant's good behavior in prison in resentencing him, we find this claim is meritless. In reviewing the transcripts of the sentencing hearing and the trial court's Rule 1925(a) opinion, we find ample evidence to show that the trial court considered all the relevant factors listed in 42 Pa.C.S.A. § 9721(b) along with Appellant's good conduct in prison. As the trial court was unsure of whether it was required to conduct a complete resentencing, it allowed Appellant to present evidence as to his good behavior and other mitigating factors. The trial court specifically found that "[Appellant's] progress towards rehabilitation as evidenced by his good conduct since being incarcerated, while laudatory, did not eclipse the gravity of his offense and the need for the protection of the public." Trial Court Opinion, 8/8/12, at 5-6.

For the foregoing reasons, we affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.