NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ALEXANDER TURNER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1915 WDA 2012

Appeal from the Judgment of Sentence July 5, 2007
In the Court of Common Pleas of Blair County
Criminal Division at No(s): CP-07-CR-0001460-2006

BEFORE: BOWES, J., MUNDY, J., and COLVILLE, J.*

CONCURRING AND DISSENTING MEMORANDUM BY MUNDY, J.:
FILED: December 10, 2013

I respectfully dissent, in part, from the learned Majority's disposition in this matter. The Majority rejects Appellant's contention that the trial court erred in imposing consecutive sentences for the crimes of robbery of motor vehicle and simple assault, concluding that these offenses do not merge for sentencing purposes. Majority Memorandum at 12-13. In reaching this conclusion, the Majority notes, "[s]ince the commission of robbery of a motor vehicle does not *ipso facto* mean that the person has committed the simple assault charged in this matter, it is improper to conclude that the two crimes statutorily merge." ***Id.*** at 14.

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* Retired Senior Judge assigned to the Superior Court.

My review of both the record and recent case law in this Commonwealth, however, reveals that such a rigid interpretation of the merger doctrine is improper. As noted by the Majority, this Court has long recognized that because simple assault is a lesser-included offense of robbery, for sentencing purposes, a conviction "for simple assault merges with a robbery conviction under 18 Pa.C.S.A. § 3701(a)(1)(ii)." ***Commonwealth v. Welch***, 435 A.2d 189, 190 (Pa. Super 1981) (citation and footnotes omitted); ***see also*** Majority Memorandum at 12. Unlike the defendant in ***Welch***, who was convicted of robbery under Section 3701, in this case Appellant was found guilty of, *inter alia*, **robbery of motor vehicle** and simple assault.

Distinct from the statutory definition of robbery set forth in Section 3701(a)(1)(ii), the Crimes Code defines the offense of robbery of motor vehicle as follows.

> **§ 3702. Robbery of motor vehicle**
>
> **(a) Offense defined.--**A person commits a felony of the first degree if he steals or takes a motor vehicle from another person in the presence of that person or any other person in lawful possession of the motor vehicle.

18 Pa.C.S.A. § 3702(a).

I find this Court's recent decision in ***Commonwealth v. Bonner***, 27 A.3d 255 (Pa. Super. 2011), *appeal denied*, 40 A.3d 1233 (Pa. 2012), instructive. In ***Bonner***, a panel of this Court clarified the necessary

elements of proof to establish the commission of the offense of robbery of motor vehicle. Specifically, the ***Bonner*** Court held that, in addition to the statutory language set forth in Section 3702(a), the Commonwealth must prove that "**the taking [was] accomplished by the use of force, intimidation, or the inducement of fear in the victim**." ***Id.*** at 258 (citations omitted; emphasis added); ***compare*** 18 Pa.C.S.A. § 2701(a)(3) (stating, a person will be found guilty of simple assault "if he … attempts by physical menace to put another in fear of imminent serious bodily injury"). Thus, it logically follows that, based upon this Court's clarification in ***Bonner***, the crimes of robbery of a motor vehicle and simple assault should have merged in this instance.[1]

In support of its conclusion that robbery of a motor vehicle and simple assault do not merge for sentencing purposes, the Majority rejects this Court's rationale in ***Bonner***, and places great emphasis on the fact that while the crime of robbery of a motor vehicle does require "the inducement of fear in the victim," it does not **explicitly** require proof that the fear is of "imminent serious bodily injury." Majority Memorandum at 13-14. However, I believe that this approach results in too narrow a reading of the

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[1] I further note that both the trial court and the Commonwealth concede that Appellant's merger claim has arguable merit and the sentence for simple assault should be vacated. ***See*** Trial Court Opinion, 1/23/13, at 11; Commonwealth's Brief at 3-4.

Bonner decision. Notably, even a cursory review of the underlying facts in ***Bonner*** supports the inference that the victims were placed in fear of imminent serious bodily injury when appellant broke into their home in the middle of the night, sexually assaulted wife, and proceeded to steal their vehicle at knifepoint. ***Bonner***, ***supra*** at 256.

Thus, I disagree with the Majority's conclusion that the trial court's judgment of sentence of 48 to 96 months' imprisonment for robbery of motor vehicle, and a consecutive sentence of 12 to 24 months' imprisonment for simple assault, was proper. On the contrary, I conclude that the sentence imposed with regard to Appellant's simple assault conviction is plainly illegal. Accordingly, I would vacate the July 5, 2007 judgment of sentence, and remand with instructions that the trial court re-sentence Appellant. In all other respects, I agree with the Majority's determination that there existed sufficient evidence to sustain Appellant's conviction for false identification to law enforcement authorities. ***See*** Majority Memorandum at 7-12.