NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
SHARI LYNN CARL,	:	No. 1481 MDA 2013
Appellant	:	

Appeal from the Judgment of Sentence, July 30, 2013,
in the Court of Common Pleas of Mifflin County
Criminal Division at No. CP-44-CR-0000447-2012

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND STRASSBURGER,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JULY 14, 2014**

Appellant appeals from the judgment of sentence imposed following her conviction for aggravated assault, simple assault, obstructing the administration of law or other government function, and resisting arrest.[1] We will affirm in part, vacate in part, and remand for further proceedings.

Appellant's convictions arose from an incident that occurred on August 1, 2012, at her residence in Kistler Borough. At that time, uniformed officers of the Mifflin County Drug Task Force were executing a search

* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 2702(a)(3); 2701(a)(1); 5101; and 5104, respectively.

warrant of the residence.[2] Appellant's daughter, who did not live at the residence, arrived on the scene and caused such an uproar that police decided to arrest her. Officer Craig Snyder was standing in the fenced backyard of the residence along with appellant while appellant's daughter was on the other side of the fence. (Notes of testimony, 5/20/13 at 133-134.) When Officer Snyder went to the gate to exit the yard and apprehend appellant's daughter, appellant grabbed the gate in an attempt to block the officer. (***Id.*** at 139.) As appellant and the officer physically struggled at the gate, appellant kneed Officer Snyder in the testicles, causing him pain and to release appellant and the gate. (***Id.*** at 139-140.) When Officer Snyder attempted to apprehend appellant, she again tried to knee him in the groin, but he blocked the blow with his thigh. (***Id.*** at 141-142.) Appellant was then arrested.

Appellant was convicted of the above-referenced offenses following a jury trial on May 20, 2013. Appellant was initially sentenced on July 30, 2013. At that time, the court informed the parties that it had been told that because appellant was on prescriptions for Xanax and Oxycontin, the Mifflin County Correctional Facility ("MCCF") could not house her. Consequently, the court sentenced appellant to an aggregate term of 3 to 12 months' house arrest, with electronic surveillance.

[2] The uniform was not a regular police uniform, but was a gray polo shirt with the legend "Mifflin County Drug Task Force." The officers also wore a gold badge. (Notes of testimony, 5/20/13 at 129.)

Upon information that the MCCF could house prisoners who were taking Xanax and Oxycontin, on August 2, 2013, the Commonwealth filed a motion for reconsideration of sentence. On August 6, 2013, appellant was detained by Mifflin County Probation and Parole after she failed to make arrangements for electronic surveillance of her home. Appellant was apparently then housed at the MCCF. On August 7, 2013, the Commonwealth filed a motion to terminate house arrest on the basis that appellant had failed to arrange for electronic surveillance and had been taken into custody. On August 13, 2013, the trial court entered an order that dismissed the motion to terminate house arrest as moot since appellant was already housed in the MCCF. In doing so, the trial court summarily found that appellant had violated the terms of her intermediate punishment of house arrest. No action was taken as to the Commonwealth's open motion to reconsider sentence. On August 16, 2013, appellant timely filed her notice of appeal from the judgment of sentence.

Appellant raises two issues on appeal:

> 1. Did the Commonwealth fail to present evidence that the Defendant caused a bodily injury or intended to cause a bodily injury to the victim beyond a reasonable doubt?
>
> 2. Did the trial court err and violate the Defendant's right to due process, primarily notice and hearing, in sua sponte modifying the Defendant's sentence based up[on] apparent ex parte submissions?

Appellant's brief at 4.

Appellant's first issue challenges the sufficiency of the evidence to support her conviction for aggravated assault. We note our standard of review:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Antidormi, 84 A.3d 736, 756 (Pa.Super. 2014), quoting ***Commonwealth v. Estepp***, 17 A.3d 939, 943-944 (Pa.Super. 2011), ***appeal dismissed as improvidently granted***, 54 A.3d 22 (Pa. 2012).

Appellant was convicted under the following subsection of aggravated assault:

> **§ 2702. Aggravated assault**
>
> **(a) Offense defined.**--A person is guilty of aggravated assault if he:
>
> (3) attempts to cause or intentionally or knowingly causes bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c), in the performance of duty;
>
> **(c) Officers, employees, etc., enumerated.**--The officers, agents, employees and other persons referred to in subsection (a) shall be as follows:
>
> (1) Police officer.

18 Pa.C.S.A. § 2702(a) and (c), in pertinent part.

"Bodily injury," as used in this subsection, means impairment of physical condition or substantial pain. 18 Pa.C.S.A. § 2301. Appellant argues that the evidence was insufficient to prove that Officer Snyder experienced substantial pain. Appellant relies upon ***Commonwealth v. Wertelet***, 696 A.2d 206 (Pa.Super. 1997). In ***Wertelet***, a police officer was kicked twice in the left shin by the back of the defendant's heel as she struggled while the officer attempted to subdue her. The court noted that there was "no evidence that appellant reared back and kicked [the officer] as hard as she could." ***Wertelet***, 696 A.2d at 212. This court held that this was insufficient to constitute the substantial pain necessary to prove "bodily injury."

Obviously, the amount of pain required to satisfy the bodily injury component of this subsection of aggravated assault is quite subjective in nature. However, we perceive a qualitative difference between an impact to the testicles rather than the shins. An impact to the testicles, even at less than full force, can cause such pain that the victim is completely incapacitated. We find the instant situation to be distinct from ***Wertelet*** and that appellant clearly exhibited an intent to cause substantial pain. The evidence was sufficient to demonstrate an intent to cause bodily injury and, therefore, aggravated assault under this subsection.

In her second issue, appellant argues that her due process rights, particularly notice and a chance to be heard, were violated when the trial court simply allowed the Mifflin County Probation and Parole office to apprehend appellant for an alleged violation of the electronic surveillance requirement of her house arrest and place her in the MCCF without hearing. In its order dismissing the Commonwealth's motion to terminate house arrest as moot, the court stated:

> Because the court's experience indicates two days allows for adequate time in which to contact the phone company and have in place all that is needed for the electronic monitoring, Defendant was instructed to have an active land line in place by August 2, 2013. Defendant failed to provide a land line within a reasonable time notwithstanding *repeated* efforts by Mifflin County Probation and Parole to delay and accommodate her. On August 6, 2013, Defendant was detained by Mifflin County Probation and Parole. Defendant is now serving her sentence at the MCCF which has now determined her

> medical needs can be accommodated. As such, the Commonwealth's Motion to Terminate House Arrest is dismissed as moot.

Order, 8/13/13 (emphasis in original).

Rather than holding a hearing on whether appellant violated the electronic surveillance requirement of her house arrest, the trial court summarily concluded, based upon its own experience and apparent ***ex parte*** communications with the Mifflin County Probation and Parole office, that a violation had occurred. We agree with appellant that this was error.

Our statute controlling sentences of county intermediate punishment states:

> **§ 9763. Sentence of county intermediate punishment**
>
> **(d) Sentence following violation of condition.**--The sentence to be imposed in the event of the violation of a condition under subsection (b) shall not be imposed prior to a finding on the record that a violation has occurred.

42 Pa.C.S.A. § 9763(d), in pertinent part.

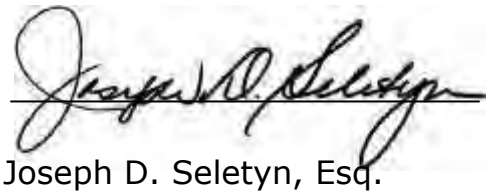
This statute clearly anticipates that before a defendant may be re-sentenced following a violation of a condition of intermediate punishment, a hearing must be held for the taking of evidence as to the alleged violation, and at which time a defendant may be heard in response. The trial court may not act in summary fashion. Moreover, compounding the problem below is the fact that appellant is being illegally subjected to total

confinement where the only existing sentencing order imposes only intermediate punishment.

Consequently, we will vacate the order entered August 13, 2013, dismissing the Commonwealth's motion to terminate house arrest, and we will remand for a hearing as to the Commonwealth's motions for reconsideration of sentence and to terminate house arrest, at which time evidence may be taken and appellant may be accorded an opportunity to be heard.

We affirm as to the sufficiency of the evidence of aggravated assault. Order entered August 13, 2013 vacated. Case remanded for hearing as directed by this Memorandum. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/14/2014