NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
WESLEY ELLIS DOWSEY, JR.	:	
Appellant	:	No. 595 MDA 2021

Appeal from the Judgment of Sentence Entered March 25, 2021
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0003549-2020

BEFORE: PANELLA, P.J., KUNSELMAN, J., and KING, J.

MEMORANDUM BY PANELLA, P.J.: **FILED: JUNE 13, 2022**

Wesley Dowsey appeals from the judgment of sentence entered following his combined jury and bench trials for Driving Under the Influence ("DUI") and related charges.[1] The jury empaneled to try Dowsey for his misdemeanor charges found him not guilty on all counts before them after hearing his entrapment defense. The trial court tasked with trying Dowsey's summary charges did not find his defense credible and found him guilty of three of his four summary charges. Dowsey was then sentenced for those charges and appeals from the order entering sentence.

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[1] The related charges were summary traffic violations for driving while license suspended, 75 Pa.C.S.A. § 1543(b)(1), driving while license suspended DUI related (75 Pa.C.S.A. § 1543(b)(1.1)(i)), driving an improperly registered vehicle (75 Pa.C.S.A. § 1301(a)), and failing to signal (75 Pa.C.S.A. § 3334(a)). These summary charges did not entitle Dowsey to trial by jury. ***See Commonwealth v. Harriott***, 919 A.2d 234, 237 (Pa. Super. 2007).

Dowsey was pulled over by police following an incident at a local bar where he was asked to leave by management. He and his friends were drinking alcohol and smoking marijuana and bar staff called the police for assistance removing them. An officer arrived and after instructing Dowsey to leave the bar, discovered he had an outstanding warrant for arrest. The officer told a fellow officer this information over radio and the second officer pulled Dowsey over for a traffic violation. Dowsey was later charged with six DUI related misdemeanors and one misdemeanor for possession of drug paraphernalia. Dowsey also faced four summary vehicle code violations.

At trial, Dowsey testified that he was threatened by police multiple times to drive home immediately, despite having consumed alcohol. He called his wife to pick him up at the bar but ultimately drove his motorcycle because he thought he would be arrested if he stayed.

On appeal, Dowsey raises two issues. First, that the trial court violated double jeopardy and collateral estoppel by finding him guilty of the summary offenses when the jury found him not guilty of the misdemeanors on the basis of entrapment. Second, that his sentence for Driving While BAC .02 or Greater While License Suspended under 75 Pa.C.S.A. § 1543(b)(1.1)(i) was illegal. In its Pa.R.A.P. 1925(a) Opinion the trial court addresses both of these issues however it first questions whether Dowsey has waived them by filing his Pa.R.A.P. 1925(b) statement late.

We must address the issue of waiver first. Pa.R.A.P. 1925(c)(3) was recently amended to reflect:

> If an appellant represented by counsel in a criminal case was ordered to file and serve a Statement and either failed to do so, or untimely filed or served a Statement, such that the appellate court is convinced that counsel has been *per se* ineffective, and the trial court did not file an opinion, the appellate court may remand for appointment of new counsel, the filing or service of a Statement *nunc pro tunc*, and the preparation and filing of an opinion by the judge.

Pa.R.A.P. 1925(c)(3)(effective April 1, 2022). In relevant part, the recent update merely clarified that subsection (c)(3) applied when counsel failed to properly serve the trial court in addition to when counsel failed to file the statement.

Here, the trial court notes that Dowsey's Pa.R.A.P. 1925(b) Statement was filed 28 days late. ***See*** Trial Court Opinion, 7/12/2021 at 12. However, the trial court goes on to address the merits of both issues raised in Dowsey's filing. ***See id***. at 13-15. Under Pa.R.A.P. 1925(c)(3) we do not have the option to remand because the trial court has filed an opinion. We are able to review the issues on the merits as the trial court has provided a full evaluation of the issues. ***See Commonwealth v. Jabbie***, 200 A.3d 500, 504-5 (Pa. Super. 2018).

Dowsey's first claim on appeal is that the trial court violated the principles of double jeopardy and collateral estoppel by imposing sentence on the summary offenses when the jury acquitted him of the DUI offenses on a theory of entrapment. ***See*** Appellant's Brief at 3. Dowsey argues that the

jury's acquittal based on entrapment precluded the trial court from finding him guilty of the summary offenses. ***See id***. at 7. Dowsey extensively explains the law behind double jeopardy and collateral estoppel, correctly noting that both preclude subsequent litigation of an issue determined by a final judgment. ***See id***. at 3-4.

Appellate review of the applicability of the doctrines of double jeopardy and collateral estoppel raises a question of law, implicating *de novo* review. ***See Commonwealth v. Jordan***, 256 A.3d 1094, 1104-1105 (Pa. 2021). Dowsey ignores ***Commonwealth v. Jordan***, a recent, directly on point ruling in which our Supreme Court considered:

> whether inconsistent verdicts rendered by separate factfinders in a simultaneous jury and bench trial implicate double jeopardy and collateral estoppel concerns, such that a defendant, who was acquitted by the jury on the charges it considered, may not also be found guilty by the trial court of other charges.

Id. at 1096.[2]

Jordan argued, as Dowsey does here, that a credibility finding made by the jury in their role as factfinder is then binding on the trial court when it serves as factfinder simultaneously. ***See id***. at 1101. Our Supreme Court succinctly dismissed this argument because Jordan faced punishment in only one trial. ***See id***. at 1105. The ***Jordan*** court clarified that convictions such as those faced by Jordan and Dowsey do not violate double jeopardy but are simply inconsistent verdicts. ***See id***. at 1107.

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[2] ***Jordan*** was filed on August 17, 2021. Appellant's brief was filed with this Court on September 23, 2021.

The Supreme Court acknowledged a long line of precedent upholding inconsistent verdicts and specifically extends this practice to simultaneous jury and bench trials. ***See id***. Pa.R.Crim.P. 648(F) provides that a trial court must dispose of summary offenses joined with misdemeanor charges that were determined by a jury.

The trial court here issued its Pa.R.A.P. 1925(a) Opinion prior to the Supreme Court's ruling in ***Jordan***. However, the trial court did rely on this Court's unpublished ruling in Jordan which employed similar reasoning to the Supreme Court's. ***See Commonwealth v. Jordan,*** 240 A.3d 117 (Pa. Super. 2020) (unpublished memorandum).[3] We find Dowsey's circumstances to be analogous to Jordan's and therefore follow the reasoning of the Supreme Court in ***Jordan***.

Dowsey's second argument on appeal is that his sentence for driving while operating privilege is suspended or revoked under 75 Pa.C.S.A. § 1543(B)(1.1)(i) is illegal because the sentencing statute failed to indicate a statutory maximum sentence. ***See*** Appellant's Brief at 7. He argues that this makes the range of sentences unconstitutionally vague and violates due process. ***See id***. The Commonwealth agrees with Dowsey and argues that under ***Commonwealth v. Eid***, 249 A.3d 1030 (Pa. 2021) a sentence of

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[3] This Court's memorandum in ***Jordan*** is a non-precedential decision, though we may cite it as applicable, persuasive authority. ***See*** Pa.R.A.P. 126(b) (stating that unpublished non-precedential decisions of the Superior Court filed after May 1, 2019, may be cited for their persuasive value). Here, we cite it to explain the trial court's reasoning.

incarceration is not appropriate. ***See*** Appellee's Brief at 17. The trial court opines that ***Eid*** does not apply to Dowsey because the Supreme Court decided it after his sentencing. ***See*** Trial Court Opinion at 15.

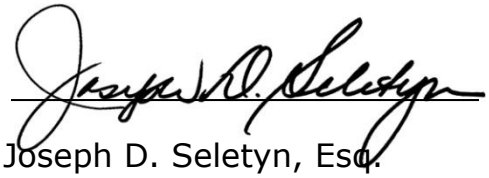
When evaluating a claim of illegal sentencing our standard of review is plenary and we are limited to determine whether the trial court committed an error of law. ***See Commonwealth v. Hodges***, 193 A.3d 428, 433 (Pa. Super. 2018). A sentence is illegal if it is not authorized by statute. ***See id***. We must vacate an illegal sentence. ***See id***.

The trial court's claim that we cannot consider ***Eid*** in our review is incorrect. Our Supreme Court has held that while normally, a new rule of law will only apply retroactively to a case on direct appeal if the issue has been properly preserved, in cases of legality of sentence there is an exception because legality of sentence claims may not be waived. ***See Commonwealth v. Monarch,*** 200 A.3d 51, 56 (Pa. 2019). Accordingly, we disagree with the trial court and find ***Eid*** dispositive.

The ***Eid*** court found 75 Pa.C.S.A. § 1543(b)(1.1)(i) unconstitutional for failure to specify a maximum term of imprisonment and determined the only punishment for violation of the statute is a $1,000 fine. ***See*** 249 A.3d at 1044. Dowsey was sentenced to 90 days to six months' incarceration under 75 Pa.C.S.A. § 1543(b)(1.1)(i). That sentence is illegal and must be vacated. All other aspects of sentence are affirmed.

Judgment of sentence affirmed in part and vacated in part. Case remanded for further proceedings. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 06/13/2022