NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. PETER ALLEN TREADWAY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2342 EDA 2011

Appeal from the Judgment of Sentence July 13, 2011
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-0001794-2010

BEFORE: PANELLA, J., OLSON, J., and FITZGERALD, J.*

MEMORANDUM BY PANELLA, J. Filed: January 15, 2013

Appellant, Peter Treadway, appeals from the judgment of sentence entered on July 13, 2011, by the Honorable James P. MacElree, II, Court of Common Pleas of Chester County. After careful review, we affirm Treadway's convictions, but vacate the judgment of sentence and remand for re-sentencing.

As we write primarily for the parties, who are familiar with the factual context and legal history of this case, we set forth only so much of the facts and procedural history as is necessary to our analysis.

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* Former Justice specially assigned to the Superior Court.

Treadway sexually abused his stepdaughter. This depravity continued for years. The victim testified that the abuse began when she was nine or ten years old and that Treadway first had sexual intercourse with her when she turned eleven. By the time the victim was thirteen or fourteen years old, Treadway had sex with her "every day or multiple times a day." N.T., Trial, 2/28/11, at 62. Eventually the victim became pregnant. The victim, with Treadway's assistance, obtained an abortion in a hospital.

After a four-day trial, the jury convicted Treadway of a multitude of sexual offenses and counts. The trial court sentenced Treadway to an aggregate term of imprisonment of 100 to 200 years.

In his first issue on appeal, Treadway challenges the legality of his sentence. His argument contains two parts. We begin with the first. Treadway alleges that the trial court imposed illegal sentences for his convictions of rape of a child, 18 Pa.C.S.A. § 3121(c), involuntary deviate sexual intercourse with a child, 18 Pa.C.S.A. § 3123(b), aggravated indecent assault, 18 Pa.C.S.A. § 3125(a)(7), and indecent assault, 18 Pa.C.S.A. § 3126(a)(7).[1] Each of these offenses pertains to a child under the age of thirteen. At sentencing, the trial court utilized a statute, 42 Pa.C.S.A. § 9718.2, *Sentences for sex offenders*, that contains enhanced mandatory

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[1] The counts are as follows: rape of a child (count 1); involuntary deviate sexual intercourse with a child (counts 15-16); aggravated indecent assault (counts 31-34); and indecent assault (counts 69-80). Counts 69 to 72 merged for sentencing purposes.

minimum and mandatory maximum sentencing provisions provided the defendant has a prior eligible conviction, as Treadway does. Section 9718.2 became effective on January 1, 2007. Treadway maintains that his sentences are illegal as he was subject to the increased penalty provisions of § 9718.2 for crimes the jury found he committed prior to the enactment of the statute, thus violating his *ex post facto* rights. We are constrained to agree.[2]

Our standard of review is as follows.

> A challenge to the legality of a sentence may be raised as a matter of right, is not subject to waiver, and may be entertained as long as the reviewing court has jurisdiction. If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated. We can raise and review an illegal sentence *sua sponte.* When we address the legality of a sentence, our standard of review is plenary and is limited to determining whether the trial court erred as a matter of law.

Commonwealth v. Borovichka, 18 A.3d 1242, 1254 n.8 (Pa. Super. 2011) (internal citations and quotation marks omitted). "[T]he determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary." ***Commonwealth v. Williams***, 868 A.2d 529, 532 (Pa. Super. 2005).

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[2] The Commonwealth suggests that this issue is waived and urges us to remand this issue for the trial court to address this issue in the first instance and for it to make factual findings. ***See*** Commonwealth's Brief, at 7-8. This claim squarely implicates the legality of Treadway's sentence, a claim that cannot be waived, and as it raises a pure legal question requires no remand.

Section 9718.2 provides that if a defendant has been convicted of an enumerated offense and already has a prior enumerated conviction, that he "be sentenced to a minimum sentence of at least 25 years of total confinement…." 42 Pa.C.S.A. § 9718.2(a). The statute further provides for a mandatory maximum: "An offender sentenced to a mandatory minimum sentence under this section shall be sentenced to a maximum sentence equal to twice the mandatory minimum sentence, notwithstanding 18 Pa.C.S. § 1103 (relating to sentence of imprisonment for felony) or any other provision of this title or other statute to the contrary." 42 Pa.C.S.A. § 9718.2(b).

Section 9718.2 increases the mandatory minimum sentencing provisions for sexual offenses pertaining to victims less than sixteen years of age that were in effect at the relevant times in this case. ***See*** 42 Pa.C.S.A. § 9718 (1995 and 2004), Amended 1995, March 31, P.L. 985, No. 10 (Spec. Sess. No. 1), § 17; 2004, Nov. 30, P.L. 1703, No. 217, § 4. Section 9718.2 also substantially increases the prescribed statutory maximum sentences for Treadway's convictions, which are as follows: rape of a child, 40 years, ***see*** 18 Pa.C.S.A. § 3121(e)(1); involuntary deviate sexual intercourse with a child, 40 years, ***see*** 18 Pa.C.S.A. § 3123(d)(1); aggravated indecent assault, ten years, ***see*** 18 Pa.C.S.A. § 1103(2); and indecent assault, five years, ***see*** 18 Pa.C.S.A. § 1104(1). Here, the trial court utilized § 9718.2 and sentenced Treadway to 25 to 50 years for each of these convictions. In

so doing, as we explain below, the trial court violated Treadway's *ex post facto* rights, thus rendering the sentences illegal.

"A state law violates the *ex post facto* clause if it was adopted after the complaining party committed the criminal acts and 'inflicts a greater punishment than the law annexed to the crime, when committed.'" ***Commonwealth v. Vaughn***, 770 A.2d 287, 289 n.2 (Pa. 2001) (quoting ***California Dept. of Corrections v. Morales***, 514 U.S. 499, 504-506 (1995)). "[I]f a defendant completes a crime before an increased penalty takes effect, it would violate his right not to be subject to *ex post facto* legislation to impose the increased penalty upon him." ***United States v. Julian***, 427 F.3d 471, 482 (CA7 2005).

The victim was born on December 12, 1992. She testified that Treadway began sexually abusing her when she was nine or ten and that he forced her to have intercourse with him beginning when she was eleven. ***See*** N.T., Trial, 2/28/11, at 59. For the nineteen convictions that have as an element of the offense that the child be thirteen years old or younger, the jury had to have found that the crimes took place prior to December 12, 2005, the day the victim turned thirteen years of age—one year and twenty days before § 9718.2 became effective.

Thus, the trial court utilized a statute that was implemented well after the convicted criminal conduct and which increased the punishment imposed by the law in effect at the time the crime was committed. ***See Miller v.***

Florida, 482 U.S. 423, 429 (1987) (an *ex post facto* law "also includes a law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed[.]") (citation and internal quotation marks omitted). In so doing, the trial court imposed an illegal sentence for counts 1, 15-16, 31-34, and 73-80. Accordingly, we remand for re-sentencing.

We now turn to the second part of Treadway's argument concerning the illegality of his sentence. Treadway argues that the trial court improperly used § 9718.2 to sentence him beyond the prescribed statutory maximum on twelve counts for crimes that required as an element of the offense that the victim be less than sixteen years of age where there was no specific jury finding as to the victim's age at the time of the offense. In essence, he claims he was deprived of his Sixth Amendment right to a jury finding as to all essential elements of the charged crimes for twelve counts.

The jury convicted Treadway of six counts each of involuntary deviate sexual intercourse, 18 Pa.C.S.A. § 3123(a)(7), and aggravated indecent assault, 18 Pa.C.S.A. § 3125(a)(8).[3] Each offense has as an element that the victim be less than sixteen years of age. The prescribed statutory maximum for a violation of § 3123(a)(7) is twenty years, ***see*** 18 Pa.C.S.A. §

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[3] The counts are as follows: involuntary deviate sexual intercourse (counts 20-25) and aggravated indecent assault (counts 43-48).

1103(1), and for § 3125(a)(8) is ten years, ***see*** 18 Pa.C.S.A. § 1103(2). However, the trial court utilized § 9718.2 to set a statutory maximum of fifty years for each offense. This is where Treadway points to the illegality.

The victim in this case turned sixteen on December 12, 2008—one year and eleven months after the effective date of § 9718.2, January 1, 2007. The criminal conduct, however, also occurred prior to the effective date of § 9718.2. There was no jury finding in this case as to when the conduct occurred yet the trial court utilized § 9718.2 to increase the penalty beyond the prescribed statutory maximums. This action violated Treadway's Sixth Amendment rights. ***See Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.") (emphasis added). [4]

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[4] In ***Blakely v. Washington***, 542 U.S. 296, (2004), the United States Supreme Court clarified the definition of "statutory maximum." The Court stated:

> Our precedents make clear, however, that the "statutory maximum" for ***Apprendi*** purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes

(Footnote Continued Next Page)

As such, we must vacate Treadway's judgment of sentence for counts 20 to 25 and 43 to 48. ***See Commonwealth v. Kearns***, 907 A.2d 649, 661 (Pa. Super. 2006) (vacating judgment of sentence and remanding for re-sentencing on ***Apprendi*** violation).

Our resolution of Treadway's first issue has upset the trial court's sentencing scheme. Accordingly, we vacate the judgment of sentence in its entirety and remand for re-sentencing in accordance with this memorandum.[5] ***See Commonwealth v. Phillips***, 946 A.2d 103, 115 (Pa. Super. 2008) ("Where we determine that a sentence must be corrected, this Court has the option of amending the sentence directly or remanding it to the trial court for re-sentencing. If a correction by this Court may upset the sentencing scheme envisioned by the trial court, the better practice is to

(Footnote Continued) ––––––––––––––––––––––

> essential to the punishment," and the judge exceeds his proper authority.

Id., at 303 (internal citations omitted; emphasis in original). Here the prescribed statutory maximums, based solely on the jury's verdict, and without any additional fact-finding, are found in 18 Pa.C.S.A. § 1103(1)-(2).

Nothing in this memorandum is to be construed as precluding the trial court on re-sentencing from exercising its discretion to impose a sentence up to the statutory maximum provided for each offense—and running those sentences consecutively. ***See***, ***e.g.***, ***Commonwealth v. Saranchak***, 675 A.2d 268, 277 n.17 (Pa. 1996) ("It is well-established that a sentencing court can impose a sentence that is the maximum period authorized by the statute.").

[5] This finding renders Treadway's second issue, that his sentence is excessive, moot.

remand."). On remand, the trial court is precluded from utilizing § 9718.2. Our decision in no way affects Treadway's convictions.

Next, Treadway argues that the suppression court erred in denying his motion to suppress a statement made during an interrogation. Treadway maintains that the suppression court erred in failing to suppress his statement that he did not know about the victim's pregnancy as the statement was made during a custodial interrogation in the absence of ***Miranda*** warnings.

At the close of evidence, the trial court permitted Treadway to make an oral motion to suppress the statements he made to the police.[6] The suppression court denied Treadway's motion after conducting a hearing. ***See*** N.T., Suppression Hearing, 3/2/11, at 621-649.

Our standard of review where a defendant appeals the denial of a suppression motion is well-settled. We first determine whether the record supports the trial court's factual findings and we must then determine if the legal conclusions drawn from those factual findings are correct. ***See Commonwealth v. Bomar***, 826 A.2d 831, 842 (Pa. 2003). As the prosecution was the prevailing party in the suppression court, we must

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[6] The untimely nature of the suppression motion does not render it "technically waived" as the Commonwealth suggests. Commonwealth's Brief, at 17. The trial court obviously permitted it under the interests of justice exception to Rule 581(B) of the Pennsylvania Rules of Criminal Procedure. ***See generally*** 26A Standard Pennsylvania Practice 2d 134:79, *Time of motion—"Interests of justice" exception*.

consider only the evidence of the prosecution and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. ***See id***. "Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error." ***Id***.

The testimony revealed the following. Two plain-clothes detectives met Treadway outside of his home and asked to speak with him. The three men went into Treadway's kitchen where the detectives placed, with Treadway's permission, an audio recorder on the kitchen table. The detectives then spoke with Treadway about the allegations of sexual abuse for approximately 33 minutes. During the interview, the detectives informed Treadway that "obviously your [sic] not under arrest, you're here talking to us freely and voluntarily" and Treadway responded to indicate that was true. Commonwealth's Exhibit 10.[7] Treadway acknowledges in his brief that the detectives informed him that "he was free to leave" or, in other words, to end the encounter since he was in his residence. Appellant's Brief, at 27.

The suppression court concluded that Treadway was not in police custody during the interview. We agree.

> The test for determining whether a suspect is in custody is whether the suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably

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[7] Exhibit 10 is a transcript of the interview conducted with Treadway at his residence on March 1, 2010.

> believes that his freedom of action or movement is restricted. This standard is an objective one, which takes into consideration the reasonable impression on the person being interrogated. The test does not depend upon the subjective intent of the law enforcement officer interrogator but instead focuses on whether the individual being interrogated reasonably believes his freedom of choice is being restricted. The fact that the police may have focused on the individual being questioned or that the interviewer believes the interviewee is a suspect is irrelevant to the issue of custody. A person is considered to be in custody for the purposes of ***Miranda*** when the officer's show of authority leads the person to believe that she was not free to decline the officer's request, or otherwise terminate the encounter.

Commonwealth v. Page, 965 A.2d 1212, 1217-1218 (Pa. Super. 2009) (internal quotes and citations omitted).

The key inquiry for determining "whether an individual is in custody for ***Miranda*** purposes is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." ***Commonwealth v. Pakacki***, 901 A.2d 983, 988 (Pa. 2006) (citation omoitted). Here, the detectives asked Treadway his permission to record the interview and explicitly informed him that he was not under arrest. The detectives chose to interview Treadway in his home and the interview lasted just 33 minutes. There is no evidence of any force or threat of force. Treadway concedes that the detectives informed him that he was free to end the encounter. Under these circumstances, we find that Treadway was not in custody. The suppression court did not err in denying Treadway's motion.

In his next issue, Treadway maintains that the trial court erred in providing the jury with a consciousness of guilt instruction based on his statements made to the police.

> [W]hen reviewing jury instructions for error, the charge must be read as a whole to determine whether it was fair or prejudicial. The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration.

Commonwealth v. Sepulveda, ___ A.3d ___, ___, 2012 WL 5936029, *24 (Pa., filed November 28, 2012).

The trial court followed § 3.15 of the Pennsylvania Suggested Standard Criminal Jury Instructions (2d ed. 2012) when giving the instruction. When the suggested instruction states "give other specifics," the trial court instructed, in pertinent part, "[t]hat specifically is referring to the statement to Detectives Sassa and Carbonell that he did not know that [the victim] was ever pregnant. There was some other evidence that he may have tried to cover up some evidence." N.T., Trial, 3/3/11, at 716. The trial court further instructed the jury to weigh this evidence and that while the jury may consider the evidence as tending to consciousness of guilt it is "not required to do so." ***Id***.

The basis for Treadway's objection to this instruction is that it "magnifie[s] the error of failing to suppress Treadway's statements" to the police. We have ruled those statements admissible as Treadway was not in

custody at the time they were made. There was no error in giving this instruction; it was warranted.

In his last issue, Treadway claims that the trial court's improper criticism of defense counsel deprived him of a fair trial. We disagree.

"A judge's remarks to counsel do not warrant reversal unless the remarks so prejudice the jurors against the defendant that it may reasonably be said [that the remarks] deprived the defendant of a fair and impartial trial." ***Commonwealth v. Jones***, 912 A.2d 268, 287 (Pa. 2006) (citation and internal quotation marks omitted; brackets in original).

At the outset, the trial court explains that defense "counsel did at times have to be directed to cease a line of questioning or to follow the [c]ourt's instructions. However, at no point during the trial was counsel treated with contempt, or in any way inappropriately so as to prejudice the appellant." Trial Court Opinion, 6/4/12, at 5. The record amply supports the trial court's conclusion.

Treadway first claims that the "rancor" between defense counsel and the trial court "hit a peak"[8] when the trial court ordered the jury out of the room on the third day of trial—and once the jury left the room the trial court threatened defense counsel with contempt. Appellant's Brief, at 29. Treadway explains that this prejudiced the jurors because although the

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[8] Interestingly, Treadway points to no "rancor" that occurred prior to the third day of trial.

chastisement took place outside their presence it was clear the trial court "was about to chastise defense counsel." ***Id***.

We have reviewed the pages of the transcript that Treadway cites in his brief, ***see*** N.T., Trial, 3/2/11, at 480-482, as well as the pages preceding the citations he provides. During the direct examination of a defense witness, the trial court sustained several of the Commonwealth's objections. ***See id***., at 478-479. Defense counsel after each objection questioned the trial court. Eventually, the trial court stated, "[d]on't argue with me." ***Id***., at 480. Defense counsel denied that she was arguing and the trial court excused the jury. ***See id***. Then, once the jury was excused, the trial court informed defense counsel that when it makes a ruling, "I don't expect you to argue with me." ***Id***. The trial court then explained that if defense counsel continued on this path it would hold her in contempt at the conclusion of the trial. ***See id***.

Defense counsel responded that she was "asking for fairness" and alleged that the trial court permitted the Commonwealth to offer general objections, but required defense counsel to formulate specific objections. ***Id***., 481. The trial court explained that it asks for "grounds [for objections] when we think grounds are necessary." ***Id***. Defense counsel then asked to be removed from the case as the trial court was "tying [her] hands." ***Id***. The trial court denied this request.

The jury heard none of this. Further, the remarks do not evidence any hostility towards the defendant. As such, Treadway cannot establish that these remarks prejudiced him.

The next remark Treadway cites is when the trial court *sua sponte* cut off a line of questioning in which defense counsel was trying to establish animosity between the victim and the victim's mother. The trial court stated, "[c]ounsel, this is not a custody trial. I'm just not going to let this thing go that far afield. Have this witness bring out something that's relevant to the criminal trial we are hearing." N.T., Trial, 3/2/11, at 582.

We find nothing wrong with this remark; it was an ordinary ruling to keep the trial moving and directed towards relevant testimony. In no way did it prejudice the jurors against Treadway.

Lastly, Treadway maintains that the trial court conveyed to the jury that it believed the victim's animosity toward her mother "was irrelevant and counsel was acting improperly in presenting such evidence" when it stated, "[y]ou have five minutes to finish up" during the direct examination of a witness. ***Id***., at 564. At the conclusion of the examination, the trial court did ask defense counsel, "[a]nything more?" to which counsel responded, "[n]o, none at all." ***Id***., at 565.

Again, we find no animus directed towards defense counsel. This claim fails.

Judgment of sentence vacated. Case remanded for re-sentencing. Convictions affirmed. Jurisdiction relinquished.