

2013 PA Super 305

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

STEVENSON LEON ROSE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 45 WDA 2011

Appeal from the Judgment of Sentence December 7, 2010
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CC 2008-0810, CP-02-CR-0000810-2008

BEFORE: STEVENS, P.J.,* BENDER, BOWES, GANTMAN, DONOHUE, ALLEN,
OLSON, OTT, and WECHT, JJ.

DISSENTING OPINION BY GANTMAN, J.: **FILED NOVEMBER 25, 2013**

I respectfully disagree with the majority's decision to vacate and remand the case for re-sentencing. Instead, I think the trial court correctly sentenced Appellant to a term of twenty (20) to forty (40) years' imprisonment for his third degree murder conviction, pursuant to 18 Pa.C.S.A. § 1102(d); and I would affirm the judgment of sentence. Hence, I dissent.

Appellant contends he "completed" the criminal deeds related to third degree murder before the 1995 enactment of 18 Pa.C.S.A § 1102(d). Appellant asserts the trial court "retroactively" applied Section 1102(d) and imposed a sentence that violates the *ex post facto* clauses of both the state and federal constitutions, because the 1995 addition of Section 1102(d)

*President Judge Stevens did not participate in the consideration or decision of this case.

increased the maximum punishment for third degree murder from twenty to forty years, and the court applied Section 1102(d) to “acts, conduct and events” which occurred before the effective date of that subsection. Appellant concludes the court should have imposed a term of imprisonment consistent with the sentencing statute in effect when Appellant attacked the victim in 1993.

Historically, settled law has held: “Murder is committed only when the victim of the assault dies.” *Commonwealth v. Ramunno*, 219 Pa. 204, 208, 68 A. 184, 185 (1907). *See also* 18 Pa.C.S.A. § 2501(a) (including “death of another human being” as element of criminal homicide); 42 Pa.C.S.A. § 5552(d) (explaining, in relevant part, that for purposes of commencement of statute of limitations: “**(d) Commission of offense.**—An offense is committed...when every element [of the offense] occurs...”). “[A] person who has been convicted of murder of the third degree...shall be sentenced to a term which shall be fixed by the court at not more than 40 years.” 18 Pa.C.S.A. § 1102(d).

Instantly, Appellant and his cohort brutally attacked the victim in 1993. The victim, however, did not die in 1993. On May 14, 1995, Section 1102(d) went into effect. The victim in this case finally succumbed to her injuries on September 17, 2007, which is the date the homicide occurred. The Commonwealth charged Appellant with criminal homicide on October 9, 2007, and a jury convicted Appellant of third degree murder on October 13, 2010. Using the statute in effect when the homicide occurred, the court

sentenced Appellant on December 7, 2010, to twenty to forty years' imprisonment, pursuant to Section 1102(d).

Here, Appellant did not "commit" the murder until the victim died on September 17, 2007. **See Ramunno, supra.** Although the attack happened years before, there was no murder until the final element of the offense, the victim's death, actually occurred. In my opinion, the court did not "retroactively apply" Section 1102(d); rather, the court utilized the sentencing statute in effect at the time of the murder. Therefore, the court's sentence was proper because Section 1102(d) went into effect in 1995, before the murder occurred. **See Calder v. Bull**, 3 U.S. 386, 390, 1 L.Ed. 648, ___ (1798) (defining *ex post facto* law as "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed").

Contrary to Appellant's assertion, the offense at issue is murder, which occurred in 2007, when the victim died. Consequently, I agree with the Commonwealth's position that the court properly sentenced Appellant per the statute in effect at the time of the murder. Based upon the foregoing, I am convinced the sentence imposed did not violate the state and federal constitutions as *ex post facto*; and I would affirm.¹ Accordingly, I dissent.

¹ I question whether Appellant is entitled to any credit for time served.