

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

BARRY A. FOULTZ,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 592 MDA 2013

Appeal from the Judgment of Sentence entered December 27, 2012,  
in the Court of Common Pleas of Lancaster County,  
Criminal Division, at No(s): CP-36-CR-0000037-2012

BEFORE: ALLEN, LAZARUS, and FITZGERALD\*, JJ.

MEMORANDUM BY ALLEN, J.:

**FILED DECEMBER 20, 2013**

Barry A. Fultz ("Appellant") appeals from the judgment of sentence imposed after he pled guilty to 15 counts of involuntary deviate sexual intercourse (person less than 16); 5 counts of statutory sexual assault; 5 counts of aggravated indecent assault (person less than 16); 15 counts of indecent assault (person less than 16); 1 count of corruption of minors; and 1 count of endangering the welfare of a child. The trial court sentenced Appellant to an aggregate 33½ to 80 years of incarceration.

Appellant presents a single sentencing issue for our review:

- I. Were the sentences imposed for five counts of statutory sexual assault, set forth in counts sixteen to twenty, illegal, as these counts should have merged with the sentences imposed for five counts of aggravated indecent assault, set forth in counts twenty-one to twenty-five?

\*Former Justice specially assigned to the Superior Court.

Appellant's Brief at 7.

Appellant raised this issue in his Pa.R.A.P. 1925(b) statement. Although the Commonwealth filed an answer in which it agreed with Appellant that the statutory sexual assault counts should have merged with the aggravated indecent assault counts, the trial court did not respond or address this issue in a Pa.R.A.P. 1925(a) opinion.<sup>1</sup>

Appellant claims that the trial court's sentence was illegal because it failed to merge his statutory sexual assault convictions at Counts 16 - 20, with his aggravated indecent assault convictions at Counts 21 - 25. The issue of merger of offenses is a pure question of law, and our standard of review is plenary. ***Commonwealth v. Robinson***, 931 A.2d 15, 24 (Pa. Super. 2007) (*en banc*) (citation omitted). "A claim that crimes should have merged for sentencing purposes presents a challenge to the legality of a sentence." ***Commonwealth v. Ousley***, 21 A.2d 1238, 1242 (Pa. Super. 2011).

The merger statute reads:

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<sup>1</sup> The trial court on June 28, 2013 simply issued an order affirming "its Opinion and Order of March 4, 2013, for the reasons set forth therein" and transmitting the record to this Court. The March 4, 2013 opinion and order was issued in response to Appellant's post-sentence motion, and did not address the specific merger issue raised by Appellant in his Pa.R.A.P. 1925(b) statement and appellate brief.

**§ 9765. Merger of sentences**

No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa.C.S.A. § 9765.

Here, Appellant pled guilty to 5 counts of aggravated sexual assault at

18 Pa.C.S.A. § 3125(a)8, which reads:

[A] person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if ... the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

Similarly, Appellant pled guilty to 5 counts of statutory sexual assault at 18 Pa.C.S.A. § 3122.1(a)(1), as follows:

[A] person commits a felony of the second degree when that person engages in sexual intercourse with a complainant to whom the person is not married who is under the age of 16 years and that person is ... four years older but less than eight years older than the complainant.

Our review of the criminal information reveals that Appellant's statutory sexual assault charges at Counts 16 - 20 are identical to his aggravated indecent assault charges at Counts 21 - 25, all of which read:

TO WIT: Actor, [Appellant], did penetrate the anus of the minor victim, [], with his (actor's) penis. Said offense occurred at 635 South Broad St., Lititz Borough, Lancaster County.

Information, 1/24/12, at Counts 16-25.

At the guilty plea hearing, the assistant district attorney summarized:

[T]he victim in this case is a juvenile – was a juvenile male, whose initials are CD, born 10/1 of '84. He was 13 or 14 years old at the time of the offenses, which was in 1997 into 1998. And at that time, [Appellant] rented a room from the victim's father.

The victim, CD, the juvenile male, was frequently in the care, left in the care of the [Appellant]. And one day the victim came home from school upset because a girl had rejected him, and the [Appellant] chose that moment of the victim's vulnerability to initiate sexual contact with the victim.

N.T., 9/25/12, at 9.

This summary, as well as the entirety of the notes of testimony from the guilty plea hearing, does not expand on the statutory sexual assault and aggravated indecent assault charges at counts 16 - 25. Nonetheless, the Commonwealth has commented:

Each Statutory Sexual Assault charge coincided with each Aggravated Indecent Assault charge, and each pair arose out of the single criminal acts of [Appellant] penetrating the victim's anus with his penis.

Commonwealth Brief at 5.

We agree that on the record before us, the sentences for statutory sexual assault merge with the sentences for aggravated indecent assault. Since our disposition does not alter Appellant's overall sentence, remand is not warranted.<sup>2</sup> ***Commonwealth v. Thur***, 906 A.2d 552, 569-570 (Pa.

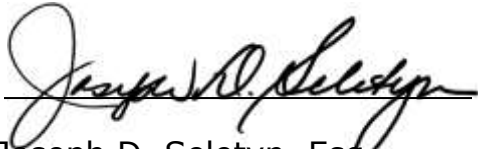
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<sup>2</sup> At each count of 16 - 20, statutory sexual assault, the trial court sentenced Appellant to 2 - 10 years of incarceration to run concurrent to count 1 (involuntary deviate sexual intercourse), and at each count of 21 - *(Footnote Continued Next Page)*

Super. 2007). Accordingly, we vacate Appellant's sentences for statutory sexual assault at counts 16 – 20 without remand, and otherwise affirm Appellant's judgment of sentence.

Judgment of sentence vacated in part and affirmed in part.  
Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/20/2013

*(Footnote Continued)* \_\_\_\_\_

25, aggravated indecent assault, the trial court sentenced Appellant to 4 – 10 years of incarceration, concurrent with each other, and all counts concurrent with count 1 (involuntary deviate sexual intercourse). N.T., 12/27/12, at 46. Appellant's aggregate sentence was, and remains, 33½ to 80 years' incarceration.