NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ROBERT WILLIAM BODTKE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 875 EDA 2012

Appeal from the Judgment of Sentence February 15, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0002785-2008

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ROBERT WILLIAM BODTKE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 876 EDA 2012

Appeal from the Judgment of Sentence February 15, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0003386-2008

BEFORE: FORD ELLIOTT, P.J.E., BENDER, J., and SHOGAN, J.

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

Appellant, Robert William Bodtke, appeals from the judgment of sentence of 11½ to 23 months' imprisonment, imposed after his sentence of probation was revoked. Appellant argues that his sentence violated the principles of double jeopardy because his new term of incarceration was

imposed for his conviction of burglary when Appellant had already served his original maximum term of imprisonment for that offense. After reviewing the record and applicable case law, we are compelled to vacate Appellant's sentence and remand for resentencing.

The procedural history of this case can be summarized as follows. On July 14, 2008, Appellant entered guilty pleas to two counts of burglary and two counts of criminal conspiracy stemming from two separate cases. He was subsequently sentenced to 18 to 36 months' incarceration for each of his burglary convictions, which were ordered to run concurrently. He also received a sentence of three years' probation for both of his conspiracy offenses. Those sentences were imposed to run concurrently with one another, and consecutively to Appellant's term of incarceration.

On November 1, 2009, Appellant was released from prison and began serving his sentence of probation. However, after failing to report to his probation officer, he was arrested on January 12, 2012. A ***Gagnon II***[1] hearing was conducted on February 15, 2012, and Appellant's probation was revoked. He was resentenced that same day to a term of incarceration of 11½ to 23 months.

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[1] ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973) (a "***Gagnon II***" hearing entails an assessment of two questions: (1) whether the facts warrant revocation of parole/probation, and (2) should the parolee/probationer be recommitted to prison).

Appellant filed a timely notice of appeal,[2] as well as a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Herein, he raises one issue for our review: "Whether the court, after revoking probation, erred in sentencing [Appellant] on the charge of burglary at the ***Gagnon II*** hearing held in these matters since the original convictions for which probation was initially imposed were conspiracy charges and not burglary charges[?]" Appellant's Brief at 7. Appellant's argument in support of this claim consists of the following:

> Appellant ... was originally sentenced in these matters on burglary and conspiracy convictions which were the underlying offenses in both cases. At the time [Appellant] was alleged to have been in violation of his supervision, he had already served the maximum terms of the sentences imposed for the two burglary charges. As such, due to the alleged violations of the probation terms imposed only on the conspiracy charges, he could not be re-sentenced on the burglary counts. Nonetheless, the lower court, after revoking Appellant's probation, sentenced him again on the burglary charges in violation of Appellant's Double Jeopardy protections under the Fifth Amendment of the United States Constitution.
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> The lower court, to its credit, acknowledges the error complained of in this appeal. Consequently, the judgments of sentence should be vacated and these matters remanded for a new sentencing hearing.

Appellant's Brief at 10 (footnotes omitted).

Initially, we consider Appellant's issue as raising a challenge to the legality of his sentence. ***See Commonwealth v. Kuykendall***, 2 A.3d 559,

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[2] Appellant actually filed two notices of appeal, one in each of his two cases, which this Court consolidated by *per curium* order on April 13, 2012.

563 (Pa. Super. 2010) (a claim that resentencing after revocation violated double jeopardy where the original term of imprisonment had been fully served at time of revocation is a question of law). "Hence, our scope of review is plenary and our standard of review is *de novo.*" ***Id.***

In its Pa.R.A.P. 1925(a) opinion, the trial court acknowledges that a mistake was made in sentencing Appellant, but characterizes it as merely a clerical error on Appellant's written sentencing documents. For instance, the court states that "[t]he sentencing sheets should have identified 'Criminal Conspiracy' as the 'Charges' rather than 'Burglary."' Trial Court Opinion (T.C.O.), 8/24/12, at 2. It then explains that "[t]he source of this error [was] probably the 'Notice of Charges and Hearing' [document] prepared by the Board of Probation [and] Parole, which lists 'CC [Criminal Conspiracy]/Burglary' as the relevant offenses." ***Id.*** The court endeavors to correct this error by stating that the sentencing sheets "may be deemed amended," and asks this Court to affirm the judgment of sentence imposed. ***Id.*** at 3.

Unfortunately, the court's attempted amendment of Appellant's sentencing documents is invalid for several reasons. First, while Pennsylvania Rule of Appellate Procedure 1701 permits a court to "correct formal errors in papers relating to the matter" even after an appeal has been filed, this Court has mandated that "an alleged error must qualify as a clear clerical error (or a patent and obvious mistake) in order to be amenable to correction." ***Commonwealth v. Borrin***, 12 A.3d 466, 473 (Pa. Super.

2011), *appeal granted*, 22 A.3d 1020 (Pa. 2011). We further explained in ***Borrin*** that, "for a trial court to exercise its inherent authority and enter an order correcting a defendant's written sentence to conform with the terms of the sentencing hearing, the trial court's intention to impose a certain sentence must be obvious on the face of the sentencing transcript." ***Id.*** Therefore, for the instant sentencing error to be clearly clerical, it must be evident that at the ***Gagnon II*** hearing the court resentenced Appellant to a term of incarceration for his conspiracy conviction, yet the written sentencing documents erroneously stated the charge as burglary.

We are unable to determine what occurred at Appellant's resentencing hearing because that proceeding has not been transcribed. The trial court notes in its opinion that the transcript was ordered, but for some reason was never produced. T.C.O. at 2 n.1. However, Appellant's argument, set forth *supra*, indicates that at the resentencing hearing, the court did in fact impose his new term of incarceration for his burglary conviction. For instance, Appellant states that the court "erred in sentencing [him] on the charge of burglary *at the **Gagnon II** hearing*." Appellant's Brief at 10 (emphasis added). Even more notable are statements by the trial court in its opinion that also imply that it mistakenly resentenced Appellant for his burglary offense at the hearing. Namely, the court explains that Appellant "does not suggest that this [c]ourt imposed illegal, excessive or unfair sentences. Criminal conspiracy is an F3 felony that could have resulted in a sentence as high as 3.5 to 7 years." T.C.O. at 2-3.

From the court's opinion and the arguments presented by Appellant in his brief, we suspect that at the resentencing proceeding, the court imposed a term of incarceration for Appellant's burglary offense, thus violating Appellant's constitutional protection against double jeopardy. ***See*** U.S.C.A. Const.Amend. 5; ***Commonwealth v. Hunter***, 468 A.2d 505, 507 (Pa. Super. 1983) ("It is axiomatic that the Double Jeopardy Clause of the Fifth Amendment of the Constitution protects against the imposition of multiple punishments for the same offense in the form of an increase in the sentence.") (citation and footnote omitted). However, due to the omitted transcripts, we are unable to ascertain for which exact conviction Appellant was resentenced, or determine whether the sentencing documents contained an obvious clerical error that the court had the power to correct after Appellant's notice of appeal was filed. Consequently, we cannot accept the court's attempted amendment of Appellant's sentence documents, and are compelled to vacate his sentence and remand for resentencing.

Judgment of sentence vacated. Remanded for resentencing. Jurisdiction relinquished.