

[J-98-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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| COMMONWEALTH OF PENNSYLVANIA, | : | No. 7 EAP 2005 |
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| Appellee | : | Appeal from the Judgment of the Superior |
| | : | Court entered September 1, 2004, at No. |
| | : | 1221 EDA 2002 Affirming the Judgment of |
| v. | : | Sentence Entered on March 25, 2002, in |
| | : | the Court of Common Pleas of |
| | : | Philadelphia County, Criminal Division, at |
| RAVAH DICKSON, | : | 0201-0022. |
| | : | |
| Appellant | : | ARGUED: September 14, 2005 |

DISSENTING OPINION

MR. JUSTICE EAKIN

DECIDED: March 29, 2007

I dissent because I believe Appellant waived his challenge to the application of 42 Pa.C.S. § 9712, by failing to raise the issue before the trial court.

“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a). Appellant failed to challenge the application of § 9712 before the trial court. At sentencing, Appellant’s counsel stated, “With regard to [Appellant], I did speak to my appeals unit. I would certainly have to concede the mandatory issue with one additional argument.” N.T., 3/25/02, at 2. Counsel then argued the jury convicted Appellant of conspiracy to commit theft. The court disagreed, determining the jury found Appellant guilty of conspiracy to commit robbery. Id., at 3, 5. Next, Appellant’s counsel argued his sentence violated Apprendi v. New Jersey, 530 U.S. 466 (2000), since the Commonwealth only had to prove § 9712 applied by a preponderance of the evidence. N.T., 3/25/02, at 3. Counsel continued:

Furthermore, your honor, applying the mandatory minimum takes away the discretion of the court to impose a lesser sentence. If there is any case that cries out for a lesser sentence, it would be this particular

case. You heard the codefendant testify in this matter and the court was aware of the disgusting [sic] behavior of the codefendant throughout the trial. The jury clearly found my client not guilty of robbery. They found him guilty of conspiracy and I would submit that we have an inconsistency argument for a motion for acquittal.

[Appellant] is not a threat to society, your honor. This is not a gentleman who needs the mandatory minimum applied to him. As I said, when you apply the mandatory, you take away the court's discretion and you, yourself, recognize the clear difference of my client's behavior throughout the trial process, as well as the abhorrent behavior of the codefendant. That, itself, would deviate from applying the mandatory and sentencing my client to a --

Id., at 3-4. The court interrupted Appellant's argument, stating, "I think case law is supportive of the Commonwealth's position. I have no discretion." Id., at 5.

Appellant failed to argue § 9712 cannot apply to him because he was not armed. Rather, Appellant argued the court should not apply the mandatory minimum since he is not a threat to society, and because of the difference in Appellant's and his co-defendant's behavior during trial. Appellant urged the court exercise leniency by not applying the sentencing enhancement; he did not assert the enhancement did not apply because he did not possess a firearm during the commission of the underlying crime.¹ Thus, Appellant has waived the challenge he currently raises, unless an exception to waiver exists.

"[C]laims concerning the illegality of the sentence are not waivable." Commonwealth v. Vasquez, 744 A.2d 1280, 1284 (Pa. 2000) (citations omitted).

¹The majority suggests finding Appellant's challenge to the application of § 9712 waived would "punish counsel for declining to resist the trial court's unequivocal effort to cut off conversation on this point." Majority Slip Op., at 7. I disagree. Counsel began her argument by conceding the mandatory issue "with one additional argument"--she made that argument, which was not remotely close to the issue raised here. Counsel argued the court should exercise leniency; she did not argue § 9712 did not apply. Counsel simply failed to raise the issue asserted here, and the failure to do so constitutes waiver.

Generally, an illegal sentence is one that exceeds the statutory limits. Commonwealth v. Bradley, 834 A.2d 1127, 1131 (Pa. 2003) (“An illegal sentence is one that exceeds the statutory limits.”); Vasquez, at 1284 (“If a sentence is within the statutory limits, it is legal.”). Appellant’s sentence is within the statutory limits--Appellant was sentenced to five to 10 years imprisonment, which is well within the 20-year statutory maximum for his first degree felony conviction for conspiracy to rob. 18 Pa.C.S. § 1103(1).

I, like the majority, recognize the uncertainty regarding what challenges implicate sentence legality. Majority Slip Op., at 5 (citing McCray v. Pennsylvania Department of Corrections, 872 A.2d 1127, 1138 (Pa. 2005) (Saylor, J., concurring)). Since Appellant’s claim does not implicate the legality of his sentence, and he failed to raise it before the trial court, I would hold Appellant’s claim waived and would not reach a discussion of its merits.

Mr. Justice Castille joins this dissenting opinion.