NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DUANE J. EICHENLAUB Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1076 WDA 2013

Appeal from the Judgment of Sentence of May 28, 2013
In the Court of Common Pleas of Blair County
Criminal Division at No.: CP-07-CR-0002238-2011

BEFORE: SHOGAN, J., OLSON, J., and WECHT, J.

MEMORANDUM BY WECHT, J.: **FILED APRIL 15, 2014**

Duane Eichenlaub ("Eichenlaub") appeals from his May 28, 2013 judgment of sentence. We affirm.

The testimony at trial established the following. At approximately 12:50 a.m. on May 30, 2010, Earl Eshelman entered the restroom at Pellegrine's Lounge in Altoona, Pa, and overheard a dispute between Eichenlaub, Herman Lardieri, and Eric Kriner. Notes of Testimony ("N.T."), 10/3/2012, at 53-54. Eichenlaub, an off-duty officer with the Altoona Police Department, asked Lardieri if he had made inappropriate contact with Eichenlaub's wife. Lardieri responded that he had not. ***Id.*** Eshelman heard "a lot of commotion" and subsequently observed both Eichenlaub and Kriner punching Lardieri repeatedly. ***Id.*** at 55-56.

When Eshelman "couldn't take it anymore," he walked toward the assault and grabbed Eichenlaub by the waist in an effort to pull him off Lardieri. ***Id.*** at 55-56. In response, Eichenlaub quickly struck Eshelman in the face. ***Id.*** at 56-57. Although Eshelman did not return any punches, Eichenlaub struck Eshelman repeatedly. ***Id.*** at 56-57, 100-01. Eshelman received two final blows to the face before losing consciousness. ***Id.*** at 57. Eshelman suffered facial fractures, damage to his orbital bone, and a retinal injury. ***Id.*** Eshelman was taken to UPMC Altoona, where he remained hospitalized for six days. ***Id.*** at 64.

By the time police arrived at Pellegrine's Lounge, Eichenlaub had already departed. Jack Kuhn, at the time an officer with the Altoona Police Department and a friend of Eichenlaub's, responded to the 911 call and was the first to arrive at Pellegrine's.[1] ***Id.*** at 116. Shortly after Kuhn's arrival, he received a series of phone calls from Eichenlaub, who acknowledged that he was involved in the altercation and asked Kuhn to "make it go away." ***Id.*** at 123. Kuhn left Pellegrine's Lounge and traveled to Eichenlaub's home. ***Id.*** at 127. During that visit, Eichenlaub specifically requested that Kuhn exclude his name from the official incident report. ***Id.*** at 136. The following day, Kuhn authored an incident report that intentionally omitted the details of Eichenlaub's involvement. ***Id.*** at 129, 131.

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[1] Kuhn resigned from the Altoona Police Department approximately six months after this incident occurred. N.T. at 112.

On July 11, 2011, the Pennsylvania State Police charged Eichenlaub with aggravated assault, simple assault, conspiracy to commit hindering apprehension or prosecution, conspiracy to commit tampering with public records or information, and conspiracy to commit obstructing administration of law or other governmental function.[2]

On January 24, 2013, following a jury trial, Eichenlaub was found guilty of all charges. On May 28, 2013, the trial court sentenced Eichenlaub to eleven and one-half to twenty-three months' incarceration on the aggravated assault conviction to be followed by three years of probation for the conspiracy and simple assault convictions.[3]

On June 17, 2013, Eichenlaub filed a notice of appeal. On July 2, 2013, the trial court ordered Eichenlaub to file a concise statement of errors

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[2] 18 Pa.C.S. §§ 2702(a)(1), 2701(a)(1), 903 (§§ 5105, 4911, and 5101), respectively.

[3] On March 13, 2014, the Commonwealth filed a petition for post-submission communication pursuant to Pa.R.A.P. 2501(a), noting that, at oral argument, this Court raised the issue of the legality of Eichenlaub's sentence. We grant the Commonwealth's petition, and we have considered the authorities submitted by the Commonwealth in preparing this memorandum. We agree with the Commonwealth that a challenge to the discretionary aspects of Eichenlaub's sentence has not been preserved for our review. We also note that "challenges to an illegal sentence can never be waived and may be reviewed *sua sponte* by this Court." ***Commonwealth v. Randal***, 837 A.2d 1211, 1214 (Pa. Super. 2003) (*en banc*). Eichenlaub's sentence, although a substantial downward departure from our sentencing guidelines, does not implicate the legality of that sentence. Accordingly, we will not *sua sponte* consider the propriety of the sentence.

complained of on appeal pursuant to Pa.R.A.P. 1925(b). Eichenlaub timely complied. On July 19, 2013, the trial court filed its Rule 1925(a) opinion.

In the sole issue presented for our review, Eichenlaub challenges the sufficiency of the evidence offered at trial to support his conviction for aggravated assault. Brief for Eichenlaub at 4. Our standard of review for such challenges is as follows:

> [W]hether the evidence at trial, and all reasonable inferences derived therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all elements of the offense beyond a reasonable doubt. We may not weigh the evidence or substitute our judgment for that of the fact-finder. Additionally, the evidence at trial need not preclude every possibility of innocence, and the fact-finder is free to resolve any doubts regarding a defendant's guilt unless the evidence is so weak and inconclusive that as a matter of law no facts supporting a finding of guilt may be drawn. The fact-finder, when evaluating the credibility and weight of the evidence, is free to believe all, part, or none of the evidence.

Commonwealth v. Stevenson, 894 A.2d 759, 773 (Pa. Super. 2006) (citations and internal quotation marks omitted).

A person is guilty of aggravated assault where he "attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life[.]" 18 Pa.C.S. § 2702(a)(1). Serious bodily injury is defined as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S. § 2301.

As noted, as a general matter, when a victim suffers serious bodily injury, the Commonwealth must prove that the assailant caused that injury either intentionally, knowingly, or recklessly. ***Commonwealth v. Nichols***, 692 A.2d 181, 185 (Pa. Super. 1997) (citation omitted). Eichenlaub argues that the Commonwealth failed to prove any of the three required *mens rea* elements. However, it is well-settled that, in cases involving serious bodily injury the Commonwealth needs only to prove that the defendant acted recklessly:

> [W]here the victim suffers serious bodily injury, the Commonwealth need not prove specific intent. The Commonwealth need only prove [that an appellant] acted recklessly under circumstances manifesting an extreme indifference to the value of human life. "[F]or the degree of recklessness contained in the aggravated assault statute to occur, the offensive act must be performed under circumstances which almost assure that [serious bodily] injury or death will ensue." ***Commonwealth v. O'Hanlon***, 653 A.2d 616. 618 (Pa. 1995).

Nichols, 692 A.2d at 185 (some citations omitted; citation modified).

To support an aggravated assault conviction based upon a theory of recklessness, the Commonwealth must demonstrate that an assailant's actions rose to the level of malice. ***See Commonwealth v. Bruce***, 916 A.2d 657, 664 (Pa. Super. 2007).

> Malice exists where there is a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. Where malice is based on a reckless disregard of consequences, it is not sufficient to show mere recklessness; rather, it must be shown the defendant consciously disregarded an unjustified and extremely high risk

> that his actions might cause death or serious bodily injury. A defendant must display a conscious disregard for almost certain death or injury such that it is tantamount to an actual desire to injure or kill; at the very least, the conduct must be such that one could reasonably anticipate death or serious bodily injury would likely and logically result.

Commonwealth. v. Kling, 731 A.2d 145, 147-48 (Pa. Super. 1999) (citations and internal quotation marks omitted).

At trial, Eshelman testified that throughout the incident he sustained numerous closed-fist blows to the face and head, which caused his body to collide repeatedly with a bathroom stall partition. N.T. at 61-62. At one point, both of Eshelman's eyes swelled to the degree that he could no longer see Eichenlaub. ***Id.*** at 56. Eshelman subsequently fell onto the bathroom floor and received two final "tremendous blows" to the head before losing consciousness. ***Id.*** at 57. Eshelman suffered facial fractures, damage to his orbital bone, and a retinal injury. ***Id.*** Eshelman's condition was severe enough to warrant a six-day hospital stay and subsequent referrals to at least five separate medical specialists. ***Id.*** at 64-66. The jury also heard testimony from former Officer Kuhn, who arrived at Pellegrine's to find Eshelman bleeding from the nose, with "a significant amount of blood on his clothing." ***Id.*** at 116.

Additionally, the Commonwealth demonstrated that Eshelman is more than thirty years older than Eichenlaub. ***Id.*** at 49. Eichenlaub was a former military police officer in the U.S. Army Reserves and was employed as a civilian police officer at the time of the assault. ***Id.*** at 88-92, 106.

Eichenlaub received extensive training as a police officer. ***Id.*** Eichenlaub testified that he is six feet tall and in good physical condition. ***Id.*** at 132. In contrast, Eshelman was fifty-nine years old, retired, and on disability. ***Id.*** at 49, 73. Eshelman had also suffered a previous spinal injury which had required surgery. ***Id.*** at 73. The trial evidence was more than sufficient to support a finding that Eichenlaub acted recklessly under circumstances manifesting extreme indifference to the value of human life. ***See Kling***, 731 A.2d at 147-48.

Eichenlaub also contends that the evidence was insufficient to support his aggravated assault conviction because the Commonwealth failed to demonstrate that he acted as a "failed murderer." ***See*** Brief for Eichenlaub at 35-36. Eichenlaub's argument misconstrues the applicable case law. In ***O'Hanlon***, our Supreme Court noted that:

> for the degree of recklessness contained in the aggravated assault statute to occur, the offensive act must be performed under circumstances which almost assure that injury or death will ensue. The recklessness must, therefore, be such that life[–]threatening injury is essentially certain to occur. This state of mind is, accordingly, equivalent to that which seeks to cause injury. . . .Aggravated assault is, indeed, the functional equivalent of a murder in which, for some reason, death fails to occur.

O'Hanlon, 653 A.2d at 618 (internal citations omitted).

Eichenlaub relies heavily upon the phrase "death fails to occur," and argues that Eshelman's injuries must be of the type that ordinarily cause death. Brief for Eichenlaub at 35. His reliance is misguided. ***O'Hanlon***

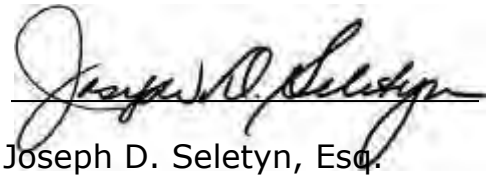
does not require that, for aggravated assault purposes, an assailant must act with the specific intent to kill. It requires only that the evidence support the conclusion that Eichenlaub reasonably could anticipate that life-threatening injury (which Eshelman certainly suffered in this case) or death would be the likely and logical consequence of Eichenlaub's actions, and that he ignored that risk. Serious bodily injury reasonably can be anticipated when a young and fit military-trained aggressor delivers repeated, excessive, and unreturned closed-fist blows to the head and face of a defenseless fifty-nine year-old victim.

Finally, throughout his brief, Eichenlaub characterizes his conduct as a mere reflex or reaction, consistent with his training as a police officer. ***See, e.g.,*** Brief for Eichenlaub at 23. At trial, Eichenlaub presented this theory to the jury, which was free to believe all, part, or none of his testimony. Contrary to his portrayal of the events, the evidence also supported a finding that Eichenlaub delivered multiple successive punches to Eshelman's face even after Eshelman fell to the floor and hovered on the verge of unconsciousness.

The evidence, viewed in the light most favorable to the Commonwealth, is sufficient to support the conclusion that Eichenlaub acted in a manner which manifested an extreme indifference to the value of Eshelman's life, and, therefore, sufficient to sustain his aggravated assault conviction as a matter of law.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014