NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. KEVIN J. GETCHIUS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1617 MDA 2014

Appeal from the Judgment of Sentence of August 26, 2014
In the Court of Common Pleas of Lancaster County
Criminal Division at No.: CP-36-CR-0002492-2013

BEFORE: BENDER, P.J.E., ALLEN, J., and WECHT, J.

MEMORANDUM BY WECHT, J.: **FILED JULY 31, 2015**

Kevin J. Getchius appeals the August 26, 2014 judgment of sentence. For the reasons contained herein, we vacate the judgment of sentence, and remand for resentencing.

On April 9, 2014, Getchius was convicted by a jury of rape of a child, involuntary deviate sexual intercourse ("IDSI") with a child, two counts of indecent assault of a person less than thirteen years old, unlawful contact with a minor, dissemination of explicit sexual materials to a minor, and corruption of the morals of a minor.[1] The trial court summarized the facts that were presented at Getchius' trial as follows:

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[1] 18 Pa.C.S. §§ 3121(c), 3123(b), 3126(a)(7), 6318(a)(1), 5903(c)(1), and 6301(a)(1)(i).

K.H., who was eight years[-]old at the time of trial, testified that when she was four or five years[-]old, she lived with her mother and [Getchius] in Lancaster[, Pennsylvania]. While her mother was at work, [Getchius] would make K.H. put her mouth and hands on his penis [and] "go up and down" and [Getchius] "peed in [her] mouth" when she did that. K.H. demonstrated for the jury the way [Getchius] made her touch his penis. K.H. told the jury that [Getchius] showed her pornographic movies and engaged in vaginal intercourse with her. When asked by both the assistant district attorney and defense counsel whether these incidents occurred once or more than once, K.H. answered: "[m]ore than one time," though she could not remember exactly how many times it happened. K.H. testified that sometimes [Getchius] would make her perform multiple sex acts on him on the same day.

K.H. did not tell anyone about the abuse until a couple of years later because [Getchius] told her that he would kill her mother if K.H. told anyone what was happening. In April, 2012, K.H. told her grandmother that [Getchius] made her have sex with him, put his penis in her mouth, and "made her watch naked people on TV." Later that day, K.H. made similar statements to her mother.

The jury saw the video recording of an interview of K.H. conducted by Megan O'Hare at the Pinnacle Health Children's Resource Center in Dauphin County. During this interview, K.H. described how [Getchius] would put his penis in her mouth and make her touch his penis.

Detective Sergeant Sonja Stebbins testified at trial that she interviewed K.H. on January 27, 2013. K.H. told Detective Sergeant Stebbins that [Getchius] had done "unappropriate" things to her while her mother was at work. At first, K.H. did not want to say out loud what [Getchius] had done, but was willing to write it on a piece of paper. K.H. wrote "s-e-x," and when Detective Sargent Stebbins asked K.H. what she meant, K.H. explained that "[Getchius'] penis was in her privates and that he made her touch his penis with her hand and he peed in her mouth. Her mouth had to go up and down on his penis and so did her hand." K.H. told Detective Sergeant Stebbins that these things happened more than ten times.

Trial Court Opinion ("T.C.O."), 11/8/2014, at 4-5 (references to the notes of testimony omitted).

On August 26, 2014, the parties appeared before the trial court for a sexually violent predator hearing pursuant to 42 Pa.C.S. § 9799.24 and sentencing. Following testimony, the trial court determined that Getchius was a sexually violent predator. Thereafter, the trial court sentenced Getchius to an aggregate of twenty-three to forty-six years in prison. Notably, with regard to the rape of a child and IDSI with a child, the trial court sentenced Getchius according to the relevant mandatory minimum sentences set forth in 42 Pa.C.S. § 9718 (prescribing ten-year mandatory minimum sentences for certain offenses committed against children).

On September 25, 2014, Getchius filed a notice of appeal. In response, the trial court directed Getchius to submit to the court a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On October 20, 2014, Getchius timely filed a concise statement. On November 19, 2014, the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a).

Getchius raises two questions for our review:

> I. Was the sentence imposed for count three, indecent assault, as its elements were set forth in the charge to the jury, illegal, as this charge should have merged with count two, involuntary deviate sexual intercourse?
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> II. Was the application of 42 Pa.C.S.§ 9718 to the sentences for rape of a child and involuntary deviate sexual intercourse with a child illegal and unconstitutional pursuant to ***Alleyne v. United States***, 133 S.Ct. 2151

> (2013) and ***Commonwealth v. Wolfe***, 106 A.3d 800 (Pa. Super. 2014)?

Brief for Getchius at 6 (comma usage modified).

In his first issue, Getchius contends that his convictions for indecent assault and IDSI should have merged for the purposes of sentencing. Whether Getchius' convictions merge for the purposes of sentencing is a question implicating the legality of his sentence.[2] Consequently, our standard of review is *de novo* and the scope of our review is plenary. ***See Commonwealth v. Collins***, 764 A.2d 1056, 1057 n.1 (Pa. 2001).

The merger doctrine is a rule of statutory construction designed to determine whether the legislature intended for the punishment of one offense to encompass that of another offense. ***Commonwealth v. Davidson***, 938 A.2d 198, 217 (Pa. 2007). The objective of the doctrine is to prevent a defendant from being punished more than once for the same criminal act. ***Id***.

In 2002, the Pennsylvania Legislature enacted Section 9765 of the Sentencing Code, which provides:

> 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.

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[2] Challenges to the legality of sentence are non-waivable. ***See Commonwealth v. Robinson***, 931 A.2d 15, 24 (Pa. Super. 2007).

42 Pa.C.S. § 9765. Accordingly, merger is appropriate only when two distinct criteria are satisfied: (1) the crimes arise from a single criminal act; and (2) all of the statutory elements of one of the offenses are included within the statutory elements of the other. ***Id.*** For the reasons that follow, we need not consider the latter prong of this analysis, because we conclude that the crimes did not arise from a single act.

Our analysis is guided by our decision in ***Commonwealth v. Ross***, 543 A.2d 1235 (Pa. Super. 1988).[3] In that case, Ross was convicted of forty-seven sexually related crimes perpetrated upon his daughter and three of his paramour's children. The sexual abuse of these young women varied in acts, and spanned approximately one and one-half years. Among the litany of crimes for which Ross was convicted were eleven counts of IDSI and eleven counts of indecent assault. ***Id.*** at 1236. Ross argued that these counts should have merged for sentencing.

We rejected the argument, and held that the merger doctrine was inapplicable to Ross because his crimes did not constitute a single criminal act. We explained our reasoning as follows:

> In the case at bar the record reflects that on several occasions [Ross] forced his victims to perform, and/or he performed, a variety of perverse sexual acts. We refuse to accept [Ross'] argument that each count of indecent assault is necessarily

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[3] We recognize that ***Ross*** predated the enactment of Section 9765. However, ***Ross***' single act analysis remains pertinent because proof of a single criminal act is an essential component of Section 9765.

> subsumed in the [IDSI] counts. Testimony elicited at trial indicated that each incident did not result in a single sexual act. Often, several perverse acts were performed during an encounter.[2] Therefore, we have no difficulty in finding acts which indicate that two crimes were two separate criminal acts.
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> [2] For instance, [J.L.] testified that on several occasions, [Ross] forced her to touch his penis and then form fellatio. [J.L.] further testified that during these encounters, three other victims were present and were forced to "do the same things." In addition, [Ross'] daughter testified that on numerous occasions, [Ross] touched her "private parts" with his hands and mouth, in addition to attempting to have sexual intercourse with her.

Id. at 1237.

We discern no meaningful difference between this case and ***Ross***. Here, as in ***Ross***, Getchius sexually abused K.H. for a sustained period of time. During that period, Getchius forced K.H. to touch his genitals orally and manually, showed her pornography, and engaged in vaginal intercourse with him. Also as in ***Ross***, K.H. explicitly testified that Getchius sometimes made her perform multiple sexual acts on him in the same day. Getchius' behavior was not meaningfully different than that performed by Ross. Consequently, ***Ross*** is controlling, and we have no difficulty in concluding that Getchius' actions did not constitute a single criminal act. Thus, the merger doctrine is inapplicable in this case, and Getchius is not entitled to relief.

In his second issue, Getchius maintains that the application of the mandatory minimum sentencing provisions set forth at 42 Pa.C.S. § 9718

was unconstitutional pursuant to ***Alleyne***. We agree. Getchius is entitled to a new sentencing hearing.

Getchius was sentenced pursuant to 42 Pa.C.S. § 9718(a)(1), which provides as follows:

> **(a) Mandatory sentence.--**
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> (1) A person convicted of the following offenses when the victim is less than 16 years of age shall be sentenced to a mandatory term of imprisonment as follows:
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> 18 Pa.C.S. § 3121(a)(1), (2), (3), (4) and (5) (relating to rape)--not less than ten years.
>
> 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse)--not less than ten years.
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> * * *
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> **(c) Proof at sentencing.--**The provisions of this section shall not be an element of the crime, and notice of the provisions of this section to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

42 Pa.C.S. § 9718(a)(3).

In ***Alleyne***, the United States Supreme Court held that "facts that increase mandatory minimum sentences must be submitted to the jury" and must be found beyond a reasonable doubt. ***Alleyne***, *supra* at 2163. In ***Commonwealth v. Miller***, 102 A.3d 988 (Pa. Super. 2014), we presented the relevant portion of the ***Alleyne*** Court's rationale as follows:

Alleyne is an extension of the Supreme Court's line of cases beginning with ***Apprendi v. New Jersey***, 530 U.S. 466 (2000). In ***Alleyne***, the Court overruled ***Harris v. United States***, 536 U.S. 545 (2002), in which the Court had reached the opposite conclusion, explaining that there is no constitutional distinction between judicial fact[-]finding which raises the minimum sentence and that which raises the maximum sentence.

> It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime. Indeed, criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty. This historical practice allowed those who violated the law to know, *ex ante*, the contours of the penalty that the legislature affixed to the crime—and comports with the obvious truth that the floor of a mandatory range is as relevant to wrongdoers as the ceiling. A fact that increases a sentencing floor, thus, forms an essential ingredient of the offense.
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> Moreover, it is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment. Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's expected punishment has increased as a result of the narrowed range and the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. Why else would Congress link an increased mandatory minimum to a particular aggravating fact other than to heighten the consequences for that behavior? This reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.

Alleyne, [133 S.Ct.] at 2160-61 (internal quotation marks and citations omitted).

Miller, 102 A.3d at 994-95 (citations modified).

In light of the constitutional pronouncement in ***Alleyne***, we have systematically been declaring unconstitutional Pennsylvania's mandatory minimum sentencing statutes that permit a trial court, rather than a jury, to make the critical factual findings for sentencing. ***See Commonwealth v. Newman***, 99 A.3d 86, 90 (Pa. Super. 2014) (holding 42 Pa.C.S. § 9712.1, which imposes a mandatory minimum sentence for possessing a firearm in close proximity to narcotics, unconstitutional); ***Commonwealth v. Valentine***, 101 A.3d 801 (Pa. Super. 2014) (holding 42 Pa.C.S. § 9712, pertaining to mandatory minimum sentencing provisions associated with the commission of certain crimes with a firearm, unconstitutional); ***Commonwealth v. Cardwell***, 105 A.3d 748, 751 (Pa. Super. 2014) (applying ***Alleyne*** and recognizing that the mandatory minimum sentences associated with the weight of narcotics possessed by a drug dealer pursuant to 18 Pa.C.S. § 7508 are unconstitutional).

Similarly, in ***Commonwealth v. Wolfe***, 106 A.3d 800 (Pa. Super. 2014), we considered the constitutionality of § 9718, the statute at issue in the case *sub judice*. In ***Wolfe***, the appellant had been sentenced to a mandatory minimum sentence of ten to twenty years pursuant to 42 Pa.C.S. § 9718(a)(1), for his conviction of involuntary deviate sexual intercourse with a person less than sixteen years-old. ***Id.*** at 802. The subsection implicated the same "proof at sentencing" provision as set forth above. Citing ***Alleyne***, ***Newman***, and ***Valentine***, we held that section 9718 was facially unconstitutional because the elements of the "proof at sentencing"

provision required a trial judge, not a jury, to make factual findings by a preponderance of the evidence, and not beyond a reasonable doubt. ***Wolfe***, 106 at 805.

Because subsection (a)(1), which was applied in the instant case, implicates the same "proof at sentencing" provision as in ***Wolfe***, its application herein was unconstitutional, and illegal. The Commonwealth maintains that the "proof at sentencing" provision can be severed from the statute, and that, because the jury found all of the elements of rape of a child beyond a reasonable doubt, the mandatory minimum sentence can still be applied constitutionally. However, most recently, our Supreme Court in ***Commonwealth v. Hopkins***, ___ A.3d.___, 2015 WL 3949099 (Pa. June 15, 2015), considered the severability of the "proof at sentencing" provision of the drug delivery in a school zone mandatory minimum sentence that is set forth at 18 Pa.C.S. § 6317(a). In ***Hopkins***, the Commonwealth conceded that the mandatory sentencing provision was unconstitutional pursuant to ***Alleyne***, but contended that the "proof of sentencing" provision was severable. Our Supreme Court rejected that argument, and held that the provision could not be severed without the court usurping the role of the legislature and recrafting the relevant portions of section 6317. ***Id.*** at *13.

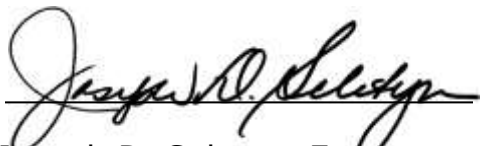
Notably, the language of the "proof at sentencing" provision that the Court held to be non-severable in ***Hopkins*** is nearly identical to the "proof at sentencing" provision contained in 42 Pa.C.S. § 9718. On the authority of ***Hopkins***, we reject the Commonwealth's position that the mandatory

minimum sentence still can be applied without consideration of the "proof at sentencing" provision. As the ***Hopkins*** Court held, the provisions are not severable, and it is up to the General Assembly to re-enact the mandatory provision at issue here in a constitutional manner, if it elects to do so.

Presently, Getchius was sentenced pursuant to an unconstitutional statute. He must be resentenced. Consequently, we reject his merger argument, and we vacate the judgment of sentence, and we remand this case for resentencing without consideration of the mandatory minimum sentencing provision at issue in this case.

Judgment of sentence vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015