

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MUMIA ABU-JAMAL A/K/A
WESLEY COOK,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3059 EDA 2012

Appeal from the Judgment of Sentence entered August 13, 2012,
in the Court of Common Pleas of Philadelphia County,
Criminal Division, at No: CP-51-CR-0113571-1982.

BEFORE: GANTMAN, ALLEN, and PLATT,* JJ.

MEMORANDUM PER CURIAM:

FILED JULY 09, 2013

Mumia Abu Jamal, a/k/a Wesley Cook, ("Appellant"), appeals from the judgment of sentence imposed by the trial court following remand from the federal district court. We affirm.

The trial court summarized the pertinent facts and procedural history as follows:

[Appellant] fatally shot Philadelphia Police Officer Daniel Faulkner on December 9, 1981. A Jury convicted him of murder in the first degree and sentenced him to death. He filed a direct appeal and the Pennsylvania Supreme Court affirmed the judgment of sentence. ***Commonwealth v. Abu-Jamal***, 555 A.2d 846 (Pa. 1989). The Supreme Court of the United States denied his petition for writ of certiorari[.] ***Abu-Jamal v. Pennsylvania***, 498 U.S. 881

*Retired Senior Judge assigned to the Superior Court.

(1990). Then Governor [of] Pennsylvania Thomas Ridge signed a writ of execution on June 1, 1995.

On June 5, 1995, [Appellant] filed his first PCRA petition in the lower court and the hearings were presided over by [the] Honorable Albert Sabo who granted a stay of execution but denied PCRA relief by order dated September 15, 1995.

[Appellant] filed an appeal to the Pennsylvania Supreme Court and while the appeal was pending petitioned to have the case remanded to the lower court for the presentation of newly-discovered evidence and other relief. The Supreme Court remanded the case for the sole purpose of taking additional testimony on after-discovered evidence.

After a hearing [on] the additional evidence, Judge Sabo denied relief by order dated July 24, 1997. The Pennsylvania Supreme Court affirmed this order on [October 29, 1998, **Commonwealth v. Abu-Jamal**, 720 A.2d 79 (Pa. 1998),] and Governor Ridge signed a second death warrant on October 13, 1999.

On October 15, 1999, [Appellant] filed a writ of Habeas Corpus in Federal District Court for the Eastern District of Pennsylvania along with a petition to stay his execution. On December 18, 2001, the Honorable William H. Yohn entered an order denying all of [Appellant's] claims except the one pertaining to his sentencing hearing where [Judge Yohn] determined that the instructions to the jury during the penalty phase were ambiguous. [Judge Yohn] entered the following order:

The execution of the writ of habeas corpus is STAYED for 180 days from the date of this order, during which period the Commonwealth of Pennsylvania may conduct a new sentencing hearing in a manner consistent with this opinion; After 180 days, should the Commonwealth of Pennsylvania not have conducted a new sentencing hearing, the writ shall issue and the Commonwealth shall sentence [Appellant] to life imprisonment.

Abu-Jamal v. Horn, at 269, No. 99-5089 (E.D.Pa. December 18, 2001)[.]

The Commonwealth appealed this ruling to the Third Circuit Court of Appeals, starting another round of appeals, petitions for rehearing, and requests for reconsideration in the Federal Courts. [At the same time, Appellant filed serial PCRA petitions which were denied by the PCRA court and affirmed by our Supreme Court.] Ultimately, the Commonwealth filed an appeal to the Supreme Court of the United States, who, on October 11, 2011, declined to hear the case. The effect of this was to make Judge Yohn's order of December 18, 2001 operative, giving the Commonwealth 180 days to decide whether to hold a new penalty hearing. On or about December 8, 2011, the Commonwealth announced that it would not seek the death penalty. [Appellant] was transferred to the general population at SCI Mahanoy on January 27, 2012. Neither the Commonwealth nor [Appellant] requested the lower court to take any action.^[1] On August 14, 2012 the lower court imposed a sentence of life imprisonment in accordance with the instructions in Judge Yohn's order and all relevant orders were placed on the public docket.

[Appellant] filed post sentence motions on August 23, 2012 and raised five issues, challenging the constitutionality of the imposition of a life sentence without parole, and solitary confinement of inmates who have been sentenced to death.

Trial Court Opinion, 10/1/12, at 1-3 (footnote omitted).

On October 1, 2012, the trial court denied Appellant's post-sentence motions. This appeal followed. The trial court did not require Pa.R.A.P. 1925 compliance.

¹ As shall be discussed *infra*, Appellant, believing the Pennsylvania Supreme Court retained jurisdiction over his case due to his post-conviction filings, filed a request for our Supreme Court to enter the life sentence. Concluding that jurisdiction was possessed by the trial court, the high court remanded the case for the imposition of the federal court mandated sentence.

Appellant raises the following issues:

1. Were Appellant's rights under Pa.R.Crim.P. § 704 violated where the trial court *sua sponte* re-sentenced Appellant to life imprisonment without parole without providing notice to Appellant or his counsel of the re-sentencing, without providing Appellant or his counsel the opportunity to present and offer information/argument before the re-sentencing, and without ensuring that Appellant was informed, on the record, of his appellate rights?
2. Were Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article [1, § 9] of the Pennsylvania Constitution violated where Appellant was re-sentenced without notice to himself or counsel, without a hearing and without the right to be present or be heard?

Appellant's Brief at 2.

Contrary to Appellant's statement in his first issue, the trial court did not sentence him "*sua sponte*," but rather, imposed the sentence in accordance with the federal court's directive. The trial court sentenced Appellant pursuant to Pa.R.A.P. 2591, which provides:

Rule 2591. Proceedings on Remand

(a) General rule. On remand of the record the court or other government unit below shall proceed in accordance with the judgment or other order of the appellate court and, except as otherwise provided in such order, Rule 1701(a) (effect of appeals generally) shall no longer be applicable to the matter.

Pa.R.A.P. 2591(a). Consistent with the federal district court's directive, the trial court imposed a life sentence, and caused it to be entered on the criminal docket.

It is initially noteworthy that, although not procedurally required to do so given Pennsylvania's optional post-sentence motion practice, Appellant did not raise any procedural or constitutional deficiency in the re-sentencing procedure before the trial court. Moreover, Appellant has disregarded Pa.R.A.P. 2591(a), *supra*.

Nevertheless, contrary to Appellant's claim that Pa.R.Crim.P. 704 "is equally applicable to re-sentencings," Appellant's Brief at 7, this Court has held that "by its plain language, [Rule 704] does not apply to the re-sentencing procedure following remand. Rule 704 applies only to sentencing after conviction, guilty plea or plea of *nolo contendere*." **Commonwealth v. Fox**, 953 A.2d 808, 812 (Pa. Super. 2008) (emphasis omitted).² Thus, Appellant's arguments based on Rule 704 are inapposite. **See also Commonwealth v. Thomas**, 419 A.2d 1344, 1350 (Pa. Super. 1980) (citation omitted) (explaining that "a remand [for resentencing] is not necessary whenever it is apparent from the record that such would be 'a mere procedural exercise' in that no change in sentence would result").

² All of the cases relied upon by Appellant, except one, do not involve resentencing following remand from an appellate court. In **Commonwealth v. Thomas**, 537 A.2d 9 (Pa. Super. 1988), the defendant filed an appeal challenging the discretionary aspects of his sentence imposed following remand from a federal court. Unlike the situation in **Thomas**, the trial court in this case had no discretion in sentencing and was required to follow the federal court's directive. Thus, Appellant's reliance upon **Thomas** is inapt.

Finally, because Appellant filed a timely post-sentence motion and this timely appeal, he cannot establish that he was prejudiced by the lack of explanation of these post-sentencing rights.³

With regard to Appellant's second issue, while Appellant ardently argues that the procedure followed by the trial court violated several of his constitutional rights, he cannot establish prejudice. In fact, Appellant has failed to cite any authority to establish that an infringement on due process and other constitutional rights occurs when a case is remanded for the imposition of a specific sentence with which the trial court has no discretion. Once again, the majority of federal cases relied upon by Appellant do not involve resentencing following remand from an appellate court. Appellant does cite ***United States v. Faulks***, 201 F.3d 208 (3rd Cir. 2000) as persuasive authority. ***See Commonwealth v. Dunnivant***, 63 A.3d 1252, *9 (Pa. Super. 2013) (explaining that, while decisions of the lower federal courts have a persuasive authority, they are not binding on Pennsylvania courts). Given the facts of the instant case, we find Appellant's reliance upon ***Faulks*** to be unavailing.

Appellant concedes that ***Faulks*** permitted the trial court on remand to exercise its discretion when resentencing. Here, the trial court was afforded no such discretion—as mandated by the federal district court, the trial court

³ Although Appellant raised several claims challenging the constitutionality of the imposition of a life sentence, he has abandoned these claims on appeal.

was required to impose a life sentence. Indeed, in **Faulks**, the district court found the facts before it “distinguishable from those in which courts have ruled that procedural protections are less important when resentencing decisions on remand are not discretionary.” **Faulks**, 201 F.3d at 212 (citing cases).

Moreover, as noted **supra**, **see** n.1, once the Commonwealth decided not to conduct a new death penalty sentencing hearing, the federal district court’s grant of habeas corpus in 2001 became operable, and Appellant petitioned the Pennsylvania Supreme Court to enter a final order imposing a life sentence. In denying Appellant’s request, the high court informed Appellant he could seek such relief with the trial court. While Appellant did not do so, the trial court’s subsequent entry of a life sentence pursuant to the federal court’s directive, is precisely the relief Appellant previously sought. Thus, Appellant cannot now complain that the trial court granted the relief he requested from our Supreme Court. **See e.g., In re adoption of S.A.J.**, 838 A.2d 616, 621 (Pa. 2003) (citation omitted) (explaining that judicial estoppel applies “to uphold the integrity of the courts by ‘preventing parties from abusing the judicial process by changing positions as the moment requires’”).

Finally, Appellant asserts that he has a constitutional right to make a statement upon resentencing. We disagree. In one of Appellant’s prior appeals, our Supreme Court concluded that no right to allocution exists in capital cases. **See Commonwealth v. Abu Jamal**, 555 A.2d 846, 857-58

(Pa. 1989) (explaining that because statute specifically governing first-degree murder sentencing procedure did not include provision for allocution, the legislature intended to abrogate the general right to allocution in such cases). Although his case is no longer a capital one, Appellant cites no authority requiring a court to afford a defendant allocution upon remand for the imposition of a court-mandated sentence.

In sum, because Appellant has not established that a procedural or constitutional violation occurred when he was resentenced, we affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambetta", written over a horizontal line.

Prothonotary

Date: 7/9/2013