

**[J-171-2004]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 7 EAP 2004
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered on July 30, 2003 at No.
	:	1528 EDA 2003, vacating the
v.	:	judgment of sentence of the Court of
	:	Common Pleas of Philadelphia County
	:	entered on April 8, 2002 at Nos. 9505-
KAREEM WALLACE,	:	0257, 9507-0920, and 9508-0096
	:	
Appellee	:	
	:	
	:	ARGUED: October 20, 2004
	:	
	:	

**OPINION**

**MR. JUSTICE NIGRO**

**DECIDED: March 29, 2005**

This appeal raises the issue of whether the Superior Court erred in holding that a trial court that is resentencing a defendant after revoking his probation is restricted to the maximum term of imprisonment prescribed by the original negotiated guilty plea. For the following reasons, we conclude that the Superior Court erred and therefore reverse.

On January 26, 1996, Appellee Kareem Wallace entered a negotiated guilty plea to three counts of possession of a controlled substance with the intent to deliver. See 35 P.S. § 780-113(30). In accordance with the plea agreement, the trial court sentenced Appellee

to three concurrent terms of imprisonment of twenty-one to forty-two months followed by two years of probation and a \$5,000 fine.<sup>1</sup>

On September 10, 2000, while still serving his probationary sentence, Appellee was arrested for another drug-related offense. Under the terms of his probation, Appellee was required to report the arrest to his probation officer within seventy-two hours but he failed to do so. At a revocation of probation hearing on November 21, 2000, Appellee did not dispute the technical violations of his probation and the trial court resentenced him to three consecutive terms of imprisonment of five to ten years, which was the maximum available for the original crimes under the Sentencing Code.

Appellee appealed to the Superior Court, arguing, *inter alia*, that his sentence was illegal under Commonwealth v. Anderson, 643 A.2d 109 (Pa. Super. 1994), which held that where a negotiated plea agreement contemplated concurrent rather than consecutive terms of imprisonment, a trial court is “without authority . . . to alter the sentencing scheme from concurrent to consecutive sentences when resentencing upon probation revocation.” Anderson, 643 A.2d at 114. A panel of the Superior Court agreed that based on Anderson, the trial court had erred in imposing consecutive terms of imprisonment where Appellee’s negotiated plea had contemplated only concurrent sentences. Specifically, the Superior Court held as follows:

In the present case, [Appellee] entered into a negotiated plea and sentence. The terms of the agreement provided that [Appellee] would plead guilty to three counts of possession of a controlled substance with intent to deliver in exchange for three concurrent terms of twenty-one to forty-two months’ imprisonment plus two years’ probation. Upon the revocation of probation,

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<sup>1</sup> Under the Crimes Code, the crime of possession of cocaine with intent to deliver carries a maximum term of imprisonment of ten years. 35 P.S. § 780-113(f)(1.1).

the trial court was bound by the terms of the negotiated plea agreement to impose concurrent sentences. Therefore, the trial court's imposition was invalid, as it altered the sentencing scheme from concurrent to consecutive sentences.

Super Ct. Op., 12/18/01, at 6.

The Superior Court then went on to discuss the maximum term of imprisonment to which Appellee could be subjected, even though that issue was not on appeal at that time.

In this regard, the panel, apparently again relying on Anderson, stated:

[A]lthough we recognize the sentence imposed was within the statutory limits, it exceeded the maximum limit of the original sentence. On resentencing, the trial court imposed an aggregate term of fifteen to thirty years which exceeded the maximum limit of the original sentence which had an outside limit of five and one-half years.

Id. at 6-7. The Superior Court then vacated Appellee's judgment of sentence and remanded to the trial court for resentencing consistent with its decision.

Upon remand, the trial court resentenced Appellee to three concurrent terms of imprisonment of five to ten years. In its opinion supporting this sentence, the trial court acknowledged that in addition to holding that the imposition of consecutive sentences upon resentencing was illegal, the Superior Court had also stated that upon resentencing Appellee should be sentenced to a term no longer than that which was contemplated in the original guilty plea agreement. However, the trial court pointed out that in stating as such, the Superior Court had failed to consider the impact of Commonwealth v. Smith, 669 A.2d 1008 (Pa. Super. 1996), which held that resentencing a defendant to a term within the statutory maximum was not illegal simply because it was a longer term than the defendant's original plea agreement circumscribed. Rather, the trial court noted that according to Smith, "it is well-settled that upon revocation of probation, a court possesses the same sentencing alternatives that it had at the time of the initial sentencing." Trial Ct. Op. at 4

(citing Smith, 669 A.2d at 1011). Thus, the trial court concluded that contrary to the Superior Court's suggestion, it was not restricted to the term contemplated in Appellee's plea agreement, but rather could impose any sentence within the statutory limits.

Appellee again appealed to the Superior Court, this time claiming that at resentencing, the trial court should have restricted its sentence to the upper bounds of the negotiated plea agreement, namely forty-two months, and not the statutory maximum of ten years. The second Superior Court panel again reversed Appellee's judgment of sentence and remanded, holding that the "law of the case" doctrine bound it to the earlier panel's decision, including the language purportedly prohibiting the trial court from resentencing Appellee to a term of imprisonment greater than that contemplated in the negotiated guilty plea.<sup>2</sup> Despite the trial court's assessment that the particular language at issue was both dicta and contrary to the established law in Smith, the Superior Court refused to find that the previous panel made a "clearly erroneous" holding by limiting the trial court's resentencing options as it did.<sup>3</sup> See Commonwealth v. Yarris, 731 A.2d 581 (Pa. 1999)

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<sup>2</sup> Traditionally, the law of the case doctrine dictates that "upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court." Commonwealth v. Starr, 664 A.2d 1326, 1331 (Pa. 1995). The Superior Court below explained that:

[A]lthough the trial court believes our reliance on Anderson is misplaced and instead relies on Commonwealth v. Smith, 669 A.2d 1008 (Pa. Super. 1996), we need not address this concern. The trial court was and this Court is bound by the earlier panel's disposition of this issue. It is the law of the case.

Super. Ct. Op., 7/31/03, at 4.

<sup>3</sup> Significantly, the two-judge majority of the Superior Court panel noted that "[a]lthough the holding in Commonwealth v. Smith appears contrary to Anderson, Anderson remains good law." Super. Ct. Op., 7/30/03, at 4. In a concurring opinion, Judge Graci (continued...)

(holding that court should follow law of the case except under exceptional circumstances, as when holding is clearly erroneous). The panel therefore instructed the trial court to resentence Appellee again, this time “limited to the terms of the plea agreement it accepted at the time of original sentencing, that is: concurrent terms with an outside limit of five and one-half years.” Super. Ct. Op., 7/30/03, at 5.

On appeal to this Court, the Commonwealth argues that the Superior Court erred in finding that the trial court could not impose a longer sentence upon resentencing after a revocation of probation than it could under the plea agreement at the time of the original sentencing. We agree.<sup>4</sup>

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stated that he joined in the majority’s disposition only because he believed the panel to be bound by the decision of the earlier panel, but he independently believed Commonwealth v. Anderson to have been wrongly decided.

<sup>4</sup> Appellee initially claims that the Commonwealth waived its right to appeal the issue of the maximum term available upon resentencing because that issue was decided within the first Superior Court panel’s decision and the Commonwealth failed to appeal it to this Court at that time. However, neither Appellant nor Appellee ever raised the question of whether the trial court was bound by the maximum term contemplated in the plea agreement before the first Superior Court panel. Thus, the only Anderson-related issue before that panel was whether the imposition of consecutive sentences upon resentencing was prohibited under that case. As such, the court necessarily vacated Appellee’s sentence based on that issue alone and we consider the discussion regarding the maximum term of Appellee’s sentence to be mere dicta. Given this fact, we simply cannot fault the Commonwealth for failing to appeal the maximum term issue to this Court at that time and we refuse to find that the Commonwealth waived its right to ultimately appeal that issue by failing to do so in conjunction with the first panel opinion.

We further conclude that in light of our determination that the maximum term discussion in the first panel’s decision was dicta, the second Superior Court panel erred in treating it as the law of the case. See Pierro v. Pierro, 252 A.2d 652, 653 (Pa. 1969) (Dicta in trial court opinion “does not establish the law of the case.”); Troxel v. A.I. Dupont Institute, 675 A.2d 314, 319 (Pa. Super. 1996) (earlier panel’s analysis was dicta and thus was not binding on subsequent panel). This error is particularly troubling in this case because the parties had not even briefed the issue of the maximum term available on

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As explained above, the Superior Court below relied on its prior decision in Anderson in concluding that a sentence imposed after probation revocation could not exceed the maximum sentence originally imposed subsequent to a guilty plea agreement. Super. Ct. Op., 7/30/03, at 3 (citing Anderson, 643 A.2d at 113). However, Anderson's statement of the law in that regard was simply incorrect.

It is clearly stated in the Sentencing Code not only that the court may revoke a defendant's probation if appropriate, but also that "[u]pon revocation the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing." 42 Pa.C.S. § 9771 (emphasis added). Likewise, this Court has explicitly stated that "upon revocation of probation, the court possesses the same sentencing alternatives that it had at the time of the initial sentencing." Commonwealth v. Pierce, 441 A.2d 1218, 1219 (Pa. 1982). As it is well established that the sentencing alternatives available to a court at the time of initial sentencing are all of the alternatives statutorily

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resentencing to the first Superior Court panel and thus, the panel made its pronouncements on that topic without the assistance of any adversarial debate from the litigants.

Finally, even assuming for the sake of argument that the second Superior Court panel did not err in applying the law of the case doctrine, this Court is certainly not bound by the dicta in the first panel's opinion as that doctrine does not bind this Court from now addressing the maximum term issue. Compare Riccio v. American Republic Ins. Co., 705 A.2d 422, 425 (Pa. 1997) (Under law of the case doctrine, "a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of the same court or by a higher court in the earlier phases of the matter.") (quoting Commonwealth v. Starr, 664 A.2d 1326, 1331 (Pa. 1995)) (emphasis added), with Commonwealth v. Ogrod, 839 A.2d 294, 317 (Pa. 2003) ("[A]n intermediate court of appeals should not possess authority to bind a court of last resort within the same proceeding, particularly where the latter court's plenary review of the trial court's final order represents the first instance in which it undertakes consideration of any aspect of the trial-level proceedings.").

available under the Sentencing Code,<sup>5</sup> these authorities make clear that at any revocation of probation hearing, the court is similarly free to impose any sentence permitted under the Sentencing Code and is not restricted by the bounds of a negotiated plea agreement between a defendant and prosecutor.<sup>6</sup>

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<sup>5</sup> In the process of negotiating a guilty plea, the prosecutor may make promises to the defendant, for instance recommending a maximum sentence for the crimes committed. Although the prosecutor is bound to act in accordance with those promises, this “in no way binds the presiding judge to the terms of the agreement.” Commonwealth v. Zuber, 353 A.2d 441, 444, n.4 (Pa. 1976); see also Commonwealth v. Wilkins, 277 A.2d 341, 343 (Pa. 1971) (noting that under a negotiated plea agreement, the defendant “knew that he could not count on the court being bound by the recommendation [of sentence]”). In fact, the presiding judge can still sentence the defendant to any term allowed under the Sentencing Code, provided that the defendant has the chance to withdraw his guilty plea if the judge’s sentence is not in accordance with his negotiated agreement. Pa. R. Crim. P. 591(A).

<sup>6</sup> The rationale for giving the trial court such discretion upon resentencing is grounded in the nature of a negotiated guilty plea, which is a two-sided agreement that imposes obligations on both the defendant and the Commonwealth. On the one hand, the Commonwealth agrees not to prosecute the defendant to the full extent of the law and to recommend a circumscribed punishment. The defendant, on the other hand, accepts this benefit with the implicit promise that he will abide by the terms of the agreement and behave in accordance with the legal punishment imposed by the court. See Commonwealth v. Coles, 530 A.2d 453 (Pa. Super. 1987) (holding that the benefit of the bargain principle commonly applied to the prosecution is also equally applicable to the defendant and imparts upon him the obligation to abide by the negotiated terms of his sentence).

Significantly, the court ensures that the Commonwealth upholds its end of the bargain. See Commonwealth v. Zuber, 353 A.2d 441, 459 (Pa. 1976) (holding that “there is an affirmative duty on the part of the prosecutor to honor any and all promises made in exchange for a defendant’s plea” and therefore, “it is well settled that ‘where a plea bargain has been entered into and is violated by the Commonwealth, the defendant is entitled, at the least, to the benefit of the bargain’”) (quoting Commonwealth v. Zakrzewski, 333 A.2d 898, 900 (Pa. 1975)). Further, the court demands that the defendant, in return, fulfill his own obligations under the plea agreement in order to retain the benefits granted to him in that bargain. As a result, if the defendant fails to satisfy his obligations, e.g., by violating probation, he necessarily forfeits any entitlement to a circumscribed punishment. As the Superior Court noted in Commonwealth v. Coles, to allow the defendant who breaches the (continued...)

While Anderson ignored the unambiguous language of both the Sentencing Code and Pierce, it is important to note that numerous other Superior Court decisions subsequent to Anderson, including Commonwealth v. Smith, upon which the trial court below relied, have recognized that court's error and have explicitly declined to follow its lead. See Smith, 669 A.2d 1008 (holding that Anderson incorrectly held that a trial court, upon resentencing, was limited to the maximum term contemplated in a guilty plea and explicitly stating that under this Court's holding in Pierce, a trial court has the same sentencing options available to it upon resentencing as it did at the time of initial sentencing); see also Commonwealth v. Adebaike, 846 A.2d 759, 761 (Pa. Super. 2004) (stating that "[t]he Commonwealth and trial court here are not the only critics of Anderson on record" but following Anderson for its holding on concurrent/consecutive sentences); Commonwealth v. Fish, 752 A.2d 921, 923 (Pa. Super. 2000) ("[U]pon sentencing following a revocation of probation, the trial court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence."); Commonwealth v. Coolbaugh, 770 A.2d 788, 792 (Pa. Super. 2001) (quoting the language in Fish as "the law applicable to revocation proceedings"); Commonwealth v. Byrd, 663 A.2d 229, 231 (Pa. Super. 1995) ("The question is whether Anderson changed the law and limited the trial court's power to sentence after revocation of probation. We find that in the absence of circumstances unique to Anderson, no such limitation was imposed on the sentencing

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bargain to keep the benefits conferred upon him by a plea agreement would "make a sham of the negotiated plea process and would give the defendant a second bite at his sentence." 530 A.2d 453, 456 (Pa. Super. 1987).



judge.”). Indeed, it is these decisions that have properly interpreted the governing law and which should have been followed by the Superior Court below.

In sum, as subsequent Superior Court panels have recognized, Anderson’s holding that “any sentence imposed after probation revocation must not exceed the maximum sentence originally imposed” is legally unsupportable and is inconsistent with both the clear and unambiguous language of the Sentencing Code and this Court’s precedent. See 42 Pa.C.S. § 9771; Pierce, 441 A.2d at 1219. Accordingly, the Superior Court below erred in relying on that holding and instead should have affirmed the trial court’s judgment of sentence, which was within the maximum term allowed by the Sentencing Code. Accordingly, we reverse the order of the Superior Court.

Mr. Justice Saylor files a concurring and dissenting opinion.

Mr. Justice Baer files a dissenting opinion.