NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
BRANDON DONLON	:	
Appellant	:	No. 2596 EDA 2025

Appeal from the Judgment of Sentence Entered December 12, 2023
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0002316-2023

BEFORE: BOWES, J., OLSON, J., and STEVENS, P.J.E.*

MEMORANDUM BY BOWES, J.: **FILED NOVEMBER 25, 2026**

Brandon Donlon appeals from the judgment of sentence of one and one-half to three years of imprisonment, followed by five years of probation, imposed after he pled guilty to persons not to possess firearms, carrying a firearm without a license, carrying a firearm on public streets in Philadelphia, and two counts of simple assault. We vacate the sentences imposed for Appellant's two simple assault convictions, affirm the judgment of sentence in all other respects, and remand for resentencing on the simple assault convictions.

On March 8, 2023, at approximately 5:20 p.m., Appellant approached the pharmacy counter of a Rite Aid at 3901 Caster Avenue in Philadelphia

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* Former Justice specially assigned to the Superior Court.

seeking to obtain his prescriptions. When the pharmacy clerk told him that she could not fill them, Appellant became aggressive, threatened the clerk, and reached toward something in his right pocket that seemed to the clerk and other witnesses to be the grip of a firearm. Appellant then threw an object at the clerk, which the store's security camera captured. After leaving, Appellant made an obscene gesture at the clerk through the window, and another witness observed him pull the firearm out of his pocket. ***See*** N.T. Plea/Sentencing, 12/12/23, at 18-19.

Police initiated a traffic stop of Appellant's vehicle shortly thereafter. Executing a search warrant, they recovered an operable black and silver nine-millimeter Smith & Wesson handgun from the left glove compartment of the automobile. Appellant was prohibited from possessing a firearm due to a prior disqualifying conviction, and he was not licensed to carry one. ***Id***. at 19-20. Appellant was charged with numerous offenses arising from this incident, including the firearms and simple assault offenses to which he ultimately pled guilty on December 12, 2023.

For the purposes of sentencing, this case was consolidated with an unrelated case at CP-51-CR-0002049-2022 ("the 2022 case"), in which Appellant had previously entered an open guilty plea to simple assault, terroristic threats, possessing an instrument of crime, and related offenses. Edward Meehan, Esquire, represented Appellant in this case, and Scott Gessner, Esquire, represented him in the 2022 case. We discuss the 2022

case only because the court found Appellant in contempt for conduct arising from that matter at the same hearing at which it sentenced him in the case, and it considered that finding in fashioning the sentence at issue here.[1]

Specifically, Appellant's then-counsel in the 2022 case sought a continuance of the October 23, 2023 sentencing hearing by emailing the court a letter, purportedly from Appellant's orthopedic surgeon, Dr. Miltiadis Zgonis, M.D., stating that a surgery Appellant needed was rescheduled to October 17, 2023. The court granted the continuance. The Commonwealth subsequently moved to hold Appellant in indirect criminal contempt pursuant to 42 Pa.C.S. § 4132, alleging that the letter was forged. On December 7, 2023, the court held an evidentiary hearing at which it admitted, over a defense objection, a notarized affidavit in which Dr. Zgonis swore that neither he nor his staff had authored the letter. The court also admitted a separate letter from his office confirming that Appellant was in fact scheduled for surgery on October 17.

The court found Appellant in contempt at the outset of the December 12, 2023 hearing, reasoning that "he tried to pass off a fake document." N.T. Plea/Sentencing, 12/12/23, at 9. At the same hearing, Appellant entered an open guilty plea in this case to the offenses noted above. ***Id***. at 10-21.

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[1] Appellant's appeals from the judgment of sentence at CP-51-CR-0002049-2022 and from the contempt conviction are pending at 482 EDA 2024 and 483 EDA 2024, respectively.

The court proceeded directly to a consolidated sentencing hearing for both criminal dockets and the contempt matter. It relied on the presentence investigation ("PSI") report and mental health evaluation it had ordered in the 2022 case. Attorney Gessner emphasized Appellant's four children, his business, and his numerous medical conditions, which included a spinal cord lesion and an ACL tear, for which he took seventeen medications. Attorney Gessner also cited Appellant's outpatient psychiatric treatment, his completion of an anger management course, his negative drug screens other than for marijuana, and several letters from physicians and acquaintances, and he requested a lengthy probationary sentence. ***Id***. at 22-28. Attorney Meehan added that Appellant had served approximately five months in custody and eight months on house arrest, and he joined that request. ***Id***. at 28-30.

The Commonwealth recounted Appellant's criminal history in Pennsylvania and Florida, much of it involving domestic violence. It argued that the fake letter, which "capp[ed] off" his record, showed that Appellant could not be trusted on probation. ***Id***. at 30-34, 38-39. When the Commonwealth sought to describe body-worn camera footage from the 2022 case, Attorney Gessner objected, asserting an agreement that the footage would not be presented. The court barred the video but permitted the Commonwealth to elaborate on the facts to which Appellant had pled. ***Id***. at 34-37. Across both criminal dockets, the Commonwealth requested an aggregate sentence of one to two years of incarceration followed by seven

years of probation, plus a consecutive ninety days of incarceration for the contempt. ***Id***. at 40-41. In his allocution, Appellant acknowledged his mistakes, attributed his conduct to his substance use and a spinal cyst, described his ongoing treatment, and stated that he never intended to impede the court. ***Id***. at 42-44.

The court discussed Appellant's mental health diagnoses, his medical conditions, his treatment, and his participation in an anger management course. It also discussed his extensive multistate criminal history and the danger his conduct posed to the pharmacy employees and police officers. ***Id***. at 44-48. The court then stated, "I cannot ignore the contempt," and noted that Appellant had tried to submit a fake document that his own doctor had disavowed. ***Id***. at 49.

In the instant case, the court imposed one and one-half to three years of incarceration for carrying a firearm without a license, and concurrent five-year probationary terms, consecutive to the incarceration, for persons not to possess firearms, carrying a firearm on public streets in Philadelphia, and each count of simple assault. ***Id***. at 49. It ordered the sentences it imposed in the 2022 case and for the contempt to run concurrently with the sentence in this case. ***Id***. at 49-50. The aggregate sentence was one and one-half to three years of incarceration followed by five years of probation. ***Id***. at 53. Citing "the foolishness with the fake letter," the court denied Attorney Gessner's request for a surrender date and revoked bail in this matter. ***Id***. at 50-53.

Appellant filed a post-sentence motion seeking reconsideration of his sentence, which the court denied. Following proceedings under the Post Conviction Relief Act ("PCRA"), the court reinstated Appellant's direct appeal rights *nunc pro tunc*, and Appellant filed a notice of appeal.[2] The court did not order Appellant to file a Pa.R.A.P. 1925(b) statement. Rather than filing a Rule 1925(a) opinion, the court filed a letter stating that it would not issue an opinion because Appellant had pled guilty and been sentenced, and the matter therefore involved no trial or dispositive motion requiring a written ruling. This Court directed the trial court to file a Rule 1925(a) opinion, and the court filed what it styled a supplemental opinion. However, that opinion addresses only the sufficiency of the evidence supporting Appellant's contempt conviction and the admission of Dr. Zgonis's affidavit, and urges that the contempt conviction be upheld. ***See*** Supplemental Opinion at 1-3. Those questions concern the contempt conviction, which is the subject of a separate appeal, not the sentence imposed in this case.

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[2] Appellant did not file a direct appeal. He filed a *pro se* PCRA petition, and retained counsel thereafter sought reinstatement of his post-sentence and appellate rights *nunc pro tunc*. The Commonwealth did not oppose reinstating Appellant's appellate rights, but objected to reinstating his post-sentence rights. The PCRA court then reinstated Appellant's direct appeal rights and directed that counsel be appointed, and Attorney Gessner entered his appearance. Counsel did not file a notice of appeal. Upon Appellant's second *pro se* PCRA petition, the court again reinstated his direct appeal rights *nunc pro tunc*, and counsel filed a notice of appeal. This Court dismissed the appeal for failure to file a brief but reinstated it upon Appellant's application for reconsideration.

Appellant presents a single issue for our review: "Did the sentencing court abuse its discretion by considering an improper finding of contempt?" Appellant's brief at 3.

Appellant's issue challenges the discretionary aspects of his sentence.[3] "[A]n appellant is not entitled to the review of challenges to the discretionary aspects of a sentence as of right." ***Commonwealth v. Bowens***, 265 A.3d 730, 762-63 (Pa.Super. 2021) (*en banc*) (cleaned up). Rather, an appellant must invoke this Court's jurisdiction by satisfying a four-part test: (1) whether the appellant filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether the appellant's brief has a fatal defect; and (4) whether there is a substantial question that the sentence is not appropriate under the Sentencing Code. ***Id***. at 763.

Appellant filed a timely notice of appeal within thirty days of the second order reinstating his appellate rights *nunc pro tunc*. His brief includes a statement of the reasons he believes his appeal presents a substantial question. ***See*** Appellant's brief at 9. The question, then, is whether Appellant preserved his claim that the court improperly considered the contempt finding in fashioning his sentence.

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[3] Since Appellant entered an open guilty plea with no agreement as to sentence, he is not precluded from challenging the discretionary aspects of his sentence. ***See Commonwealth v. Tirado***, 870 A.2d 362, 365 n.5 (Pa.Super. 2005).

The Commonwealth contends that he did not, because Appellant did not object at sentencing to the court's reliance on the contempt findings, and his post-sentence motion asked only that the court impose a more lenient sentence. ***See*** Commonwealth's brief at 8. "[I]ssues challenging the discretionary aspects of sentencing must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. Absent such efforts, an objection to a discretionary aspect of a sentence is waived." ***Commonwealth v. Griffin***, 65 A.3d 932, 935 (Pa.Super. 2013) (cleaned up).

Our review confirms that Appellant failed to preserve his discretionary sentencing claim in the trial court. When the court stated that it could not ignore the contempt, neither Attorney Meehan nor Attorney Gessner objected. Nor did either attorney object when the court later cited the forged letter in denying a surrender date. ***See*** N.T. Plea/Sentencing, 12/12/23, at 49-53. Attorney Gessner's earlier remark that "the letter and the contempt [are] an entirely separate issue" was made in support of his objection to the Commonwealth's description of body-worn camera footage. It was not an objection to the court's consideration of the contempt in fashioning the sentence. ***Id***. at 34-36. Appellant's post-sentence motion sought reconsideration of his sentence generally, and Appellant does not contend that it raised the claim he now presents. ***See*** Appellant's brief at 7. Accordingly, Appellant's claim is waived.

Although Appellant raises no challenge to the legality of his sentence, the Commonwealth brings our attention to the infirmity of the probationary sentences imposed for Appellant's two simple assault convictions. ***See*** Commonwealth's brief at 7. Challenges to the legality of a sentence cannot be waived, and this Court may raise them *sua sponte*. ***See Commonwealth v. Ramos***, 197 A.3d 766, 768 (Pa.Super. 2018). A sentence that exceeds the statutory maximum is illegal and must be vacated. ***See Commonwealth v. Infante***, 63 A.3d 358, 363 (Pa.Super. 2013).

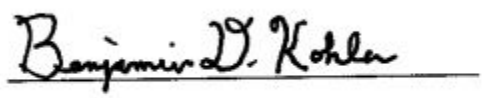
Appellant pled guilty to two counts of simple assault graded as misdemeanors of the second degree. ***See*** N.T. Plea/Sentencing, 12/12/23, at 10, 21. The maximum sentence for a misdemeanor of the second degree is two years. ***See*** 18 Pa.C.S. § 1104(2). The court nonetheless imposed a five-year probationary term on each count. ***See*** N.T. Plea/Sentencing, 12/12/23, at 49. Those sentences exceed the statutory maximum and are illegal.

Ordinarily, when we vacate a sentence that is part of a multi-count sentencing scheme, we remand for resentencing so that the trial court may restructure its sentence. This court has declined to remand where vacating the illegal sentence does not upset the overall sentencing scheme. ***See Commonwealth v. Melvin***, 103 A.3d 1, 57 (Pa.Super. 2014). However, that principle typically applies where the trial court could not impose any punishment for the affected conviction, such as where it merges with another offense for sentencing purposes. That is not the case here. Although the

court could not lawfully sentence Appellant to five years of probation for each simple assault conviction, Appellant remains subject to a sentence of up to two years on each count. A lawful sentence on those counts, if imposed concurrently, would not change Appellant's aggregate sentence, but the trial court must have the opportunity to fashion one. Accordingly, we vacate the sentences imposed on Appellant's two simple assault convictions and remand for resentencing. We affirm the judgment of sentence in all other respects.

Judgment of sentence vacated in part and affirmed in part. Case remanded for resentencing consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.



Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/25/2026