

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

NO. CR-927-2022

JAMES HAROLD SHIRLEY,
Defendant

Joseph D. Perilli, Esquire
Assistant District Attorney
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Counsel for Commonwealth
Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – September 27, 2023

Herein, Defendant challenges the legality of his sentence raising one issue on appeal: Whether Section 9762(i) of the Sentencing Code¹ prohibits a defendant convicted of an ungraded misdemeanor drug offense – here, simple possession of a controlled substance, for which a period of imprisonment not to exceed three years can be imposed as a second or subsequent offense – from being given a state sentence to be served in a state correctional institution.

PROCEDURAL AND FACTUAL BACKGROUND

On November 17, 2022, Defendant, James Harold Shirley, who was then serving a state sentence of eighteen to thirty-six months for possession with intent to deliver a

¹ 42 Pa.C.S.A. §§9701-9799.75.

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controlled substance, a felony offense, was being supervised on state parole. On this date, Defendant's state parole agent, Chris Molchan, while conducting a house check of Defendant's residence, observed and seized, *inter alia*, ten grams of methamphetamine, a digital scale coated with methamphetamine residue, one hundred twenty small plastic bags used for packaging methamphetamine, and \$141.00 in United States Currency. On the same date, a criminal complaint was filed against Defendant charging him with possession with intent to deliver a controlled substance, 35 P.S. §780-113(a)(30), a felony offense; possessing a controlled substance, 35 P.S. §780-113(a)(16), a misdemeanor offense; and possession of drug paraphernalia, 35 P.S. §780-113(a)(32), also a misdemeanor offense.

By stipulation dated May 15, 2023, Defendant agreed to plead guilty to the simple possession and paraphernalia charges; the most serious offense, possession with intent to deliver, was to be dismissed; and Defendant was to receive a state sentence. Defendant was represented by counsel when this stipulation was entered, as well as at all relevant times through and including his pending appeal. (Written Stipulation dated May 15, 2023 (filed May 19, 2023); (N.T., 6/22/23, p. 2.)

In accordance with the foregoing stipulation, Defendant pled guilty on June 22, 2023, to the simple possession and paraphernalia charges and was sentenced the same date to a period of confinement in a state correctional institution of not less than one nor more than three years on the possession charge, consecutive to his state sentence of eighteen to thirty-six months. See also 61 Pa.C.S.A. §6138(a)(5)(i) (requiring a

defendant's sentence for a new crime committed while on parole to run consecutive to the remainder of the original sentence imposed). Defendant was granted credit for 218 days against this sentence. The sentence was within the standard guideline range, within the statutory maximum for a second or subsequent conviction for simple possession, and consistent with Defendant's stipulation.

Due to his history of prior drug and drug-related convictions - Defendant had previously been convicted of simple possession on four separate occasions, of possession of drug paraphernalia, and of possession with intent to deliver a controlled substance - Defendant was subject to a maximum sentence not to exceed three years and a fine not to exceed \$25,000.00, or both, for his conviction of simple possession. 35 P.S. §780-113(b); (N.T., 6/22/23, p. 4). Given Defendant's prior record score of five, the standard guideline range for this offense was six to sixteen months. On the paraphernalia charge, Defendant received a sentence of one year probation consecutive to his sentence for simple possession. The standard guideline range for this offense was RS to six months.

At the time of sentencing, it was noted that Defendant had a long history of drug offenses (N.T., 6/22/23, p. 7) and that Defendant's possession of drugs and drug paraphernalia while on parole was a violation of his parole. (N.T., 6/22/23, p. 7). The

sentence imposed on Defendant made him RRRI eligible² and not ineligible for the state drug treatment program.³

On July 3, 2023, Defendant filed a Post-Sentence Motion in which Defendant expressly acknowledged that he was in agreement with the sentence imposed, but was concerned that the State Department of Corrections would not accept custody because the simple possession charge to which he pled guilty and was sentenced, although carrying a maximum penalty of three years, was an ungraded misdemeanor, citing 42 Pa.C.S.A. §9762(i)(1). (Post-Sentence Motion, ¶¶2, 3). In his Post-Sentence Motion, Defendant also makes reference to the Pennsylvania Superior Court's decision in Commonwealth v. Pacheco, 289 A.3d 77 (Pa.Super. 2022), a non-precedential decision, in which the Superior Court dismissed the claim by Pacheco that his sentence of sixteen to thirty-six months for violating the same section of the Controlled Substance, Drug, Device, and Cosmetic Act was illegal as violative of Section 9762(i). (Post-Sentence Motion, ¶6). The matter was scheduled for hearing on August 3, 2023, and, following a hearing on that date, denied by order dated August 30, 2023, for the reasons stated of record.

Defendant filed his appeal to the Superior Court on August 25, 2023. In response to this court's order dated August 31, 2023, directing Defendant to file a concise statement of the errors complained of on appeal within twenty-one days of the entry of the order,

² Recidivism Risk Reduction Incentive. 61 Pa.C.S.A. §§4501-4512.

³ 61 Pa.C.S.A. §§4101-4109.

Defendant's Concise Statement was filed on September 21, 2023. Therein, Defendant contends the sentence he received of one to three years' imprisonment in a state correctional facility, with a time credit of 218 days, was illegal in that "the Department of Corrections has considered sentences of ungraded misdemeanors to not be those which may be served in a state correctional institution pursuant to 42 Pa.C.S. §9762(i)(1) which mandates that any conviction not graded as a misdemeanor of the second degree or higher is ineligible for confinement in such an institution." (Concise Statement of Matters Complained of Pursuant to Pa.R.A.P. 1925(b), ¶2).

DISCUSSION

On its face, based on length of sentence alone, Defendant's sentence of one to three years for simple possession is a state sentence. Under the Sentencing Code, a sentence of two years or more, but less than five years is to be served in a state facility absent certain conditions, none of which apply. 42 Pa.C.S.A. §4762(b)(2). Moreover, because the sentence Defendant received for simple possession ran consecutive to Defendant's existing state sentence,⁴ under the rules of aggregation, Defendant's aggregate sentence was two and a half to six years. 42 Pa.C.S.A. §§9757, 9762(f); Commonwealth v. Ford-Bey, 590 A.2d 782, 783 (Pa.Super. 1991). Section 9762(b)(1) of the Sentencing Code provides that sentences with a maximum term of five or more years

⁴ Defendant pled guilty to possession with intent to deliver a controlled substance on October 20, 2021, and was sentenced the same day to eighteen to thirty-six months' incarceration in a state correctional facility. (N.T., 6/22/23, p.9).

shall be committed to the Department of Corrections for confinement. 42 Pa.C.S.A. §9762(b)(1). Only sentences whose maximum term is less than two years shall be committed to a county prison. 42 Pa.C.S.A. §9762(b)(3).

In his Post-Sentence Motion, Defendant refers to Section 9762(i) of the Sentencing Code as the reason he believes the State may not accept custody of Defendant for confinement in a state facility. (Post-Sentence Motion, ¶4).⁵ Section 9762(i) of the Sentencing Code and Section 9762(j) on applicability provide as follows:

- (i) Prohibition. – Notwithstanding any other provision of law, no person sentenced to total or partial confinement after the effective date of this subsection shall be committed to the Department of Corrections unless:
 - (1) the aggregate sentence consists of a conviction for an offense graded as a misdemeanor of the second degree or higher, or
 - (2) the Secretary of Corrections or the secretary's designee has consented to the commitment.
- (j) Applicability. – 18 Pa.C.S. § 106(b)(8) and (9) (relating to classes of offenses) applies to subsection (i).

42 Pa.C.S.A. §9762(i), (j).

Section 9762(i), however, by its very terms is inapplicable to Defendant's sentence. The bar to committing a person to the Department of Corrections applies only if the aggregate sentence does not include a conviction for an offense graded as a misdemeanor of the second degree or higher. Here, Defendant's aggregate sentence includes a felony offense.

⁵ Significantly, Defendant never asserts the State has in fact not accepted Defendant for confinement in a state facility.

In his Post-Sentence Motion, Defendant cites to Pacheco which, though not necessary to resolution of the issue before us, is helpful. In Pacheco, the defendant was convicted of possession of a Schedule I controlled substance, the same offense for which Defendant has been convicted here, and sentenced to a period of imprisonment in a state facility of sixteen to thirty-six months. Pacheco, not the Department of Corrections, challenged the legality of his sentence, contending that because his conviction was for an ungraded misdemeanor, pursuant to Section 9762(i)(1) he could not be committed to a state facility.

The Superior Court rejected this argument. In doing so, the Court stated:

Section 9762(j) states: "18 Pa.C.S. § 106(b)(8) and (9) (relating to classes of offenses) applies to subsection (i)." 42 Pa.C.S. § 9762(j). Specifically, subsections 106(b)(8) and (b)(9) of the Crimes Code classify a crime as a "misdemeanor of the third degree if it is so designated in this title or if a person convicted thereof may be sentenced to a term of imprisonment, the maximum of which is not more than one year[,]" 18 Pa.C.S. § 106(b)(8), or if it is declared a misdemeanor "without specification of degree[.]" *Id.* at § 106(b)(9). In other words, a person convicted of a third-degree misdemeanor cannot be sentenced to a state institution. However, pursuant to section 780-113(b) of the Controlled Substance, Drug, Device and Cosmetic Act, Pacheco's sentence was properly enhanced to a first-degree misdemeanor. Section 780-113(b) provides:

(b) Any person who violates any of the provisions of clauses (1) through (11), (13) and (15) through (20) or (37) of subsection (a) shall be guilty of a misdemeanor, and except for clauses (4), (6), (7), (8), (9) and (19) shall, on conviction thereof, be sentenced to imprisonment not exceeding one year or to pay a fine not exceeding five thousand dollars (\$5,000), or both, and for clauses (4), (6), (7), (8), (9) and (19) shall, on conviction thereof, be sentenced to imprisonment not exceeding three years or to pay a fine not exceeding five thousand dollars (\$5,000), or both; but, *if the violation is committed after a prior conviction of such person for a violation*

of this act under this section has become final, such person shall be sentenced to imprisonment not exceeding three years or to pay a fine not exceeding twenty-five thousand dollars (\$25,000), or both.

35 P.S. § 780-113(b) (emphasis added). Notably, in Commonwealth v. Cousins, 212 A.3d 34 (Pa. 2019), our Supreme Court held that convictions under 35 P.S. §§ 780-113(a)(31) and (32) (possession of paraphernalia and possession of small amount of marijuana) were properly used to enhance maximum sentences under section 780-113(b)). The Court stated: “[U]pon review of the Act, we conclude that 35 P.S. § 780-113(b) is not ambiguous. Indeed, in referring to a “violation of this act under this section,” the legislature *clearly evidenced an intent that any violation under the entirety of 35 P.S. § 780-113, and not only those violations specified in § 780-113(b), would support an enhanced sentence.*” *Id.* at 39-40 (emphasis added).

Pacheco, 289 A.3d at *3.⁶ Accordingly, the Pacheco Court held that the trial court's order requiring Pacheco, who, like Defendant here, had multiple prior convictions for simple possession of a controlled substance, to serve his sentence of sixteen to thirty-six months in a state correctional facility for his conviction of simple possession of a controlled substance was not illegal. Pacheco is on all fours with our decision to sentence Defendant to a state correctional institution, the location of confinement agreed upon by


⁶ Both from a practical and logical viewpoint, this discussion by the Superior Court implicitly comprehends that as a recidivist drug offender, the penalties Pacheco faced under Section 780-113(b) were vastly greater than those faced by an individual convicted not only of a misdemeanor of the third degree, but also to those faced by a person convicted of a misdemeanor of the second degree - two years and \$5,000.00 or both, 18 Pa.C.S.A. §106(a)(7) - for which a state sentence is not barred. In considering the enhanced penalty to be a first-degree misdemeanor, the Court cited to 18 Pa.C.S.A. §106(b)(6) (“A crime is a misdemeanor of the first degree if it is so designated in this title or if a person convicted thereof may be sentenced to a term of imprisonment, the maximum of which is not more than five years.”) (emphasis in original), a statute *in pari materia* with 18 Pa.C.S.A. §106(b)(8), (9).

Defendant as part of his stipulation, even if we had not run this sentence consecutive to his existing state sentence for a felony conviction.

CONCLUSION

To the extent Defendant challenges the legality of his sentence, for the reasons stated the sentence is legal. To the extent the Department of Corrections has or intimated it will not except custody of Defendant, we note first, that the Department of Corrections is not a party to this appeal and cannot be bound to our decision, and second, that to bind the Department of Corrections, Defendant would be better served by filing an action in which the Department would be bound, such as an action in mandamus or one for declaratory judgment.⁷

BY THE COURT:


_____ P.J.

⁷ Significant also is that as a state sentence we do not retain the authority to parole Defendant. Commonwealth v. Ford-Bey, 590 A.2d 782, 784 (Pa.Super. 1991).