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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	NO. CR-1105-2021
	:	CR-1318-2021
JOCELYN TIGLIO,	:	
Defendant	:	

Cynthia Ann Dyrda Hatton, Esquire — Counsel for Commonwealth
Assistant District Attorney

Adam R. Weaver, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – October 26, 2023

Defendant appeals our order dated August 14, 2023, denying her *pro se* Motion for Work Release filed on May 8, 2023, after the two orders dated December 9, 2022, each imposing a state sentence to be served in a state correctional institution, had become final, but for which the Pennsylvania Department of Corrections refused to accept Defendant's transfer to a state facility for incarceration.

PROCEDURAL AND FACTUAL BACKGROUND

On January 4, 2022, Defendant, Jocelyn Tiglio, pled guilty to two separate counts of simple possession of a controlled substance, 35 P.S. §780-113(a)(16), before the Honorable Joseph J. Matika of this court as part of her admission and participation in the County's drug treatment court program: simple possession of fentanyl in the case docketed to No. 1318-CR-2021 and simple possession of methamphetamine in the case

docketed to No. 1105-CR-2021. Prior to entering these pleas, Defendant had been convicted twice of possession of drug paraphernalia, 35 P.S. §780-113(a)(32), and multiple drug-related convictions. (N.T., 12/9/22, p. 19).

Before her sentencing on December 9, 2022, a pre-sentence investigation report ("PSI") was ordered. The report details the extent and severity of her addiction to controlled substances. She was born on November 23, 1994, and was twenty-six years of age on the date both offenses to which she pled guilty were committed. Defendant is single, never married, and has two children: a daughter, nine years of age, and a son, three years of age. (PSI, p. 7). The father of both of Defendant's children died of an overdose of fentanyl. (PSI, p. 7; N.T., 12/9/22, p. 18).

Defendant has been an addict since she was 14 years old. (PSI, p. 5). Her life since then has been consumed by drug usage. (PSI, p. 11). She's been in and out of approximately twenty rehabilitation facilities, but without the structure these facilities provide, upon discharge, is unable to refrain from drug usage. (PSI, pp. 9-10; N.T., 12/9/22, pp. 11, 16-17, 21-22).

In the case docketed to No. 1318-CR-2021, Defendant checked in to a rehabilitation facility on the evening of February 19, 2021, and brought with her twenty bags of fentanyl/heroin she had placed in the finger of a rubber glove she concealed in her vagina. She snorted ten bags throughout the night and when found intoxicated the next morning, the remaining ten bags were found on her person. In the case docketed to No. 1105-CR-2021, while serving an arrest warrant on Defendant at her mother's home

on August 30, 2021, Defendant was discovered in an attic hiding in a wooden chest. Defendant was found to have in her possession 4.87 grams of methamphetamine, two loaded syringes, two empty syringes, ten glassine baggies with fentanyl, one spoon with residue, and one clear baggie with soaked Q-tip cotton balls.

When Defendant was admitted into the County's drug treatment court on January 4, 2022, this was the last option realistically available to Defendant within the County to address her substance abuse issues which are further complicated by co-existing mental health problems. Defendant has been diagnosed with anxiety, attention deficit/hyperactivity disorder, and being Bipolar. (PSI, pp. 10-11). While in the County drug treatment program Defendant spent ninety days in in-patient treatment at the Malibu Wellness Ranch between January 5 and April 4, 2022, and an additional 30 days in in-patient treatment at Pyramid Duncansville between June 8 and July 6, 2022. Ultimately, due to Defendant's failure to appear at treatment court status conferences, multiple missed urinalysis tests, failure to complete sanctions, unsuccessful discharge from the Carbon Monroe Pike Drug and Alcohol program, and failure to maintain contact with Adult Probation, Defendant was discharged from the County's drug treatment program on September 19, 2022, and scheduled for sentencing.

On December 9, 2022, Defendant was sentenced in both cases. In the case docketed to No. 1105-CR-2021, she was sentenced to a period of imprisonment of not less than one year less one day, nor more than three years to be served in a state correctional institution. In the case docketed to No. 1318-CR-2021, she was sentenced

to a period of imprisonment of no less than six months nor more than two years in a state correctional institution, consecutive to the sentence imposed in 1105-CR-2021[1]. Defendant's aggregate sentence was no less than one and half years less one day nor more than five years. Both sentences made Defendant RRRI eligible[2] and not ineligible for the State Drug Treatment Program.[3] Both sentences were within the standard guideline range. At the time of sentencing, the court noted that Defendant had exhausted all potential resources and options at the county level, that the state had resources not available to the county to address Defendant's drug and mental health issues, and that by making Defendant not ineligible for the State Drug Treatment Program, it was the court's hope and intent that she receive the benefit of this Program and, if successfully completed, complete her sentence in two years, rather than five years. See 61 Pa.C.S.A. §4105(b) (Duration and components) (setting the duration of the State Drug Treatment Program at two years). (N.T., 12/9/22, pp. 26-27, 36; N.T., 1/9/23, pp. 6-7, 25; N.T., 3/2/23, pp. 10, 12-13, 25-26).

On December 18, 2022, Defendant filed a Motion to Reconsider her Sentences and a supplement to this Motion on January 10, 2023. The primary focus of these motions was the Pennsylvania Department of Corrections' rejection of Defendant's transfer to a

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[1] As a second or subsequent offender under 35 P.S. §780-113(a) whose prior convictions had become final, Defendant was subject to maximum penalties of imprisonment not exceeding three years or a fine not exceeding $25,000, or both, for each of these convictions. See 35 P.S. §780-113(b).

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

[3] 61 Pa.C.S.A. §§4101-4109.

state facility which acknowledged that her sentences met the jurisdictional threshold for length - two years or greater[4] – but claimed the grading requirement of 42 Pa.C.S.A. §9762(i) was not met because the underlying convictions on which she was sentenced were not misdemeanors of the second degree or higher. (See Exhibit "A" to Defendant's Supplemental Motion (Response of Denise Wood, Records Administrator, Department of Corrections, dated January 10, 2023, to Attorney Weaver confirming the Department of Corrections' refusal to accept Defendant into a state correctional institution)). In this same Response of Ms. Wood to Attorney Weaver, she mentioned the possibility of the County applying for a 5B Transfer (see 61 Pa.C.S.A. §1151(a)), which was applied for by the Carbon County Correctional Facility's Warden, James E. Youngkin, but disapproved on February 2, 2023, by Randall S. Perry, Specialized Program Referral Manager, Office of Population Management of the Department of Corrections, without explanation. (See Defendant's Motion to Reconsider the August 14, 2023, Court Order, Exhibit "B").

Following hearings held on January 9, 2023, and March 2, 2023, on Defendant's Motion to Reconsider Sentences and supplement to that Motion, Defendant's Motion to Reconsider Sentences and Supplement were denied by order dated March 2, 2023. The order advised Defendant of her right to appeal to the Pennsylvania Superior Court and contained the notice and information required by Pa.R.Crim.P. 720(B)(4). No appeal was filed.

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[4] See 42 Pa.C.S.A. §9762(b).

On May 8, 2023, Defendant filed a *pro se* Motion for Work Release. Before acting on this request, the court noted that the parties needed to brief the issue whether the court had jurisdiction to grant Defendant's request or whether this must be approved by the State Probation and Parole Board. Defense counsel filed a legal memorandum on May 12, 2023, referring to Ms. Wood's note of January 10, 2023, and her belief that "[i]f the county chooses to keep [Defendant] and not apply for a 5B transfer, the county Judge retains jurisdiction over the sentence." In essence, the entirety of Defendant's argument that this court retains the authority to grant Defendant work-release and ultimately to parole her sometime in the future is that because the Pennsylvania Department of Corrections rejected Defendant's transfer to a state correctional institution pursuant to 42 Pa.C.S.A. §9761(i), Defendant remains subject to county jurisdiction by virtue of being a Carbon County Correctional inmate by default. (See Defendant's legal memorandum in support of Defendant's *pro se* Motion to Consider Work Release, p.3).

On August 10, 2023, the Commonwealth filed its opposition to Defendant's Motion for Work Release, and on August 14, 2023, the court entered an order denying the request. In that order which is the subject of the instant appeal, we noted our belief that the aggregate sentence of one and a half (less one day) to five years' imprisonment in a state correctional facility imposed on December 9, 2022, was properly classified as a state sentence and should be served in a state correctional facility and that, consequently, we had no jurisdiction to grant Defendant's Motion for Work Release. This order further cited to the Superior Court's non-precedential decision in Commonwealth v. Pacheco, 289 A.3d

77 (Pa.Super. 2022), wherein the Court held that Pacheco's sentence of sixteen to thirty-six months' incarceration in a state correctional facility for conviction of one count of possession of a controlled substance, an ungraded misdemeanor, was not illegal and affirmed the judgment of sentence imposed by the trial court.

On August 23, 2023, Defendant filed a Motion to Reconsider our August 14, 2023, order denying her request for work release for the reason that we lacked jurisdiction to grant her work release, furlough or parole. That Motion was denied by order dated August 29, 2023.

On August 30, 2023, Defendant filed an appeal from the order of August 14, 2023, denying her *pro se* Motion for Work Release, and the order dated August 29, 2023, denying her Motion to Reconsider the August 14, 2023 order. By order dated September 5, 2023, we directed Defendant to file a concise statement of the errors complained of on appeal within twenty-one days of the entry of that order. Defendant's Concise Statement was timely filed on September 6, 2023. Therein, the Defendant raises one issue on appeal: that "the Trial Court erred in determining that it lacked jurisdiction to either grant the Defendant work release, to furlough her, and/or to parole the Defendant out of the Carbon County Correctional Facility ("CCCF") when the Pennsylvania Department of Corrections (the "DOC") administratively rejected the DC-5B Transfer request of the CCCF to transfer the Defendant to the DOC to serve her 1.5 to 5 year state prison Sentence at the State Correctional Institute ("SCI") on two ungraded misdemeanor possession counts and now the Defendant remains at the CCCF to serve the remainder

of her aforesaid Sentence due to the DOC's rejection of the prison transfer from county jail to state jail." (Issue as phrased by Defendant).

DISCUSSION

The simple and easy answer to Defendant's appeal of our order denying Defendant work-release is that notwithstanding the Department of Corrections' refusal to accept custody of Defendant, and, in consequence, Defendant remaining in the County prison by default, because the sentence we imposed in the aggregate is not less than five years, we do not have the statutory authority to grant Defendant work-release. Specifically, Section 9813(a) of the County Intermediate Punishment Act provides:

> § 9813. Work release or other court order and purposes
> (a) Generally. - Notwithstanding any provision of law, if any offender has been sentenced to undergo imprisonment in a county jail for a term of less than five years, the court, at the time of sentence or at any time thereafter upon application made in accordance with this section, may enter an order making the offender eligible to leave the jail during necessary and reasonable hours for the purpose of working at his employment, conducting his own business or other self-employed occupation, including housekeeping and attending to the needs of family, seeking employment, attending an educational institution, securing medical treatment or for other lawful purposes as the court shall consider necessary and appropriate.

42 Pa.C.S.A. §9813(a).

Beyond this "simple" answer, the problem with Defendant's appeal is even more fundamental. Defendant apparently believes that the aggregate sentence we imposed is illegal, not because of the length of the sentence-five years or more-but because of the place of confinement to which Defendant was committed, a State Correctional Institution, relying on the Department of Corrections' refusal to accept Defendant's transfer to a State

Correctional Institution because of the limitation imposed by 42 Pa.C.S.A. §9762(i). We disagree with the Department of Corrections' interpretation of Section 9762(i), but, even if we are incorrect in this belief and the sentences imposed are illegal because of the location to which we committed Defendant, Defendant has failed to timely appeal the final judgments of the two sentences imposed. See Commonwealth v. Concordia, 97 A.3d 366 (Pa.Super. 2014) (holding that a sentencing court lacks jurisdiction to correct an illegal sentence after the judgment of sentence is final under 42 Pa.C.S.A. §5505 and a timely PCRA petition challenging the legality of the sentence has not been filed), appeal denied, 125 A.3d 775 (Pa. 2015); Commonwealth v. Whiteman, 204 A.3d 448 (Pa.Super. 2019) (same) (holding the Court was unable to address the merits of defendant's argument that the sentence imposed was illegal as being greater than the maximum term of imprisonment allowable by law), appeal denied, 216 A.3d 1028 (Pa. 2019). Consequently, these sentences are final and binding upon Defendant in accordance with their terms. As written, the sentences are state sentences to be served in a state facility, and were so intended.

The Department's position that because it did not accept Defendant's transfer to a state facility, the sentences are somehow converted to county sentences no longer subject to the Department's supervision is incorrect. Section 9762(b)(1) of the Sentencing Code mandates that "maximum terms of five or more years *shall* be committed to the Department of Corrections for confinement." 42 Pa.C.S.A. §9762(b)(1) (emphasis added). See also 61 Pa.C.S.A. §6132(a)(1)(i) (granting exclusive power to the

Department to parole all persons *sentenced* to imprisonment in a state correctional facility). Defendant was sentenced to serve her sentences in a state facility, which is where she in fact should be but for the Department of Corrections' refusal to accept her transfer from the County prison to a state correctional institution.

The elephant in the room, and one which we agree needs to be addressed at some point, is that the Department has administratively refused to accept Defendant's transfer to a state facility. In doing so, the Department cites to Section 9762(i) of the Sentencing Code. This Section, in conjunction with Section 9762(j) which is inextricably part and parcel of the application of Section 9762(i), provides 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:
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> (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).

The only case of which we are aware which deals with the same offense of which Defendant was convicted, a violation of Section 780-113(a)(16) of the Controlled Substance, Drug, Device, and Cosmetic Act (i.e., simple possession) subsequent to a prior conviction for violating Section 780-113(a), and the imposition of a state sentence in a state facility for a conviction thereof, is Commonwealth v. Pacheco, 289 A.3d 77

(Pa.Super. 2022) (Non-Precedential Decision). In upholding the legality of Pacheco's sentence of sixteen to thirty-six months to be served in a state facility, 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:
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> > (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.[5] Accordingly, the Pacheco Court held that the trial court's order requiring Pacheco, who, like Defendant here, had multiple prior convictions under Section 780-113, 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. Not only does Pacheco refute the Department's position, but, if anything, the aggregate sentence of five years imposed on Defendant speaks even louder for the place of confinement to be in a state facility than it did in Pacheco: Pacheco's sentence of sixteen to thirty-six months fell within the ambit of Section 9762(b)(2) of the Sentencing Code, whereas Defendant's aggregate sentence of five years is controlled by Section 9762(b)(1).[6]

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[5] 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), 1101 - 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). See 1 Pa.C.S.A. §1932 (providing that "statutes in *pari materia shall* be construed together, if possible, as one statute") (emphasis added).

[6] Section 9762(b) of the Sentencing Code provides in its entirety as follows:

> **(b) Sentences or terms of incarceration imposed after a certain date.**-All persons sentenced three or more years after the effective date of this subsection to total or partial confinement shall be committed as follows:
>
> (1) Maximum terms of five or more years shall be committed to the Department of Corrections for confinement.
>
> (2) Maximum terms of two years or more but less than five years shall be committed to the Department of Corrections for confinement, except upon a finding of all of the following:
>
> > (i) The chief administrator of the county prison, or the administrator's designee, has certified that the county prison is available for commitment of persons sentenced to maximum terms of two or more years but less than five years.

CONCLUSION

To the extent Defendant challenges the legality of her underlying sentences - which are final judgments of sentence and cannot be collaterally attacked on appeal in these proceedings – for the reasons stated the sentences are legal and binding on Defendant. To the extent the Department of Corrections has refused to accept the transfer of Defendant to a state facility to serve her sentence, we note first that as to the specific issue raised on appeal by Defendant – that we erred in denying her request for county work release - this is irrelevant under 42 Pa.C.S.A. §9813(a) given that Defendant received an aggregate sentence of five years. To the extent the Department's refusal to accept custody of a defendant sentenced to a state correctional facility for a maximum term of five years or more simply because the convictions involve ungraded misdemeanors, regardless of the maximum statutory allowable term of imprisonment applicable to each such conviction, needs to be addressed and should be addressed, we are also cognizant of the fact that the Department of Corrections is not a party to this appeal and cannot be bound to our decision and that to bind the Department on the

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(ii) The attorney for the Commonwealth has consented to the confinement of the person to the county prison.

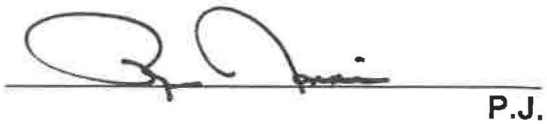
(iii) The sentencing court has approved the confinement of the person in the county prison within the jurisdiction of the court.

(3) Maximum terms of less than two years shall be committed to a county prison within the jurisdiction of the court.

42 Pa.C.S.A. §9762(b).

underlying issue of where Defendant should be confined, 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] Unfortunately, because it appears Defendant wants to avoid being committed to a state facility, even though this presents the possibility of completing her sentence in two years if she is able to gain admission into the State Drug Treatment Program and successfully completes the Program, as well as the greater resources available to Defendant at the state level to address her substance abuse and mental health issues, this is unlikely to occur. (N.T., 1/9/23, pp. 27-28; N.T., 3/2/23, pp. 9-11, 19-20, 22-23, 26-27, 31). This of course does not prevent the Commonwealth from commencing such an action or other appropriate proceeding to address the question of Defendant's placement and supervision.