

FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to an information filed on December 14, 2011, Defendant was charged with one (1) count of Robbery³, one (1) count of Criminal Conspiracy, one (1) count of Simple Assault, one (1) count of Theft by Unlawful Taking⁴ and one (1) count of Receiving Stolen Property⁵. The offenses arose from an incident that occurred in the Borough of Lehigh on October 23, 2011. On that date, Defendant, along with another individual, Dietrik Hosier, approached the victim, Damian Smith. The Defendant and Hosier inquired whether Smith was selling anything. Thereafter, Neff, Hosier and Smith went to a nearby parking lot where Defendant struck Smith and otherwise acted in furtherance of a conspiracy to commit robbery against Smith.

On November 28, 2011, Defendant entered into a stipulation whereby he agreed to plead guilty to Counts 2 and 3, Criminal Conspiracy and Simple Assault, respectively, and the remaining charges would be dismissed. On January 31, 2012, this Court sentenced Defendant to periods of imprisonment of six (6) to twenty-four (24) months on the Simple Assault charge and eighteen (18) to thirty-six (36) months on the Criminal Conspiracy charge, with the sentences to run consecutively.

³ 18 Pa. Cons. Stat. Ann. § 3701 (a) (1) (v).

⁴ 18 Pa. Cons. Stat. Ann. § 3921 (a)

⁵ 18 Pa. Cons. Stat. Ann. § 3925 (a)

On February 8, 2012, Defendant filed a "Motion for Post Sentence Relief" requesting that our sentencing order of January 31, 2012 be vacated and that Defendant's sentences be ordered to run concurrently, on the grounds that Simple Assault and Criminal Conspiracy merge for sentencing purposes under Pennsylvania law. Following oral argument thereon and upon consideration of the briefs of counsel, we denied Defendant's motion on May 17, 2012. This appeal resulted.

DISCUSSION

Our Supreme Court has held that the principle of merger prevents double punishment for a lesser offense when it is a necessary component of the greater offense for which the Defendant has also been indicted, convicted or punished. Commonwealth v. McCusker, 363 Pa. 450, 70 A.2d 273 (1950).

The rule governing merger of offenses for the purposes of sentencing under Pennsylvania law is as follows:

No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense. 42 Pa. Cons. Stat. Ann. § 9765.

Thus, the appropriate analysis in determining whether two offenses should merge for sentencing is first, whether the offenses each arise from a single act, and second, whether one offense includes each of the statutory elements of the other.

The proper focus with respect to the first inquiry is whether the actor "commits multiple criminal acts beyond that which is necessary to establish the bare elements of the additional crime." Commonwealth v. Yeomans, 24 A.3d 1044 (Pa. Super. 2011). If the actor does commit multiple criminal acts, rather than the single criminal act required for merger, the doctrine does not apply. Commonwealth v. Robinson, 931 A.2d 15, 24 (Pa. Super. 2007).

With respect to the second inquiry, the Pennsylvania Supreme Court has held that "The true test of whether one criminal offence has merged in another is not (as is sometimes stated) whether the two criminal acts are 'successive steps in the same transaction' but it is whether one crime *necessarily involves* another." Commonwealth ex rel. Moszczynski v. Ashe, 343 Pa. 102, 104, 21 A.2d 920, 921 (1941) (emphasis in original). We must ask "whether the elements of the lesser crime are all included within the elements of the greater crime, and the greater offense includes at least one additional element which is different, in which case the sentences merge, or whether both crimes require proof of at least one element which the other does not, in which case the sentences do not merge." Commonwealth v. Anderson, 538 Pa. 574, 582, 650 A.2d 20, 24 (1994).

The crime of conspiracy does not merge into the completed offense that is the subject of the conspiracy. Commonwealth ex rel. Perry v. Day, 121 A.2d 904 (Pa. Super. 1956). The law considers conspiracy and the completed offense to be separate crimes. Commonwealth v. Miller, 364 A.2d 886, 886-87 (Pa. 1976).

The application of these principles to Defendant's case is straightforward. Defendant pled guilty to, and was sentenced on, one count of Criminal Conspiracy and one count of Simple Assault. Criminal Conspiracy is defined as follows:

A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 Pa. Cons. Stat. Ann. § 903.

A person commits Simple Assault, meanwhile, when he attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another. 18 Pa. Cons. Stat. Ann. § 2701 (a) (1).

Clearly, each of the offenses of which Defendant was convicted contains an element that the other does not. Conspiracy requires an agreement, and Simple Assault does not.

Conversely, Simple Assault requires attempted or actual bodily injury to another, and Criminal Conspiracy does not. In fact, the two offenses do not share any element. Defendant's argument seems to be that, because Defendant engaged in an assault as the required act in furtherance of the conspiracy, because the underlying crime with regard to the conspiracy was robbery, and because assault is a lesser included offense as to robbery, the assault was a lesser included offense of a conspiracy to commit robbery. This is an inaccurate statement of the law. Firstly, that Defendant did in fact commit an assault during the commission of a conspiracy does not support the argument that a conspiracy necessarily includes an assault. Secondly, whether or not an assault offense would merge with a robbery offense is immaterial, as in this case Defendant was sentenced for the conspiracy charge, not a robbery charge. As discussed hereinabove, Criminal Conspiracy constitutes a separate offense from the offense underlying the conspiracy, and merger does not pass from the offense to the conspiracy charge.

Defendant pled guilty to the separate offenses of Simple Assault and Criminal Conspiracy. Each offense contains at least one element that the other does not. As a result, the doctrine of merger does not apply and consecutive sentences were appropriate.

CONCLUSION

Based upon the foregoing, we submit that the offenses for which Defendant was sentenced do not merge, and respectfully recommend that our Order of Sentence dated January 31, 2012 and our Order of Court dated May 17, 2012 denying Defendant's "Motion for Post Sentence Relief" be affirmed.

BY THE COURT:

Steven R. Serfass, J.