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IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PHILADELPHIA

EDA 2018 NO. 1278

COMMONWEALTH OF PENNSYLVANIA

V.

JOHN BLOUNT, APPELLANT

REPLY BRIEF OF APPELLANT

Appeal from the March 26, 2018 Judgment of Sentence
in the Court of Common Pleas, Philadelphia County,
Docket CP-51-CR-0124901-1990.

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I. STATEMENT OF THE CASE

This matter comes before this Court following a timely filed appeal. Appellant John Blount filed his principal brief on October 15, 2018 and the Commonwealth filed its brief as appellee on January 14, 2019. Appellant sought and received an extension of time until February 28, 2019, in which to file his reply brief and now timely files this reply brief.

Appellant relies upon the Statement of the Case in his original brief.

II. SUMMARY OF THE ARGUMENT

The parties had agreed upon a sentence of 29 years to life in this resentencing required by Miller v. Alabama, 567 U.S. 460 (2012). Near the conclusion of the sentencing hearing, Judge McDermott suggested for the first time that she may not accept that disposition. Defense counsel immediately moved for recusal. Counsel advanced three arguments demonstrating that recusal was required. Judge McDermott had agreed in four other juvenile lifer resentencing cases that she would grant recusal if she did not accept the agreed upon disposition. The Commonwealth on appeal did not respond to this argument. Counsel also demonstrated that the court rules set up by the First Judicial District for the resentencing of juveniles required that the sentencing judge impose the agreed upon disposition. The Commonwealth did not respond to this argument. Instead the Commonwealth suggested that the trial judge retained the discretion to impose or not impose the agreed upon disposition. While true, that does not answer the question of whether the judge must grant recusal if the judge is not going to impose the agreed upon disposition.

At sentencing Judge McDermott explicitly relied upon two "facts" that not only were unsupported by the record, they were simply false. Without any evidence, Judge McDermott concluded that Mr. Blount's projected lifespan was into his 90s. However, studies have demonstrated that incarcerated people lose an average of two

years of life expectancy for each year of incarceration. The Commonwealth suggests that this error was harmless because Judge McDermott did not impose consecutive sentences. However, by her sentence Judge McDermott suggested that she intended that Mr. Blount have maybe four decades for freedom after release. By erroneously concluding that he would live into his 90s, Mr. Blount was indeed prejudiced by Judge McDermott's sentence.

Judge McDermott also concluded that Mr. Blount had desecrated the bodies of the decedents. However, the record presented by the Commonwealth at the resentencing hearing and agreed to by the Commonwealth on appeal demonstrated only that after the murders Mr. Blount moved the bodies to a pit in the garage and later paid two people to remove the bodies. There was no evidence that he had desecrated the bodies.

III. ARGUMENT

1. THE SENTENCING COURT ERRED BY DENYING A RECUSAL MOTION WHERE THAT COURT DECLINED TO FOLLOW THE NEGOTIATED SENTENCE AGREED UPON BY THE COMMONWEALTH AND THE DEFENSE.

The prosecutor, defense counsel and John Blount all agreed that Mr. Blount should be resentenced to 29 years to life. Unexpectedly Judge McDermott refused to impose the negotiated sentence. It was error for her to have denied counsel's motion for recusal. In four unrelated juvenile lifer resentencing cases, Judge McDermott explained that she would recuse herself if she refused to accept the recommended sentence. These facts are ignored by the Commonwealth on appeal. The Philadelphia Court Rules that established the procedures for juvenile lifer resentencings required that the judge impose the recommended negotiated sentence. This was also ignored by the Commonwealth. It is only this third basis for relief, the requirement of recusal, that the Commonwealth addressed. The Commonwealth's argument, however, is unavailing as well established law and procedure required that Judge McDermott recuse herself. This Court should, therefore, reverse Mr. Blount's sentence and remand the matter for a new sentencing hearing before a different judge.

At the conclusion of the sentencing hearing but prior to the imposition of sentence, Judge McDermott indicated that she did not intend on imposing the

sentence agreed upon by the parties. Counsel immediately moved for recusal (N.T. 3/26/18, 92). Counsel's motion was denied and Judge McDermott imposed two concurrent sentences of 35 years to life, six years greater than the agreed upon negotiated sentence (N.T. 3/26/18, 92).

Appellant in his brief discussed four specific cases where Judge McDermott was explicit and said that "if for some reason I would not accept the agreement, you would be able to withdraw your decision and go to another judge."[1] Brief for Appellant at 22-23. Judge McDermott was unequivocal in those case: she explained that if she refused to accept the negotiated sentence, those defendants would go before another judge. Judge McDermott provided no explanation for her refusal to follow this rule in Mr. Blount's case and the Commonwealth advances no explanation in this Court. To not follow that process in Mr. Blount's case deprived him of due process of law and equal protection under the Federal Constitution and the parallel provisions under the Pennsylvania Constitution. U.S.CONST., Amend. XIV;

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[1] This quotation is from Commonwealth v. Carrero, N.T. 1/18/18, 9-10, but Judge McDermott was just as explicit in the other cases. Commonwealth v. Berry: "If for some reason I would not accept the recommendation, you could go to another judge." (N.T. 2/12/18, 10); Commonwealth v. Lyew: "So if for some reason I was not to accept this recommended sentence, then you would go to another judge." (N.T. 2/21/18, 18); Commonwealth v. Little: "[I]f I wasn't going to accept [the negotiated sentence], you would have the right to go back to 1105 [the homicide calendar courtroom], and then you might be able to go to another judge." (N.T. 1/17/18, 12-13).

PA.CONST., Art. 1, Sec. 1, 9.

The Commonwealth similarly failed to respond to a second argument that demonstrated that Judge McDermott erred in denying the recusal motion when she refused to follow the sentencing recommendation of the parties. The First Judicial District had by General Court Regulation set up the governing procedures for resentencing juvenile lifers. These Rules require that, "Should negotiations result in a stipulation addressing all issues prior to the resentencing hearing, the case shall be slated forthwith for immediate disposition before the assigned presiding judge." General Court Regulation No. 1 of 2016, 4c. While Judge McDermott correctly notes that she is not obligated to impose the negotiated sentence, that does not address the question of whether she should recuse herself should she be disinclined to impose that sentence. The Rules, by requiring immediate disposition where the parties agree on a negotiated sentence, do not permit a judge to impose a greater sentence than that agreed upon by the parties.

The Commonwealth did respond to a third basis demonstrating that Judge McDermott should have recused herself. Appellant contended that Pennsylvania law and procedure establishes a strong preference for resolution of criminal cases by a negotiated plea and sentence. Brief for Appellant at 18-20. The Commonwealth is correct that one of the cases cited in support of this argument, Commonwealth v.

Evans, 434 Pa. 52, 252 A.2d 689 (1969) (Brief for Appellant at 20; Brief for the Commonwealth as Appellee at 8) did not deal with the issue of a judge rejecting a sentencing recommendation. It dealt with a judge who had participated in the plea negotiations. However, the Supreme Court in Evans supported the proposition presented here: that it is advantageous to the criminal justice system that cases be resolved by a negotiated sentence. The entire criminal justice system would break down without such a preference because the system does not have the resources were each case to require a trial and separate sentencing hearing. It is this principle that was violated by Judge McDermott's denial of a recusal motion following her refusal to follow the negotiated sentence recommendation.

The Commonwealth, defense for Mr. Blount and Mr. Blount had all agreed upon a negotiated sentence of 29 years to life. While Judge McDermott did not have to accept the negotiated sentence, if she refused to accept the sentence it was incumbent upon her to grant a recusal motion. She had explicitly said that would be the rule she would follow in four other specific cases that preceded Mr. Blount's sentencing. Moreover, the First Judicial District's governing juvenile lifer regulations similarly require a judge to impose the negotiated sentence. Lastly, Pennsylvania law and procedure strong encourage negotiated pleas and sentences to resolve criminal matters. This Court should reverse the instant sentence and remand

the matter for a new sentencing hearing before a different judge.

2. IT WAS AN ABUSE OF DISCRETION FOR THE SENTENCING COURT TO CONSIDER IN FASHIONING HER SENTENCE TWO "FACTS" THAT WERE PALPABLY FALSE: THAT JOHN BLOUNT HAD DESECRATED THE BODIES OF THE MURDERED VICTIMS AND THAT JOHN BLOUNT HAD A EXPECTED LIFESPAN OF 90 YEARS.

"If a sentencing court considers improper factors in imposing sentence upon a defendant, although the sentence thereby imposed is not rendered illegal, the court has committed an abuse of discretion. Commonwealth v. Archer, 722 A.2d 203, 210 (Pa.Super., 1998) *(en banc)*." Commonwealth v. McAfee, 849 A.2d 270, 274 (Pa. Super., 2004). At sentencing the judge committed precisely this error. The judge declared that Mr. Blout had "desecrated" the bodies of the murder victims and that his life expectancy was into his 90s. Neither are factually correct and for this reason this Court should remand for resentencing.

The Commonwealth and Mr. Blount agreed on the facts in this case: John Blount was 17 years old when he shot and killed the two victims. "He moved the bodies with the help of his stepfather to a pit in the house's garage and cleaned the blood from the bedroom. He hired someone to move the victim's bodies out of the

garage, and they were left in a Philadelphia street wrapped in a tarp." Brief for the Commonwealth as Appellee at 2. Those were the facts presented to the judge at sentencing (N.T. 3/26/18, 8-9). However, the sentencing judge was clear that she relied upon other matters in sentencing: "I was pretty upset with the level of what I believe is sophistication and the additional pain you put the families through by hiding the bodies and then desecrating the bodies." (N.T. 3/26/18, 85).

There was no evidence that there had been any desecration of the bodies and the Commonwealth in this Court does not contend that there was. Rather the Commonwealth notes that Mr. Blount had been found guilty of abuse of corpse. Brief for the Commonwealth as Appellee at 11. Abuse of corpse requires only "treat[ing] a corpse in a way that . . . would outrage ordinary family sensibilities." 18 Pa.C.S.A. § 5510. Merely concealing a corpse is sufficient to constitute abuse of corpse, Commonwealth v. Smith, 389 Pa.Super. 606, 567 A.2d 1070 (1989), *appeal denied*, 526 Pa. 648, 585 A.2d 468 (1990), and here Mr. Blount and his stepfather placed the bodies in a pit in the garage and then paid someone to remove the bodies. "Desecration" would require some act upon the body itself, such as mutilation or dismemberment[2]. That did not occur here and for the sentencing judge to rely upon

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[2] *Cf.* Desecration of Flag, 18 Pa. C.S.A. § 2102:

(a) Offense defined.--A person is guilty of a misdemeanor of the third

continue...

that at sentencing was error.

It was similarly error for the judge to assert that Mr. Blount would likely live into his 90s. Judge McDermott discussed the impact of a 35 year to life sentence upon Mr. Blout who was 17 at the time of the crime. A 35 year to life sentence would make him eligible for parole at the age of 52. Judge McDermott suggested that while some might consider such a sentence a little too much, "the Court recognizes that a life expectancy is in the 90s these days" (N.T. 3/26/18, 13). Apparently, Judge McDermott thought than an appropriate sentence would be one that would give Mr. Blount about forty years of freedom after being paroled, i.e., being paroled at the age of 52 and living into his 90s.

In this Court the Commonwealth does not challenge the statistics that demonstrate that prisoners lose an average of two years of life expectancy for each year of incarceration. Brief for Appellant at 27. This would mean that a 17 year old serving 35 years in prison (and being 52 upon release) would be equivalent to a non-incarcerated 17 year old living for 70 years (and being 87).

Instead of challenging the data, the Commonwealth suggests that because the

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[2]...continue

degree if, in any manner, he:

. . .

(4) publicly or privately mutilates, defaces, defiles, or tramples upon, or casts contempt in any manner upon any flag.

judge did not impose two consecutive 35 years to life sentences, her comments about people living into their 90s was "irrelevant to her ultimate decision." Brief for the Commonwealth as Appellee at 13. How that is irrelevant is never explained by the Commonwealth. Rather, it is clear that Judge McDermott thought that because Mr. Blount would live into his 90s, he would have maybe four decades of life if he was released from prison at the age of 52.[3] Rather than "irrelevant" musings about lifespan, Judge McDermott relied on facts *de hors* the record regarding lifespan, facts that are plainly false.

While a judge at sentencing can take a wide variety of factors into account in determining a sentence, and Judge McDermott did, the judge cannot consider improper factors. And Judge McDermott did: she considered that Mr. Blount had "desecrated" the bodies when he had moved the bodies to a pit in the garage and then paid others to remove the bodies. The judge also considered that Mr. Blount would

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[3] Judge McDermott in her written opinion does not challenge the facts that at sentencing she considered that Mr. Blount would live into his 90s. Rather, she contends that no prejudice had been demonstrated. Opinion of McDermott, J. at 11. That she determined that if she imposed a sentence of 35 years to life, Mr. Blount would statistically have about 40 years of freedom during his remaining life is precisely that prejudice because, statistically Mr. Blount would have very little lifespan remaining if he was paroled at 52 years of age. This is because at 52 it would be as if he were 87, having aged two years for each year of incarceration. Judge McDermott never challenged those facts except to note that the Michigan study of juvenile lifers that found their lifespan to be 50.6 years had not led to a parallel Pennsylvania study. See Opinion of McDermott, J. at 11, fn. 8.

live into his 90s without any evidence to support it and what evidence exists is to the contrary. This Court should remand the matter for a new sentencing hearing.

3. THE SENTENCING COURT VIOLATED MILLER V. ALABAMA, 567 U.S. 460 (2012) AND THE 8TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FOCUSING ENTIRELY UPON THE FACTS OF THE INSTANT HOMICIDE RATHER THAN FULLY CONSIDERING THE REHABILITATION, GROWTH AND REMORSE THAT JOHN BLOUNT HAD DEMONSTRATED DURING HIS 28½ YEARS OF INCARCERATION.

The Commonwealth agrees with John Blount that he had demonstrated that he was rehabilitated and it was for that reason that the Commonwealth recommended a sentence of 29 years to life (Brief for the Commonwealth as Appellee at 15). The Commonwealth in this Court does not advance a legal justification for a judge to impose a new sentence six years greater that would be necessary upon a juvenile lifer who had demonstrated complete rehabilitation. Appellant contends that the resentencing judge was overwhelmed by the facts of the instant case[4] and imposition of a sentence beyond that necessary to prove rehabilitation would be unconstitutional.

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[4] Alternatively, rather than being improperly overwhelmed by the facts of the case, the sentencing judge could have improperly considered factors that were factually incorrect. See Argument II, *supra.* Either way, resentencing is required.

This Court should, therefore, remand for a new resentencing hearing.

4. THE SENTENCING COURT ERRED BY IMPOSING AN EXCESSIVE SENTENCE WHERE EVEN THE SENTENCING COURT AGREED THAT THE EVIDENCE ESTABLISHED THAT JOHN BLOUNT HAD, DURING HIS 28½ YEARS OF INCARCERATION, DEMONSTRATED THAT HE WAS FULLY REHABILITATED.

The sentencing judge and the prosecutor agreed that John Blount had demonstrated remorse, growth and complete rehabilitation during his 28½ years of incarceration. As Judge McDermott explained: "I will agree that he's demonstrated rehabilitation. I thought I made it clear and part of the reason is because I do appreciate the efforts he's made in prison" (N.T. 4/26/18, 26-27). She further noted that Mr. Blount "has done everything that's expected of him and beyond" (N.T. 4/26/18, 27). There was no additional purpose to be served by requiring an additional six years of incarceration. The record, therefore, demonstrates that the instant sentence was excessive.

It is contended that part of the reason the judge imposed an excessive sentence was because she improperly considered as facts matters that were not factually correct: that Mr. Blount would live to his 90s and that he had desecrated the bodies.

See Brief for Appellant at 35-37. On appeal the Commonwealth only contends that the judge had the discretion to impose the sentence and had the authority to weigh the factors differently than the parties. While that proposition is true, judges legally abuse their sentencing discretion by considering as "facts" matters that are not factually correct. "If a sentencing court considers improper factors in imposing sentence upon a defendant, although the sentence thereby imposed is not rendered illegal, the court has committed an abuse of discretion. Commonwealth v. Archer, 722 A.2d 203, 210 (Pa.Super., 1998) *(en banc)*." Commonwealth v. McAfee, 849 A.2d 270, 274 (Pa. Super., 2004) (See Argument II, *supra)*.

It was an abuse of discretion for Judge McDermott to impose a sentence that would require John Blount to serve an additional 6 years of incarceration before even being eligible for parole. All parties agreed that he was fully rehabilitated. This Court should vacate his sentence and remand for a new sentencing hearing.

5. IN 1994 JOHN BLOUNT WAS ILLEGALLY SENTENCED TO MANDATORY LIFE WITHOUT PAROLE AND IN 2018 AT HIS RESENTENCING HE WAS ILLEGALLY SENTENCED TO A MANDATORY LIFETIME PAROLE TAIL SENTENCE AND MUST BE GIVEN A NEW SENTENCING HEARING .

Judge McDermott determined that she was required to impose a mandatory lifetime parole tail at sentencing. See Opinion of McDermott, J. at 12. The Commonwealth further agrees that a mandatory lifetime parole tail is unconstitutional. See Brief for the Commonwealth as Appellee at 19. This Court should remand for a new resentencing hearing where the judge would have the discretion to impose an appropriate maximum sentence.

IV. CONCLUSION

This Honorable Court should vacate John Blount's sentences and remand the instant matter for resentencing.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATION OF COMPLIANCE WITH RULE 2135

I do hereby certify on this 27th day of February, 2019, that the Reply Brief For Appellant filed in the above captioned case on this day does not exceed 7,000 words. Using the word processor used to prepare this document, the word count is 3,180 as counted by WordPerfect.

Respectfully submitted,

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