

IN THE SUPERIOR COURT OF PENNSYLVANIA

SITTING AT PITTSBURGH

1306 WDA 2023

**COMMONWEALTH OF PENNSYLVANIA,
APPELLEE**

VS.

**MICHAEL PAUL FOUST,
APPELLANT**

BRIEF FOR APPELLEE

**Appeal from the final Order of October 10, 2023 denying PCRA
petition in the Venango County Court of Common Pleas, Criminal
Docket 0679-1993**

The Honorable Robert L. Boyer presiding

**D. SHAWN WHITE
DISTRICT ATTORNEY
VENANGO COUNTY COURTHOUSE
FRANKLIN, PA 16323
(814) 432-9598
ID 48924**

TABLE OF CONTENTS

	Page #
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii - iii
SUMMARY OF ARGUMENT	1-2
COUNTER STATEMENT/ARGUMENT	7-11
CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF CITATIONS

CASE(S):

<u>Commonwealth v. Crispell,</u> 648 Pa. 464, 193 A.3d 919 (2018)	10
<u>Commonwealth v. Felder,</u> 269 A.3d 1247 (2022)	6
<u>Commonwealth v. Foust,</u> 446 Pa. Super. 676, 667 A.2d 418 (1995)	3
<u>Commonwealth v. Foust,</u> 543 Pa. 709, 672 a.2d 304 (1995)	3
<u>Commonwealth v. Foust,</u> 180 A.3d 416, 2018 PA Super 39 (2018)	4, 7
<u>Commonwealth v. Foust,</u> 279 A.3d 39 (2022)	4
<u>Commonwealth v. Fowler,</u> 930 A.2d 586, 2007 PA Super 219 (2007)	11
<u>Commonwealth v. Keaton</u> 615 Pa. 675, 45 A.3d 1050 (2012)	11
<u>Commonwealth v. Williams,</u> 649 Pa. 471, 196 A.3d 1021 (2018)	10
<u>Commonwealth v. Wrecks,</u> 934 A.2d 1287, 2007 PA Super 301 (2007)	11
<u>Miller v. Alabama,</u> 567 U.S. 460, 132 S. Ct. 2455 (2012)	3, 5
<u>Montgomery v. Louisiana,</u> 84 U.S.L.W. 4063, 136 S. Ct. 718 (2016)	3, 5

PENNSYLVANIA STATUTES:

42 Pa.C.S.A. § 9541-9546	9
42 Pa.C.S.A. § 9721 (a)	8
42 Pa. C.S.A. § 9781 (b)	10

SUMMARY OF ARGUMENT

Appellant Foust has filed a timely fifth petition under the Post-Conviction Relief Act alleging that his aggregate sentence of sixty (60) years to life is a *de facto* life without parole sentence and that it is unconstitutionally impermissible as cruel punishment under the state and federal constitutions.

This sentence has already been the subject of Appellant Foust's direct appeal and this Honorable Court has already judicially determined that Foust received two legal and constitutional sentences and was therefore attacking the discretionary aspect of the sentencing; whether the sentences should be consecutive. This Court, in their Opinion, has already ruled against Appellant Foust and determined that there was no abuse of discretion by the sentencing court.

Foust has now filed this petition seeking the same or similar relief again suggesting it is a review of the legality of his sentence. The basis of Foust's argument however goes to the court's discretion and this matter has already been decided at the highest level of appellate court. This Court should not have jurisdiction to hear this matter as it has already been litigated. By way of further argument, Foust has already challenged the discretionary aspects of his sentence on direct appeal and did not include this challenge in his

issues complained of on appeal. As such, this issue should now be deemed as waived.

COUNTER STATEMENT OF THE CASE

Appellant Michael Paul Foust was seventeen years of age when he was found guilty of two counts of 1st Degree Murder following a jury trial. Appellant Foust was sentenced by the Honorable H. William White on June 30, 1994 to two consecutive terms of life imprisonment without the possibility of parole. Foust timely appealed and the Superior Court affirmed his sentence and the Pennsylvania Supreme Court denied Foust's Petition for Allowance of Appeal thereafter. Commonwealth v. Foust, 446 Pa.Super. 676, 667 A.2d 418 (1995), *appeal denied by* Commonwealth v. Foust 543 Pa. 709, 672 A.2d 304 (1995).

On, or about, February 24, 2016, Appellant Foust filed his fourth petition under the Post-Conviction Relief Act (PCRA) 42 Pa.C.S.A. § 9541-9546. In this fourth petition Foust sought relief under the authorities of Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012) and Montgomery v. Louisiana, 84 U.S.L.W. 4063, 136 S. Ct. 718 (2016) citing that his life without parole sentences violated the 8th Amendment of the United States Constitution. This petition was granted by the Court of Common Pleas of Venango County on May 12, 2016 and the judgment of sentence was vacated to allow for a new sentencing hearing.

On July 5, 2016, after a lengthy resentencing hearing, the Honorable H. William White, Senior Judge, Specially Presiding (and the original trial judge) resentedenced Appellant Foust to thirty (30) years to life imprisonment on each count running consecutive with each other. The aggregate sentence being sixty (60) years to life.

On July 15, 2016, Foust filed post sentence motions challenging that the aggregate sentence was unconstitutional and an abuse of discretion. This motion was denied by Senior Judge White on July 19, 2016.

A timely appeal of the sentence was filed on August 4, 2016 and the Superior Court affirmed the sentence on February 21, 2018. Commonwealth v. Foust, 180 A.3d 416, 2018 PA Super 39. Thereafter, on March 23, 2018, Foust filed a timely Petition for Allowance of Appeal which was denied by the Pennsylvania Supreme Court on May 25, 2022. Commonwealth v. Foust, 279 A.3d 39 (2022).

The instant petition under the Post-Conviction Relief Act was timely filed on May 22, 2023. In this fifth petition, Foust asks for relief as follows:

15. The imposition of a *de facto* life sentence on Mr. Foust violated the Eight [sic] of the U.S. Constitution. Judge White was very clear that the reason for the imposition of that sentence was because of the nature of the crime. (N.T. 169:15-21 (“I cannot in

any way rationalize a sentence that is not consecutive. This case – there are two distinct victims...and the effect of that is that I have to, in my mind, run these sentences consecutively.”); see *also id.* 172:20-23 (“What drives this case is the fact that it was Murder 1, and there were two victims.”)). Such an analysis is improper as it ignores Miller’s requirement that factors other than the crime be considered in sentencing. As the Superior Court in Commonwealth v. Schroat held:

In total, the court’s opinion reflects a lack of consideration for Appellant’s youth, history, and rehabilitative needs in favor of an inordinate focus on the heinous act he committed as a minor. Appellant presented significant, uncontroverted evidence that he has matured and made steps toward rehabilitation while in prison. Yet, in the sentencing court’s view, Appellant has made no progress because he committed a murder in 1992. This view directly contradicts the Supreme Court’s edict that “children who commit even heinous crimes are capable of change [.]”
272 A.3d 523, 530 (Pa. Super. Ct. 2022) (alteration in original)(quoting Montgomery, 577 U.S. at 212).

See Foust Petition for Post-Conviction Relief, Paragraph 15, page 8.

Furthermore, Foust states in Paragraph 16, page 9 of said petition as follows:

16. In addition, the *de facto* life sentence here violates the Pennsylvania Constitution’s prohibition against “cruel punishment.” Pa. Const. art. I § 13. The Pennsylvania Constitutional protection against “cruel punishment” is broader

than the United States' Constitutional prohibition against "cruel and unusual punishment." See *Felder*, 269 A.3d at 1247-48 (Donahue, J. concurring). As Justice Donohue noted in her concurrence in *Felder*:

Today's decision does not foreclose further developments in the law as to the legality of juvenile life without parole sentences (or their de facto equivalent as alleged here) under the Pennsylvania Constitution nor as to how appellate courts will review the discretionary aspects of such sentences.

Id. at 1247.

The relief requested in Foust's petition asks this Honorable Court to grant relief as his sixty (60) year to life sentence constitutes a *de facto* life sentence. The Commonwealth has objected by argument with Foust's position asking the PCRA Court to dismiss this fifth PCRA petition taking the position that this argument has already been litigated and therefore should not be heard.

On October 10, 2023, Senior Judge Robert L. Boyer, Specially Presiding, heard argument and denied relief under the PCRA petition. The PCRA court determined that the two consecutive thirty (30) year to life sentences did not violate the Pennsylvania Constitution or the United States Constitution . This timely appeal followed.

COUNTER STATEMENT OF QUESTIONS INVOLVED

- I. THIS COURT LACKS JURISDICTION TO ENTERTAIN APPELLANT'S CHALLENGE TO THE LEGALITY OF HIS SENTENCE BECAUSE IT IS BASED ON THE FALSE CONSTRUCT OF A DE FACTO LIFE SENTENCE.

Appellant Foust's characterization of his sentence as a *de facto* life sentence is inaccurate and misleading and should therefore foreclose the review of his legality of sentence claim.

In this direct appeal Appellant Foust again argues that the sentence of sixty (60) years to life is a *de facto* life sentence and therefore illegal using constitutional arguments. In this Court's Opinion in Commonwealth v. Foust, 180 A.3d 416, 2018 PA Super 39, the Court noted that Foust's counsel conceded that the sentences for the individual homicide counts are constitutional.¹ With the constitutionality of the sentences no longer in dispute, this Honorable Court refined the analysis. The issue became Appellant Foust asking the Court to declare the discretionary determination of the trial court in imposing consecutive (but independently valid)

¹ Counsel for Foust stressed that it is the consecutive nature of these two sentences that require vacatur of appellant's punishment.

punishments for a double murder to be unlawful under the principles of the 8th Amendment.

After lengthy analysis, this Honorable Court rejected Foust's effort to invalidate the legality of his sentence under principles traditionally confined to discretionary sentencing review. Again, holding that consecutive imposition of independently valid punishments is distinctly a discretionary function of the sentencing authority. Citing further, "barring trial courts from running such sentences consecutively would strip them of their traditional statutory duty to make such determinations regarding each offense committed." 42 Pa.C.S.A. § 9721 (a).

Once this Court determined that Foust's sentence was constitutional and therefore NOT AN ILLEGAL SENTENCE, the Court looked at whether the trial court abused its discretion. After reviewing the record, which included the Honorable H. William White's extensive, well-reasoned and on the record explanation of his sentence (in a footnote it was noted that Judge White's order should be used as a model for all trial courts sentencing juvenile homicide cases), this Honorable Court concluded that there was no abuse of discretion and that Foust was not entitled to relief on the discretionary aspect challenge.

In the current appeal from the PCRA determination, Foust has once again attacked the constitutionality of not the individual sentences but instead the aggregate of the constitutionally valid sentences. This determination has already been made by this Court and Foust is repeating an attack on the discretionary aspects of sentencing.

II. APPELLANT'S ATTACK ON DISCRETIONARY ASPECTS OF SENTENCE HAVE BEEN PREVIOUSLY LITIGATED.

The issue before this Court has been brought by Foust by petition under the Post-Conviction Relief Act. 42 Pa.C.S.A. § 9541, et seq. Under this Act, § 9543 (a) sets forth as follows:

(a) General Rule – to be eligible for relief under this subchapter the Petitioner must plead and prove by a preponderance of the evidence all of the following:

...

(3) that the allegation of error has not been previously litigated or waived.

...

A post-conviction petitioner must demonstrate that the issues included in his petition have not been previously litigated or waived. Commonwealth

v. Crispell, 193 A.3d 919, 648 Pa. 464 (2018). An issue raised in a petition for post-conviction relief is waived if the petitioner could have raised it but failed to do so before trial, at trial, on appeal, or in a prior state post-conviction proceeding. Commonwealth v. Williams, 196 A.3d 1021, 649 Pa. 471 (2018).

Based on previous arguments herein, it is believed Foust has misrepresented the form in which the sentence was presented. In actuality, Foust's arguments are challenges to the discretionary aspects of his sentence. This Court has already denied relief on this issue. This Court also noted that Foust does not have an automatic right to appeal the discretionary aspects of his sentence. See, 42 Pa.C.S.A. § 9781 (b).

Based upon this Court's opinion and the analysis, the discretionary aspects of this sentence have been previously litigated and therefore this issue now brought under the PCRA should be dismissed as previously litigated.

III. APPELLANT'S ATTACK ON DISCRETIONARY ASPECTS OF SENTENCE HAVE BEEN WAIVED.

Appellant Foust filed a direct appeal from his resentencing in front of the Honorable H. William White. In so doing, Foust preserved his issues which amounted to an attack on the Court's discretion in making his two sentences

consecutive. The issue currently before this Court is being raised in a petition for post-conviction relief. The attack, again, properly reviewed, is another attack alleging abuse of discretion by the sentencing judge. It is not an attack on the legality of sentence.

It is well settled that “[c]hallenges to the discretionary aspects of sentencing are not cognizable under the PCRA.” Commonwealth v. Fowler, 930 A.2d 586 (Pa. Super. 2007), appeal denied, 944 A.2d 756 (Pa. 2008); see also Commonwealth v. Wrecks, 934 A.2d 1287, 1288 (Pa. Super. 2007) (“Requests for relief with respect to the discretionary aspects of sentence are not cognizable in PCRA proceedings.”) (citation omitted).

An issue is “waived,” and, thus, one for which petitioner for postconviction relief is not entitled to relief, if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in prior state postconviction proceeding. Commonwealth v. Keaton, 45 A.3d 1050, 615 Pa. 675 (2012).

Based on the law an issue with regard to the abuse of discretion of the sentencing judge is not cognizable under the PCRA. Furthermore, Foust has raised abuse of discretion on direct appeal and failed to include this state constitutional argument. As such, this issue should now be dismissed as it has been waived.

CONCLUSION

Based upon the arguments herein Appellant Foust has incorrectly framed his issue as a constitutional challenge to the legality of his sentence. Foust's issue is more correctly an argument of excessive "cruel punishment" as a result of consecutive constitutional sentences. The vehicle Foust has used to bring this to the Court's attention is a petition under the PCRA and arguments which attack the discretionary aspects of sentencing are not cognizable under this act. In the alternative, this issue has been previously litigated by this Court or, further, and in the alternative, the issue has been waived for failure to preserve it on direct appeal.

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing documents upon the person(s) and in the manner indicated below which service satisfies the requirements of Pa. R.A.P. 121.

Service by first class mail addressed as follows:

Prothonotary
Superior Court of Pennsylvania
310 Grant Street, Suite 600
Pittsburgh, PA 15219-2297

Dana E. Becker
Alison P. Patitucci
Alexis Caris
2222 Market Street
Philadelphia, PA 19103

Marsha L. Levick
Riya Saha Shah
Juvenile Law Center
1800 JFK Blvd., Ste. 19103

CERTIFICATE OF COMPLIANCE

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

Dated: May 3, 2024

/s/ D. Shawn White

D. Shawn White, Esquire
District Attorney
Venango County Courthouse
1168 Liberty Street
Franklin, PA 16323
ID #: 48924