

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

SHAWN ALLAN WAGNER,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2247 MDA 2012

Appeal from the Judgment of Sentence September 19, 2012
in the Court of Common Pleas of York County
Criminal Division at No.: CP-67-CR-0005037-2011

BEFORE: FORD ELLIOTT, P.J.E., SHOGAN, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.

FILED NOVEMBER 07, 2013

Appellant, Shawn Allan Wagner, appeals from the judgment of sentence imposed after his jury convictions of stalking and harassment.¹ After careful review, we vacate and remand for resentencing.

On June 13, 2011, the Commonwealth charged Appellant with the above crimes and related offenses. The charges arose from Appellant's actions against his ex-paramour between April 2011 and June 2, 2011. Specifically, his conduct included scaring her by repeatedly driving by her home, yelling obscenities, revving his motorcycle engine, and, on one

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. §§ 2709.1(a)(1) and 2709(a)(3), respectively.

occasion, entering her property on foot, all without any legitimate purpose. (**See** N.T. Trial, 6/12/12, at 82-83, 87-92).

On June 12, 2012, a jury convicted Appellant of stalking and harassment, and acquitted him of the remaining charges. On September 19, 2012, the court sentenced Appellant to not less than six nor more than twenty-three months' incarceration on the stalking conviction and a separate \$300 fine on the harassment conviction. Appellant filed post-sentence motions that the court denied on November 20, 2012. Appellant timely appealed.²

Appellant raises one issue for our review: "[Whether] the sentencing court issued an illegal sentence when it failed to merge Appellant's summary harassment conviction with the misdemeanor stalking conviction[?]" (Appellant's Brief, at 4).

In reviewing an illegal sentence claim, [t]he issue . . . is a question of law and, as such, our scope of review is plenary and our standard of review is *de novo*. Section 9765 of our Judicial Code provides:

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.

² Appellant filed a timely Rule 1925(b) statement on March 4, 2013, and the court filed an opinion on May 14, 2013. **See** Pa.R.A.P. 1925.

42 Pa.C.S.A. § 9765. This Court has assessed a merger issue by examining whether the charges arose out of a single set of facts and whether all the statutory elements of one offense coincide with the statutory elements of the other offense.

Commonwealth v. Lomax, 8 A.3d 1264, 1267-68 (Pa. Super. 2010) (case citations and quotation marks omitted).

Here, Appellant argues that “[t]he intent of harassment is . . . a necessary subcomponent of stalking, making it a lesser-included offense.” (Appellant’s Brief, at 8). The Commonwealth agrees. (**See** Commonwealth’s Brief, at 8). We also are constrained to agree.

Section 2709.1 of the Crimes Code provides, in pertinent part:

(a) Offense defined.—A person commits the crime of stalking when the person . . .

(1) engages in a course of conduct or repeatedly commits acts toward another person, including following the person without proper authority, under circumstances which demonstrate either an intent to place such other person in reasonable fear of bodily injury or to cause substantial emotional distress to such other person[.]

18 Pa.C.S.A. § 2709.1(a)(1).

Also, “[a] person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person . . . engages in a course of conduct or repeatedly commits acts which serve no legitimate purpose[.]” ***Id.*** at § 2709(a)(3).

We held in ***Commonwealth v. Reese***, 725 A.2d 190 (Pa. Super. 1999), *appeal denied*, 740 A.2d 1146 (Pa. 1999):

[A]ll the factual predicates which support a finding of harassment would equally serve as factual predicates for stalking if committed repeatedly under circumstances demonstrating the requisite intent. For instance, a harassment charge under either § 2709(a)(1) or (2) merely requires a single act of physical contact or following in public with the intent to harass, annoy, or alarm. This same conduct if committed repeatedly with the intent to place the victim in fear of bodily injury or cause the victim substantial emotional distress would rise to the level of stalking. Moreover, but for the differing intent, the language used in § 2709(a)(3) closely parallels the language found in the stalking subsection. Clearly, one can harass without stalking, but one cannot stalk without also harassing. Stalking is simply a more serious form of harassment. Consequently, we find that harassment is a constituent offense of stalking.

Reese, supra at 191-92; **see also Commonwealth v. D'Collanfield**, 805 A.2d 1244, 1249 (Pa. Super. 2002) (discussing **Reese** holding that harassment is a lesser-included offense of stalking).

Here, Appellant's convictions for stalking and harassment were premised on the same behavior. Specifically, without any legitimate intent, he scared the victim by repeatedly driving by her home, revving his motorcycle's engine, entering her yard on foot, and yelling obscenities. (**See** N.T. Trial, 6/12/12, at 82-83, 87-92; **see also** N.T. Sentencing, 9/19/12, at 3, 8).

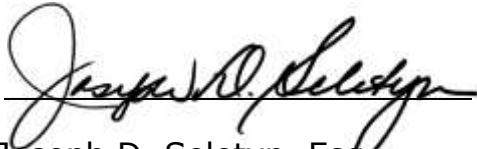
Accordingly, based on our binding precedent and our review of the record in this matter, we are constrained to conclude that the court erred when it failed to merge the crimes of stalking and harassment for sentencing purposes. **See Reese, supra** at 192; **see also** 18 Pa.C.S.A. §§

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2709.1(a)(1), 2709(a)(3). Therefore, we vacate the September 19, 2012 order and remand for re-sentencing consistent with this decision.

Judgment of sentence vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/7/2013