DISTRICT OF COLUMBIA COURT OF APPEALS

No. 97-CO-425

ANTHONY E. BRAGDON, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the
District of Columbia

(Hon. Henry H. Kennedy, Jr., Motions Judge)

(Argued June 2, 1998 Decided September 3, 1998)

Caroline M. Brown, with whom *Nancy Dickinson* was on the brief, for appellant.

T. Anthony Quinn, Assistant United States Attorney, with whom *Wilma A. Lewis,* United States Attorney, and *John R. Fisher* and *Patricia Stewart*, Assistant United States Attorneys, were on the brief, for appellee.

Before WAGNER, *Chief Judge,* KING, *Associate Judge, Retired,* and MACK, *Senior Judge*.

Opinion for the court by *Associate Judge, Retired,* KING.*

Dissenting opinion by *Senior Judge* MACK at p. .

KING, *Associate Judge, Retired*: In this case we are asked to decide whether a sentencing judge, when sentencing a defendant on multiple charges under the Youth Rehabilitation Act ("YRA"),[1] may impose the sentences consecutively. We conclude that consecutive sentences in those circumstances are permissible.

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* Judge King was an Associate Judge of the court at the time of argument. His status changed to Associate Judge, Retired, on September 1, 1998.

[1] D.C. Code §§ 24-801 to -807 (1996 Repl.).

The governing facts are not in dispute. On April 30, 1992, after a jury had convicted Bragdon of single counts of armed assault with intent to commit rape and possession of a firearm during a crime of violence, the trial court (Judge Harriett R. Taylor) imposed a sentence of fifteen years under the YRA for each charge.[2] Judge Taylor did not specify, either at the time of imposing sentence or in the judgment and commitment order, whether the sentences were to run concurrently or consecutively. On direct appeal, the convictions were affirmed.[3]

Subsequently, assertedly after learning that the Department of Corrections regarded the sentences to be consecutive, Bragdon filed a motion for Correction and Reduction of Sentence pursuant to the applicable court rule.[4] Judge Kennedy, sitting in place of Judge Taylor who was not available, denied the motion. This appeal followed. Bragdon contends that the adult sentencing rule requiring multiple sentences to be served consecutively, unless the judge specifies otherwise, does not apply to sentences under the YRA. A reasonable interpretation of the applicable statutes does not support Bragdon's position; therefore, we affirm.

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[2] D.C. Code §§ 22-501, -3202 (a), -3204 (b) (1996 Repl.). The maximum sentences permitted by law for armed assault with intent to rape and the weapons offense are life imprisonment and fifteen years, respectively.

[3] *Bragdon v. United States*, 668 A.2d 403 (D.C. 1995).

[4] Super. Ct. Crim. R. 35. Because this motion was filed within 120 days of the receipt of the mandate after the affirmance on direct appeal, it was timely as both a motion to correct an illegal sentence and as a motion to reduce sentence.

Resolution of this issue turns upon the interrelationship between two separate statutes governing the sentencing of offenders by courts in the District of Columbia. The first, which was enacted by Congress in 1970, provides in relevant part, that "[a] sentence imposed . . . for conviction of an offense *shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed* . . . for conviction of an offense . . . ." D.C. Code § 23-112 (1996 Repl.) (emphasis added). The second provision, the YRA, which was enacted by the Council of the District of Columbia ("Council") in 1985, allows the court, where it finds that a youthful offender will derive benefit from sentencing under its provisions, to sentence the offender for treatment "up to the maximum penalty of imprisonment otherwise provided by law." D.C. Code § 24-803 (b).

Bragdon does not dispute that if the sentences imposed here were adult sentences, § 23-112 would apply and, because the judge was silent on the point, the sentences would run consecutively. He argues, however, that the same rule does not apply to YRA sentences. He does so even though there is nothing in any of the provisions of the YRA to suggest or indicate that multiple sentences under the YRA are not controlled by the clear requirement of § 23-112 that "a sentence imposed . . . for conviction of an offense shall . . . run consecutively" unless the sentencing judge "expressly provides otherwise." We think that the two provisions must be read together with the terms of each given full effect. "[W]hen two statutes are capable of co-existence it is the duty of the courts, absent a clearly expressed [legislative] intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Applying that principle to the circumstances presented here persuades us that consecutive YRA

sentences are not only permissible, but required unless the sentencing judge provides otherwise.

Not only is there no expression of legislative intent that the two provisions should not co-exist, we are satisfied that a fair interpretation of the language in the YRA indicates that the Council intended that sentencing under the YRA would be guided by other generally applicable sentencing provisions, including § 23-112. For example, the YRA provides that the sentencing judge may impose a sentence "up to the maximum penalty of imprisonment *otherwise provided by law*." D.C. Code § 24-803 (b) (emphasis added). Another passage provides that "[s]ubsections (a) through (e) [which includes sub-section (b) quoted in the previous sentence] provide sentencing alternatives *in addition to the options already available to the court.*" D.C. Code § 24-803 (f) (emphasis added). In the language of the YRA, § 23-112 is clearly an "option[] already available to the court" which is "otherwise provided by law." In sum, the language of the YRA is entirely consistent with the notion that the Council intended that the terms of that act would co-exist with other sentencing provisions in effect when it was enacted. Therefore, we conclude that there is no basis for Bragdon's contention that the consecutive sentencing mandate of § 23-112 does not apply to sentences imposed under the YRA.

Bragdon also argues that because the YRA was modeled on an earlier federal statute governing sentencing of youthful offenders, which did not permit consecutive sentences, the YRA also does not allow for consecutive sentences. Specifically, Bragdon refers to the Federal Youth Corrections Act ("FYCA") which

was repealed in 1984.[5] To be sure, this court has held that one FYCA sentence could not run consecutive to another FYCA sentence previously imposed, *Royster v. United States*, 361 A.2d 165, 166 (D.C. 1976), and federal courts have held that consecutive FYCA sentences could not be imposed on each of several counts. *See, e.g., Price v. United States*, 384 F.2d 650, 652 (10th Cir. 1967). It does not follow, however, that consecutive sentences may not be imposed under the YRA.

As Bragdon correctly observes, to fill the gap left by the repeal of the FYCA, the Council enacted the YRA. *See, e.g., Smith v. United States*, 597 A.2d 377, 380 n.2 (D.C. 1991). As we said above, however, there is nothing in the language of the YRA indicating that the consecutive sentencing provisions of § 23-112 do not apply to YRA sentences. Moreover, because the FYCA was a federal statute it can not be seriously argued that a District of Columbia statute, i.e., § 23-112, would have any effect upon it. The same cannot be said of the YRA however, because both it and § 23-112 are statutes applicable only in the District of Columbia.

Finally, unlike the YRA, the plain language of the FYCA specifically limited the duration of time that a youth offender could be incarcerated and measured the termination date of sentences imposed thereunder from the date of conviction. *See Royster*, *supra*, 361 A.2d at 166 (citing 18 U.S.C. §§ 5010 (b), 5017 (c)). Thus, in *Royster*, this court determined that

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[5] The FYCA was enacted in 1950, 64 Stat. 1085. It was codified at 18 U.S.C. §§ 5005 to -5026 (1982). It was repealed by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 235 (a)(1)(A), 98 Stat. 1837, 2031. Its provisions applied to sentences imposed in the Superior Court. *See, e.g., Veney v. United States*, 681 A.2d 428, 432 (D.C. 1996) (en banc).

> the imposition of consecutive FYCA sentences is tantamount to amending the statute because it permits the release date of a youth offender to be computed from the termination of a prior FYCA sentence and not, as statutorily required, "from the date of [appellant's] conviction."

Id. (footnote omitted). The YRA imposes no such limitations, and provides specifically for any sentence up to the maximum provided by law. D.C. Code § 24-803 (b).

For the reasons stated, we are satisfied that the consecutive sentences imposed here are not improper. Therefore, the motions judge did not err in denying the motion. Accordingly, the judgment is hereby

Affirmed.

MACK, *Senior Judge,* dissenting: My colleagues, in reaching a conclusion today, employ the time-honored method of "accommodating the co-existence" of two distinct statutes by a selective reading of the plain language of each. In my view, this accommodation is factually and legally inappropriate in the context of this case. It ignores the legislative history of the Youth Rehabilitation Act ("YRA"),[1] and defeats the purpose thereof, as well as the obvious intention of the sentencing judge as evidenced by the record in this case.

[1] D.C. Code §§ 24-801 to -807 (1996 Repl.).

The primary objectives of the YRA were (1) to give the trial court flexibility in sentencing a youth according to individual needs, (2) to separate youth offenders from mature, experienced offenders, and (3) to provide an opportunity for a deserving youth to start anew. Specifically, the sentencing judge is given many alternatives under the Act in meeting these objectives.[2] *See* D.C. Code § 24-803. If the court finds that the youth will benefit from the provisions of the treatment provided by Chapter 8 of the D.C. Code Title 24 (*i.e.*, "Youth Rehabilitation") it may sentence the offender "pursuant to the provision of this chapter." D.C. Code § 24-803 (c).

Specifically, while § 24-803 (b) on which the majority relies, provides that a court *may* sentence a youth offender for "treatment and supervision" *up* to the maximum penalty of imprisonment otherwise provided by a law (*unless sooner released*), subsection (c) specifically provides that if a court "determines that [a] youth offender will derive benefit from the provisions of this chapter, the court shall make a statement on the record of the reasons for its determination." D.C. Code § 24-803 (c). If, however, "the court shall find that the youth offender will not derive benefit from treatment under subsection (b) . . ., then the court may sentence the youth offender under any other applicable penalty provision." D.C. Code § 24-803 (d).

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[2] Thus, the court may suspend the imposition or execution of sentence, place the youth on probation, release the youth conditionally or unconditionally, commit the youth for observation while gathering additional information, or sentence the youth under other applicable penalty provisions, etc. D.C. Code § 24-803 (a)-(f).

Here the sentencing judge (The Honorable Harriett R. Taylor) made a finding that Mr. Bragdon would benefit from the provisions of the YRA and she made a lengthy statement on the record of her reasons for this determination.[3] D.C.

[3] The Superior Court said:

> I do believe that you might continue to benefit from such a sentence . . . . I'm doing this for the reasons that your attorney said and also because this offense was committed before you had the last Youth Act sentence.

The reasons cited by Bragdon's trial counsel that were incorporated by the Superior Court included:

> that Bragdon came from a broken family and had been part of the neglect system since age one; that this presence of this lack of supervision indicated Bragdon would benefit from a Youth Act sentence;
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> that Bragdon had performed well during his previous Youth Act sentence; that he was able to respond, which indicated that he could get his education;
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> that Bragdon was someone ". . . that we shouldn't give up on yet;" and
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> that he was a particularly good candidate because of the conflicting verdict, in which Bragdon was acquitted of most counts and only convicted of a lesser included offense and the additional offense of carrying a firearm during a crime of violence.

(continued...)

Code § 24-803 (c). Moreover, on this record, the "General Provisions" Chapter of Title 23 on "Criminal Procedure," D.C. Code § 23-112 "Consecutive and Concurrent Sentences," should not be imported to defeat the obvious intent of Judge Taylor that the two sentences she imposed under the YRA were not meant to be consecutive.[4]

As the majority here notes in part, the "adult" provisions of D.C. Code § 23-112 provide:

> A sentence imposed on a person for "*conviction*" of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for "*conviction*" of an offense . . . . (Emphasis added.)

However, the section continues:

> . . . whether or not the offense (1) arises out of another transaction, or (2) *arises out of the same transaction and requires proof of a fact which the other does not.* (Emphasis added.)

Turning to the record here (*see Bragdon v. United States*, 668 A.2d 403 (D.C. 1995) (*Bragdon I*), *petition for reh'g en banc denied*, Order No. 92-CF-648 (Sept. 20, 1996)), it appears that out of a ten-count indictment filed by the government alleging kidnapping, rape and related crimes, Bragdon went to trial

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[3](...continued)

[4] Even the government, presupposing that the sentences were in fact consecutive, does not press this issue with its usually commendable conviction since it advances a "fall-back" position to the effect that even if the sentences were not meant to be consecutive, this is not a ground for reversal in view of the general provisions of default in adult sentence imposition.

before Judge Taylor on seven counts.[5] The jury found the appellant guilty of (1) one count *of assault with intent to rape while armed* (as a lesser included offense of *rape while armed*) (D.C. Code §§ 22-2801, -3202 (a)), and (2) one count of possession of a firearm during a crime of violence (D.C. Code § 22-3204 (b)). He was acquitted on the remaining five counts. The jury's difficulty in deciding this case is evidenced by its two reports that it was "sharply divided" and "deadlocked" before being given the *Winters* charge.[6]

On appeal to this court, the majority rejected Bragdon's assertion that, on the basis of the record of the complainant's testimony (which may I say was less than credible), the trial court's giving of an instruction as to the *uncharged* offense of "assault" with intent to commit armed rape, over the objection of the defense, facilitated an "irrational compromise verdict." *See Bragdon I, supra*, 668 A.2d at 407 (Mack, J., concurring in part and dissenting).

This factual account is recited, not only to characterize the seriousness of (or lack of) such conduct by the perpetrator of the two crimes for sentencing purposes, but also to emphasize that (1) the assault while armed, and (2) the possession of a firearm[7] during a crime of violence, grew out of the same transaction *but did not require proof of a fact that the other does not,* and

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[5] On the three counts severed for a separate trial, the government, after the sentencing of Bragdon as a youth offender, dismissed two counts (D.C. Code §§ 22-3811, -3812), and appellant pled guilty to a lesser-included offense of a third (§ 22-3815). Judge Taylor sentenced appellant to a sentence not to exceed six months under the YRA.

[6] *See Winters v. United States*, 317 A.2d 530 (D.C. 1974).

[7] The firearm was an inoperable "starter" pistol.

therefore, even under the "General Provisions" of Chapter I of Title 23, should not be read to trigger the imposition of lengthy consecutive sentences for a youth offender thought to be deserving not only of treatment, but for the chance to start anew. *Cf. Freeman v. United States*, 600 A.2d 1070 (D.C. 1991) (affirming imposition of concurrent sentences and construing the adult sentencing provisions of § 23-112 as referring to an "element" rather than a "fact").

In this regard, as the majority on this appeal concedes, the federal courts and this court have held that under the repealed Federal Youth Corrections Act ("FYCA") a youth sentence could not run consecutive to another youth sentence. *See Royster v. United States*, 361 A.2d 165, 166 (D.C. 1976); *Price v. United States*, 384 F.2d 650, 652 (10th Cir. 1967). We cannot dismiss this argument by simply stating that there is nothing in our District of Columbia (YRA) statute that requires us to accept these interpretations. As counsel for appellant has argued, here the legislative history of our act shows that it was expressly intended to replace the federal act. *See Meiggs v. Assoc. Builders, Inc.*, 545 A.2d 631, 635 (D.C. 1988), *cert. denied*, 490 U.S. 1116 (1989).[8] And despite the varying scholarly interpretations advanced in our en banc decision of *Veney v. United States*, 681 A.2d 428 (D.C. 1996) (en banc), the fact remains that the majority, those who concurred in the judgment only, as well as the dissent, all

[8] The Addendum submitted by counsel is replete with testimony before the City Council by scholars, expert citizen advisory committees, and youths who had benefited from the provisions of the FYCA (or suffered because of its repeal) as well as petitions submitted by District of Columbia citizens. *See also Dorszynski v. United States*, 418 U.S. 424 (1974); *Tuten v. United States*, 440 A.2d 1008, 1012 (D.C. 1982).

agreed that the manifestation of intent by the sentencing judge was the controlling factor. *See also Dorszynski, supra* note 8.

Judge Taylor sentenced Bragdon under the YRA Act. "It is not the place of this court to carve an exception into the statute not written in its language." *United States v. Howard*, 146 U.S. App. D.C. 10, 16, 449 F.2d 1086, 1092 (1971).

I would reverse the order of the Honorable Henry H. Kennedy, Jr. (sitting as a Motions Judge), denying the timely filed motion for correction and reduction of sentence, and remand for resentencing.