

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-1050-2014
: CP-41-CR-1387-2014
: CP-41-CR-2061-2014
CARL MOYER, JR., :
Appellant :
: 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

In 1970, the band Grateful Dead released an album titled “American Beauty.” The album’s signature song “Truckin” was recognized by the United States Library of Congress in 1997 as a national treasure. The song’s signature climactic refrain “what a long, strange trip it’s been” could not better describe this case at this juncture.

On October 31, 2014, Appellant Carl Moyer, Jr. (hereinafter Moyer) pled guilty under CR-1050-2014 to count 2, driving under the influence with the highest rate of alcohol, a misdemeanor of the first degree and under CR-1387-2014 to count 2 driving under the influence with the highest rate of alcohol, also a misdemeanor of the first degree. On March 10, 2015, Moyer pled guilty under CR-2061-2014 to count 2, driving under the influence with the highest rate of alcohol, again a misdemeanor of the first degree. Moyer’s DUI offenses occurred on March 15, 2014, May 3, 2014 and August 30, 2014, respectively. On March 10, 2015, the court proceeded to a sentencing hearing on all three DUI convictions. The court received and reviewed the pre-sentence report, as well as Moyer’s CRN and assessment. The court also received and reviewed a risk needs assessment.

Of note to the court, Moyer committed three DUI offenses within five months, all with similar blood/alcohol content levels, approximately .21. As well, each driving under the

influence offense occurred shortly after Moyer had notice of the prior DUI offense, and the third DUI offense occurred while Moyer was out on bail on the prior two DUI offenses. (Sentencing Transcript I, March 10, 2015, at 7-8). Moyer's prior record score was a repeat felony offender (RFEL) based on defendant's 1990 convictions for attempted homicide and aggravated assault for which he spent 14 years in state prison (Id. at 9). The court reviewed and considered the sentencing guidelines, the nature of the offenses, Moyer's history and characteristics and his effort at rehabilitating himself following the last offense. (Id. at 17, 23). The court noted among other things that Moyer was "attending church, he's going to AA meetings, he's got a home group, he's doing therapy and treatment, he's working the five steps, he's working the big book, he's got a good job and he's got support at home." (Id. at 17). The court noted as well that "were it not for his conviction 25 years ago, his risk needs would be minimal and the standard range would be one to twelve, if not, probably not even that." (Id.).

The court entered a sentence that admittedly was "going to shock everyone." (Id. at 16). Concluding that under all of the circumstances, the sentence would be consistent with protecting the public, reflecting the gravity of the offenses to the extent it impacted the community as well as the defendant's rehabilitation needs, the court imposed a sentence of 15 years of intermediate punishment with the first 17 months to be served at the work release facility. (Id. at 23). In support of its sentence, the court noted in the sentencing order as follows:

The Court is acutely aware that this sentence is below the standard range. The Court, however, is of the opinion that this sentence is appropriate for several reasons.

First, [Moyer's] criminal record and prior record score of RFEL is based solely on convictions which are 25 years old. Accordingly, the court is of the opinion that [Moyer's] prior record score overstates his criminal culpability. Furthermore, [Moyer] has taken extraordinary steps in addressing

his alcohol abuse as set forth in the Presentence Report, as well as the White Deer Run notification of [Moyer's] completion of treatment. [Moyer] regularly attends AA meetings, he has a sponsor, he is working the big book, he is steadily employed, he has a church support group, he has a home group, and he still attends individual and family group counseling.

The court is also considering [Moyer's] age of 60 years old. The court is of the opinion that [Moyer's] age causes him to be less likely of a risk going forward.

Finally, the court has extensively reviewed the risk needs assessment as set forth in the Presentence Report. Of 28 points, 23 of them are attributed solely to [Moyer's] conviction of 25 years ago. But for those points, the defendant's supervision status would be a risk of five, which is close to the administrative risk, and its need would fit into the administrative category. Moreover, the court is greatly concerned that [Moyer] has served 14 years previously in a state prison setting, and if he were sentenced to state prison in this particular case, it would be detrimental to his recovery, and indeed impose a greater risk to the community. By this, the court means that [Moyer] has been doing everything he possibly could to ensure that he does not reoffend. Sending [Moyer] to state prison under these circumstances would interrupt his treatment, and essentially stop all of the support he has in place. [Moyer] would lose his job, discontinue his treatment, lose his sponsor, lose his support group, and not be able to continue with his counseling. To interrupt such under these circumstances as indicated would pose a great risk of [Moyer] reoffending, and thus further potentially risk the public's health and safety.

Sentencing Order of March 10, 2015.

The court also noted that it fashioned the sentence to ensure that Moyer not consume "any alcohol whatsoever." After his release from incarceration, Moyer was to be placed on a SCRAM (alcohol monitoring unit) for no less than six months. Any violation would result in his immediate detention and incarceration. (Sentencing Order March 10, 2015).

Following the imposition of the sentence, the court's plans went awry. As Moyer was being taken into custody, the court overheard discussions between Moyer and his "significant other" as well as Moyer and a representative of the Adult Probation Office. It appeared to the court that the information provided by Moyer may have not had been accurate. Accordingly, the court stopped Moyer, directed him to return to the courtroom and reopened the

record. The court immediately vacated the initial sentence and proceeded with taking additional testimony.

In questioning Moyer, it became evident to the court that much if not all of the information provided by Moyer and upon which the court based the initial sentence, was incorrect. Specifically, Moyer admitted that he only attended one AA meeting, he went to church only once, and he drank as recently as “last Friday.” (Sentencing Transcript II, March 10, 2015, at 2).

Moyer’s significant other indicated that Moyer was still drinking. She looked at Moyer and stated: “You can only go so long, because when you get fidgety, I know when you are going to want to drink. And I know the signs. I’ve been around you long enough, Carl, I can’t...you can’t hide it from me. You can’t even hide a can of beer unless I find it.” (Sentencing Transcript II at 4).

The court then entered a sentence, the aggregate of which was a minimum of six years and a maximum of which was 15 years, to be served in a state correctional facility. The court noted that while it was willing to give Moyer a significant break, it was of the opinion that under the circumstances a sentence of state prison was warranted. (Re-Sentence Order, March 10, 2015). The court noted that it was “apparent...that [Moyer] continues to drink and has not accepted responsibility for his extremely dangerous conduct, and has, in fact, made misrepresentations to the court regarding his steps at recovery.” (Re-Sentence Order, March 10, 2015).

The court added as follows:

[Moyer], while 60 years old, clearly has a severe drinking problem which is impacting his mental health, and severely impacting his behaviors. Unfortunately, despite given

an opportunity to correct such, he continues to abuse alcohol and as a result continues to be a substantial risk to the community. While [Moyer] made representations to the [c]ourt regarding his failure to use alcohol, the [c]ourt does not accept those as credible. The [c]ourt accepts the other testimony as credible.

Moreover, the [c]ourt is of the opinion that because [Moyer] allowed the [c]ourt to praise what the [c]ourt had thought were substantial efforts, [Moyer] knew that he was doing very little, if anything to address his alcoholism.

Finally, while in [c]ourt, [Moyer] made excuses which can best be explained as “lame”. If [Moyer] does not address his alcohol problem, [Moyer] will continue to commit criminal activities, and continue to be a danger to the community.

(Re-Sentence Order, March 10, 2015).

Moyer was transported from the Lycoming County prison to the State Correctional Institution at Camp Hill on March 24, 2015.

On February 2, 2016, the defendant filed a motion for Post-Conviction Collateral Relief. The court appointed counsel and scheduled a conference for April 25, 2016. On April 20, 2016, defense counsel filed a motion to withdraw as counsel which included a Turner/Finley letter.

Following the conference in April, the court conducted an independent review of the record. On October 26, 2016, Moyer filed a pro se petition for writ of mandamus requesting that this court make a ruling on petitioner’s Post Conviction Relief Act (PCRA) “requesting correction of an illegal and improper sentence.”

By Order of Court dated November 1, 2016, the court denied counsel’s motion to withdraw and granted an evidentiary hearing on the sole issue of whether counsel failed to file a direct appeal. The court noted that Moyer asserted in his PCRA petition that counsel was ineffective in failing to file an appeal. Moyer attached as an exhibit to his petition a letter dated March 23, 2015 from an Assistant Public Defender. The letter indicated that the Assistant Public Defender received a request slip dated March 19, 2015 in which defendant requested an appeal

of his sentence of March 10, 2015. The Assistant Public Defender explained that he did not believe that an appeal would be successful, but advised Moyer to write him back as soon as possible if he wanted to file an appeal.

The court noted as well that there was a factual question concerning whether Moyer requested an appeal and whether there was an unjustified failure by counsel to file the requested appeal. The court scheduled an evidentiary hearing for December 13, 2016.

On December 13, 2016, upon stipulation of the parties, the court granted Moyer's PCRA petition to the extent it sought reinstatement of his direct appeal rights nunc pro tunc. The court appointed Ravi Marfatia of the Lycoming County Public Defender's office to file a Notice of Appeal within thirty (30) days.

The Notice of Appeal was filed by Mr. Marfatia on December 19, 2016. On December 23, 2016, the court directed Moyer to file a concise statement of errors complained of on appeal. On or about February 10, 2017, the court received notice from the Superior Court that the appeal was dismissed for failure to comply with Pennsylvania Rule of Appellate Procedure 3517. On March 20, 2017, however, the court received notification that the "records are more than 30 days overdue." Believing that the appeal was dismissed, the court contacted the Superior Court Prothonotary. The court was advised that by Order dated February 15, 2017, the appeal was reinstated and the dismissal order was vacated. Unfortunately, the court had not received a copy of said order.

On March 27, 2017, the court received a letter from Moyer indicating, among other things, that he had no contact with Attorney Marfatia.

On June 2, 2017, Mr. Marfatia filed a concise statement of matters complained of

on appeal. Moyer avers that the sentence “is unduly harsh, inappropriate and excessive as to constitute too severe punishment, in view of all of the facts and circumstances presented at his sentencing hearing.”

When imposing a sentence, a sentencing court must consider the protection of the public, gravity of the offense in relation to the impact on the victim and community, and the rehabilitative needs of the defendant. *Commonwealth v. Fullin*, 892 A.2d 843, 847 (Pa. Super. 2006). The court is also guided by § 9781 (d) of the Judicial Code, which requires appellate courts to review the record with regard to: “(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the opportunity of the sentencing court to observe the defendant, including any presentence investigation; (3) the findings upon which the sentence was based; and (4) the guidelines promulgated by the commission.” 42 Pa. C.S.A. § 9781 (d).

“Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.” *Commonwealth v. Kitchen*, 2017 PA Super 147, 2017 Pa. Super. LEXIS 346, *11 (May 16, 2017), citing *Commonwealth v. Antidormi*, 84 A.3d 736, 760-61 (Pa. Super. 2014).

In this particular case, the court reviewed the presentence investigation report, the CRN and the assessment, and the risk needs evaluation. Accordingly, it is presumed that the

court properly considered and weighed all of the relevant factors in fashioning the sentence. *Commonwealth v. Baker*, 72 A.3d 652, 663 (Pa. Super. 2013).

There is no basis whatsoever to conclude that the court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived a manifestly unreasonable decision. In fact, the court specifically stated the reasons for its sentence and specifically took into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offenses as they related to the impact on the community. The court explicitly stated of record the factual basis and specific reasons which compelled it to arrive at its sentence.

The standard range for each offense was 24 to 36 months. (Sentencing Transcript I, March 10, 2015, at 10). While the court was willing to impose what arguably was a manifestly lenient sentence, once it became clear to the court that Moyer not only lied but more importantly was continuing to drink and not addressing his alcohol problem, all of the arguments made by the Commonwealth became valid. Moyer “thumbed his nose at society basically by getting two DUI’s and then picking up a third one while out on bail.” (Id. at 11). The blood alcohol level was extremely high on all three. Moyer didn’t “care if he’s going out on the road or potentially injuring or killing himself and others on the road.” (Id.). Moyer had a substantial period of time to take advantage of counseling and treatment yet chose not to do so and chose to continue to drink.

It was abundantly clear to the court that Moyer could not stop drinking and accordingly would not stop jeopardizing the safety of the public. It was abundantly clear to the court that Moyer was in denial regarding his alcohol problem. Moyer hid his alcohol

consumption from his significant other and continued the ruse in court until he was caught lying. When given the opportunity, Moyer did not do what he needed to do to rehabilitate himself. Moyer did not do what he needed to do to protect the community. As well, Moyer did not do what he needed to do to reflect the seriousness of the offense on the community. The court's only and best option was to sentence the defendant to a significant period of state incarceration.

The purpose of such a sentence was, as stated by the court, primarily to protect the public for a significant period of time and to force Moyer into alcohol remission. Furthermore, keeping Moyer off the roads was of paramount importance. Finally, Moyer needed appropriate motivation to get all the help he needs.

Date: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Ravi Marfatia, Esquire (APD)
Work File
Gary Weber, Esquire, Lycoming Reporter
File CR-1050-2014
File CR-1387-2014