

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-147-2005  
 : (05-10147)  
 vs. :  
 : CRIMINAL  
 JENNIFER LYNN FRANK, :  
 Defendant :

**OPINION AND ORDER**

This matter came before the court for an argument on the mandatory minimum sentence applicable to this driving under the influence (DUI) case. The relevant facts follow.

In case number 05-10010, the defendant was arrested for a DUI offense, which occurred on October 16, 2004. The defendant was placed on accelerated rehabilitative disposition (ARD) on April 11, 2005.

In the case at bar, the defendant was arrested for a DUI offense, which occurred on December 2, 2004. The defendant's blood alcohol content (BAC) for this offense was .10%. The defendant pleaded guilty to this offense on April 11, 2005. At the guilty plea hearing, a question arose whether this case should be treated as a first or second DUI conviction for mandatory minimum sentencing purposes.

The court scheduled an argument on this issue for June 3, 2005. At the argument, defense counsel asserted that since the defendant had not been placed on ARD in case number 05-10010 before the offense occurred in this case, the ARD could not count as a prior offense for mandatory minimum purposes under 75 Pa.C.S.A. §3806(b). The Commonwealth argued that it should count as a prior offense pursuant to the general rule set

forth in 75 Pa.C.S.A. §3806(a), because the defendant was placed on ARD in case number 05-10010 prior to the sentencing in this case. The court agrees with defense counsel and finds that the ARD in case number 05-10010 does not count as a prior offense for purposes of calculating the mandatory minimum sentence.<sup>1</sup>

Resolution of this issue depends upon a careful reading of section 3806. Under the general rule set forth in subsection (a), the term prior offense includes a conviction, adjudication of delinquency, juvenile consent decree, acceptance of ARD or other form of preliminary disposition for a former or current Pennsylvania DUI offense or a substantially similar offense from another jurisdiction, which occurs before the sentencing on the present violation. 75 Pa.C.S.A. §3806(a). Subsection (b), however, creates an exception to this general rule. Subsection (b) indicates that for purposes of sections 1553(d.2) and 3804 the calculation of prior offenses shall include a conviction, adjudication of delinquency, juvenile consent decree, acceptance of ARD or other form of preliminary disposition for a former or current Pennsylvania DUI offense or a substantially similar offense from another jurisdiction within the ten years **before the present violation occurred**. Section 3804 is the penalty section and sets forth the mandatory minimum sentences for DUI offenses. Because section 3806(b) governs the applicability of the mandatory minimum penalties found in section 3804, the defendant's acceptance of ARD had to occur before the present violation occurred to count as a prior offense for mandatory minimum purposes. It did not. The present violation occurred on December 2, 2004, and the defendant was not accepted on

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1 Although the Commonwealth acknowledged subsection (b) would seem to dictate the result requested by defense counsel, the prosecutor wondered for what purposes subsection (a) would be applicable. It would appear that subsection (a) would govern situations other than the limited occupational license provisions found in section 1553(d.2) and the penalties for DUI found in section 3804. Examples of situations where subsection (a) could be utilized would be the calculation of prior record scores and the determination of whether ignition

ARD until April 11, 2005. Therefore, pursuant to sections 3806(b) and 3804(b), the mandatory minimum sentence for the DUI offense in this case is 48 consecutive hours of imprisonment.

**ORDER**

**AND NOW**, this day of June 2005, the court finds that 75 Pa.C.S.A §3808(b) governs the calculation of prior offenses for mandatory minimum sentencing purposes. Therefore, the defendant's acceptance of ARD in case number 05-10010 does not count as a prior offense for calculation of the mandatory minimum, and the mandatory minimum sentence for the defendant's DUI offense in this case is 48 hours consecutive imprisonment.

By The Court,

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Kenneth D. Brown, P.J.

cc: Nicole Spring, Esquire (APD)  
District Attorney  
Gary Weber, Esquire (Lycoming Reporter)