

**IN THE COURT OF COMMON PLEAS  
LYCOMING COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION**

<b>COMMONWEALTH</b>	:	
	:	
<b>v.</b>	:	<b>No.: 04-10,973</b>
	:	
<b>LARRY POTTER,</b>	:	
<b>Defendant</b>	:	

**OPINION AND ORDER**

Defendant entered a plea of guilty in the above-captioned case on November 1, 2004. Pursuant to that Order, the Commonwealth and Defendant were required to consult and attempt to agree on the appropriate grading of the offense given the existence of previous DUI offenses in New York State. The parties were unable to reach consensus and a hearing was held on the matter on May 12, 2005.

The Court finds that the DUI convictions in New York State contribute to the grading of the current offense pursuant to 75 Pa.C.S. § 3803 and § 3806. Defendant's reliance on *Commonwealth v. Kinney*, 2001 PA Super 173, 777 A.2d 492 (2001) is misplaced. *Kinney* was decided based on an interpretation of the language of the previous DUI statute at 75 Pa.C.S. § 3731. In the language of that statute, "Nothing in Section 3731(e)(1), the grading section, addresses convictions in other jurisdictions." 777 A.2d at 495. A plain reading of the statute, combined with resolving the ambiguity in favor of the criminally accused, led to a finding that out-of-state DUI convictions did not contribute to the grading of the current offense.

Presently, Defendant's offense was committed pursuant to the current DUI statute at 75 Pa.C.S. §§ 3801-3817. The current statute does not suffer from the ambiguity revealed in *Kinney*. Section 3803 provides that the grading of the offense under the chapter is determined based in relevant part on the number of prior offenses committed by the Defendant. "Prior Offense," for purposes of the entire chapter, is set forth in § 3806, which reads:

(a) GENERAL RULE.-- Except as set forth in subsection (b), the term "prior offense" as used in this chapter shall mean a conviction, adjudication of delinquency, juvenile consent decree, acceptance of Accelerated Rehabilitative Disposition or other form of preliminary disposition before the sentencing on the present violation for any of the following:

(1) an offense under section 3802 (relating to driving under influence of alcohol or controlled substance);

(2) an offense under former section 3731;

(3) an offense substantially similar to an offense under paragraph (1) or (2) in another jurisdiction; or

(4) any combination of the offenses set forth in paragraph (1), (2) or (3).<sup>1</sup>

The language of the current DUI statute unambiguously includes similar offenses from another jurisdiction in a Defendant's "prior offenses." Section 3803 uses said "prior offenses" to determine the grade of the current offense. Therefore, unlike the previous DUI statute discussed in *Kinney*, under the current statute out-of-state DUIs are expressly included in determining the grade of a current offense.

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<sup>1</sup> "Subsection (b)" as referred to in the statute refers to the 10 year look-back limitation. It did not encompass grading at the time of the current offense, and in any event the prior offenses at issue occurred within a ten-year period, so is inapplicable in the current analysis.

In the present case, Defendant has two DUI offenses in New York State that are applicable to the grading of the current offense. Pursuant to § 3803(b)(4) the resulting grade of the current offense is a misdemeanor of the first degree.

**ORDER**

AND NOW, this \_\_\_\_\_ day of May, 2005, based on the foregoing Opinion, it is hereby ORDERED and DIRECTED that the record reflect the correct grade of the offense found in Count 1, Driving Under the Influence of Alcohol is a misdemeanor of the first degree.

By the Court,

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Nancy L. Butts, Judge

xc: DA (RC)  
J. Campana, Esquire  
G. Weber, Esquire  
Law Clerk  
Judges