IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR – 457 - 2005
	:	
vs.	:	CRIMINAL DIVISION
	:	
LUANN KAY SAGAN,	:	
Defendant	:	Post-Sentence Motion

OPINION AND ORDER

Before the Court is Defendant's Post-Sentence Motion, filed April 5, 2006. Argument on the motion was held June 9, 2006.[1]

After a bench trial on February 6, 2006, Defendant was convicted of DUI and related summary offenses. On April 4, 2006, Defendant was sentenced on the DUI as a second offense and as having refused a blood test, to serve 90 days to six months incarceration and pay a fine of $1500.00. In the instant post-sentence motion, Defendant contends the Court erred in (1) considering a prior (1996) charge of DUI, which had been disposed of through ARD, as a first offense, (2) considering her refusal to submit to a blood test in applying the enhanced penalty provided for by 75 Pa.C.S. Section 3804(c), (3) denying her suppression motion, and (4) denying her a jury trial. These will be addressed seriatim.

With respect to consideration of Defendant's prior ARD as a first offense, Defendant points out that at the time of the ARD she was told that successful completion of the program would result in the charge being dismissed and that in the future it would not be considered a conviction unless she had a subsequent DUI within seven years. Defendant argues that to now consider the ARD as a first offense under the amended look-back period of ten years would constitute a violation of her right to due process as she was not provided notice that a subsequent offense within ten years would cause the ARD to be viewed as a first offense. The Court does not agree.

A similar argument was presented in Commonwealth v. Godsey, 492 A.2d 44 (Pa. Super. 1985). There, the appellant contended that a prior ARD should not be considered a first

[1] Defendant's brief was filed May, 16, 2006; the Commonwealth failed to file a brief.

offense under the law in effect at the time of his second offense when it had not been so considered at the time of the ARD, arguing that his acceptance of ARD was not knowing, intelligent and voluntary. The Court rejected the argument, noting that

> in volunteering to accept A.R.D., the appellant could not reasonably have concluded that it forever bound the legislature against further legislation it deemed necessary to deal with repeat offenses of the class which was subject of the A.R.D. The benefits of A.R.D. were substantial and he obtained what he bargained for -- an opportunity to obtain a clean record and to avoid the possibility of incarceration, upon successful completion of the program.

Id. at 46.

Further, in Commonwealth v. Tustin, 888 A.2d 843 (Pa. Super. 2005), in response to the argument that a 1996 DUI conviction should not be considered a first offense in sentencing on a 2004 DUI conviction because to do so would constitute a due process violation, the Court noted that due process is satisfied if a statute provides reasonable standards by which a person may gauge his future conduct. The Court reasoned that since Section 3806(b), which altered the look-back period from seven years to ten years, became effective more than three months before appellant was arrested for the 2004 DUI, due process was satisfied because appellant had notice of the statute and its effects at the time of his 2004 arrest. "Contrary to Appellant's argument, due process does not require an appellant to receive notice of when he may once again commit the same violation in the future." Id. at 846.

In the instant case, since the ten year look-back period was in effect at the time of Defendant's arrest on October 15, 2004, she had the requisite notice that her prior ARD would comprise a first offense and the fact that at the time of the ARD she had been told it was seven years does not implicate due process concerns.

Next, Defendant argues that considering her refusal to submit to a blood test in applying the enhanced penalty provided for by 75 Pa.C.S. Section 3804(c) would also deny her due process of law inasmuch as she was merely told at the time of the refusal that a conviction would be subject to a mandatory penalty of at least 72 hours of incarceration and a $1000 fine, but was not told the specific penalties which could apply if the conviction were considered a

second offense. In rejecting the claim that this same warning failed to satisfy the statutory requirements of the Implied Consent Law,[2] the Commonwealth Court stated as follows:

> It is not the duty of the police to explain the various sanctions available under a given law to an arrestee to give that individual an opportunity to decide whether it is worth it to violate that law. It is sufficient for the police to inform a motorist that he or she will be in violation of the law and will be penalized for that violation if he or she should fail to accede to the officer's request for a chemical test. The verbiage on form DL-26 informs a motorist that he or she will be in violation of the law and will be penalized for that violation if he or she should fail to accede to the officer's request for a chemical test; that is sufficient information upon which to base a decision as to whether or not to submit to chemical testing.

Commonwealth v. Weaver, 873 A.2d 1, 2 (Pa. Commw. 2005), *appeal granted* in Commonwealth v. Weaver, 890 A.2d 1061 (Pa. 2005). While Defendant seeks to distinguish Weaver on the basis it dealt with a license suspension, rather than the penalty for a criminal conviction, the Court believes the language in Weaver supports application of the law contained therein to the increased criminal penalties upon conviction as well as to the license suspension. Indeed, the Implied Consent Law itself addresses both the conviction for DUI as well as the suspension.[3] Since the Commonwealth Court held the notice provided by the same warning as was given Defendant to provide a sufficient basis upon which a person may "gauge his conduct", due process is satisfied.

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[2] 75 Pa.C.S. Section 1547.

[3] The relevant subsection provides:

> (2) It shall be the duty of the police officer to inform the person that:
>
> (i) the person's operating privilege will be suspended upon refusal to submit to chemical testing; and
>
> (ii) if the person refuses to submit to chemical testing, upon conviction or plea for violating section 3802(a)(1), the person will be subject to the penalties provided in section 3804(c) (relating to penalties).

75 Pa.C.S. Section 1547(2).

Third, Defendant contends the Court erred in denying her suppression motion. The reasons for the Court's ruling may be found in the Order addressing same,[4] and will not be repeated herein.

Finally, Defendant contends the Court erred in denying her a jury trial. The right to a jury trial exists, however, for only "those crimes carrying more than six months sentence" of incarceration. Commonwealth v. Mayberry, 327 A.2d 86, 89 (Pa. 1974). See also, Commonwealth v. Appel, 652 A.2d 341 (Pa. Super. 1994). Since the crime charged in the instant matter, DUI (second offense), carries a maximum penalty of six months incarceration, 75 Pa.C.S. Section 3803(a)(1), Defendant had no right to a jury trial.

As none of Defendant's post-sentence claims has any merit, her motion for post-trial relief will be denied.

ORDER

AND NOW, this 12th day of June 2006, for the foregoing reasons, Defendant's Post-Sentence Motion is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
Peter T. Campana, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson

[4] See Order dated November 2, 2005, entered by the Honorable Kenneth D. Brown.