IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. CR – 457 - 2005
	:
vs.	:
	:
LUANN KAY SAGAN,	:
Defendant	:

OPINION IN SUPPORT OF ORDER OF APRIL 4, 2006,
IN COMPLIANCE WITH RULE 1925(A) OF
THE RULES OF APPELLATE PROCEDURE

Defendant appeals this Court's Order of April 4, 2006, which sentenced her on one count of DUI to 90 days incarceration, following a bench trial on February 6, 2006, which resulted in a conviction of DUI and related summary offenses. In her Concise Statement of Matters Complained of on Appeal, Defendant contends the Court erred in denying a suppression motion, in considering her refusal to submit to chemical testing in imposing sentence, and in considering a previous DUI (ARD) as a first offense, rendering the instant charge a second offense. These issues will be addressed seriatim.

With respect to the suppression motion, Defendant had argued she had been denied her right to counsel when being asked to submit to chemical testing, and that police had failed to sufficiently warn her of the penalties she faced if she refused chemical testing. In her Statement of Matters, Defendant acknowledges that Superior Court has ruled that Defendant has no right to counsel when being asked to submit to chemical testing, and that the failure to properly advise a defendant in such circumstances is not grounds for suppression of the fact of the defendant's refusal. Defendant indicates that she is simply preserving these issues for a later appeal to the Supreme Court. In light of such, these issues will be addressed no further.

With respect to the consideration of Defendant's refusal in imposing sentence under Section 3804(c) of the Vehicle Code, Defendant contends that the warning provided by police in the process of requesting her to submit to chemical testing was inadequate and, as a result, her refusal should not have been considered, citing Commonwealth v. Jaggers, 903 A.2d 33 (Pa. Super. 2006). The Court agrees that Jaggers is controlling in this matter, and that Defendant should have been sentenced as though she had not refused chemical testing.[1] See

1 The Court notes it attempted to correct this error by granting Defendant's Motion for Reconsideration

this Court's Opinion in support of Order of August 7, 2006.

Finally, with respect to Defendant's contention the Court should not have considered a prior DUI ARD as a first offense, this issue was addressed in the Opinion issued in support of the Order dated June 12, 2006, which denied Defendant's Post-Sentence Motion. The Court will therefore simply rely on that opinion for purposes of the instant appeal.

Accordingly, since the Court agrees that Defendant is entitled under Jaggers to be sentenced without considering her refusal to submit to chemical testing, it is respectfully suggested that the matter be remanded for re-sentencing. The Court does believe, however, that the other issues are without merit.

Dated: October 3, 2006

Respectfully Submitted,

Dudley N. Anderson, Judge

cc: DA
Peter T. Campana, Esq.
Gary L. Weber, Esq.
Hon. Dudley Anderson
Hon. Kenneth D. Brown

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of her Post-Sentence Motion, but the Order directing re-sentencing, dated August 7, 2006, was entered several days past the 120-day deadline and was thus a nullity. Once this was brought to the Court's attention, the Prothonotary was directed to enter an Order denying the Post-Sentence Motion/Motion for Reconsideration by operation of law so that Defendant could instead pursue the instant appeal.