

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**JEREMY EARNEST,
Defendant**

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No.: 68-2008

OPINION AND ORDER

On November 24, 2008, Defendant filed a Motion for Reconsideration of Sentence in the form of a Post-Sentence Motion; subsequently an amended Motion was filed on December 10, 2008. Argument on Defendant's Motion was held on December 11, 2008. Defendant raises three issues in his motion: (1) that the Court abused its discretion and the sentence was excessive; (2) that the Court did not consider mitigating factors; and (3) that the sentence is not consistent with the plea agreement. Defendant asserts the sentences imposed should run concurrently and asks this Court to reconsider his sentence.

Background

On August 26, 2008, Defendant pled guilty to one count of Aggravated Assault by Vehicle While Driving Under the Influence of Alcohol (second offense) at 75 P.a.C.S. § 3735.1(a), one count of Driving Under the Influence of Alcohol (third offense) at 75 Pa.C.S. § 3802(a)(1), one count of Driving Under the Influence of Alcohol at 75 Pa.C.S. § 3802(b) (third offense), and one count of Driving While Operating Privilege is Suspended or Revoked (second offense) at 75 Pa.C.S. § 1543(b)(1.1). Defendant's sentence was deferred in order to determine his eligibility for the State Intermediate Punishment (IP) Program. On November 13, 2008, after

it was determined that Defendant was not eligible for State IP, he received an aggregate sentence of twenty-seven (27) months ninety (90) days to thirteen (13) years in a State Correctional Institution.

Discussion

The Court abused its discretion and the sentence is excessive

Defendant contends that the sentence imposed by this Court is excessive and an abuse of discretion.

When a Defendant is challenging the discretionary aspects his sentence there is no absolute right to appeal the sentence imposed. 42 Pa.C.S.A. § 9781(b). The Defendant is required to show there is a substantial question that the sentence imposed is not appropriate under the sentencing code. *Id.* “A bald claim of excessiveness of sentence does not raise substantial question so as to permit review where the sentence is within the statutory limits.”

Commonwealth v. Petaccio, 764 A.2d 582, 587 (Pa. Super. Ct. 2000). See also Commonwealth v. Jones, 613 A.2d 587, 593 (Pa. Super. 1992) (*en banc*). “In order to establish a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.”

Commonwealth v. Fiascki, 886 A.2d 261, 263 (Pa. Super. Ct. 2005). The trial court's sentence will stand unless there is a manifest abuse of discretion. To demonstrate an abuse of discretion, “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. Perry, 883 A.2d 599, 602 (Pa. Super. Ct. 2005).

The Court did not abuse its discretion and the sentence was not excessive. The Defendant pled guilty on August 28, 2008, to one count of Aggravated Assault by Vehicle While DUI, which is a second degree felony, two counts of DUI, misdemeanors of the first degree, and DUS. The statutory maximum for the Aggravated Assault by Vehicle While DUI is 10 years and the maximum for the two DUI's is five years. The Defendant received a sentence of twenty-one (21) months to eight (8) years in state prison, for the Aggravated Assault by Vehicle While DUI, which does not exceed ten (10) years and is within the standard range of the sentencing guidelines. The Defendant also received a sentence of sixth (6) months for DUI, which is above the mandatory ninety (90) days, but does not exceed five (5) years. Further, the Defendant had a prior record score of four, this was his second offense for Aggravated Assault by Vehicle While DUI, and his third DUI offense. Therefore, the Court did not abuse its discretion in imposing the Defendant's sentence as it was not excessive.

The Court did not consider mitigating factors argued during sentencing

Defendant also asserts that this Court did not consider mitigating factors such as his young age, his recognition of the serious alcohol problem he struggles with, his attempts to obtain help for his addiction, and his contributions to the community through employment.

“[A]n allegation that a sentencing court failed to consider or did not adequately consider certain factors does not raise a substantial question that the sentence was inappropriate. Such a challenge goes to the weight accorded the evidence and will not be considered absent extraordinary circumstances.” Petaccio, 764 A.2d at 587 (quoting Commonwealth v. Urrutia, 653 A.2d 706, 710 (Pa. Super. 1995)).

The Court believes the Defendant's allegations do not raise a substantial question that his sentence was inappropriate. Further, based upon a review of the transcript, the Court believes Defendant's assertion is without merit. At the time of sentencing, Defense Counsel presented mitigating factors such as Defendant's employment, in fact the Defendant's employer wrote a letter on behalf of the Defendant, asking this Court to be lenient on the Defendant and sentence him to County Prison with hopes of work release eligibility. Furthermore, Defense Counsel asserted that Defendant shows remorse to the Court and has apologized to the passenger. Finally, Defendant contended that he has attempted to receive help with his alcohol issues by applying for DUI Court and the State IP Program. The Court in sentencing the Defendant cited the fact that this is the Defendant's second offense of Aggravated Assault by Vehicle While DUI and his third DUI offense. The Court also noted that the Defendant could get involved in a therapeutic community in the state prison system which would help him with his alcohol issues. The Court's decision was based upon all of the information received by the Court, including the Defendant's employment, alcohol issues, and prior contacts with the system for the same type of offense. Therefore, the Court did not fail to consider the Defendant's employment and recognition of his alcohol problem.

The sentence Defendant received is not consistent with the plea agreement

Defendant claims that this Court failed to comply with the plea agreement when imposing sentence.

When the plea contains a negotiated term of confinement, the Court cannot unilaterally alter the length of the Defendant's incarceration. Commonwealth v. Townsend, 693 A.2d 980, 983 (Pa. Super. Ct. 1997). However, "a distinction must be made between agreements in which

the parties have agreed upon a specific sentence and those in which the length of the sentence is left to the sound discretion of the court.” Id.

The negotiated plea agreement between the Commonwealth and the Defendant was that the Defendant would receive a State IP sentence for this case and for his Probation Violation. The Defendant was later determined to be ineligible for State IP. The plea agreement did not provide for any specific sentence if Defendant was determined to be ineligible for State IP. Absent that agreement, the sentence was within the sound discretion of the Court. Therefore, the Court did not violate the terms of the plea agreement in imposing its sentence.

Conclusion

Based upon the foregoing, the Court finds no reason upon which to grant Defendant’s Motion. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4)(a), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty days (30) of the date of this Order to the Pennsylvania Superior Court; “(b) the right to assistance of counsel in the preparation of the appeal; (c) the rights, if the defendant is indigent, to appeal in forma pauperis and to proceed with assigned counsel as provided in Rule 122; and (d) the qualified right to bail under Rule 521(B).”

ORDER

AND NOW, this ____ day of March 2009, based on the foregoing Opinion, it is hereby ORDERED AND DIRECTED that Defendant's Motion for Reconsideration of Sentence is DENIED.

By The Court,

Nancy L. Butts, Judge

cc: DA
PD (RB)
Trisha D. Hoover, Esq. (Law Clerk)
Gary Weber, Esq. (LLA)