IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	**:**	
	:	
vs.	**:**	**NO. 121-2006; 456-2006; 579-2006**
	:	
DAINA HEDGES,	**:**	
Defendant	**:**	**1925(a) OPINION**

OPINION IN SUPPORT OF THE ORDER OF IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This Opinion is written in support of the judgment of sentence dated November 18, 2008. The relevant facts follow.

As a result of an incident on November 14, 2005, where Appellant's blood alcohol content (BAC) was .22, Appellant was charged with driving after imbibing a sufficient quantity of alcohol to render her incapable of safe driving (DUI-incapable of safe driving), 75 Pa.C.S. § 3802(a)(1); driving after imbibing a sufficient quantity of alcohol that her blood alcohol content was .16% or greater within two hours of driving (DUI-BAC .16% or greater), 75 Pa.C.S. § 3802(c), and driving when her operating privilege was suspended for a previous driving under the influence violation and her blood alcohol content was .02% or greater (DUS-DUI related BAC .02 or greater), 75 Pa.C.S. § 1543(b)(1.1).

Appellant also drove a vehicle while under the influence of alcohol on January 29, 2006. Appellant's BAC was .19%. The police charged Appellant with DUI-incapable of safe driving, 75 Pa.C.S. § 3802(a)(1); DUI-16% or greater, 75 Pa.C.S. § 3802(c); and DUS-DUI related, 75 Pa.C.S. § 1543(b)(1).

On February 1, 2006, Appellant was stopped for expired registration and poor driving. The police again believed she was under the influence. Her blood was tested and her BAC was

.26%. The police charged her with DUI-incapable of safe driving, 75 Pa.C.S. 3802(a)(1); DUI-BAC .16% or greater, 75 Pa.C.S. 3802(c); DUS-DUI related BAC .02 or greater, 75 Pa.C.S. 1543(b)(1.1); and other summary Vehicle Code violations.

Appellant failed to appear for arraignment on all these cases and a bench warrant was issued. Appellant was picked up on the bench warrant in Florida. She waived extradition and was returned to Pennsylvania in June 2006.

Appellant pled guilty to the DUI and DUS charges in all three cases on January 9, 2007. The terms of the plea agreement, as evidenced by the cover sheet of the written guilty plea colloquy was for the mandatory minimum for each offense to run consecutive for a total minimum of 510 days and $7,000 fine, based upon the belief that each DUI was or would be considered Appellant's second within the ten-year look back period.

Sentencing was scheduled for February 27, 2007, but Appellant failed to appear and a bench warrant was issued. Appellant was picked up on the bench warrant in the state of Missouri. She contested extradition. Ultimately, Appellant was extradited and returned to Pennsylvania on or about September 3, 2008.

On November 18, 2008, the Court held a sentencing hearing. At the sentencing hearing both counsel agreed that Appellant had two prior DUIs that were within the ten-year look back period.[1] Therefore, the mandatory minimum for each DUI was one year, not 90 days as the defense mistakenly believed at the time of Appellant's guilty plea. The Court imposed a mandatory minimum of one-year on each DUI, a 90-day mandatory minimum on the DUS charges in case number 121-2006 and 579-2006, and a 60-day mandatory minimum on the

DUS in 456-2006.[2] All the DUI sentences were consecutive, resulting in an aggregate state sentence of 3 years to 15 years plus an additional consecutive 90 days for one DUS.

On December 16, 2008, Appellant filed a notice of appeal.

The sole issue raised in Appellant's statement of errors complained of on appeal is that the trial court violated the terms of the plea agreement and therefore abused its discretion in imposing sentence. The Court cannot agree. The Court could not comply with the plea agreement because it was based on the false premise that each of Appellant's DUIs would be considered a second DUI within 10 years and the mandatory minimum would be 90 days. This belief was erroneous for two reasons. First, Appellant and her counsel did not believe her ARD in case number CR-805-1995 would fall within the ten-year look back period for any of her current DUI convictions. Although the case number and offense date were from 1995, Appellant was placed on ARD on March 11, 1996, within ten years of all three of Appellant's current DUIs. See 75 Pa.C.S.A. § 3806(b). Second, at the time Appellant entered her plea, there was no case law regarding how section 3806 would be interpreted when a defendant pleads guilty at one plea hearing to multiple DUI offenses that occurred on different dates. Apparently, the defense believed that all three DUIs would be considered second offenses for mandatory minimum purposes. After Appellant's guilty plea and before her sentencing hearing, the Pennsylvania Superior Court rejected similar defense arguments and found that so long as the conviction, disposition or adjudication occurs prior to sentencing the offense counts as a prior conviction under section 3806 for purposes of determining the applicable mandatory

---

[1] In case number CR-805-1995, Appellant was placed on ARD for the offense of DUI on March 11, 1996. In case number CR-1743-2000, Appellant pled guilty to DUI on or about September 21, 2001.

[2] At the sentencing hearing, the Court noted that if Appellant had been charged under different subsections of 1543, the mandatory minimum sentences would have been higher on the DUS offenses.

minimum. See ***Commonwealth v. Misner***, 946 A.2d 119 (Pa.Super. 2008); ***Commonwealth v. Nieves***, 935 A.2d 887 (Pa.Super. 2007); ***Commonwealth v. Stafford***, 932 A.2d 214 (Pa.Super. 2007). Therefore, contrary to Appellant's belief, her DUIs were not second offenses for mandatory minimum purposes, but her third, fourth and fifth. When an individual pleads guilty to DUI-BAC .16% or greater, any third or subsequent offense carries a mandatory minimum of one year. The Commonwealth does not need to provide notice of its intent to seek a mandatory sentence for DUI. The Court must impose the mandatory sentence and does not have any discretion to impose a lesser sentence. If the Court would have imposed a lesser sentence, it would have been an illegal sentence. ***Commonwealth v. Edrington***, 780 A.2d 721, 723 (Pa. Super. 2001) (failure to impose a mandatory minimum sentence results in an illegal sentence). The Court made Appellant aware of the higher mandatory minimum and questioned whether she wished to proceed with sentencing and she replied in the affirmative. N.T., November 18, 2008, pp. 5-6, 12. Appellant cannot obtain relief by attempting to force the Court to impose an illegal sentence. Instead, her only avenue for relief would have been to seek to withdraw her plea and, if successful, either attempt to obtain a plea agreement that did not require each DUI to be consecutive or to go to trial and try to obtain an acquittal on some of the charges. Appellant chose to proceed with sentencing.

Based on the foregoing discussion, the Court did not have any discretion to impose a lesser sentence. The applicable mandatory minimum was one year for each DUI and the plea agreement called for a guilty plea for the mandatory minimum with each to run consecutive.

BY THE COURT,

Kenneth D. Brown, President Judge

cc: Robert Cronin, Esquire
DA
Judges
Gary L. Weber, Esquire (Lycoming Reporter)