

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

**COMMONWEALTH OF PENNSYLVANIA**

**v.**

**DAVID LUNGER,**  
**Defendant**

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**No. SA-65-2008**  
**CRIMINAL DIVISION**  
**APPEAL**

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

The Defendant appeals this Court's Order dated November 20, 2008, finding the Defendant guilty of Driving Under Suspension (DUS) (not DUI related). The Court notes a Notice of Appeal was timely filed on December 9, 2008 and that the Defendant's Concise Statement of Matters Complained of on Appeal was then filed on December 11, 2008. The Defendant challenges the Court's Order on three grounds: first, there was insufficient evidence to sustain a verdict of guilt; second, the verdict of guilt as to the offense of DUS was against the weight of the evidence; and third, the Court abused its discretion in imposing sentence.

***Background***

On April 24, 2008, Chief Richard Shearer (Shearer) of the Hughesville Borough of Police observed a white GMC pick-up driven by David Lunger (Defendant) with a temporary registration that was not visible in the back window. Shearer proceeded to pull the vehicle over. The Defendant was able to provide the temporary registration paper which was behind the seat. The Defendant related to Shearer that he (Defendant) did not have any tape when he bought the truck, but subsequently had tape and taped the registration to the window. Shearer asked the Defendant for his license, but the Defendant who said he had a plastic license, was unable to

produce it. Shearer ran a check of the Defendant's driver's license status and discovered it was suspended. Shearer also checked into the history of the Defendant's license suspensions using JNET, which revealed eight prior license suspension convictions. Shearer explained that on the Defendant's driving record the most recent suspension was October 19, 2007, but that the record did not report an expiration date of the suspension. The license was suspended for a failure to respond to a § 1543a, suspension of driving privilege citation. Shearer related that each § 1543a failure to respond results in a subsequent one year violation and in the Defendant's case "he is looking at nine additional years." Shearer explained the driving record does not specifically list whether PennDot receives the license, only if a pick-up order was issued. Shearer also related that if someone has their license after a pick-up order has been issued that means the person did not surrender their license to PennDot as required. Further, he related that the license would still be suspended until PennDot receives the document in hand.

At the summary appeal trial held on November 20, 2008, this Court found the Defendant guilty of the summary offense of Driving Under Suspension (not DUI related). As this was the Defendant's sixth or subsequent offense, he was sentenced pursuant to 75 Pa. C.S. § 6503(a.1) Habitual Offenders. The Defendant was sentenced to 90 days incarceration, but eligible for electronic monitoring, ordered to pay a fine in the amount of \$1000, and ordered to pay the costs of prosecution.

## *Discussion*

### *There was insufficient evidence to sustain a verdict of guilt*

Defendant asserts the Commonwealth's evidence presented at trial was insufficient to sustain a verdict of guilt. Defendant alleges the Commonwealth did not present evidence that the Defendant's license was suspended and that the Defendant had notice of the suspension.

The test used to determine the sufficiency of the evidence in a criminal matter is "whether the evidence, and all reasonable inferences taken from the evidence, viewed in the light most favorable to the Commonwealth, as verdict-winner, were sufficient to establish all the elements of the offense beyond a reasonable doubt." Commonwealth v. Maloney, 876 A.2d 1002, 1007 (Pa. Super. Ct. 2005) citing Commonwealth v. Lawson, 759 A.2d 1 (Pa. Super. Ct. 2000). When applying "the above test, the entire record must be evaluated and all evidence actually received must be considered." Commonwealth v. Lambert, 795 A.2d 1010, 1015 (Pa. Super. Ct. 2002). An appellate court should not interfere with the trial court's findings in a non-jury trial unless "the evidence is so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances." Commonwealth v. George, 878 A.2d 881, 885 (Pa. Super. Ct. 2005) (quoting Commonwealth v. Wright, 722 A.2d 157, 161 (Pa. Super. 1998)).

A person violates 75 Pa.C.S. § 1543(a) and is guilty of Driving Under Suspension when he/she "drives a motor vehicle on any highway or trafficway of this Commonwealth after the commencement of a suspension, revocation or cancellation of the operating privilege and before the operating privilege has been restored . . ." Under 75 Pa.C.S. § 1533(a), a person's license shall be suspended for failure to respond to a citation, summons, writ or pay fines and costs imposed by an issuing authority. "The suspension shall continue until such person shall respond

to the citation, summons or writ, as the case may be, and pay all fines and penalties imposed or enter into an agreement to make installment payments for the fines and penalties imposed . . . .”

Id. at (d).

In the instant case, the Commonwealth produced a certified copy of the Defendant’s driving record which shows his license was suspended as a result of a hearing effective June 19, 2007, then another suspension for 20 days effective August 13, 2007. Following those suspensions there is nothing in the Defendant’s driving record to show that his driving privileges had been restored. The Defendant’s driving record refers to § 1533(d), which is failure to respond, as the reason for his continued suspension. Therefore, on April 24, 2008, the date the Defendant was pulled over by Shearer his operating privilege was suspended. Viewed in the light most favorable to the Commonwealth, the Court finds there was sufficient evidence for it to find the Defendant guilty of Driving Under Suspension.

***The verdict of guilt was against the weight of the evidence***

The Defendant alleges the verdict of guilt was against the weight of the evidence. Particularly, the Defendant asserts the Commonwealth failed to present evidence that the Defendant’s license was suspended and the Defendant had notice of such suspension.

“Whether a new trial should be granted on grounds that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial judge, and h[er] decision will not be reversed on appeal unless there has been an abuse of discretion.” Commonwealth v. Polk, 500 A.2d 825, 827 (Pa. Super. Ct 1985). (quoting Commonwealth v. Taylor, 471 A.2d 1228, 1230 (1984). “The question of weight of the evidence is one reserved exclusively for the trier of fact who is free to believe all, part, or none of the evidence and free to determine the credibility

of witnesses.” Commonwealth v. Solano, 906 A.2d 1180, 1186 (Pa. 2006) citing Commonwealth v. Champney, 832 A.2d 403, 408 (Pa. 2003). When the judge is the trier of fact her “findings are entitled to the same weight as a jury verdict, and h[er] refusal to grant a new trial on the grounds that the verdict was against the weight of the evidence will not be disturbed if supported by the record.” Commonwealth v. Starks, 444 A.2d 736, 738 (Pa. Super. Ct. 1982).

At the summary appeal trial, the court was presented with a certified copy of the Defendant’s driving record. There was no testimony at the hearing that the Defendant did not live at the address on the driving record. Under the Motor Vehicle code, Section 1515, the Defendant is required to notify Penn Dot of any address change within fifteen days. 75 Pa.C.S. § 1515(a). The Court finds that even if there was testimony that the Defendant did not live at the address on his driving record, that lack of notice still would not have been a defense. After review of the driving record, the Court notes it reveals the Defendant was aware of his responsibilities as far as responding to a citation. The record shows the Defendant received a citation for speeding in July of 2007 and that he answered to it in August of 2007, which means he knew what his responsibilities were. There is nothing in the record from that departmental hearing, where he received a license suspension, which indicates that his privilege was ever restored. Furthermore, the Defendant’s driving record reveals his license has been suspended eight times, which shows he is very familiar with the requirements of having the license restored when it has been suspended. Therefore, the verdict of guilt was not against the weight of the evidence.

*The Court abused its discretion in imposing sentence*

Defendant contends in his Statement of Matters Complained of on Appeal that the Court abused its discretion in imposing sentence. Specifically, the Defendant alleges the Court should have considered the Defendant's age, the absence of victims, and the period of incarceration which would have been necessary to punish, yet rehabilitate the Defendant.

When a Defendant is challenging the discretionary aspects of 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). "[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 did not abuse its discretion and the sentence was not excessive. Further, the Court believes the Defendant’s allegations do not raise a substantial question that his sentence was inappropriate. The Defendant was found guilty of the summary offense of Driving Under Suspension (not DUI related). As this was the Defendant’s sixth or subsequent offense, the Defendant was sentenced pursuant to the Habitual Offenders section. The mandatory minimum sentence for that offense is 30 days imprisonment and a \$1000 fine. The statutory maximum for the offense is six months in prison and a \$1000 fine. The Defendant was sentenced to 90 days incarceration, but eligible for electronic monitoring, ordered to pay a fine in the amount of \$1000, and ordered to pay the costs of prosecution. The Court’s sentence was based upon the fact that the Defendant believed his operating privilege was restored because he had a plastic license, even though he continually failed to respond to citations, thus having open-ended suspensions. As the Defendant sets forth no specific claim as to how the Court has abused its discretion, his claim has no merit.

***Conclusion***

For the foregoing reasons, this Court respectfully suggests that its November 20, 2008 Order finding the Defendant guilty of Driving Under Suspension (not DUI related) be affirmed.

By the Court,

Dated: \_\_\_\_\_

Nancy L. Butts, Judge

xc: DA (PP)  
PD (RC)  
Trisha D. Hoover, Esq. (Law Clerk)  
Gary L. Weber, Esq. (LLA)