

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

<b>COMMONWEALTH</b>	:	
	:	<b>No. 1237-2009</b>
<b>v.</b>	:	
	:	<b>CRIMINAL DIVISION</b>
<b>JESSE AUL,</b>	:	<b>APPEAL</b>
<b>Defendant</b>	:	

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

The Defendant appeals the Sentencing Order of the Honorable Nancy L. Butts dated November 9, 2010 and Order of January 6, 2011, which in part denied his Post-Sentence Motion. The Court notes a Notice of Appeal was timely filed on February 2, 2011 and that the Defendant's Concise Statement of Matters Complained of on Appeal was filed on March 4, 2011. The Defendant raises one issue on appeal: (1) that the sentence in this case was unduly harsh and excessive.

***Background***

The Defendant in this case, Jesse Aul, sexually abused his step-daughter during a five (5) year period of time between the years 2002 and 2008 starting when the victim was seven (7) years old to approximately the age of twelve (12) or thirteen (13). On August 17, 2009, the Defendant pled guilty to Aggravated Indecent Assault, a consolidated count of Indecent Assault, a felony of third degree, and a consolidated count of Indecent Assault and Corruption of Minors, both misdemeanors of the first degree. On November 9, 2010, a Megan's Law/Sentencing Hearing was held before Judge Butts at which time the Court determined that the Defendant did

meet the criteria of a Sexually Violent Predator (SVP) and sentenced the Defendant on the Aggravated Indecent Assault charge to incarceration for 50 to 100 months with a consecutive five (5) year period of supervision with the Pennsylvania Board of Probation and Parole, on the consolidated count of Indecent Assault to incarceration for 6 to 24 months, and on the consolidated count of Indecent Assault and Corruption of Minors to a period of incarceration of 3 to 24 months. The Defendant's aggregate sentence was for 62 to 172 months incarceration with a consecutive five (5) year period of probation under the supervision of the Pennsylvania Board of Probation and Parole.

The Defendant filed a Post-Sentence Motion on November 19, 2010, alleging that the Court noted on the record that the Defendant was to receive a 24 month maximum sentence on each of the lesser charges in order to make them state sentences, but that all the sentences were then aggregated, resulting in an aggregate state sentence for all counts. The Defendant averred that it was unnecessary to sentence him to a 24 month maximum sentence on each of the lesser charges to achieve a state sentence, and that due to this fact, the Court's sentence was unduly harsh and excessive.<sup>1</sup>

After consideration of the Defendant's Post-Sentence Motion, the Court vacated the original sentence as to the consolidated count of Indecent Assault and imposed a sentence of 6 to 12 months, and vacated the original sentence as to the consolidated count of Indecent Assault and Corruption of Minors and imposed a sentence of 3 to 6 months incarceration. All of the sentences were still to run consecutive to one another and consecutive to the original sentence, leaving the Defendant with a new aggregate sentence of 62 to 124 months. In all other respects, the original sentence remained in full force and effect.

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<sup>1</sup> The Defendant also alleged that the Court failed to take into full account the Defendant's remorse, cooperation, willingness to seek treatment, and lack of a prior record. This allegation is completely unfounded; the Court did take into account all of these details and in turn delivered a thoughtful sentence reflective of these considerations, as discussed in more detail below.

## *Discussion*

### *The sentencing imposed against the Defendant was unduly harsh and excessive*

The Defendant claims that the sentence imposed against him was unduly harsh and excessive. However, the Court notes that the Defendant fails to state exactly how the sentence imposed against him was either unduly harsh or excessive. 42 Pa. C. S. A. § 9781(b) provides

The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals. Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.

A Defendant has no absolute right to challenge the discretionary aspects of his sentence.

Commonwealth v. Petaccio, 764 A.2d 582, 586 (Pa. Super. 2000) (See Commonwealth v. Hoag, 665 A.2d 1212 (Pa. Super. 1995)). It is well settled that sentencing is a matter vested in the sound discretion of the sentencing judge. See Commonwealth v. Paul, 925 A.2d 825, 829 (Pa. Super. 1997) (Quoting Commonwealth v. Kenner, 784 A.2d 808, 810 (Pa. Super. 2001)).

The decision of the sentencing court will be reversed only if the sentencing court abused its discretion or committed an error of law. See Paul (Quoting Kenner). “An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.” See Paul (Quoting Kenner).

Furthermore, a claim that a sentence is manifestly excessive does not raise a substantial question on appellate review when the sentence was within the statutory guidelines. See Commonwealth v. Jones, 613 A.2d 587 (Pa. Super. 1992).

At the Megan’s Law/Sentencing Hearing, C. Townsend Velkoff (Velkoff), a licensed psychologist employed by the Sexual Offender Assessment Board, testified that the most significant aspect of the Defendant’s case was that the sexual abuse occurred over a five (5)

year period of time. N.T., 11/9/10, p. 9. The Defendant began sexually abusing his stepdaughter when he started taking showers with her when she was only seven (7) years old. N.T., 11/9/10, p. 12. Over the course of the next five (5) years, the Defendant would find ways of being alone with the victim so that he could sexually abuse her, such as taking the victim on long trips with him when he drove a tractor trailer. N.T., 11/9/10, p. 12. The Defendant would get angry if the victim did not respond to him sexually, and threatened to kill her or her family if she ever told anyone about the sexual abuse. N.T., 11/9/10, p. 12-13. The Defendant felt bad about what he was doing and apparently considered committing suicide as a result. N.T., 11/9/10, p. 11. Based on these facts, Velkoff determined that the Defendant suffered from pedophilia that was likely to cause him to engage in predatory sexually violent offenses. N.T., 11/9/10, p. 13. The Court agreed with Velkoff, finding that the Defendant was in fact a sexually violent predator, which in turn requires him to register for life under Megan's Law. N.T., 11/9/10, p. 38, 47.

In formulating the Defendant's sentence, the Court did acknowledge the fact that the Defendant accepted responsibility for his actions in entering a plea, even accepting a longer period of incarceration than at first anticipated, as the Court discusses below, without forcing the victim to go through the additional trauma of a trial. The Court also believed that the Defendant was very remorseful for his actions, as evidenced by his behavior in court, and noted that this behavior was consistent with someone with no prior criminal record. Because of these facts, the Court agreed to accept the plea agreement and sentence the Defendant within the low end of the standard range. However, because of the nature of the charges and the length of time over which the incidents took place, and considering the devastating consequences the Defendant's actions will have on the victim and the victim's family throughout the remainder of their lives, the Court found that all of the charges should run consecutive to one another. In

response to Defense Counsel's request for counseling treatment for the Defendant, the Court informed the Defendant that part of his state prison sentence included mandatory counseling. The Court also noted that the consecutive period of supervision after confinement with parole is mandated partly to ensure that the Defendant remains on the right track with counseling and the other requirements of supervision.

At the time the Defendant entered his plea, which was an agreement for sentencing within the low end standard range, the Defendant was informed that the Aggravated Indecent Assault charge had an offense gravity score of 10 with the standard range of 22 to 36 months. However, at the time of the Sentencing Hearing the Defendant was informed that the Aggravated Indecent Assault charge actually had an offense gravity score of 12 with the standard range of 48 to 66 months. Notwithstanding this change, the Defendant was willing to go forward with his guilty plea and sentencing within the guidelines. The Defendant was also informed that the standard range for the consolidated counts of Indecent Assault was 3 to 12 months and for the consolidated Indecent Assault and Corruption of Minors was RS to 9 months. The Defendant was then ultimately sentenced, as the Court noted above, on the Aggravated Indecent Assault charge to incarceration for a minimum of 50 months and a maximum of 100 months with a consecutive five (5) year period of supervision with the Pennsylvania Board of Probation and Parole, on the consolidated count of Indecent Assault to 6 to 12 months, and on the consolidated count of Indecent Assault and Corruption of Minors to 3 to 6 months incarceration. The Court finds that this sentence was within the sentencing guidelines and in compliance with the plea agreement to sentence within the low end of the

guidelines.<sup>2</sup> Therefore, the Court finds the Defendant's claim that his sentence was unduly harsh and excessive to be without merit.

***Conclusion***

As the Defendant's argument is without merit, it is respectfully suggested that both this Court's Sentencing Order of November 9, 2010, and Order of January 6, 2011, which granted in part and Denied in part the Defendant's Post-Sentence Motion, be affirmed.

By the Court,

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

Nancy L. Butts, President Judge

xc: DA  
Robin C. Buzas, Esq.  
Gary L. Weber, Esq. (LLA)

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<sup>2</sup> The Court interprets "low end" as a sentence between the bottom of the standard range plus 3 months.