

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-258-2011
vs. :
: CRIMINAL DIVISION
: RICHARD A. LUCAS,
: Appellant : 1925(a) Opinion

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

This opinion is written in support of this court's judgment of sentence dated June 1, 2011 and its Order dated July 18, 2011, which denied Appellant's motion for reconsideration of sentence.

On January 7, 2011, at approximately 2:36 a.m., Lt. Arnold Duck of the Williamsport Bureau of Police conducted a traffic stop on a vehicle being driven by Appellant Richard Lucas, because Appellant was driving at nighttime without the appropriate lights turned on. During the traffic stop, Lt. Duck noticed a variety of factors that indicated Appellant was intoxicated, so he arrested Appellant for driving under the influence of alcohol (DUI). Blood tests revealed Appellant's blood alcohol content (BAC) was .159%.

On April 4, 2011, Appellant entered an open plea to DUI-incapable of safely driving, DUI-high rate of alcohol, and a traffic summary. Both DUI offenses were ungraded misdemeanors.

On June 1, 2011, the court sentenced Appellant to serve a six-month period of Intermediate Punishment with the first 30 days to be served at the Lycoming County

Prison/Pre-Release Facility, as well as to pay fines and costs.

On June 3, 2011, Appellant filed a motion for reconsideration of sentence, in which Appellant averred that the court abused its discretion when it imposed a sentence in the aggravate range of the sentencing guidelines and inappropriately considered Appellant's prior Accelerated Rehabilitative Disposition (ARD) completions. After a hearing and argument held on July 18, 2011, the court denied the motion for reconsideration.

Appellant filed a timely notice of appeal. Appellant's sole contention is that the court abused its discretion imposing a sentence in the aggravated range of the sentencing guidelines by considering Appellant's prior ARD completions in violation of the Superior Court's decision in Commonwealth v. Wise, 848 A.2d 932 (Pa. Super. 2004).

The court cannot agree for two reasons. First and foremost, the court imposed a sentence in the aggravated range not because Appellant had two prior ARD completions, but because Appellant had a problem drinking pattern that had lasted decades, he had a long history of disregarding the traffic laws, the incident occurred at a busy intersection, and previous sanctions had not worked to address his disregard of the traffic laws or his issues with drinking and driving. N.T., June 1, 2011, at pp. 7-8; N.T., July 18, 2011, at 7, 9.

It was undisputed that Appellant's prior criminal history and driving history consisted of an ARD for DUI in 1986, an ARD for DUI in 1998, fleeing and eluding a police officer in 1980,¹ and 10 other traffic violations. In determining an appropriate sentence, the

¹ Although fleeing and eluding a police officer was a summary in 1980, it is now graded as a misdemeanor of the second degree. See 75 Pa.C.S.A. §3733(a.2). Therefore, the court believes this offense would count as a misdemeanor for prior record score purposes based on 204 Pa.Code §303.8(d)(1), which states: "A prior conviction or adjudication of delinquency under former Pennsylvania law is scored as a conviction for the current equivalent Pennsylvania offense." Although Appellant's prior record score still would be a zero, the court believes it could consider the fleeing and eluding conviction as another factor justifying an aggravated range sentence. See Description of the Adequacy of the Prior Record Score, Sentencing Guidelines Implementation Manual, 6th ed., p. 93, which states: "The court may also consider any other legally permissible

court must consider several factors, including protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. 42 Pa.C.S.A. §9721(b). Similarly, in reviewing the record to determine whether the trial court's sentence is unreasonable, the appellate court must have regard for not only the sentencing guidelines but also the nature and circumstances of the offense and the history and characteristics of the defendant. 42 Pa.C.S.A. §9781(d); Commonwealth v. Walls, 592 Pa. 557, 926 A.2d 957, 963 (Pa. 2007). The reasons given by the court in imposing an aggravated range sentence are appropriate considerations related to the nature of the offense and the history, characteristics and rehabilitative needs of the defendant.

Second, the court finds Wise distinguishable from the case at bar. In Wise the trial court imposed an aggravated sentence solely on the fact that the defendant had a prior ARD. Here, it was not the fact that Appellant had two prior ARDs that resulted in a sentence in the aggravated range, but what those dispositions, in conjunction with Appellant's other traffic violations, showed about Appellant's history, characteristics and rehabilitative needs, i.e., Appellant had a drinking problem that spanned decades and an apparent inability to conform his driving to the requirements of the law, despite being given previous opportunities to address these problems that did not involve incarceration. Appellant also had a summary conviction for fleeing and eluding, which under current Pennsylvania law would have been graded as a misdemeanor of the second degree and for prior record score purposes would be treated as an "other misdemeanor." See footnote 1, *supra*.

Moreover, at the time Wise was decided, the sentencing guidelines did not

factors not otherwise included in the calculation of the Prior Record Score. These include, but are not limited to, previous convictions that are not reflected in the Prior Record Score (e.g., one prior 'Other misdemeanor' conviction....)"

contain a provision regarding the adequacy of a defendant's prior record score. The trial court in Wise imposed an aggravated sentence, because it believed it should have the discretion to consider a prior conviction when distinguishing between a driver who had been convicted for a first violation and those who have had prior dispositions under the DUI statute. 848 A.2d at 934. In rejecting the trial court's rationale, the Superior Court indicated it was not the role of the judicial branch to fault the wisdom of the legislative branch and its adoption of the guidelines. Id.

In the 6th edition of the guidelines, which became effective in 2005 (the year after the Wise decision), a provision regarding the adequacy of the defendant's prior record score was added. That provision states: "The court may consider at sentencing previous convictions, juvenile adjudications or dispositions not counted in the calculation of the Prior Record Score, in addition to other factors deemed appropriate by the court." 204 Pa.Code §303.5 (d). An ARD is a disposition that is not counted in the calculation of a defendant's prior record score. Thus, one could argue that consideration by the sentencing court of a disposition such as a prior ARD is now expressly authorized by the sentencing guidelines and that the persuasiveness of Wise rationale was undercut by subsequent legislative action.

For the foregoing reasons, the court believes a sentence in the aggravated range was appropriate in this case.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
Nicole Spring, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)