

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1619-2008  
vs. :  
: Opinion and Order re Defendant's  
KEITH SNOOK, : Oral Post Sentence Motion  
Defendant :

**OPINION AND ORDER**

This matter came before the court on the defendant's oral post sentence motion, which asserted issues regarding double jeopardy and the defendant's eligibility for the recidivism risk reduction incentive (RRRI) program. The relevant facts follow.

On October 14, 2009, the defendant was found guilty of Driving Under the Influence of Alcohol (DUI), DUI with Highest Rate of Alcohol and Driving While Operating Privilege is Suspended or Revoked with BAC .02% or Greater at a bench trial presided over by the Honorable William S. Kieser, Senior Judge. The driving with a suspended license (DWSL) conviction was graded as a misdemeanor of the third degree and Judge Kieser sentenced the defendant as a second violator under 75 Pa.C.S. §1543(b)(1.1)(ii).

The defendant filed a timely appeal in which he challenged the sufficiency of the evidence for his DUI conviction and the grading of his DWSL conviction as a misdemeanor of the third degree instead of a summary offense.

The Pennsylvania Superior Court affirmed the defendant's conviction for DUI, but reversed and remanded the DWSL conviction with directions to the lower court to determine whether the suspension was DUI-related and, if so, whether the present DWSL conviction represents the first or second one for driving with at least a .02% BAC.

The court held a hearing and argument on June 30, 2011. The

Commonwealth argued that the conviction was DUI-related and it represented the defendant's second violation for driving with at least a .02% BAC. Defense counsel claimed the defendant's suspension was not DUI-related and, even if it were, it would only be his first violation for driving with at least a .02% BAC. The court also was provided with a copy of the defendant's driving record.

The court needed time to review the driving record and the relevant law, so it scheduled the defendant's re-sentencing hearing for September 5, 2011. At this hearing, the court found that the defendant's DWSL conviction was DUI-related, but it was only his first conviction under 75 Pa.C.S. §1543(b)(1.1). Therefore, the court issued amended orders to change the grade of the offense from a misdemeanor of the third degree to a summary offense and vacating the six-month to one-year sentence and re-sentencing the defendant to 90 days imprisonment and a fine of \$1,000.

After the court issued its decision and imposed this sentence, defense counsel raised two issues: (1) the sentence violated double jeopardy because the defendant was charged with a violation of section 1543(b)(1.1)(ii) and not subparagraph (i), and (2) the defendant was eligible for RRRI, so the court should impose a RRRI minimum sentence on both the DUI and the DWSL convictions. The court indicated it would treat counsel's arguments as an oral post sentence motion and it gave both counsel two weeks to submit any case law on these issues to the court. Neither counsel has provided any authority to the court for their position within the two week time period; therefore, this matter is ripe for decision.

The defendant first asserts that the imposition of a sentence under section

1543(b)(1.1)(i) violates his rights against double jeopardy because he was only charged with a violation of subparagraph (ii); therefore the DWSL charge should be dismissed. The court cannot agree.

Section 1543(b) states in relevant part:

(1.1)(i) A person who has an amount of alcohol by weight in his blood that is equal to or greater than .02% at the time of testing...and who drives a motor vehicle on any highway or trafficway of this Commonwealth at a time when the person's operating privilege is suspended or revoked as a condition of acceptance of Accelerated Rehabilitative Disposition for a violation of section 3802 or former section 3731 or because of a violation of section 1547(b)(1) or 3802 or former section 3731 or is suspended under section 1581 for an offense substantially similar to a violation of section 3802 or former section 3731 shall, upon a first conviction, be guilty of a summary offense and shall be sentenced to pay a fine of \$1,000 and to undergo imprisonment for a period of not less than 90 days.

(ii) A second violation of this paragraph shall constitute a misdemeanor of the third degree, and upon conviction thereof the person shall be sentenced to pay a fine of \$2,500 and to undergo imprisonment for not less than six months.

75 Pa.C.S. §1543(b)(1.1)(i) and (ii). Both subparagraphs require proof that the defendant's operating privilege was suspended or revoked due to a conviction or acceptance of ARD for violating Pennsylvania's DUI statute (section 3802 or former section 3731), violating a substantially similar DUI statute from another jurisdiction, or refusing a chemical test after being arrested for violating Pennsylvania's DUI statute; and the amount of alcohol by weight in the defendant's blood is equal to or greater than .02% at the time of testing. Subparagraph (ii) is simply a sentencing enhancement for a second violation. Since subparagraph (i) is the same offense or a lesser-included offense of subparagraph (ii), and the defendant's sentence for subparagraph (ii) was vacated by his appeal, the defendant is not being punished twice for

the same offense in violation of his double jeopardy rights.

The fact that the defendant was not charged with a violation of subparagraph (i) is of no moment, because it is well-settled that a defendant may be convicted of any lesser-included offense of the particular crime charged. Commonwealth v. Karetny, 583 Pa. 514, 521 n.13, 880 A.2d 505, 521 n.13 (2005); see also Commonwealth v. Sims, 591 Pa. 506, 919 A.2d 931 (Pa. 2007)(appellant properly convicted of attempted escape even though only charged with substantive crime of escape, because attempt was a lesser-included offense); Commonwealth v. Pelluchia, 925 A.2d 848 (Pa. Super. 2007)(appellant properly convicted of criminal trespass graded a third-degree felony under 18 Pa.C.S. §3503(a)(1)(i) even though he was only charged with felony two criminal trespass under 18 Pa.C.S. §3503(a)(1)(ii), because the third-degree felony was a lesser-included offense).

Defense counsel also asserts that the court should impose a RRRI minimum on both the defendant's DUI and his DWSL convictions. The court cannot agree.

First, the court questions whether it would have jurisdiction to impose a RRRI minimum on the defendant's DUI conviction. The Pennsylvania Superior Court affirmed the judgment of sentence for the defendant's DUI; it remanded the case solely for the court to address the DWSL conviction.

The court also questions whether this issue was waived. The current version of the RRRI statute was approved on August 11, 2009 and became effective 60 days thereafter. Therefore, contrary to the statements made at re-sentencing, the RRRI statute was in effect at the time of the defendant's original sentencing. Neither the defendant nor his

counsel raised this issue at the original sentencing before Judge Kieser on December 14, 2009 or in his appeal to the Pennsylvania Superior Court.

Finally, and most importantly, the defendant does not meet the definition of eligible offender. To be an eligible offender, the defendant cannot have any convictions for personal injury crimes. 61 Pa.C.S. §4503. A personal injury crime includes any act which would constitute a misdemeanor or felony under 18 Pa.C.S. Ch. 27. 18 P.S. §11.103. The defendant's criminal history includes a conviction for simple assault, a misdemeanor of the second degree, in violation of 18 Pa.C.S. §2701. N.T., December 14, 2009, at p. 18. The only other way the court could impose a RRRI minimum is if the prosecuting attorney waived the eligibility requirements pursuant to 61 Pa.C.S. §4505(b), which has not occurred in this case.

For the forgoing reasons, the court finds the defendant is not entitled to dismissal of his DWSL conviction or imposition of a RRRI minimum. Accordingly, the following Order is entered:

**COMMONWEALTH**

**: No. CP-41-CR-1619-2008**

**vs.**

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**KEITH SNOOK,**

**ORDER**

**AND NOW**, this \_\_\_ day of September 2011, the court DENIES the defendant's oral post sentence motion. The defendant is not entitled to dismissal of his DWSL conviction because section 1543(b)(1.1)(i) is not a different or separate offense from the offense charged. The defendant also is not eligible for RRRI, because his criminal history includes a simple assault conviction.

The defendant is notified that he has a right to appeal. Any appeal must be filed within thirty (30) days of the date of this Order. The defendant is notified that he has the right to assistance of counsel in the preparation of the appeal. If the defendant is indigent (without financial resources), he has the right to appeal in forma pauperis and to proceed with assigned counsel as provided in Rule 122 of the Pennsylvania Rules of Criminal Procedure. The defendant has a qualified right to bail under Rule 521(B) of the Rules of Criminal Procedure. Since the defendant's aggregate sentence in this case exceeds 2 years, the defendant does not have the same right to bail as before verdict, but bail may be allowed in the discretion of the judge. Pa.R.Cr.P. 521(B)(2).

By The Court,

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Marc F. Lovecchio, Judge

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