

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-617-2011;
vs. : CR-911-2011;
: CR-1763-2011
GERMAINE COLES, :
Defendant :

OPINION AND ORDER

Defendant was charged with numerous criminal and traffic summary offenses under the above-captioned Informations.

On March 2, 2012, Defendant pled guilty to the following offenses: under Information CR-617-2011 to Count 1, Theft of Property Lost, a misdemeanor of the first degree and Count 2, Criminal Conspiracy to Commit Theft, also a misdemeanor of the first degree; under Information CR-1763-2011 to Count 1, Driving Under the Influence of Alcohol (incapable of safely driving) an ungraded misdemeanor, Count 2, Driving Under the Influence with the Highest Rate of Alcohol, a misdemeanor of the first degree, Count 3, Accidents Involving Damage to Attended Vehicle or Property, a misdemeanor of the third degree, and numerous traffic summaries; and under Information CR-911-2011 to Count 1, Driving Under the Influence of Alcohol (incapable of safely driving) (refusal), a misdemeanor of the first degree, and a traffic summary.

There was no plea agreement with respect to Information No's. CR-911-2011 or CR-1763-2011 but there was an agreement with respect to CR-617-2011. Specifically, in exchange for Defendant pleading guilty to both the theft and conspiracy counts, the Commonwealth would recommend a sixty-day sentence to run concurrent to the sentences received on the other charges.

By prior Order entered on February 14, 2012 after the Court concluded that

Defendant knowingly, intelligently, and voluntarily waived his right to be represented by counsel at Information No's. CR-1763-2011 and CR-911-2011, the Court granted Defendant's request to proceed pro se in connection with said matters. Standby counsel was appointed to assist Defendant while appointed counsel at CR-617-2011 remained.

During Defendant's guilty plea hearing, it became clear to the Court that the parties disputed Defendant's prior record score. Defendant claimed his prior record score was a 3 while the Commonwealth claimed his prior record score was a RFEL. Accordingly, the Court directed that the Lycoming County Adult Probation office prepare a Presentence Report. Sentencing was scheduled for May 30, 2012.

During the May 30, 2012 sentencing hearing, it became evident to the Court that the Defendant did not receive a copy of the Presentence Report and did not have an opportunity to confirm or contest the prior record score calculation of a RFEL as set forth in the Presentence Report. Accordingly, the sentencing was continued to June 19, 2012.

The Court directed that, no less than one week prior to sentencing, Defendant provide to the Court a written argument setting forth his position on why the prior record score as calculated in the Presentence Report was not accurate.

On June 19, 2012, the Court sentenced Defendant to a term of incarceration in a state correctional institution the minimum of which was 3 ½ years and a maximum of which was seven (7) years. Under CR-1763-2011, with respect to Count 2, Driving Under the Influence with the Highest Rate of Alcohol, the Court sentenced the Defendant to a minimum of 1 ½ years and a maximum of 3 years to be followed by 2 years of probation. With respect to Count 3, Accidents Involving Damage to Attended Vehicle or Property, the Court sentenced Defendant to a consecutive six months to one year.

Under Information CR-911-2011, the Court sentenced Defendant on Count 1, Driving Under the Influence (incapable of safely driving) (refusal) to a consecutive term of state incarceration, the minimum of which was 1 ½ years and the maximum of which was 3 years to be followed by 2 years of probation.

The aggregate sentence was a period of state incarceration, the minimum of which was 3 ½ years and the maximum of which was 7 years, to be followed by 4 years of probation supervision.

All of the remaining charges either merged for sentencing purposes or were run concurrent.

At Defendant's sentencing, the Court determined Defendant's prior record score was a 5. Defendant's prior convictions consisted of two 1998 convictions in North Carolina for breaking and entering, a 2004 conviction for burglary in Pennsylvania and a 2008 DUI conviction in Pennsylvania.

With respect to the North Carolina offenses, Defendant asserted that there was only one North Carolina offense. While Defendant's rap sheet indicated two separate offenses, one at 98CRS26 for which Defendant was found guilty on March 9, 1998 and one under 98CRS549 in which Defendant was found guilty on December 9, 1998, the Court deferred in favor of Defendant and only utilized one breaking or entering offense when calculating Defendant's prior record score.

In 1998, Defendant committed the North Carolina crime known as "breaking or entering buildings generally." This was in violation of North Carolina General Statute § 14-54. The statute notes that any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.

The Sentencing Guidelines note that with respect to out of state convictions, such are scored for prior record score purposes as a conviction for the current equivalent Pennsylvania offense. 204 Pa.Code § 303.8 (f)(1). Under Pennsylvania law, burglary is defined as a person entering a building, among other things, with intent to commit the crime therein. 18 Pa. C.S.A. § 3502. It is graded as a felony of the first degree unless the building is not adapted for overnight accommodation and if no individual is present at the time of entry. 18 Pa. C.S.A. § 3502 (c) (1), (2). Because there was no evidence with respect to the North Carolina offense that the building was adapted for overnight accommodation or that an individual was present, the Court again gave Defendant the benefit of the doubt and graded the North Carolina offense for equivalency purposes as a burglary graded as a felony of the second degree. This is a 2 point offense. 204 Pa.Code § 303.15.

Defendant's 2004 burglary conviction occurred in Lycoming County under Information No. 1364-2004. Defendant was convicted of burglary graded as a felony of the first degree, and involved a home where no one was present. This calculates as three points for prior record score purposes.

Accordingly, giving Defendant the benefit of the doubt both as to the number of North Carolina convictions and the grading thereof, Defendant's prior record score was a five.

If the Court had not given Defendant the benefit of the doubt, he would have had a prior record score of RFEL, because two North Carolina offenses equivalent to felonies of the second degree and one Pennsylvania felony of the first degree would result in seven prior record score points from felonies of the first and second degree and would have put Defendant in the prior record score category of a RFEL.

It was undisputed that the offense gravity score with respect to both DUI offenses to which the Defendant was sentenced was a five. A prior record score of a five and an offense gravity score of a five resulted in a standard sentencing range of 12 to 18 months.

With respect to Count 3, under Information 1763-2011, Accidents Involving Damage to Attended Vehicle or Property, the offense gravity score was a one. With a prior record score of a five, the sentencing guideline range was RS to 6.

Taking the Sentencing Guidelines into account, the Court sentenced Defendant on all three counts at the top end of the standard range.

On June 22, 2012, Defendant filed a Post Conviction Relief Act (PCRA) Petition, claiming he was sentenced outside the Sentencing Guidelines. By Order of Court dated June 28, 2012, the Court treated Defendant's PCRA Petition as a Post Sentence Motion.

Julian Allatt, Esquire was subsequently appointed to represent Defendant with respect to such Post Sentence Motion and in general any and all post sentencing matters. Argument was held before the Court on August 22, 2012. Following the argument, the Court granted Defendant's request for thirty (30) days to submit any supplement Post Sentence Motions. None were submitted and accordingly, Defendant's previously filed Post Sentence Motion is ripe for a decision.

Defendant's claim that he was sentenced outside of the guideline range is without merit. Indeed, it is clear that Defendant was sentenced within the standard guideline range with respect to all three determinative counts. Indeed, the Court gave Defendant the benefit of the doubt both in calculating the prior record score and ultimate standard range.

Furthermore, the Court exercised restraint in not sentencing Defendant in the

aggravated range or even above the sentencing guidelines. As the Court noted at sentencing and during the Post Sentence Motion argument, the facts and circumstances justifying the sentence could have easily merited a much longer term of incarceration.

More specifically, the theft offense occurred on August 30, 2010. The charges were filed on March 10, 2011. A preliminary hearing was held on April 27, 2011 and bail was set. A condition of bail was that Defendant remain law abiding.

Despite such, Defendant committed the first DUI offense on May 17, 2011 while on bail.

The charges on the first DUI were filed on May 20, 2011. The preliminary hearing was held on June 24, 2011 and bail was set and posted.

On October 10, 2011, Defendant committed the second DUI offense while out on bail on not only the theft offense but also the first DUI offense.

Moreover, on the second DUI charge, Defendant failed to appear for his preliminary hearing, and a bench warrant was issued. Defendant was subsequently apprehended approximately one month later and committed without bail.

The fact that Defendant committed several offenses while he was out on bail on earlier offenses, as well as the fact that he failed to appear for his preliminary hearing on the second DUI charge could have justified a sentence in the aggravated range. Instead, the Court sentenced Defendant at the top of the standard guideline range.

Accordingly, Defendant's Post Sentence Motion shall be denied.

ORDER

AND NOW, this ___ day of October 2012, for the reasons set forth above and following a hearing and argument, Defendant's Post Sentence Motion is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Kathryn Bellfy, Esquire (APD)
Julian Allatt, Esquire
Work File
Gary Weber, Lycoming Reporter