IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	**No. 885-2011**
v.	**:**	
	:	**CRIMINAL DIVISION**
DAVID SEESE,	**:**	**APPEAL**
Defendant	**:**	

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

The Defendant appeals the Sentencing Order of this Court dated November 15, 2011. A Notice of Appeal was timely filed on December 21, 2011 and the Defendant's Concise Statement of Matters Complained of on Appeal was filed on January 13, 2012. The Defendant believes that the sentence imposed against him was excessive because: 1) the Court cited the Defendant's accident as an aggravating factor even though the accident was minor and determined to be "non-reportable" by Officer James Douglas of the Williamsport City Police; 2) the Court abused its discretion in fashioning a sentence of sixty (60) days which was twenty (20) times greater than the mandatory minimum sentence determined by the Pennsylvania Legislature; and 3) the Court did not consider the mitigating factors of the Defendant's age sixty-seven (67), his health condition, the remoteness of his prior convictions (18 and 27 years respectively) or the fact that the Defendant had previously attended outpatient counseling.

Background

On November 15, 2011 the Defendant appeared before this Court for sentencing following his July 18, 2011 plea of guilty to Driving Under the Influence of Alcohol (DUI). There was no plea agreement in place, leaving the sentence imposed to the sole discretion of the

Court, and the Defendant's prior record score was determined to be a one (1) as a result of two previous DUI offenses, one in 1992 and one in 1983. However, as this was the Defendant's first DUI offense in ten (10) years, the Court discussed with the Defendant that the mandatory minimum sentence to be imposed was seventy-two (72) hours in jail and a one thousand dollar fine. The Court also discussed with the Defendant the results of his CRN evaluation, which established that the Defendant was arrested by the Williamsport City Police on February 9, 2011 and that the Defendant's blood alcohol level was a .21. The Defendant's evaluation results, or his Mortimer Filkins score, was a fifty-two (52), indicating that the Defendant engages in a problem drinker pattern which affects his mental health. The Court then sentenced the Defendant to six (6) months Intermediate Punishment with sixty (60) days to be spent at the Lycoming County Pre-Release Center.

Discussion

The sentence imposed was excessive

The Defendant claims that the sentence imposed against him was excessive as it was in the aggravated range and was not consistent with the protection of the public or the gravity of the offense as it relates to the impact of the victim, the community and the rehabilitative needs of the Defendant. The Defendants lists three specific areas of concern relating to the sentence imposed: 1) the Court cited the Defendant's accident as an aggravating factor even though the accident was minor and determined to be "non-reportable" by the Williamsport City Police; 2) the Court abused its discretion in imposing a sentence of sixty (60) days which was twenty (20) times greater than the mandatory minimum sentence to be imposed; and 3) the Court did not consider the mitigating factors of the Defendant's age (67), his health condition, the remoteness of his

prior convictions (18 and 27 years respectively), or the fact that the Defendant previously attended outpatient counseling. 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]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." See Petaccio at 587.

As noted above, the plea agreement in this case was open, leaving the Court with the sole discretion to impose an appropriate sentence. In this case, the Court considered a number of factors in order to fashion an appropriate sentence against the Defendant. Although the Court was aware that the Defendant's two prior DUI offenses were well outside the ten year look back period, the Court determined that the mere fact that the Defendant had prior offenses

was enough to enhance the mandatory. Furthermore, the Defendant's most recent DUI resulted in an accident, which the Court considered to be another aggravating factor regardless of the gravity of the accident. The Court reasoned that the 72 hour mandatory minimum is to be reserved for true first time offenders, and that to impose the same mandatory to an individual who has been in the system for a DUI conviction more than once would be unfair. The Court also explained that the length of time over which the Defendant has had contact with the legal system relating to drinking was a cause for concern. The Defendant indicated that he has health problems, that he takes care of his wife and that he previously attended out-patient counseling for his drinking problem; however, the Defendant provided no evidence that he is involved in any sort of ongoing recovery for his drinking problem, leading the Court to believe that the Defendant does not have mechanisms outside of drinking to help him deal with the stress of his other life events. The Court concluded that by imposing the statutory maximum sentence, which was six (6) months in this case given the high level of the Defendant's blood alcohol content, this would hopefully instill in the Defendant an understanding of the severity of his problem and the necessity of changing his behavior, especially in light of his older age. The Court imposed a sentence of six (6) months Intermediate Punishment Supervision with sixty (60) days to be served at the Lycoming County Pre-Release Center. The Court sentenced the Defendant to work release so that he might be able to continue his employment while serving his sentence. Based upon the above reasoning, the Court finds that the sentence imposed against the Defendant was not excessive, but was appropriate and specifically tailored to the needs of the Defendant as well as being consistent with the protection of the public. As the sentence imposed was within the guideline range, although not required to be, the Court can find no merit to the Defendant's claim of an excessive sentence. Additionally, the Court finds

that the Defendant has failed to set forth a valid claim as to how the Court abused its discretion in imposing the sentence.

Conclusion

As the Defendant's argument is without merit, it is respectfully suggested that this Court's Sentencing Order of November 15, 2011 be affirmed.

By the Court,

Dated: _____ Nancy L. Butts, President Judge

xc: DA
Kyle W. Rude, Esq.
Gary L. Weber, Esq. (LLA)