IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-617-2011;**
	:	**CP-41-CR-911-2011;**
vs.	**:**	**CP-41-CR-1763-2011**
	:	
	:	
GERMAINE COLES,	**:**	
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 response to the appeal of Appellant's judgment of sentence dated June 25, 2012. Appellant's appeal rights were reinstated through a Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

Under information 617-2011, Appellant was charged with theft of property lost or mislaid and conspiracy to commit theft. Under information 911-2011, Appellant was charged with driving under the influence (DUI) – incapable of safely driving (refusal) and a summary traffic offense. Under information 1763-2011, Appellant was charged with DUI-incapable of safe driving; DUI-highest rate of alcohol; accident involving damage to attended vehicle or property and numerous traffic summaries. Appellant had a previous DUI in 2007 for which he received ARD; therefore, the DUIs under informations 911-2011 and 1763-2011 were second offenses for grading and penalty purposes. 75 Pa.C.S.A. §3806(b).

On March 2, 2012, Appellant 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), 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 Appellant 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 Appellant 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 Appellant's request to proceed pro se in connection with said matters. Standby counsel was appointed to assist Appellant while appointed counsel at CR-617-2011 remained.

On June 19, 2012, the court sentenced Appellant to an aggregate term of incarceration in a state correctional institution the minimum of which was 3 ½ years and the 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 Appellant to 1 ½ to 3 years of incarceration to be followed by an additional 2 years of supervision.

With respect to Count 3, Accidents Involving Damage to Attended Vehicle or Property, the court sentenced Appellant to a consecutive 6 months to 1 year of imprisonment. Under Information CR-911-2011, the court sentenced Appellant on Count 1, Driving Under the Influence-incapable of safely driving (refusal) to a consecutive term of 1 ½ to 3 years of state incarceration to be followed by 2 years of probation.[1]

On June 22, 2012, Appellant filed a Post Conviction Relief Act (PCRA) Petition. Appellant believed he had been sentenced outside the guidelines because he disputed the court's calculation of Appellant's prior record score. By Order dated June 28, 2012, the court treated Appellant's PCRA Petition as a Post Sentence Motion.

Julian Allatt, Esquire was subsequently appointed to represent Appellant with respect to the post sentence motion and in general any and all post sentencing matters. The court denied the post sentence motion in an Opinion and Order dated October 4, 2012, and no direct appeal was filed.

Appellant filed a timely pro se PCRA petition that, among other things, included an allegation that Mr. Allatt never filed his requested appeal. The court appointed counsel and gave counsel the opportunity to amend the pro se PCRA petition. PCRA counsel submitted a witness certification from Mr. Allatt, and the Commonwealth agreed to reinstate Appellant's direct appeal rights without the necessity of an evidentiary hearing.

The sole issue raised on appeal is that the court erred in imposing maximum

[1] The remaining charges merged for sentencing purposes, were run concurrent or were summary offenses for which a minimal fine was imposed.

terms of incarceration of 3 years along with an additional period of two years of supervision on his DUI convictions in 1763-2011 and 911-2011, because 75 Pa.C.S.A. §3803(a)(1) provides a maximum sentence of not more than 6 months. The court rejects Appellant's contention with respect to the sentence imposed in case 1763-2011, but agrees that it imposed an illegal sentence for DUI in case 911-2011.

This issue involves the proper interpretation of section 3803, which sets forth the grading for DUI offenses. The subsections of 3803 relevant to this case state:

> **(a) Basic offenses.—**Notwithstanding the provisions of subsection (b):
>
> (1) An individual who violates section 3802(a)(relating to driving under influence of alcohol or controlled substance) and has no more than one prior offense commits a misdemeanor for which the individual may be sentenced to a term of imprisonment of not more than six months and to pay a fine under section 3804 (relating to penalties).
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> * * *
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> **(b) Other offenses.—**
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> * * *
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> (4) An individual who violates section 3802(a)(1) where the individual refused testing of blood or breath, or who violates section 3802(c) or (d) and who has one or more prior offenses commits a misdemeanor of the first degree.

75 Pa.C.S.A. §3803(a)(1) and (b)(4).

Under information 1763-2011, Appellant was convicted of and sentenced on Count 2, DUI with the highest rate of alcohol, a violation of 75 Pa.C.S.A. §3802(c). Therefore, section 3803(a) is inapplicable to this conviction, and the court was required to sentence Appellant such that he was under supervision for the statutory maximum of five years for a misdemeanor of the first degree. See 18 Pa.C.S.A. §106(b)(6); 18 Pa.C.S.A.

§1104(1); 75 Pa.C.S.A. §3804(d).

In contrast, under information 911-2011, Appellant was convicted of and sentenced on Count 1, DUI incapable of safely driving (refusal) in violation of 75 Pa.C.S.A. §3802(a)(1). In this situation, there is a conflict between the provisions of section 3803(a)(1) and (b)(4). On June 28, 2013, in Commonwealth v. Musau, 69 A.2d 754 (Pa. Super. 2013), the Pennsylvania Superior Court resolved this conflict in favor of the accused and held that the maximum allowable sentence is six months for a second conviction of DUI incapable of safely driving where the individual has refused testing of his blood or breath. The court recognizes that a petition for allowance of appeal has been filed in Musau (see 510 EAL 2013), which the Pennsylvania Supreme Court has not yet ruled upon. As a result, prosecutors have taken the position that Musau is not a final decision or binding precedent. Nevertheless, this court finds the Superior Court's reasoning persuasive and intends to utilize the same rationale unless or until either the Pennsylvania Supreme Court reverses Musau or the legislature amends the statute. Therefore, the court agrees that the sentence of 1½ to 3 years of incarceration followed by 2 years of supervision on count 2 under information 911-2011 was an illegal sentence. Instead, due to the mandatory minimum of 90 days imprisonment, see 75 Pa.C.S.A. §3804(c)(2), and the maximum term of not more than six months pursuant to 75 Pa.C.S.A. §3803(a)(1), the only lawful sentence for Count 2 would be a sentence of 90 days to 6 months of incarceration. See 42 Pa.C.S.A. §9756(b)(1)("The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed").

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Donald F. Martino, Esquire
District Attorney
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)