IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-1423-2012**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
PAUL M. HARTON,	:	
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 August 13, 2013. The relevant facts follow.

Around midnight on February 23, 2012, Officer Curt Hockman of the Montoursville police came in contact with Appellant and his girlfriend, Melinda Jacobs, after he observed Ms. Jacobs' vehicle parked partly on the grass and partly on the roadway with its lights on in the 700 block of Broad Street in Montoursville. Officer Hockman asked who had been driving the vehicle. Appellant motioned that Ms. Jacobs had been driving and stated he had drunk way too much to be driving. Officer Hockman noticed that Appellant's eyes were red and glossy and there was an odor of an alcoholic beverage coming from his breath. Officer Hockman spoke to Ms. Jacobs, who also appeared to be intoxicated. He asked her to perform field sobriety tests, which she failed, so he placed her under arrest. He advised Appellant that he was taking Ms. Jacobs to the DUI Processing Center at the Williamsport Hospital. Appellant said he would pick up Ms. Jacobs. Officer Hockman told Appellant that he shouldn't drive, and Appellant said he had lots of people who could pick

up Ms. Jacobs.

Office Hockman transported Ms. Jacobs to the hospital, released her to other officers there, and returned to patrol the streets of Montoursville. A few minutes before 1:00 a.m., he observed Appellant at Turkey Hill pumping gas into the same vehicle he had observed about 45 minutes earlier. Officer Hockman pulled into a nearby parking lot to see if anyone came out of Turkey Hill or if Appellant was going to attempt to operate the vehicle.

Appellant got into the driver's seat and pulled out of the parking lot onto Broad Street. Officer Hockman activated his lights and stopped the vehicle. He administered field sobriety tests, which Appellant failed. Then he took Appellant into custody and transported him to the Williamsport Hospital, where his blood was drawn at 1:36 a.m. Appellant's blood alcohol content (BAC) was .144%.

Appellant was charged with driving under the influence of alcohol (DUI) - incapable of safely driving and DUI-high rate of alcohol, both ungraded misdemeanors.

On February 13, 2013, Appellant filed an omnibus motion nunc pro tunc seeking suppression of all the evidence on the basis that the stop of his vehicle was unlawful. By agreement of the parties, this motion was heard in conjunction with the non-jury trial on May 6, 2013. The court denied Appellant's motion and found him guilty of both counts of DUI.

On August 13, 2013, the court sentenced Appellant to six months on the Intermediate Punishment Program with the first 60 days to be served at the Lycoming County Prison/Pre-Release Facility. Appellant did not file any post sentence motions;

instead, he filed a notice of appeal.

Appellant first asserts that the trial court erred by failing to suppress all the evidence because Officer Hockman lacked reasonable suspicion that Appellant violated the Vehicle Code or that criminal activity was afoot. This argument is frivolous.

Reasonable suspicion is a less stringent standard than probable cause necessary to effectuate a warrantless arrest. Commonwealth v. Brown, 606 Pa. 198, 996 A.2d 473, 477 (2010). "In order to determine reasonable suspicion, the totality of the circumstances – the whole picture – must be considered. Based on the whole picture, the detaining officers must have a particularized and objective basis for suspecting the person stopped of criminal activity." In the Interest of D.M., 566 Pa. 445, 781 A.2d 1161, 1163 (2001), citing United States v. Cortez, 449 U.S. 411, 417-18 (1981).

Officer Hockman had reasonable suspicion to suspect that Appellant was driving under the influence. As a result of arresting Appellant's girlfriend for DUI, Officer Hockman had an encounter with Appellant during which Appellant admitted that he was too drunk to be driving and Officer Hockman observed that Appellant's eyes were red and glossy and there was an odor of alcohol emanating from his breath. Approximately 45 minutes later, Officer Hockman observed Appellant operating a motor vehicle. Given the amount of time it takes for alcohol to be eliminated from the blood stream, it was probable that Appellant was still intoxicated. Therefore, Officer Hockman had at least reasonable suspicion, if not probable cause, to suspect that Appellant was violating the Vehicle Code or committing criminal activity by driving under the influence of alcohol.

Appellant also submits that the court abused its discretion by sentencing him

in the aggravated range and imposing an excessive sentence that was not consistent with the protection of the public, the gravity of the offense or his rehabilitative needs.

Appellant failed to properly preserve this issue for appellate review. "Claims relating to the discretionary aspects of sentencing are waived if not raised either at sentencing or in a post-sentence motion." Commonwealth v. Foster, 960 A.2d 160, 163 (Pa. Super. 2008), affirmed 609 Pa. 502, 17 A.3d 332 (2011); see also Pa.R.App.P. 302(a); Pa. R.Cr.P. 720, comment; Commonwealth v. Griffin, 65 A.3d 932, 935-36 (Pa. Super. 2013). "A challenge to an alleged excessive sentence is a challenge to the discretionary aspects of a sentence." Commonwealth v. Ahmad, 961 A.2d 884, 886 (Pa. Super. 2008).

Appellant did not state any objection to his sentence during the sentencing hearing, and he never filed a post-sentence motion claiming that his sentence was excessive. Therefore, this issue is waived.

This claim also lacks merit. Although Appellant's prior record score was zero, this was not a case involving a typical, first time DUI offender. Appellant had been arrested for another DUI on November 24, 2011, and he was on bail for that offense when he committed this offense.

Appellant also failed to recognize the seriousness of his actions and the danger he posed to the public and himself. Although Appellant admitted that he was too drunk to drive during his initial encounter with Officer Hockman and Officer Hockman specifically told him he shouldn't be driving, within approximately 45 minutes thereafter he was driving on Broad Street, the main thoroughfare through the borough of Montoursville.

While Appellant's counsel argued that Appellant was accepting responsibility

for his actions, this argument was belied by Appellant's conduct in this case. Appellant delayed this case for 18 months. Appellant also failed to appear for his CRN evaluation or his initial sentencing hearing. He blamed these failures on other people or circumstances beyond his control, but his excuses were contradicted by the statements of others, and he did not provide any documentation to support his claim that his failure to appear at his initial sentencing was due to the fact that his truck broke down, despite being ordered to do so. He disrespected and manipulated the court system. Appellant's actions amounted to classic minimization and avoidance, not acceptance, of responsibility for his actions.

Appellant also claimed he was not in need of any rehabilitation. He did not have any drug or alcohol problem; he simply "took on a job that overwhelmed him just a little bit." Sentencing Transcript, pp. 23-24.

The court imposed a sentence in the aggravated range so that Appellant could fully comprehend the seriousness of the charges and the consequences of his actions. Under the facts and circumstances of this case, the mandatory minimum sentence simply would not have been sufficient for Appellant to get the message.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Kyle Rude, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)