IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-331-2011;**
	:	**CP-41-CR-463-2011**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
FREDERICK POPOWICH,	:	
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 January 31, 2013 and its Order denying Appellant's post sentence motions dated April 10, 2013. The relevant facts follow.

On October 3, 2011, Appellant pled guilty under Information 331-2011 to Count 1, Driving Under the Influence of the Highest Rate of Alcohol, a misdemeanor of the first degree; Count 2, Driving Under the Influence of Alcohol (incapable of safe driving), a misdemeanor of the second degree; Count 3, Driving under Suspension, DUI related, a traffic summary; and Count 4 Operation of a Vehicle without a Valid Certificate of Inspection, a traffic summary. Under Information 463-2100, Appellant pled guilty to Count 1, Driving Under the Influence of the Highest Rate of Alcohol, a misdemeanor of the first degree; Count 2, Driving Under the Influence of Alcohol (incapable of safely driving) a misdemeanor of the second degree; Count 3, Driving Under Suspension, DUI related, a summary offense; Count 4, Possession of Drug Paraphernalia, an ungraded misdemeanor; Count 5, Reckless Driving,

a traffic summary; and Count 6, Open Container, also a traffic summary.

The DUI charges constituted either Appellant's sixth and seventh, or seventh and eighth DUIs in his lifetime and constituted at least his fourth, if not his fifth, DUI in the last ten years for mandatory minimum purposes. The standard minimum sentencing guideline range for DUI-highest rate of alcohol was 12 to 18 months. Appellant faced a mandatory one-year period of incarceration on each of these DUI offenses, as well as a mandatory 90 days on each count of Driving Under Suspension-DUI related.

On August 28, 2012, the Court sentenced Appellant to an aggregate Intermediate Punishment sentence of five years with the first year on house arrest with electronic monitoring. The Commonwealth filed a motion to reconsider, which was granted and the Court's sentencing order of August 28, 2012 was vacated. The Court noted that it sentenced Appellant to a County Intermediate Punishment sentence, but Appellant was ineligible for such a sentence because he had been convicted of more than three prior DUI offenses. 42 Pa.C.S. §9804(b)(5).

On January 2, 2013, the Court sentenced Appellant to undergo incarceration in the Lycoming County Prison for one to five years, but with the one-year minimum to be served on electronic monitoring in-home detention.

On January 17, 2013, the Commonwealth filed a motion for reconsideration nunc pro tunc, in which it alleged that the sentence was illegal because Appellant was ineligible for house arrest with electronic monitoring pursuant to statute. The Court granted the Commonwealth's motion, vacated the sentence, and scheduled Appellant for re-sentencing on January 31, 2013.

On January 31, 2013, the Court sentenced Appellant to an aggregate sentence of one to five years of incarceration in a state correctional institution.

Appellant filed a post sentence motion on February 1, 2013 requesting that the Court reconsider the sentence and sentence Appellant to in-home detention with electronic monitoring or stay its sentence and set bailing pending appeal if the motion was denied. The Court held a hearing and argument on Appellant's motion on March 28, 2013. In an opinion and order dated April 10, 2013, the Court denied Appellant's motion to reconsider his sentence but granted his request to stay the sentence and set bail pending appeal.

Appellant filed his notice of appeal on April 12, 2013. He has asserted four issues in his concise statement of errors on appeal.

Appellant first contends that the Court erred in granting the Commonwealth's untimely motion for reconsideration of sentence. The Court cannot agree.

Section 5505 of the Judicial Code gives the Court the authority to modify or rescind an order within 30 days after its entry if no appeal has been taken. 42 Pa.C.S.A. §5505. This statute has been interpreted as giving a trial court the discretion to grant a request to file a post-sentence motion nunc pro tunc. Furthermore, a court's decision to grant such a request will not be reversed on appeal unless the court abused its discretion. See Commonwealth v. Dreves, 839 A.2d 1122, 1128 (Pa. Super. 2003). "An abuse of discretion is not merely an error of judgment, but rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence on the record." Commonwealth v. Barnes, 871 A.2d 812, 819 (Pa. Super. 2005), quoting Commonwealth v. Cameron, 780 A.2d 688, 692

(Pa. Super. 2001).

The Court's decision was not unreasonable or the result of any bias, prejudice, ill-will or partiality against Appellant. Although the Commonwealth did not file its motion within ten days as required by Rule 720(A)(1) of the Rules of Criminal Procedure, the Commonwealth requested reconsideration nunc pro tunc, which the Court, in its discretion, granted because the 30-day time period for an appeal had not yet expired and the Commonwealth was asserting that the in-home detention electronic monitoring component of Appellant's sentence was illegal. It made no sense to deny the Commonwealth's request to file its motion nunc pro tunc, when an illegal sentence cannot be waived. Since it appeared that the Commonwealth's claim of illegality was correct, the Court vacated the sentencing order and scheduled the case for another hearing. The Court, however, did not deprive Appellant of the opportunity to contest the Commonwealth's claim. At the hearing, Appellant had the opportunity to argue, and did in fact argue, that a sentence of in-home detention with electronic monitoring was not an illegal sentence. Unfortunately, the Court was constrained to agree with the Commonwealth's argument that the previous sentence was illegal.

Appellant next asserts that the Court erred in holding that it could not sentence Appellant to electronic monitoring for the offense charged. Again, the Court cannot agree.

Generally, the Court has the discretion to choose among the sentencing alternatives set forth in section 9721 (a), including county intermediate punishment. 42 Pa.C.S.A. §9721(a). Where a mandatory sentence is provided by law, however, the Court

may only impose a sentence of county intermediate punishment if such a sentence is specifically authorized under section 9763. 42 Pa.C.S.A. §9721(a.1)(1); Commonwealth v. Mazzetti, 44 A.3d 58, 64 (Pa. 2012); Commonwealth v. Griffith, 950 A.2d 324 (Pa. Super. 2008). Home electronic monitoring is a form of intermediate punishment. 42 Pa.C.S.A. §9763(b)(16),(17); Griffith, 950 A.2d at 326.

Appellant is subject to a mandatory minimum sentence of not less than one year of imprisonment, because his DUI convictions under Count 1 of both Informations are for a third or subsequent offense with the highest blood alcohol level. 75 Pa.C.S.A. §3804(c)(3)(i). Appellant's convictions are at least his fourth, if not his fifth, offenses within ten years. Section 9763 only authorizes a sentence of county intermediate punishment for a first, second or third DUI offense. 42 Pa.C.S.A. §9763(c); see also 42 Pa.C.S.A. §9804(b)(5)(relating to eligibility for county intermediate punishment programs). Therefore, Appellant was not eligible for a county intermediate punishment program such as house arrest with electronic monitoring.

Appellant's reliance on Commonwealth v. Kriston, 527 Pa. 90, 588 A.2d 898 (1991) and Commonwealth v. Kyle, 582 Pa. 624, 874 A.2d 12 (2005) is misplaced. Kriston actually supports the Court's ruling because in that case the Pennsylvania Supreme Court found that electronic monitoring in home detention did not constitute "imprisonment" to satisfy a mandatory minimum sentence for DUI. Subsequent to Kriston, the Legislature amended the statute to permit intermediate punishment for a first, second, or third DUI. Although today the defendant in Kriston would have been eligible for an intermediate punishment sentence for his second DUI conviction, the Pennsylvania Supreme Court's

reasoning in Kriston would apply to Appellant because his DUI convictions are at least his fourth within ten years.

The Court acknowledges that Kriston was ultimately awarded credit for time served on electronic monitoring, but Kriston involved unique circumstances not present in the case at bar. In Kriston, prison authorities unilaterally transferred the defendant from the prison to an electronic monitoring program without the knowledge or consent of the sentencing court, and they assured him that any time spent on this program would count toward his minimum sentence. When Kriston sought parole, the sentencing court denied the request and ordered Kriston back to prison until he had served enough days to satisfy his mandatory minimum sentence. Applying prior precedent where individuals had been awarded credit for time served where they were improperly released from prison through no fault of their own, the Court found that denying Kriston credit for time served on electronic monitoring under the facts and circumstances of that case would constitute a manifest injustice.

Kyle involved interpretation of the term "custody" as that term was used in the statute governing credit for time served, 42 Pa.C.S.A. §9760. The Court specifically held that time spent subject to electronic monitoring at home as a condition of pre-trial release on bail was not time spent in "custody" for purposes of credit under section 9760. The Court also stated, "As a practical matter, defendants now must choose whether to accept the condition that they post bail and spend time on electronic monitoring, should the court so require – in which case credit will not be awarded – or to forgo release on bail restriction and immediately serve their prison sentences – for which credit will be available." 874 A.2d at

23.

Despite Appellant's arguments to the contrary, neither Kriston nor Kyle established any type of rule that a sentencing court has "equitable authority" to place a defendant on electronic monitoring to serve a mandatory term of imprisonment in contravention of a statute that would specifically preclude such a county intermediate punishment sentence.

This case is more akin to Commonwealth v. Griffith, 950 A.2d 324 (Pa. Super. 2008) than Kriston or Kyle. Although Griffith involved a drug conviction instead of DUI convictions, it specifically addressed eligibility for an intermediate punishment sentence. In Griffith, the Superior Court addressed the issue of whether a mandatory minimum term of imprisonment of one year for a drug trafficking offense could be satisfied by time spent on house arrest with electronic monitoring. The Superior Court determined that electronic home monitoring was a form of intermediate punishment, only a person deemed an "eligible offender" could be sentenced to intermediate punishment, and excluded therefrom is a person subject to a mandatory minimum sentence. 950 A.2d at 326. Therefore, the Superior Court held that the trial court committed an error of law in sentencing the defendant to house arrest with electronic monitoring and remanded for resentencing. The rationale of Griffith is applicable to the case at bar.

Appellant also asserts that because the sentencing guidelines, specifically 204 Pa. Code §303.11(b), authorizes a sentence of partial confinement for level 4 offenders, he is eligible for in-home detention and electronic monitoring despite the provisions of 42 Pa.C.S. §9804(b)(5). The Court cannot agree.

When all the relevant statutes and case law are considered as a whole, it is apparent to the Court that in-home detention and electronic monitoring are intermediate punishment programs and that the only sentence of "partial confinement" that would satisfy the mandatory minimum sentence for a fourth DUI conviction would be incarceration in the county prison with work release. See 75 Pa.C.S.A. §3813; Commonwealth v. DiMauro, 434 Pa. Super. 129, 642 A.2d 507, 508 (home monitoring constitutes intermediate punishment, not partial confinement; "the legislature intended that one sentenced to partial confinement be confined in a penal institution with permission to leave the facility to go to work, school or other proper activity.").[1] Therefore, the Court could not sentence Appellant to in-home detention or electronic monitoring as partial confinement.

Appellant also claims the Court abused its discretion in imposing a sentence of state incarceration, the minimum of which is one (1) year and the maximum of which is five (5) years.

The Court did not have any discretion to impose a shorter sentence in this case. The Court was required to impose a minimum sentence of at least one year. Appellant's DUI convictions were for violations of 75 Pa.C.S.A. §3802(c). These convictions were at least Appellant's fourth DUI convictions within ten years. When an individual violates section 3802(c), he must be sentenced to undergo imprisonment of not less than one year for a third or subsequent offense. 42 Pa.C.S.A. §3804(c)(3)(i). The Court also was required to impose a maximum sentence of five years. See 42 Pa.C.S.A. §3804(d).

While the Court had the discretion to sentence Appellant to imprisonment in

[1] Appellant's medical conditions prevent him from working or attending school.

the county prison instead of a state correctional institution, see 75 Pa.C.S.A. §3815(a), the Court did not believe the county prison would be able to handle Appellant's medical conditions. When the Court originally sentenced Appellant to serve his sentence at the county prison, it incorrectly believed that Appellant could legally serve that sentence on in-home detention with electronic monitoring and that Appellant could continue to receive medical treatment with his private medical providers outside of the prison setting. The Court did not change the sentence to a state correctional institution as a means to cause a hardship or burden on Appellant or his family. Instead, the Court sincerely believed that a state correctional institution would be much better equipped to handle Appellant's medical issues than the county prison. Therefore, the Court did not abuse its discretion when it directed that Appellant serve his sentence in a state correctional institution.

Appellant's final issue on appeal is that, by restricting the Court's discretion to sentence him to house arrest, in-home confinement or electronic monitoring, the punishments required by 75 Pa.C.S. §3804 in this case constitute Cruel and Unusual Punishment. Although Appellant never raised this issue in the trial court, it is not waived because "a claim that a sentence violates an individual's right to be free from cruel and unusual punishment is a challenge to the legality of the sentence, rendering the claim unwaivable." Commonwealth v. Brown, 2013 PA Super. 194, at *15-16 (July 17, 2013); Commonwealth v. Howard, 540 A.2d 960, 961 (Pa. Super. 1988)("appellant's contention that the sentence imposed constitutes cruel and unusual punishment is a challenge to the legality of sentence which may be appealed as of right on direct appeal"). Appellant's failure to raise this issue in his motion for reconsideration, however, makes it much more difficult for the

court to address this issue.

It is the Court's belief that the Department of Corrections does not house inmates who are sick or confined to a wheelchair in the general population; instead it has separate units for the aged, sick or infirm. Furthermore, the Court believes that the correctional institutions have medical personnel on the premises that can dispense medications and attend to an inmate's medical issues. The Court sentenced Appellant to a state correctional institution because it believed his medical issues could be appropriately handled there. Quite candidly, however, the Court has never sentenced an individual with Appellant's unique constellation of medical issues. If Appellant had raised this issue in his motion for reconsideration, the Court either would have taken testimony from an individual at the Department of Corrections who could testify about the Department's ability to handle an inmate with Appellant's specific medical issues or the Court would have sent Appellant to SCI-Camp Hill for an evaluation to determine whether they could adequately address Appellant's medical issues. If the Department of Corrections can handle Appellant's medical issues, then the Court's sentence would not constitute cruel and unusual punishment. If the Department cannot adequately address Appellant's medical problems, then the Court would agree with Appellant that a sentence of incarceration in a state correctional institution would constitute cruel and unusual punishment.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Robert Cronin, Esquire (APD)
Eric Linhardt, Esquire (ADA)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)