

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No's. CR-331-2011  
vs. : CR-463-2011  
:   
FREDERICK POPOWICH, : Post-Sentence Motion  
Defendant :

**OPINION AND ORDER**

Before the Court is Defendant's Post-Sentence Motion.

By way of background, on October 3, 2011, Defendant 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 safely 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 Certification of Inspection, a traffic summary. Under Information CR-463-2011, Defendant 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, blood alcohol charges, were graded as misdemeanors of the first degree and constituted either Defendant's sixth and seventh, or seventh and eighth DUI's in his lifetime and either his fourth and fifth, or fifth and sixth DUIs in the last ten years. The

standard minimum sentencing guideline range for the DUI offenses was 12 to 18 months. Defendant faced a mandatory one-year of incarceration on each DUI offense and a mandatory 90 days on the Driving Under Suspension/DUI related counts.

On August 28, 2012, the Court sentenced Defendant 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 Defendant to a County intermediate punishment sentence but that Defendant was ineligible for such, because he had been convicted of more than three prior DUI offenses. 42 Pa. C.S.A. § 9804 (b) (5).

By Order dated January 2, 2013, the Court sentenced Defendant to undergo incarceration in the Lycoming County Prison for an indeterminate term, the minimum of which was one year and the maximum of which was five years. The Court directed that Defendant's one-year period of incarceration be served on electronic monitoring in-home detention.

On January 17, 2013, the Commonwealth filed a Motion for Reconsideration Nunc Pro Tunc alleging that the sentence was illegal in that Defendant was ineligible for house arrest with electronic monitoring pursuant to statute. The Court granted the Commonwealth's motion, vacated the sentence and scheduled Defendant for re-sentencing on January 31, 2013.

On January 31, 2013, the Court sentenced the Defendant to an aggregate sentence of one to five years of incarceration in a State Correctional Institution.

Defendant filed a Post-Sentence Motion on February 1, 2013 requesting that the Court reconsider the sentence and sentence Defendant to in-home detention electronic

monitoring, stay the sentence and set bail pending appeal if the Motion to Reconsider was denied.

By Order dated February 5, 2013, the Court stayed Defendant's sentence pending the disposition of the motion.

The Court held an argument on Defendant's motion on March 28, 2013. Defendant first argued that the Court should not have vacated its sentence of in-home detention with electronic monitoring in response to the Commonwealth's motion filed on January 17, 2013, because that motion was untimely. The Court disagrees for two reasons. First, the Commonwealth requested reconsideration nunc pro tunc, which the Court, in its discretion, granted. Second, the Court retained jurisdiction to correct its error, because the Commonwealth filed its motion within 30 days of the Order dated January 2, 2013 and, as will be explained in more detail infra, the order was illegal in that it violated express statutory requirements precluding the imposition of a county intermediate punishment sentence when a mandatory minimum sentence applies. See 42 Pa.C.S.A. §5505; Commonwealth v. Arest, 734 A.2d 910 (Pa. Super. 1999).

Defendant also argued that the Court possessed the equitable authority to impose a sentence of in-home detention with electronic monitoring. Defendant heavily relied on the cases of Commonwealth v. Kyle, 582 Pa. 624, 874 A.2d 12 (2005) and Commonwealth v. Kriston, 527 Pa. 90, 588 A.2d 898 (1991). Again, the Court cannot agree. While the Court believes a sentence of one year of house arrest with electronic monitoring would be appropriate given all the relevant sentencing factors including Defendant's medical issues, the Court is precluded by law from imposing such a sentence.

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). Defendant is subject to a mandatory minimum sentence of not less than one year of imprisonment, because Defendant's 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).

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). Defendant's DUI convictions are either his sixth and seventh, or his seventh and eighth DUI convictions in his lifetime and either his fourth and fifth, or fifth and sixth DUI convictions within the last ten years. Therefore, Defendant is not eligible for a county intermediate punishment program such as house arrest with electronic monitoring, and the Court must sentence him to undergo imprisonment of not less than one year.

Defendant's reliance on Kriston and Kyle is also misplaced. In Kriston, the Court found that home monitoring did not constitute "imprisonment" to satisfy a mandatory minimum sentence for DUI. Although today Kriston would have been eligible for an intermediate punishment sentence for his second DUI conviction, the statutes that permitted a mandatory minimum sentence for a first, second or third DUI offense to be satisfied through certain restrictive intermediate punishment programs, such as house arrest with electronic

monitoring, were not in effect at the time Kriston was sentenced. 588 A.2d at 901, n.3.

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 Kriston 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 into 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 was not time spent in “custody” for purposes of credit under section 9760. Kyle, 874 A.2d at 22. 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 forego release on bail restriction and immediately serve their prison sentences – for which credit will be available.” 874 A.2d at 23.

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 discussed 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.

While the Court remains of the strong opinion that there is absolutely no purpose in sentencing Defendant to imprisonment under all the circumstances of this case, which include but are not limited to Defendant’s significantly deteriorating physical health, the exorbitant cost of his medications, the fact that Defendant is wheelchair bound and can never drive again, and the fact that Defendant suffered a stroke and has limited cognitive abilities, the Court does not have any discretion to impose a sentence other than imprisonment in this case. A sentence of house arrest with electronic monitoring would be a form of intermediate punishment which is not permissible under the law. Accordingly, Defendant’s post-sentence

motion to vacate the sentence will be denied.

On the other hand, the Court acknowledges that Defendant intends to appeal this decision as well as the Court's sentence. Under the facts and circumstances of this case, Defendant is neither a danger to society nor flight risk whatsoever. Therefore, Defendant's sentence is stayed and Defendant shall remain released on bail as previously posted, provided he files a timely notice of appeal.

**ORDER**

**AND NOW**, this \_\_\_\_ day of April 2013, following an argument, Defendant's post-sentence motion is denied in part and granted in part. Defendant's motion for reconsideration of sentence is **DENIED**. Defendant's motion for stay pending appeal and to set bail is **GRANTED**. Defendant shall remain free on bail as previously posted, provided he files a timely notice of appeal. If Defendant fails to file a timely appeal, the stay will be lifted; otherwise, Defendant shall remain released on bail until final resolution of his direct appeal.

By The Court,

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Marc F. Lovecchio, Judge

cc: DA  
PD (RC)  
Gary Weber, Lycoming Reporter  
Work File