



Defendant's DUI offenses, and the penalties that the court could impose in this case. This Opinion and Order will address the OGS dispute and Defendant's claim that the court is limited to the penalties set forth in section 3804(c.1), as the parties now agree that Defendant's prior record score is a 2.

In connection with her guilty plea, Defendant admitted that a minor under 18 years of age was an occupant in her vehicle at the time the offense occurred. Therefore, she committed a misdemeanor of the first degree.

Pursuant to 18 Pa. C.S.A. § 106 (b) (6), a misdemeanor of the first degree carries with it a sentence of a term of imprisonment the maximum of which is not more than five years.

Pursuant to 75 Pa. C.S.A. § 3804 (c), an individual who violates § 3802 (d) (controlled substances) shall be sentenced to certain mandatory minimums and other mandatory conditions of supervision. As well, an individual whose offense involves a minor occupant shall be sentenced to additional penalties in accordance with 75 Pa. C.S.A. § 3804 (c.1).

Defendant contends that the sentencing options available to the court are solely limited to the provisions of section 3804(c.1). This argument lacks merit.

Section 3804(c) and (c.1) state in relevant part:

**(c) Incapacity; highest blood alcohol; controlled substances.—**  
An individual who violates... section 3802(c) or (d) shall be sentenced as follows:

- (1) For a first offense, to:
  - (i) undergo imprisonment of not less than 72 consecutive hours;
  - (ii) pay a fine of not less than \$1,000 nor more than \$5,000;
  - (iii) attend an alcohol highway safety school approved by the department; and

(iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.

**(c.1) Violation involving minor occupant.**—An individual who violates section 3805(b)(5)(relating to grading) in addition to any penalty imposed in this chapter, shall be sentenced as follows:

- (1) For a first offense, to:
  - (i) pay a fine of not less than \$1,000; and
  - (ii) complete 100 hours of community service.

The statutory scheme is clear. The penalties set forth in section 3804(c.1) are **in addition to** any other penalty imposed in Chapter 38 of the Vehicle Code, not in lieu of any other penalty. Therefore, the court must impose the penalties set forth in both section 3804(c) and (c.1). In other words, Defendant faces a mandatory minimum sentence of at least 72 hours of incarceration, a fine of not less than \$2,000.00, 100 hours of community service, attendance at an approved alcohol highway safety school and drug and alcohol treatment.

Defendant contends that the OGS for her DUI conviction is a 1, while the Commonwealth contends that it is a 5. These offenses occurred on March 23, 2013; therefore, the 7<sup>th</sup> edition of the Sentencing Guidelines, which became effective on December 28, 2012, apply to this case. A review of these guidelines confirms that the OGS is a 5 for any DUI violation when there was a minor occupant in the vehicle at the time of the offense. 204 Pa. Code § 303.15. With an OGS of a 5 and a prior record score of a 2, the standard minimum sentencing guideline range in this case is 3-14 months' of incarceration.

Finally, and to the extent that Defendant asserts that the Superior Court's decision in Commonwealth v. Musau, 69 A.3d 754 (Pa. Super. 2013) may control, said assertion is also without merit. The decision in Musau only applies, per its own language, to

violations of section 3802 (a). Defendant is not charged with any violation of section 3802(a); her offenses are violations of section 3802(d).

**ORDER**

**AND NOW**, this \_\_\_\_ day of March 2014, Defendant's oral Motion to ascribe an offense gravity score of 1 to Defendant's DUI offense is **DENIED**. The Court concludes that the offense carries an offense gravity score of 5.

By The Court,

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Marc F. Lovecchio, Judge

cc: DA  
PD (KG)  
Work file  
Gary Weber, Esquire (Lycoming Reporter)