

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-1976-2012;
 : CP-41-CR-1261-2011
vs. :
 :
 :
 :
BARBARA NEWMAN, :
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 September 5, 2013. The relevant facts follow.

Under Information 1976-2012, Defendant was charged with driving under the influence of alcohol while incapable of safely driving and then refusing a chemical test of her blood (hereinafter DUI-incapable (refusal)), driving when her operating privilege was suspended as a result of a previous DUI (hereinafter DUS-DUI related), and several other summary offenses as a result of an incident on August 8, 2012 where she drove past a "Road Closed" sign and got her truck stuck on a portion of Route 864 that was under construction. At the time Defendant committed these offenses, she was under probation supervision for simple assault, a misdemeanor of the second degree, and trespass, a misdemeanor of the third degree, in case 1261-2011.

Defendant failed to appear for a status conference and a bench warrant was issued for her arrest. Defendant fled to Missouri, but was arrested and extradited back to Pennsylvania.

On August 8, 2013, Defendant entered a no contest plea to DUI-incapable (refusal) and DUS-DUI related. On September 5, 2013, the court sentenced Defendant to pay a \$1500 fine and to serve six months under the Intermediate Punishment Program with the first 90 days to be served at the pre-release center for DUI. In addition, the court sentenced Defendant to 60 days of incarceration and a \$500 fine for DUS-DUI related.

The court also held Defendant's probation violation hearing on September 5, 2013. The court found that Defendant violated her probation by absconding from supervision and committing a new criminal offense. The court revoked Defendant's probation and sentenced her to a term of 3 to 6 months of incarceration to be served consecutively to her sentence in case 1976-2012.

The Commonwealth appealed, claiming Defendant's maximum sentence for DUI-incapable (refusal), which was a second offense, should have been 5 years, not 6 months. Defendant filed a notice of appeal in case 1261-2011 but, in response to the order directing her to file a concise statement of errors on appeal, defense counsel indicated that it was her intent to file an Anders/McClendon brief in lieu of a concise statement. Since the court does not know what issues Defendant wishes to assert on appeal, it will only address the issue presented by the Commonwealth.

The Commonwealth contends that the court erred by sentencing Defendant to a maximum of 6 months, instead of 5 years. The Commonwealth argues that 75 Pa.C.S. §3803(b)(4) establishes that an individual who violated section 3802(a)(1) where the individual refused testing of blood or breath and who has one or more prior offenses commits a misdemeanor of the first degree. Furthermore, 18 Pa.C.S. §106(b)(6) sets the statutory maximum for a misdemeanor of the first degree at 5 years. Therefore, the court erred when it

failed to impose a maximum sentence of five years. The court cannot agree.

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).
- * * *
- (b) **Other offenses.**—
- * * *
- (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).

In Commonwealth v. Musau, 69 A.3d 754 (Pa. Super. 2013), a Superior Court panel concluded that although a refusal to submit to blood alcohol testing results in the grading of a DUI offense as a first degree misdemeanor, the maximum for a first or second conviction for such is six months imprisonment. Utilizing the Rules of Statutory Construction, the Court referred to the possibility of the legislature having different motives in grading an offense and fixing its punishment and that the specific language of a penalty trumped the general language of offense grading. The Court held that the maximum sentence allowable for a conviction under 75 Pa. C.S.A. § 3802 (a) (1), incapable of safely driving, where the individual refused testing of blood or breath and has no more than one prior offense, is six months.

The Commonwealth argues that the court should not follow Musau, because a

petition for allowance of appeal was filed with the Pennsylvania Supreme Court. The court acknowledges that a petition for allowance of appeal was filed to docket number 510 EAL 2013, but the docket does not reflect, and the court has been unable to find, an order granting the petition. Regardless, the Commonwealth has not cited any case or statutory authority to support its position that, because a petition for an appeal is filed, a duly filed and published Opinion of the Superior Court need not be followed by the trial court. In fact, there is appellate case law to the contrary, such that not only is the trial court bound by the decision, but so are other panels of the Superior Court. See Marks v. Nationwide, 762 A.2d 1098, 1101 (Pa. Super. 2000)(even though petition for allowance of appeal was granted, decision of Superior Court remains binding precedent as long as it has not been overturned by the Pennsylvania Supreme Court), appeal denied, 788 A.2d 381 (Pa. 2001); Sorber v. American Motorists Ins. Co., 680 A.2d 881, 882 (Pa. Super. 1996)(Superior Court decision binding precedent despite pending petition for allowance of appeal).

This court was required to apply the decision in Musau to the DUI offense in case 1976-2012. In this count, Defendant is charged with DUI-incapable of safely driving in violation of 3802(a)(1). While section 3803(b)(4) of the Vehicle Code states that an individual who violates section 3802(a)(1) and who has one or more prior offenses commits a misdemeanor of the first degree, section 3802(a)(1) provides that, notwithstanding the provisions of subsection (b), an individual who violates section 3802(a) 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. The Superior Court in Musau found that the word “notwithstanding” meant despite; therefore, despite the provisions of section 3802(b)(4), the maximum term of imprisonment allowable for a second DUI incapable of

safely driving offense, where the individual refused blood or breath testing, is six months.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: A. Melissa Kalaus, Esquire (ADA)
Kathryn Bellfy, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)