IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-769-2009**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
ZEPPLIN ZEIGLER,	:	
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 December 24, 2014. The relevant facts follow.

On March 31, 2009, police were dispatched to the Village Park in Antes Fort, because someone was "doing donuts" (driving in circles) on the ball fields. As police headed to the ball fields, they were advised by County Communications that the vehicle, a light-colored Ford Explorer, was now traveling on Front Street towards Rte. 44.

The police came up behind the Ford Explorer on Rte. 44 and immediately observed signs that the driver may be driving under the influence of alcohol. The vehicle was drifting over the double center line and the white fog line, and came close to striking the guiderail on at least one occasion.

When police activated their lights and sirens to conduct a traffic stop, it appeared that the driver of the vehicle was going to pull over and stop, but the driver suddenly pulled the vehicle back onto the roadway and sped away. A high speed chase ensued on country roads and then went "off road" onto farm roads and fields. While

traveling on the farm fields, the driver turned the vehicle and drove towards the police vehicle. The police vehicle struck the passenger side of the Ford Explorer, but the driver continued his flight in the fields. To get the driver to stop, the police used the front of their vehicle to strike the rear of the Ford Explorer numerous times until the Ford Explorer spun to a stop.

Appellant Zeppelin Zeigler was the driver of the Ford Explorer.

One of the police officers experienced pain in his back and neck. An ambulance was requested for the female passenger in Appellant's vehicle who was also experiencing neck pain.

Appellant was transported for chemical testing of his blood to the Jersey Shore Hospital emergency room, where he was loud, belligerent and caused a disturbance.

Appellant was charged with fleeing or attempting to elude a police officer, two counts of aggravated assault, three counts of recklessly endangering another person, accidents involving personal injury, driving under the influence of alcohol (DUI), disorderly conduct, possession of drug paraphernalia, and numerous summary offenses.

On December 22, 2009, Appellant pled guilty to Count 1, fleeing or attempting to elude a police officer; Counts 4 and 6, recklessly endangering another person; Court 19, DUI; Count 11, criminal mischief; and Count 18, driving under suspension (DUS). Appellant was sentenced to an aggregate sentence of 1 year 30 days to 2 years 6 months' incarceration in a state correctional institution followed by a 5-year term of probation.

Appellant subsequently violated the conditions of his probation. On February 20, 2013, the court revoked Appellant's probation on Count 1 and re-sentenced him to 1 to 2

years' incarceration in a state correctional institution. Appellant, however, sought reconsideration of this sentence. In his motion he claimed that his employment, drug rehabilitation through AA/NA while incarcerated, and the birth of his child would prevent him from committing further offenses. Furthermore, he alleged that Lycoming County had alternative resources to treat his drug problems. Therefore, a state sentence, as opposed to a county sentence, was excessive. The court granted Defendant's motion for reconsideration on March 18, 2013 and, on Count 1 fleeing and eluding, sentenced Appellant to a split sentence of incarceration of one year less one day to two years less one day in the Lycoming County Prison and an additional two years' probation. Appellant's other probation sentences continued to run consecutive to his sentence on Count 1 per the original sentencing order.

On December 24, 2014, the court again found that Appellant violated the conditions of his probation by committing a new criminal offense and smoking "spice" (synthetic marijuana). The court re-sentenced Appellant on Count 6, recklessly endangering another person, to 1 to 2 years' incarceration in a state correctional institution.

Appellant filed a notice of appeal. The sole issue raised on appeal is that the trial court abused its discretion by imposing an unduly harsh and manifestly excessive sentence. The court cannot agree.

Initially, the court believes that this claim is waived. A claim that a sentence is unduly harsh and excessive challenges the discretionary aspects of sentencing. In order to preserve such a claim, a defendant must either assert the issue on the record during the sentencing hearing or raise it in a post sentence motion. *Commonwealth v. Kalichak*, 943 A.2d 285, 289 (Pa. Super. 2008). Appellant did neither in this case. Furthermore, Appellant

did not specify in his concise statement how or why his sentence was allegedly unduly harsh or manifestly excessive. Bald assertions such as Appellant's are insufficient. Instead, Appellant was required to articulate in his concise statement "the way in which the court's conduct violated the sentencing code or process." *Id*. at 290.

Even if Appellant's claim is not waived, it lacks merit.

> The imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal. An abuse of discretion is more than an error in judgment – a sentencing court has not abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Colon, 102 A.3d 1033, 1043 (Pa. Super. 2014)(quoting *Commonwealth v. Simmons*, 56 A.3d 1280, 1283-84 (Pa. Super. 2012)).

> In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance, or indifference.

Id. (quoting *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa. Super. 2003)).

The court also cannot impose a sentence of total confinement for a probation violation unless the court finds that (1) the defendant has been convicted of another crime; (2) the defendant's conduct indicates a likelihood of future offenses; or (3) such a sentence is necessary to vindicate the court's authority. 42 Pa.C.S.A. §9771(c).

The court was justified in sentencing Appellant to a term of total confinement in a state correctional institution. Appellant entered a guilty plea to being a habitual offender for driving under suspension, a misdemeanor of the second degree. Therefore, he was convicted of another crime. He also violated his probation by smoking synthetic marijuana.

Appellant's conduct also indicated a likelihood of future offenses and a lack of respect for the court's authority. Appellant failed to abide by the conditions of his probation and continued to commit criminal offenses. His license was suspended and he was not to consume drugs and alcohol, and yet he got convicted of DUI in Perry County (CP-50-CR-316-2012), which resulted in a revocation of probation and re-sentencing in 2013. The court originally imposed a sentence of 1-2 years' incarceration in a state correctional institution on the revocation of the probationary portion of Appellant's sentencing for fleeing and eluding, but, at Appellant's behest, reconsidered that sentence and imposed a county prison sentence and consecutive probation to give Appellant a "second chance" so that Appellant could keep his job and support his family. At that time, Appellant claimed that his job, the birth of his child, and his participation in AA/NA meetings and programs would keep him from committing further offenses. Unfortunately, it did not, and Appellant again appeared before the court for a probation revocation hearing in December 2014 based on his habitual offender conviction and smoking synthetic marijuana.

The court considered the nature and circumstances of the crime, the protection of the public, and Appellant's characteristics when it imposed the sentence of state incarceration in this case.

The court revoked Appellant's probation and re-sentenced him on count 6, recklessly endangering another person. The victim of this offense was Officer Jason Gill. Appellant failed to stop his vehicle and took the police on a high speed chase on country roads and in farm fields. He turned around in one of the fields and drove directly at Officer Gill's vehicle. Officer Gill tried to avoid Appellant's oncoming vehicle, but the vehicles

collided. Appellant's actions put Officer Gill and Officer Litzelman, as well as the passenger in Appellant's vehicle, in danger of death or serious bodily injury. Officer Gill experienced neck and back pain.

Appellant is a menace to the traveling public. His operating privileges are suspended, but he continues to drive and does so in a manner that endangers both persons and property. The police were called because Appellant was "doing donuts" at the ballfields at the Antes Fort Village Park. When the police observed Appellant's driving, they immediately recognized that he was probably under the influence of alcohol. The police activated their lights and siren to pull over Appellant, but he did not stop. Instead, he took them on a high speed chase. Appellant then went "off road" into farm fields. He collided with the police vehicle, but still did not stop. The police had to rear end Appellant's vehicle several times to get him to stop.

Appellant's probation violations involved driving while his operating privileges were suspended and smoking spice. Unfortunately, Appellant has driven so many times while his license was suspended that he is a habitual offender, which made his new charge a misdemeanor of the second degree, instead of a summary traffic offense.

During the revocation hearing, Appellant's probation officer and the court detailed Appellant's poor supervision history. N.T., 12/24/2014, at 6-8, 10. The court noted:

> In the last 8 years, or the last 10 years, burglary, theft, fleeing and eluding, burglary, theft, possession, DUI and you've been in state prison twice, if not three times I guess. You've been in the county prison the last time. So the last sentence you get we decide to give you a county sentence and see if our county resources can be utilized in order to help you change your behavior but- - but you only do what you want to do. You do very – very little. Basically what you're --- it's no different that you telling me that yes, I know I'm a diabetic, I know I have to watch what I eat, and I'm meeting with my doctor

> every month as prescribed, I'm taking the medication as prescribed, but I'm eating donuts every other night because I like them.
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> * * * * * *
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> We all have problems that are difficult. But sooner or later your behavior has to change where you stop committing criminal acts, and you stop doing the things that lead you down the path. The problem here is that you clearly don't have whatever internal resources that you need to help you choose not to do the things you're not supposed to do, and you – Mr. Zeigler, you leave me no choice
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> I can't have somebody who's been in and out of state prison, who's had violations, who's had new criminal offenses over – over the years, who has been violated before for smoking pot, for drinking, and who now, after he's been given a break, ends up committing another criminal offense, a misdemeanor two criminal offense, and is smoking spice. It – it – it doesn't work that way.

N.T., 12/24/2014, at 10-11, 13.

Appellant's initial sentence of probation for recklessly endangering another person was lenient. The offense gravity score for this conviction was a three and Appellant's prior record score was a five. Therefore, the standard minimum guideline range was six to sixteen months' incarceration and the mitigated range was three to six months' incarceration. Thus, Appellant's original sentence of probation was below the guidelines.

"A trial court does not necessarily abuse its discretion in imposing a seemingly harsh post-revocation sentence where the defendant originally received a lenient sentence and then failed to adhere to the conditions imposed on him." *Commonwealth v. Schutzues*, 54 A.3d 86, 99 (Pa. Super. 2012). Furthermore, although the guidelines do not apply to probation or parole violations, the court's probation violation sentence of one to two years' incarceration was within the guidelines.

Actions speak louder than words. While Appellant claimed remorse and

pleaded for another chance at his probation revocation hearing so he could support his family, nothing short of incarceration was keeping him from illegally driving a motor vehicle or using drugs and alcohol.

For the foregoing reasons, Appellant's sentence was not unduly harsh or manifestly excessive.

DATE: _____________ By The Court,

____
Marc F. Lovecchio, Judge

cc: District Attorney
Joshua Bower, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)
Work file