IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**:**	**No. CR-1790-2014**
	:	
JUSTIN KIESS,	**:**	**Opinion and Order re both parties**
Defendant	**:**	**motion to reconsider (or modify) sentence**

OPINION AND ORDER

This matter came before the court on May 31, 2016 for a hearing and argument on both Defendant's motion to reconsider sentence and the Commonwealth's motion to reconsider sentence, which were filed on May 6, 2016. The relevant facts follow.

On July 4, 2014 at approximately 10:15 p.m., Defendant was operating a motor boat on the West Branch of the Susquehanna River. Two minor children were on board. Defendant also had been consuming alcohol. His blood alcohol content (BAC) was .145%. Defendant was charged with two counts of operating a watercraft under the influence of alcohol,[1] two counts of endangering the welfare of children,[2] and summary boating offenses.

On October 6, 2015, Defendant pled guilty to both counts of boating under the influence (BUI). The parties, however, disputed the grading and offense number of Defendant's current convictions. The court ruled on this issue in an Opinion and Order entered January 11, 2016.

On April 27, 2016, in addition to paying fines, costs and fees, the court

[1] 30 Pa.C.S.A. §5502(a)(1) and (a.1).
[2] 18 Pa.C.S.A. §4304.

sentenced Defendant to five years on the Lycoming County Intermediate Punishment Program, with the first five (5) months to be served at the work release facility and the second seven (7) months to be served on in-home detention/electronic monitoring. During the first ninety (90) days of Defendant's in-home detention, Defendant would be required to wear a SCRAM bracelet or alcohol related monitor.

On May 6, 2016, both Defendant and the Commonwealth filed motions to reconsider sentence.

In his motion to reconsider sentence, Defendant sought to reduce the work release portion of his sentence from five (5) months to four (4) months so that he could be present for the birth of his child and be a support for his wife. The court will deny this motion. The child will not remember whether Defendant was present for his or her birth. While the court understands that this is an important event in Defendant's life, the court finds that it is more important for Defendant to take time and learn from his mistakes. The original sentence was fair and appropriate under the circumstances and the court will not reduce the amount of time Defendant must serve in the work release facility.

In its motion, the Commonwealth asserted that Defendant was not eligible for an Intermediate Punishment (IP) sentence because he had three prior DUI offenses.

When the court decided the issues regarding the grading and offense number for Defendant's current convictions, the parties agreed that Defendant was convicted of driving under the influence (DUI) on May 7, 2005 and April 26, 2007, in violation of 75 Pa.C.S.A. §38002(a)(1) and (c), respectively. At the hearing on this matter, the parties

agreed that Defendant also had conviction for driving while impaired (DWI) in New York in 2001.

The Commonwealth contends that Defendant is not eligible for an IP sentence because this is his fourth DUI or BUI offense in his lifetime. The Commonwealth relies on the definition of prior offense in 75 Pa.C.S. §3806, which includes a substantially similar offense in another jurisdiction. Defendant argues that he is eligible for an IP sentence because this is not a fourth offense within ten years. Both arguments miss the mark.

"In matters of statutory interpretation, the General Assembly's intent is paramount." ***Commonwealth v. Hacker*** 15 A.2d 333, 335 (Pa. 2011)(citing 1 Pa.C.S.A. §1921(a)). Generally, such intent "is best expressed through the plain language of the statute." ***Commonwealth v. Hart***, 28 A.3d 898, 908 (Pa. 2011). Thus, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S.A. §1921(a).

In this case, the parties have failed to realize or acknowledge that the IP statute is in a different title, separate and apart from the BUI statute and the DUI statute, and that the BUI and DUI statutes are not mirror images of each other.

The relevant portion of the IP statute states:

> A defendant subject to 75 Pa.C.S. §3804 (relating to penalties) or 30 Pa.C.S. §5502(c.1) may only be sentenced to county intermediate punishment for a first, second or third offense under 75 Pa.C.S. Ch. 38 (relating to driving after imbibing alcohol or utilizing drugs) or 30 Pa.C.S. §5502.

42 Pa.C.S. §9804(b)(5).

Pursuant to the plain language of the IP statute, it appears that only violations

of 75 Pa.C.S. Ch. 38 or 30 Pa.C.S. 5502 count in determining a first, second or third offense. The use of the language "subject to 75 Pa.C.S. §3804… or 30 Pa.C.S. §5502 (c.1)" and "under 75 Pa.C.S. Ch. 38 … or 30 Pa.C.S. §5502" seems to imply that both the current and prior offenses must be violations of either Pennsylvania's DUI or BUI laws. Furthermore, unlike 75 Pa.C.S. §3806, this statute does not have any language to include a substantially similar offense in another jurisdiction. Under the plain language of the statute, Defendant's New York conviction would not count because it is a violation of New York law, not Pennsylvania's DUI or BUI laws. Therefore, Defendant is eligible for an IP sentence.

Even if such an argument would not win the day, the court would still reject the Commonwealth's argument because 75 Pa.C.S. §3806 has no applicability to this case.

Section 3806 states:

> **(a) General rule.—**Except as set forth in subsection (b), the term "prior offense" as used in this chapter shall mean a conviction, adjudication of delinquency, juvenile consent decree, acceptance of Accelerated Rehabilitative Disposition or other form of preliminary disposition before the sentencing on the present violation of any of the following:
>
> (1) an offense under section 3802 (relating to driving under the influence of alcohol or controlled substance);
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> (2) an offense under former section 3731;
>
> (3) an offense substantially similar to an offense under paragraph (1) or (2) in another jurisdiction; or
>
> (4) any combination of the offenses set forth in paragraph (1), (2), or (3).
>
> **(b) Repeat offense within ten years. –** The calculation for offenses for purposes of section 1553(d.2)(relating to occupational limited license), 3803 (relating to grading) and 3804 (relating to penalties) shall include any conviction, whether or not judgement of sentence has been imposed for the violation, adjudication of delinquency, juvenile consent decree, acceptance of Accelerated Rehabilitative Disposition or other form of preliminary disposition with the ten years before the sentencing on the present violation for any of the following:

1) an offense under section 3802 (relating to driving under the influence of alcohol or controlled substance);

(2) an offense under former section 3731;

(3) an offense substantially similar to an offense under paragraph (1) or (2) in another jurisdiction; or

(4) any combination of the offenses set forth in paragraph (1), (2), or (3).

75 Pa.C.S. §3806 (emphasis added).

Defendant is charged with BUI in violation 30 Pa.C.S. §5502. Therefore, neither Chapter 38 of the Vehicle Code nor the grading and penalty provisions in sections 3803 and 3804 are applicable to this case.

If to construe the IP statute the court needed to import any definition relating to prior offenses in this case, it would be 30 Pa.C.S. §5502(d), which states:

(d) Subsequent conviction.—Acceptance of Accelerated Rehabilitative Disposition, an adjudication of delinquency or consent decree under 42 Pa.C.S. Ch. 63 or any other form of preliminary disposition of any charge brought under this section or a conviction or guilty plea under §3802 (relating to driving under influence of alcohol or controlled substance) shall be considered a first conviction for the purpose of computing whether a subsequent conviction of a violation of this section shall be considered a second, third or subsequent conviction.

Noticeably absent from this definition is an offense under former section 3731 or an offense substantially similar to an offense under section 3802 or former section 3731 in another jurisdiction. Therefore, Defendant's New York DWI conviction does not count when determining whether Defendant's current BUI conviction is a first, second, third or subsequent conviction, and Defendant is not precluded from receiving an IP sentence.

Defendant's argument that his prior convictions must have occurred within the past ten years also misses the mark. Neither section 9804(b)(5) of the IP statute nor

section 5502(d) of the BUI statute contain any look back period or time limit.

As the court noted in its prior decision regarding grading and offense number, if the lack of a look back period was the result of legislative oversight, the legislature is free to amend the statutes accordingly. Similarly, if the legislature wanted the BUI statute to mirror the DUI statute it could have done so; it did not. There are significant differences between the two statutes, including but not limited to the lack of a look back period in the BUI statute (or the IP statute), the lack of a substantially similar offense in another jurisdiction being included in the definition of subsequent conviction in section 5502(d), and a prior DUI being included in the calculation of convictions under the BUI statute (30 Pa.C.S. §5502(d)) but a prior BUI conviction not being included in the definition of prior offense in the DUI statute (75 Pa.C.S. §3806).

The court's role is to interpret the statute passed by the legislature. The court cannot act as a super-legislature and correct the alleged mistakes or omissions argued by the Commonwealth or Defendant. See ***Mt. Lebanon v. County Board of Elections***, 470 Pa. 317, 368 A.2d 648, 649-650 (1977)("it is too often forgotten that under our basic form and system of a Constitutional Government the power and duty of [a court] is interpretative, not legislative. We are not a Supreme or even a Superior Legislature, and we have no power to redraw the Constitution or to rewrite Legislative Acts or Charters, desirable as that sometimes would be.")(quoting ***Cali v. Philadelphia***, 406 Pa. 290, 312, 177 A.2d 824, 835 (1962)).

ORDER

AND NOW, this ___ day of June 2016, the court **DENIES** the Commonwealth's motion to reconsider sentence. The court also **DENIES** Defendant's motion to reconsider sentence without prejudice to Defendant to seek a furlough to visit with his wife and child in the hospital immediately after the child's birth. The court has treated the Commonwealth's motion as a motion to modify sentence under Rule 721 and Defendant's motion as a post-sentence motion under Rule 720.

Both parties are notified that they have the right to appeal to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the opposing party. The form and contents of the Notice of Appeal shall conform to the requirements set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, the parties may lose forever their right to challenge the court's sentence and rulings in this case.

Defendant is also advised of (1) his right to assistance of counsel in the preparation of the appeal, (2) his rights, if he is indigent, to appeal *in forma pauperis* and to proceed with assigned counsel; and (3) the qualified right to bail under Rule 521(B).

By The Court,

_____

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)/Martin Wade, Esquire (ADA)
Matthew Welitkovich, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file