IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**: No.**	**CR-102-2017**
	:	**OTN: T826157-3**
BRIAN LONG, JR.,	**:**	
Defendant	**:**	**Reconsideration of March 14, 2018 Order**

The court VACATES its Opinion and Order entered on May 7, 2018, and replaces it with the following Amended Opinion and Order. In the previous Opinion and Order, the court misstated the Commonwealth's position and arguments with respect to the defendant's last argument.

AMENDED OPINION AND ORDER

This matter came before the court on the defendant's request that the court reconsider its Order dated March 14, 2018, which rejected the parties' plea agreement. The relevant facts follow.

The defendant was driving his vehicle in Lycoming Township on July 9, 2016. Police suspected that the defendant needed assistance and attended to him. The defendant, however, had been drinking alcoholic beverages and soon after contacting the defendant, the police suspected that he was driving under the influence. They took him into custody and the defendant consented to a blood draw. Within two (2) hours of the time that the defendant was driving his blood alcohol content was .15 %.

On August 11, 2017, the defendant pled guilty to Count 2, driving under the influence with high rate of alcohol, second offense within ten (10) years, an ungraded misdemeanor. The plea agreement reached between the parties was for the defendant to serve "the mandatory minimum of 48 hours." The parties erroneously believed that this was

defendant's first DUI within ten (10) years despite the fact that the Information charged the defendant with a second DUI within ten (10) years.

The defendant appeared without counsel for sentencing on March 14, 2018. The defendant was expecting to proceed to sentencing and waived counsel for this proceeding.

The court indicated to the defendant that it could not accept the plea agreement that was reached between the parties, because the mandatory minimum was thirty (30) days. At that time, the Commonwealth also indicated that it never offered a mandatory minimum of 48 hours.

The court placed the case on the guilty plea list for June 1, 2018. The court also permitted the defendant to file a motion to withdraw his plea of guilty.

Subsequently, the parties privately discussed the matter and then requested a court conference.

At the conference, the defendant specifically requested that the court reconsider its decision to reject the plea agreement. The defendant first asserted that the court accepted the plea agreement when it accepted defendant's plea of guilty. He also claimed that, despite the mandatory minimum being thirty (30) days and the parties being in error that it was the defendant's first offense, the court should ignore the mandatory minimum and sentence the defendant in accordance with the plea agreement. The Commonwealth agreed with the defendant that the plea agreement was 48 hours and acknowledged that it could not argue against the plea agreement.[1]

The parties indicated to the court that if it accepted the 48 hour plea agreement,

[1]Contrary to what the Commonwealth represented at the March 14, 2018 hearing, the Commonwealth conceded that the plea agreement was for 48 hours.

the Commonwealth could not appeal and Defendant would not appeal.

A preliminary but critical issue concerns whether this is, in fact, defendant's second DUI within ten (10) years. The DUI offense in this case occurred on July 9, 2016. On April 20, 2016, defendant was placed on the Accelerated Rehabilitative Disposition (ARD) Program for a DUI offense in Cumberland County under CP-21-CR-2269-2015. The defendant was participating in the ARD Program at the time he committed this offense. His ARD was revoked on March 22, 2017. Pursuant to a plea agreement, the DUI was dismissed in exchange for a plea of guilty to recklessly endangering another person.

The defendant argues that because he was never found guilty of the DUI offense and instead ended up pleading guilty to recklessly endangering another person, this could not be a second DUI offense for mandatory minimum purposes. Despite the defendant's argument to the contrary, acceptance of ARD constitutes a prior offense for purposes of mandatory minimum sentencing. A defendant who has accepted ARD within ten (10) years preceding his present DUI violation is a repeat DUI offender for sentencing purposes. *Commonwealth v. Bowers*, 25 A.3d 349 (Pa. Super. 2011), *appeal denied*, 616 Pa. 666, 51 A.3d 837 (2012); *Commonwealth v. Love,* 957 A.2d 755 (Pa. Super. 2008); 75 Pa. C.S.A. § 3806.

The defendant next argues that the court accepted the plea agreement when the defendant pled on August 11, 2017. First, this is belied by the guilty plea order, the oral guilty plea colloquy, and the defendant's written guilty plea colloquy.

Per the Order of August 11, 2017, the court only accepted the defendant's plea of guilty as knowing, intelligent and voluntary. The court scheduled sentencing for October 11, 2017 and ordered an assessment and CRN evaluation. The court referenced the plea agreement

but did not accept the plea agreement.

During the defendant's on-the-record oral guilty plea colloquy, the court referenced the plea agreement and informed the defendant that the court was not bound to accept it. The court asked the defendant if he understood such and the defendant indicated he did.

In the defendant's written guilty plea colloquy which was attached to the written guilty plea order and referenced during the defendant's oral guilty plea colloquy, Question 3 specifically notes as follows: "If there is a plea agreement, do you understand that the judge is not bound by this agreement and does not have to accept it?" Question 4 asks: "Do you understand that if the judge does not accept the plea agreement that you may then withdraw your plea of guilty?" To both questions, the defendant specifically answered "yes." Question 6 states: "Has anybody told you, promised you, or suggested to you in any manner what the actual sentence of the judge will be? [This does not include conversations with your attorney about plea agreements and sentencing guidelines]." The defendant answered: "No (plea agreement)."

Secondly, a court may legally impose a harsher sentence than the one agreed upon, even after accepting a plea with a negotiated sentence. *Commonwealth v. Root*, 179 A.3d 511, 518 (Pa. Super. 2018), quoting *Commonwealth v. Tann,* 79 A.3d 1130, 1133 (Pa. Super. 2013). "Following the acceptance of a negotiated plea, the trial court is not required to sentence a defendant in accordance with the plea agreement." *Tann*, *id.* Of course, if a defendant is sentenced to more than what was agreed upon, the defendant may withdraw his plea. *Root*, *id.*; *Tann, id.*; *Commonwealth v. Wallace,* 582 Pa. 234, 870 A.2d 838 (2005).

The defendant argues that the Pennsylvania Supreme Court decision in *Commonwealth v. Martinez,* 637 Pa. 208, 147 A.3d 517 (2016) "supports [defendant's] position." The court cannot agree. Specifically, *Martinez* holds that the a plea agreement does not become binding on the parties and is not valid until it is evaluated and accepted by the court. *Id.* at 531. Only after the court has accepted the plea agreement is the defendant entitled to the benefit of the bargain. *Id.* at 532.

Martinez is clearly distinguishable. In *Martinez*, the court accepted the plea agreement and sentenced the defendant in accordance therewith. The dispute was whether increased sexual offender registration requirements due to a change in the law years later could be applied to the defendant when a specific provision of his plea agreement was that he would be required to register for ten years.

Here, as previously noted in this opinion, the court accepted the defendant's guilty plea, but it did not evaluate and accept the negotiated sentence at that time. The court did not evaluate the negotiated sentence until it reviewed the defendant's criminal history shortly before the defendant was scheduled for sentencing. Once the court discovered that the defendant was on the ARD program for a DUI at the time he committed his current DUI, the court realized that this was the defendant's second DUI within ten years and the applicable mandatory minimum was 30 days, not 48 hours as provided in the negotiated plea agreement.

The defendant's last argument is that because the plea agreement was for 48 hours and because neither party will or can appeal that sentence, the court should impose it despite the mandatory minimum.

75 Pa. C.S.A. §3804 (b) (2) (ii) provides that an individual who violates § 3802

(b), as the defendant has, shall be sentenced for a second offense to undergo imprisonment of not less than thirty (30) days. Subsection (g) notes that the sentencing guidelines shall not supersede the mandatory penalties of this section. The defendant cannot cite to any statutory or case authority which permits a court to sentence a defendant below the mandatory minimum as set forth in the statute.

Every Pennsylvania judge must, before entering into the duties of his or her office, take and subscribe the following oath before a person authorized to administer oaths:

> I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity.

42 Pa. C.S.A. § 3151

The Pennsylvania Constitution states, in pertinent part, that judges: "shall not engage in any activity prohibited by law and shall not violate any cannon of legal or judicial ethics prescribed by the [Pennsylvania] Supreme Court." PA. CONST. art. 5, § 17(b).

Cannon 1 of the Judicial Code of Conduct states that a judge shall uphold and promote the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. Rule 1.1 of said Cannon requires a judge to "comply with the law." PA. CODE OF JUD. CONDUCT, Rule 1.1, 42 Pa. C.S.A.

The defendant, in this argument, is asking the court to ignore its sworn duty of upholding and following the law. Specifically, the defendant is asking that the court ignore the fact that he has pled guilty to a second DUI offense within ten years, which requires that the court impose a mandatory minimum sentence of thirty (30) days' incarceration.

Presumably, the defendant supports the position that if the appellate court never

sees the failure of this court to impose the mandatory minimum, the failure does not exist. This reasoning is similar to the well-known philosophical question attributed to Philosopher George Berkeley, although first specifically set forth in the June 1883 edition of the Chautauquan Magazine: "If a tree were to fall on an island where there were no human beings would there be any sound?" To account for other creatures in nature, in the 1910 book Physics by Charles Mann and George Twiss, the question was posed thusly: "When a tree falls in a lonely forest, and no animal is nearby to hear it, does it make a sound?" In a similar vein, Albert Einstein asked his friend, Niels Bohr, if he realistically believed that the moon does not exist if nobody is looking at it.

The court cannot ascribe to such a philosophy in this case. Samuel Alito, Jr., an Associate Justice of the Supreme Court of the United States, noted during his confirmation hearing in January of 2006 that "the judge's only obligation—and it's a solemn obligation—is to the rule of law." This court takes its oath and its obligations seriously. In this court, the unobserved world functions the same as the observed world. The lack of observation by an appellate court does not affect the outcome of this court. Indeed, this case brings to mind the quote oft associated with C.S. Lewis, although perhaps a paraphrase from Charles Marshall's *Shattering the Glass Slipper*: "Integrity is doing the right thing, even when no one is watching." While the court certainly is not perfect and may on occasion inadvertently or mistakenly impose an unlawful sentence, it is unwilling to "turn a blind eye" to clear statutes and binding case law and knowingly and intentionally impose an incorrect mandatory minimum sentence in this case.

Accordingly, the court will enter the following order:

AND NOW, this ___ day of May 2018, the Court DENIES the defendant's motion for reconsideration of this court's March 14, 2018 order. The court will not accept the plea agreement reached between the parties because the mandatory minimum is thirty (30) days, not 48 hours. The defendant's sentencing is scheduled for **June 1, 2018 at 9:00 a.m. in Courtroom No. 4** of the Lycoming County Courthouse. The court will proceed to sentencing at that time. The defendant has thirty (30) days from the date of this Order to file a motion to withdraw his plea of guilty.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Scott Werner, Esquire, (ADA)
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