

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CP-41-CR-1619-2012
	:	CP-41-CR-1899-2018
vs.	:	CP-41-CR-1900-2018
	:	
	:	
MICHAEL KAPPAS,	:	
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 July 31, 2018. The relevant facts follow.

Information 1619-2012

On July 8, 2012, Trooper Edward Dammer of the Pennsylvania State Police was dispatched for a report of an intoxicated male at the Muncy pool. When Trooper Dammer approached the pool, he was advised that the person had driven away in a gray pickup truck. Trooper Dammer observed the truck pull out of the pool complex. Trooper Dammer followed the truck and conducted a traffic stop. Appellant Michael Kappas (“Kappas”) was the driver of the truck and a ten-year old child was a passenger in the front passenger seat. Kappas was charged with Endangering the Welfare Of Children (EWOC), Driving Under the Influence (DUI), and summary traffic offenses.

On February 1, 2013, Kappas pleaded guilty to endangering the welfare of children and DUI, both misdemeanors of the first degree.

On June 25, 2013, the court sentenced Kappas to one to two years’

incarceration in a state correctional institution for DUI and five years' consecutive probation for EWOC consecutive to any sentence he was currently serving.

On January 17, 2019, the court found probable cause to believe that Kappas violated the conditions of his probation by committing new criminal offenses.

On July 31, 2019, the court revoked Kappas' probation and re-sentenced him to serve one and one-half (1 ½) to three (3) years' incarceration in a state correctional institution.

Information 1899-2018

On October 23, 2018, the Pennsylvania State Police were dispatched to a crash in Muncy Creek Township near the ramp from Lycoming Mall Drive. Kappas was the driver of a vehicle that rear-ended another vehicle. Kappas' eyes were glassy and blood shot, his speech was slurred and he failed standard field sobriety tests. He gave a blood sample, and his blood alcohol content was .36%. Kappas was charged with DUI and summary traffic offenses.

On March 22, 2019, Kappas pleaded guilty to DUI, a misdemeanor of the first degree, and summary traffic offenses.

On July 31, 2019, the court sentenced Kappas to one (1) to five (5) years' incarceration in a state correctional institution to be served consecutive to his sentence under Information 1619-2012.

Information 1900-2018

On September or October 22, 2018, Kappas was driving a vehicle on Kepner Hill Road in Muncy and he was involved in a one-vehicle accident. His blood alcohol

concentration (BAC) was .33%. He was charged with DUI and related summary traffic offenses. These offenses occurred either on the same date as, or likely the day before, the DUI under Information 1899-2018.

On March 22, 2019, Kappas entered an open guilty plea to DUI, a misdemeanor of the first degree, and summary traffic offenses.

On July 31, 2019, the court sentenced Kappas to one (1) to five (5) years' incarceration in a state correctional institution entirely concurrent to Information 1899-2018.

The aggregate sentence imposed on all three cases was two and one-half (2 ½) to eight (8) years' incarceration in a state correctional institution.

Kappas did not file a motion for reconsideration.

On September 13, 2019, Kappas filed a notice of appeal. The court directed Kappas to file a concise statement of matters on appeal; however, Kappas never filed such a statement.

Although Kappas did not file a concise statement, the court suspects that Kappas wishes to challenge the discretionary aspects of his sentence, as Kappas argued for a county intermediate punishment sentence so that he could participate in Treatment Court. In order to preserve such a challenge for appeal, however, Kappas was required to preserve it either at the sentencing hearing or in a motion to modify sentence. *Commonwealth v. Padilla-Vargas*, 204 A.3d 971, 975-976 (Pa. Super. 2019). Kappas did neither. Therefore, any claim that the court should have sentenced him to county intermediate punishment or that his sentence was unreasonable or manifestly excessive is waived.

Even if Kappas had properly preserved such a claim, the court did not abuse

its discretion in imposing a sentence of state incarceration in this case.

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Garcia-Rivera, 983 A.2d 777, 780 (Pa. Super. 2009), quoting *Commonwealth v. Hoch*, 936 A.2d 515, 517-518 (Pa. Super. 2007).

In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing [judge'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.

Commonwealth v. Colon, 102 A.3d 1033, 1043 (Pa. Super. 2014)(quoting *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa. Super. 2003)).

In a probation violation context, the sentencing court enjoys even a greater degree of deference.

[W]here the revocation sentence was adequately considered and sufficiently explained on the record by the revocation judge, in light of the judge's experience with the [appellant] and awareness of the circumstances of the probation violation, under the appropriate deferential standard of review, the sentence, if within the statutory bounds, is peculiarly within the judge's discretion.

Commonwealth v. Pasture, 107 A.3d 21, 28 -29 (Pa. 2014).

As the Supreme Court noted in *Pasture*, a sentencing court does not abuse its discretion by imposing a harsher post-revocation sentence where the appellant initially received a lenient sentence and failed to adhere to the conditions imposed. *Id.* at 28.

A defendant's rehabilitative needs are only one of the factors the court must

consider when imposing a sentence. In addition to the defendant's rehabilitative needs, the court must also consider the protection of the public and the gravity of the offense as it relates to the impact on the life of the victim and on the community. 42 Pa. C.S.A. §9721(b).

The court must also consider the sentencing guidelines, *id.*, although the sentencing guidelines do not apply to sentences imposed following the revocation of probation. 204 Pa. Code §303.1(b).

Kappas' two new DUIs were his second and third within ten years, but his fourth and fifth in his lifetime. His BAC for both DUIs was approximately four times the legal limit. Kappas committed these crimes while he was on supervision for EWOC arising out of a prior DUI.

With an offense gravity score of a five and a prior record score of a two, the standard guideline range was three to fourteen months. The minimum sentence imposed for each DUI was twelve months, which was within the standard range and was the mandatory minimum for one of the offenses. The court was required to impose a maximum sentence of five years because Kappas' drug and alcohol assessment indicated that he was in need of treatment. 75 Pa.C.S.A. §3804(d).

The court also revoked Kappas' probation for EWOC, a misdemeanor of the first degree. Kappas violated his probation by committing the two new DUI offenses. The maximum lawful sentence for a misdemeanor of the first degree is two and one-half to five years' imprisonment. The court imposed a sentence of one to two years' imprisonment.

As the Pennsylvania Supreme Court noted in *Pasture*,¹ a sentencing court does not abuse its discretion by imposing a harsher post-revocation sentence when the

appellant initially received a lenient sentence and failed to adhere to the conditions imposed.

Kappas' original probationary sentence was lenient; it was at the very bottom of the standard guideline range.² Whether explicit or implicit, a condition of every probationary sentence is that the individual not commit any further crimes. Kappas did not uphold his end of the bargain. He committed two new criminal offenses before he completed half of his term of probation.

Kappas wanted the court to impose a county intermediate punishment sentence, allegedly so that he could participate in Treatment Court. There was a legal issue concerning whether these offenses were even eligible for an intermediate punishment sentence as the statute limits intermediate punishment to a first, second or third offense. See 42 Pa.C.S.A. §§9763(c)(1), 9804(b)(5). Kappas argued that the statute incorporated the ten-year look back period whereas the Commonwealth's position was that it did not.

The court did not need to resolve this issue because it could not in good conscience impose such a sentence in these cases even if Kappas was eligible. To do so would give Kappas a volume discount for his crimes and disregard the danger to the public.

Kappas drove with an extremely high BAC not once, but twice. He struck another vehicle. These were not instances where Kappas was capable of safely driving his vehicle or where his vehicle was pulled over as the result of a summary traffic violation such as a failure to use a turn signal or to come to a complete stop at a stop sign. He was simply lucky that the accidents were minor. He could have seriously injured or killed someone.

The court was also not convinced that Kappas was invested in his recovery.

¹*Commonwealth v. Pasture*, 107 A.3d 21, 28 (Pa. 2014).

²At the time of Kappas original sentencing hearing for EWOC, his prior record score was a zero. The offense

Kappas had participated in inpatient rehabilitation previously. He was offered Treatment Court for his last DUI conviction but refused to participate in the program. He lost everything, including his job and his family; none of that convinced him to change or to stop drinking. The court questioned Kappas' motivation, his sincerity and why nothing else worked previously. The court specifically noted that it wasn't just about Kappas anymore. Instead, the court needed to emphasize the seriousness of the offense and the protection of the public. Sentencing Transcript, at 22-26.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
Matthew Welickovitch, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)

gravity score was a five. Therefore, the standard sentencing guideline range was RS-9.