IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-0001286-2017**
	:	**CP-41-CR-0000929-2017**
vs.	:	
	:	
	:	
MICHAEL WILLITS,	:	
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 the court's judgment of sentence dated February 12, 2019. The relevant facts follow.

Under 1286-2017, on April 28, 2017 at approximately 12:17 p.m., Trooper Jonathan Thompson stopped Appellant's vehicle due to an insurance cancellation. Trooper Thompson approached Appellant, who was the driver of the vehicle, and immediately noticed an odor of marijuana. Trooper Thompson asked Appellant to step out of the vehicle and noticed that Appellant was eating marijuana. When Trooper Thompson asked Appellant why he was eating marijuana, Appellant just smiled and said he was eating a sandwich. Trooper Thompson searched the vehicle and discovered a small amount of marijuana and a homemade smoking device on the floor board, and marijuana seeds in a twisted plastic bag. As a result of this stop, Trooper Thompson charged Appellant with driving under the influence of a controlled substance, possession of a small amount of marijuana, possession of drug paraphernalia, tampering with evidence, and several summary offenses.

Following a bench trial on October 22, 2018, Appellant was found guilty of

possession of a small amount of marijuana, an ungraded misdemeanor; possession of drug paraphernalia, an ungraded misdemeanor; and tampering with evidence, a misdemeanor of the second degree.

Under 929-2017, on May 15, 2017, Appellant was driving a vehicle which had two adult passengers in addition to Appellant's two children, ages 6 and 5. The police attempted to stop Appellant's vehicle due to a suspended registration. Appellant, however, did not stop his vehicle, but rather fled from the police. The pursuit lasted for approximately 35 minutes during which Appellant traveled at high rates of speed (at times, as high as 100 mph), ran numerous stop signs, and endangered the occupants of his vehicle as well as other motorists. Eventually, Appellant pulled his vehicle off the road, got out of the vehicle and fled on foot. After a time, he came back. The police noticed a strong odor of marijuana emanating from the vehicle and searched it. In the vehicle, the police found marijuana and a gravity bong, which belonged to Appellant.

Appellant was charged with fleeing or attempting to elude law enforcement officers, two counts of endangering the welfare of children, possession of a small amount of marijuana, possession of drug paraphernalia, and numerous summary traffic offenses.

On October 29, 2018, Appellant entered an open plea to fleeing or attempting to elude a law enforcement officer, a felony of the third degree; two counts of endangering the welfare of children, graded as felonies of the third degree; possession of a small amount of marijuana, an ungraded misdemeanor; possession of drug paraphernalia, an ungraded misdemeanor; and several traffic summaries.

On February 12, 2019, the court imposed an aggregate sentence of six to fifteen years' incarceration in a state correctional institution, which consisted of two to five

years' incarceration for each count of endangering the welfare of children, one and one-half to three years' incarceration for fleeing, and six months to two years' incarceration for tampering with evidence.

On February 22, 2019, Appellant filed a motion to reconsider in which he asserted that his sentence was unduly harsh and excessive. Appellant contended that the court did not take into consideration the fact that he pled guilty and was taking responsibility for his actions. Appellant also believed that there were instances of his prior juvenile adjudications lapsing, but counsel looked into the matter and confirmed that this was not an issue.

In an Order dated March 6, 2019, the court denied Appellant's motion to reconsider. The court noted that Appellant's claim that he pled guilty and took responsibility was meritless as he went to trial under 1286-2017 and did not plead guilty under 929-2017 until 16 months after arraignment. With respect to his claim that the sentence was unduly harsh and excessive, the court noted that it accepted the stipulation of the parties to use a prior record score of five when, in fact, Appellant's prior record score was a repeat felony offender (RFEL) and all of the sentences were within the standard guidelines.

On March 29, 2019, Appellant, through former counsel, filed a notice of appeal and a concise statement in which he raised two issues:

> 1. [Appellant] avers that the aggregate state sentence of six to fifteen years, which he was sentenced to by the Honorable Marc Lovecchio following his pleas of guilty in two separate cases, was[,] despite being within the standard range, excessive.
>
> 2. [Appellant] avers that the [c]ourt abused its discretion in determining that [Appellant] did not suffer from any significant mental health or substance abuse issues despite

> the provided documentation the [c]ourt had for sentencing, and the lengthy period of state incarceration that was handed down was as a result of the [c]ourt's conclusion that [Appellant] was not particularly amenable to a more rehabilitation-based sentence.

Appellant first contends that his sentence was unduly harsh and excessive in light of his guilty pleas in these cases. The court cannot agree.

> 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). Sentences must be consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. *Commonwealth v. Ali*, 197 A.3d 742, 765 (Pa. Super. 2018).

When imposing a sentence, the court is required to consider the particular circumstances of the offense and character of the defendant. *Edwards*, 194 A.3d at 637. The sentencing court "should refer to the defendant's criminal record, age, personal characteristics and potential for rehabilitation." *Id.* Moreover, where a court is informed by a presentence report, it is presumed that the court is aware of all appropriate sentencing factors and considerations. *Commonwealth v. Ventura*, 975 A.2d 1128, 1135 (Pa. Super. 2009). As well, the sentencing court has discretion to impose a sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. *Commonwealth v. Austin*, 66 A.3d 798, 808 (Pa. Super. 2013). Defendants are not entitled to

volume discounts for crimes and the imposition of consecutive rather than concurrent sentences should not be disturbed except in only the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment. *Id*.; see also *Commonwealth v. Lamonda*, 52 A.3d 365, 372 (Pa. Super. 2012)(en banc);*Commonwealth v. Prisk*, 13 A.3d 526, 533 (Pa. Super. 2011).

Pursuant to 42 Pa. C.S.A. §9781(a), the court must consider the nature of the offense, the history and circumstances of the defendant, the advisory guidelines promulgated by the sentencing commission, the pre-sentence report if any, as well as the court's observations of the defendant.

The term "unreasonable" commonly connotes a decision that is "irrational" or "not guided by sound judgment." *Commonwealth v. Walls*, 926 A.2d 957, 963 (Pa. 2007). The sentencing judge has broad discretion in determining a reasonable sentence, as it is in the best position to view the defendant's character, displays of remorse, defiance or indifference, and the overall effect and nature of the crime. *Id*. at 961. As well, when a court has been informed by a pre-sentence report, its discretion should not be disturbed. *Ventura*, 975 A.2d at 1135. Finally, the court enjoys an institutional advantage, bringing to its decisions an expertise, experience and judgment that should not lightly be disturbed. *Walls*, 926 A.2d at 961.

At sentencing, the court must make as part of the record and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. *Commonwealth v. Cartrette*, 83 A.3d 1030, 1041 (Pa. Super. 2013). The judge, however, does not need to give a lengthy discourse explaining its reasons. *Commonwealth v. Crump*, 995 A.2d 1280, 1283 (Pa. Super. 2010). The record as a whole must reflect the court's

consideration of the facts of the crime and character of the defendant. *Id*.

> The term "discretion" imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for purposes of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions.

Commonwealth v. Soto, 2018 PA Super 356, 2018 WL 6816969, *14 (Pa. Super. 2018)(quoting *Commonwealth v. Reese*, 31 A.3d 708, 715-716 (Pa. Super. 2011)(en banc)(citations omitted)).

Initially, the court notes that Appellant's assertion is factually inaccurate. Appellant did not plead guilty and accept responsibility in two separate cases. Under 1286-2017, Appellant went to trial. Under 929-2017, Appellant did plead guilty, but he did not do so until 16 months after arraignment and immediately prior to trial. A trial and an eleventh hour guilty plea do not constitute an acceptance of responsibility that would justify a sentencing reduction.

Furthermore, Appellant's conduct unnecessarily placed numerous people in harm's way, including his two young children. The police attempted to stop Appellant for a summary offense. If he had simply stopped his vehicle, the most he could have been charged with were ungraded misdemeanors for possession of a small amount of marijuana and drug paraphernalia as well as summary offenses related to the validity of his license, insurance and/or registration. Instead, he took the police on a 35-minute, high speed chase during which he not only endangered himself, but also his children, the adult occupants of his vehicle, the police and the traveling public. He drove in an extremely reckless manner. He traveled at speeds exceeding 100 miles per hour, he ran stop signs, and he crossed the double yellow line, even when there was oncoming traffic. He was fortunate that he did not kill or

injure anyone.

The court considered the pre-sentence report, the sentencing guidelines, Appellant's character and circumstances (including his rehabilitative needs) and the protection of the public. Despite the fact that Appellant's prior record score was actually a repeat felony offender (RFEL), the court accepted the stipulation of the parties and utilized a prior record score of five. Sentencing Transcript, 2/12/2019, at 5-9.

Counsel vigorously argued against a state prison sentence. Counsel argued that, due to Appellant's chaotic upbringing and his history of mental health and substance abuse issues, Appellant needed treatment and services. Appellant also requested treatment and services, preferably within the community and not in a jail or prison.

The court, however, was not willing to impose such a sentence for a variety of reasons. First, the standard sentencing guidelines called for a state sentence. The guidelines for endangering the welfare of children were 21-27 months and the guidelines for fleeing and eluding were 12-18 months. Sentencing Transcript, 2/12/2019, at 8, 10. The minimum sentence cannot exceed one-half of the maximum sentence imposed. 42 Pa. C.S.A. §9756(b)(1). Therefore, even if the court had imposed a bottom of the standard guideline range sentence solely for endangering the welfare of children with a maximum that was only double the minimum, the sentence would have been 21 to 42 months. Since 42 months exceeds two years, such a sentence would have to be served in a state correctional institution as the Lycoming County Prison is not certified as available for the commitment of persons sentenced to maximum terms of two or more but less than five years and the Commonwealth would not consent to a county sentence. 42 Pa. C.S.A. §9762(b). The court was also not willing to impose a mitigated range sentence in this case, because there was nothing

mitigating about the facts and circumstances of the offenses.

Second, as will be discussed more fully below, Appellant's mental health and substance abuse history was neither as significant nor justifying of a lesser sentence as claimed by Appellant.

Third, Appellant was already getting a break by the court utilizing a prior record score of five, rather than RFEL.

Fourth, Appellant failed or refused to take advantage of the treatment and services available to him. While at the county prison, Appellant was prescribed medications for his mental health issue but he would not take them as directed. Instead, he was cheeking and hoarding one of his medications. Sentencing Transcript, 2/12/2019, at 12, 13. Similarly, Appellant complained about vision problems. The prison had his vision checked by an eye doctor and procured glasses for Appellant but he refused to wear them because he said they were ugly. Mental Health Assessment, p. 4.

Appellant was also offered meetings and programs for his alcohol and substance abuse issues but he was removed from them for missing meetings. Sentencing Transcript, 2/12/2019, at 14.

Finally, the court was not willing to impose a county sentence, as Appellant could not follow the rules at the county prison leading up to sentencing when he would have the most incentive to be on his best behavior. Sentencing Transcript, 2/12/2019, at 14, 25.

Appellant also avers that the court abused its discretion in determining that he did not suffer from any significant mental health or substance abuse issues despite the provided documentation the court had for sentencing, and the lengthy period of state incarceration that was handed down was a result of the court's conclusion that Appellant was

not particularly amenable to a more rehabilitation-based sentence.

The lengthy state sentence was the product of many factors. With respect to Appellant's mental health and substance abuse issues, it was a combination of Appellant not having significant mental health or substance abuse issues as well as the fact that Appellant was not amenable to a more rehabilitation-based sentence.

Appellant reported that he been diagnosed with ADD, ADHD, depression, obsessive compulsive disorder, bipolar disorder, and oppositional defiance disorder. He was never hospitalized but he received mental health services as a youth and was prescribed medications but he stopped taking them at the age of 16, because he "didn't feel like himself" and "didn't really feel it was helping." Sentencing Transcript, 2/12/2019, at 20; Mental Health Assessment, p. 2.

Dr. Calvert is a licensed psychiatrist who began seeing Appellant at the Lycoming County Prison in July 2017. She saw Appellant numerous times, diagnosed him with depression, anxiety, and ADHD, and treated those conditions with appropriate medications. One medication, however, was discontinued because Appellant was cheeking and hoarding it.

The court accepted Dr. Calvert's current diagnoses. The court noted that these diagnoses were not serious mental illnesses and they could not be treated in a mental health facility. Sentencing Transcript, 2/12/2019, at 23.

Similarly, although Appellant used numerous controlled substances throughout his lifetime, the court found that he did not have significant substance abuse issues. In other words, he wasn't committing these offenses to support a habit. Sentencing Transcript, 2/12/2019, at 23-24. Instead, he admittedly committed these offenses because he

doesn't think about the things he does and he acts on impulse. Sentencing Transcript, 2/12/2019, at 22.

The court summed up the situation as follows:

> Probably the best way to describe this is, unfortunately, you are who you are. ..[T]his is your personality. Your personality is oppositional. Your personality is defiant. Your personality is to act on impulse. Your personality is to put others in harm's way. That's who you are and that is reflected in all of this…. You're consciously disregarding risks. You're consciously acting in a certain way because that's who you are. And, unfortunately, there is no place to send anybody to get better for who they are. …You are, unfortunately, … an antisocial young man who can't conform his behaviors to the norms of society…. Your actions and your conduct belie your statements.

Sentencing Transcript, 2/12/2019, at 24-25.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)
Michael Willits, NT7630
SCI-Coal Township, 1 Kelley Drive, Coal Township PA 17866-1020
File 929-2017
Work file
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