

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,  
PENNSYLVANIA**

**COMMONWEALTH,**

**vs.**

**MARK BIRD,**  
**Defendant**

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**NO. CR-1009-2019  
CR-1010-2019**

**PCRA**

**OPINION**

On February 20, 2020, Defendant filed a *Pre Se* Motion for Post Conviction Collateral Relief under the Post Conviction Relief Act (PCRA). Conflicts Counsel Nicole Spring, Esq. of the Lycoming County Public Defender's Office was appointed on February 25, 2020 to represent the Defendant. On the same date, the Court issued an Order requiring the Petitioner/Defense Counsel to file an Amended Petition or a *Turner/Finley*. An Amended Petition was filed on April 21, 2020 and, after a continuance was granted, a PCRA Conference was held on May 28, 2020.

**I. Background**

On October 28, 2019, Defendant pled guilty to the following: two counts of Driving Under Suspension, Habitual Offender, misdemeanors in the second degree; and two counts of Driving Without a License, summary offenses. The offense gravity score (OGS) for each of the misdemeanors is 2 and Defendant has a prior record score of 5, making the sentencing guideline range 1-9 months plus 3 points for aggravated circumstances.

Defendant completed a six page Settlement Colloquy which states the plea agreement as follows: "Guilty plea to all counts; max county sentence; work

release eligible; fines and costs; two years consecutive supervision.” The Court inquired of the Defendant as to his understanding of the plea and its consequences and was satisfied that Defendant was knowingly, intelligently, and voluntarily pleading guilty. The Court sentenced Defendant pursuant to the plea agreement and the sentence was later amended on December 5, 2019 as it related to the calculation Defendant’s time served. Defendant’s sentence, as it relates to the misdemeanor charges, is currently as follows:

- CR-1009-2019: Habitual Offender charge: Incarceration in the Lycoming County Prison, minimum twelve (12) months less one (1) day and maximum twenty-four (24) months less one (1) day;
- CR-1010-2019: Habitual Offender charge: Supervision by the Adult Probation Office for two (2) years to be served consecutive to the sentence set forth above.

In his Amended Petition, Defendant argues that he could not have been found to be a habitual offender pursuant to 75 Pa.C.S.A. § 1542 and thus, the conviction itself is illegal. He further argues that, even if the conviction is legal, his sentence is outside of the 1-9 month standard sentencing guideline range. In short, Defendant is requesting that he be re-sentenced pursuant to the guidelines and be made eligible for the re-entry program.

## **II. Discussion**

As stated above, the crux of Defendant’s argument is that 1) he is not a habitual offender and 2) even if he was, his sentence of a minimum of twelve (12) months less one (1) day and maximum of twenty-four (24) months less one (1) day was excessive.

**a. Defendant is a Habitual Offender Status**

Section 1542 states that a person who has three separate and distinct convictions within any five year period under section 1543(b)(1.1)<sup>1</sup> shall be considered a habitual offender. 75 Pa.C.S.A. § 1542(a) and (b)(1.2). Section 6503.1 states that a habitual offender commits a misdemeanor of the second degree. 75 Pa.C.S.A. § 6503.1. The Pennsylvania Department of Transportation records reveal that three of Defendant's conviction dates, as well as three of Defendant's offense dates, fall within a five (5) year period, as conceded by defense counsel during the PCRA conference. Therefore, Defendant was properly charged as a habitual offender pursuant to 75 Pa.C.S.A. § 6503.1.

**b. Defendant's Sentence Is Not Excessive**

Defendant argues that his sentence was illegal because the Pennsylvania Basic Sentencing Matrix suggest one to nine months of incarceration. However, it is well established that the sentencing guidelines are not mandatory and the trial court has broad discretion in sentencing matters. *Com. v. Antidormi*, 84 A.3d 736, 760 (Pa. Super. 2014). The guidelines do not prohibit any particular sentence within the statutory maximum and the sentence will not be disturbed unless it is outside of that statutory maximum. *Com. v. Mitchell*, 883 A.2d 1096, 1107 (Pa. Super. 2005); *Com. v. Ellis*, 700 A.2d 948, 958 (Pa. Super. 1997). The Pennsylvania Supreme Court has held:

[T]he guidelines have no binding effect, create no presumption in sentencing, and do not predominate over other sentencing factors- they are advisory guideposts that are valuable, may provide an essential starting point, and that must be respected and

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<sup>1</sup> Relating to driving while operating privilege is suspended or revoked.

considered; **they recommend, however, rather than require** a particular sentence.

*Com. v. Walls*, 926 A.2d 957, 964 (Pa. 2007) (emphasis added).

As established above, Defendant pled guilty to two misdemeanors of the second degree in two separate cases, each with a maximum sentence of two (2) years. 18 Pa.C.S.A. § 1104(2). Further, when a plea contains a negotiated term of confinement, “the court [cannot] unilaterally alter the length of [defendant’s] incarceration.” *Com. v. Townsend*, 693 A.2d 980, 983 (Pa. Super. 1997). In this instant matter, Defendant completed the Settlement Colloquy with his attorney, which fully sets forth the terms of his plea agreement as described above. Specifically, Defendant answered in the affirmative to the following question: “Do you understand the permissible range of sentences and/or fines that can be imposed for the crime/crimes to which you are entering a plea?”

Here, the Court sentenced Defendant to twenty-four (24) months less one (1) day as a maximum and twelve (12) months less one (1) day as a minimum pursuant to the plea agreement. Due to the Defendant pleading guilty to two separate charges in two separate cases, the Defendant could have been sentenced to a maximum of four (4) years in prison. However, pursuant to the terms of the plea agreement which he knowingly and voluntarily accepted, the Court only sentenced the Defendant to a lesser aggregate period of incarceration of twelve (12) months minus one (1) day to twenty-four (24) months less one (1) day. Therefore, this sentence is not excessive.

### **III. Conclusion**

Based on the above discussion, the Court finds no basis upon which to grant the Defendant's PCRA Petition and will enter an Order dismissing same.

### **ORDER**

AND NOW, this 29<sup>th</sup> day of **May, 2020**, upon review of the record, Petitioner's Amended PCRA Petition is hereby **DENIED**. Petitioner is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as set forth in Rule 904 of the Rules of Appellate 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.A.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Petitioner may lose forever his right to raise these issues.

By The Court,

Ryan M. Tira, Judge

RMT/ads

CC: DA (JR)  
PD (NS)  
Mark Bird – Lycoming County Prison  
Gary L. Weber, Esq.