IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-0001399-2019**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
NOLAN GREGORY PROCTOR,	:	
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 October 13, 2020 and docketed on October 16, 2020, which became a final order on October 28, 2020 when the court denied Appellant's post-sentence motion.

By way of background, on September 4, 2019, a law enforcement officer filed a criminal complaint against Nolan Gregory Proctor ("Appellant"), charging him with four counts of Delivery of a Controlled Substance, four counts of Possession With Intent to Deliver a Controlled Substance (PWID), one count of Criminal Use of a Communication Facility, four counts of Possession of a Controlled Substance, one count of Possession of a Small Amount of Marijuana, and one count of Possession of Drug Parapharnalia, arising out of incidents that allegedly occurred on January 28, 2019, February 1, 2019 and March 6, 2019.

On August 7, 2020, Appellant pleaded guilty to Count 8, PWID, an ungraded felony. Appellant admitted that he was contacted by a friend or acquaintance, working as a confidential informant, who requested that he obtain MDMA. Appellant acquired the

MDMA and sold approximately three grams of MDMA to the confidential informant. The plea agreement was for an open county sentence followed by two years of supervision. When the court dictated the guilty plea order, it alerted the parties that, at sentencing, the parties would need to address why the recommended sentence was below the standard range.

On October 13, 2020, in accordance with the plea agreement, the court sentenced Appellant to incarceration in the Lycoming County Prison for an indeterminate term, the minimum of which was 12 months less one day and the maximum of which was 24 months less one day followed by two years of supervision. The court awarded Appellant credit for time served from September 4, 2019 to September 23, 2019, and made him eligible for work crew and work release.

On October 22, 2020, Appellant filed a Motion to Reconsider and Modify Sentence. In his motion, Appellant asked the court to reconsider and to sentence him to electronic monitoring or house arrest based predominantly on his eight-year clean record, the upcoming publication of a book he had been working on since 2016, and his rehabilitative needs. On October 28, 2020, the court summarily denied Appellant's motion.

On November 25, 2020, Appellant filed a notice of appeal. In his concise statement of errors on appeal, Appellant asserted the following issues:

> 1. This Honorable Court erred in sentencing [A]ppellant to a county sentence of incarceration for an indefinite term, the minimum of which is twelve months minus one day and the maximum of which is twenty-four months minus one day.
> 2. This Honorable Court erred with said sentence, especially given that there is an eight-year period of clean criminal history and the pre-sentence investigation report indicated that Appellant has been writing a book since 2016.
> 3. This Honorable Court erred in sentencing in that the Court failed to consider and select one or more of the sentencing alternatives as provided in 42 Pa. C.S. §9721(a).

4. This Honorable Court erred in sentencing in considering the entire contents of the pre-sentence investigation report, the general rule of 42 Pa. C.S. §9721(a), and the General Standards of 42 Pa. C.S. §9721(b) in relevant part, the "rehabilitative needs of the defendant."
5. This Honorable Court erred in failing to make a determination as to whether Appellant is an eligible offender for Recidivism Risk Reduction Incentive programs as required under 61 Pa. C.S. §4505.
6. Such other errors as may be discovered when the transcripts have been reproduced.

Appellant first contends that the trial court erred in sentencing him to an indeterminate term of incarceration of 12 months minus one day to 24 months minus one day. 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. Derrickson, 242 A.3d 667, ___ (Pa. Super. 2020).

The court did not ignore or misapply the law, arrive at a manifestly unreasonable decision or sentence Appellant based on partiality, prejudice, bias or ill will. In this case, the standard guideline range was 15 to 21 months' incarceration, the mitigated range was 9 to 15 months' incarceration and the aggravated range was 21 to 27 months' incarceration. The court considered the protection of the public, the gravity of the offense, the rehabilitative needs of Appellant, the pre-sentence investigation report (PSI), and the sentencing guidelines. Then the court imposed a **mitigated range** sentence that was within

the terms of the plea agreement, which called for a county sentence followed by two years of supervision. Neither Appellant nor his attorney requested or argued for a sentence of time-served, electronic monitoring, or house arrest before the court sentenced Appellant.

After the court imposed sentence, Appellant asserted that his attorney promised or informed him that he would receive a time-served sentence followed by two years of probation. Appellant stated that if he went to jail he would not be able to publish his book and he asked if he could withdraw his guilty plea. The court paused the hearing, so that the court reporter could get the notes from Appellant's guilty plea hearing. The court then reviewed with Appellant the terms of the plea agreement as stated on the record at his guilty plea hearing, and the court's explanation that an open county sentence meant that the court could impose a jail sentence with a minimum of 12 months less one day and a maximum of 24 months less one day. There was no mention of a time-served sentence or of house arrest or electronic monitoring. The court also reviewed Appellant's response to questions at the guilty plea hearing showing that his guilty plea was not the product of promises, inducements, or coercion but rather he entered it knowingly, voluntarily and intelligently. Accordingly, the court rejected Appellant's oral request to withdraw his guilty plea, advised Appellant of his post sentence rights and told him to discuss his options with his attorney.

Even if defense counsel had argued for a time-served, house arrest or electronic monitoring sentence during the sentencing hearing, the court would not have imposed such a sentence. Appellant had only served 20 days of incarceration. Such a short term of incarceration was well below even the mitigated sentencing range. Appellant was convicted a felony drug delivery. The standard guideline range called for a sentence of state incarceration. The plea agreement was for a county sentence. The agreement did not state

that Appellant could or would argue for time served, electronic monitoring or house arrest. Therefore, the plea agreement contemplated county incarceration, the length of which would be determine by the court. Given the court's statement in the guilty plea order that the parties should be prepared to address why the plea was below the standard range, Appellant and his counsel should have realized that the court did not believe that the plea agreement contemplated a sentence without additional incarceration. Rather, the court wanted to know why the agreement was not for state incarceration. Moreover, a lesser sentence of the type desired by Appellant would depreciate the seriousness of the crime. 42 Pa. C.S.A. §9725(3).

Appellant next asserts the trial court erred given that he had an eight-year period of a clean criminal history and the PSI indicated Appellant had been writing a book since 2016. Appellant had a period of years where he did not commit a crime. The exact duration of that period varies depending on how the period is measured. According to the court's records, Appellant's most recent prior convictions were for criminal mischief and unauthorized use of a motor vehicle in case CP-41-CR-0000237-2013. The offense date for those offenses was December 22, 2012 and his guilty plea and sentencing occurred on July 12, 2013. His current offense, delivery of MDMA, occurred on or about January 28, 2019. The court would measure the time period from Appellant's prior guilty plea and sentencing date (July 12, 2013) to the date of his current offense (January 28, 2019), which is approximately 5½ years. Even if the court used offense date to offense date for the look back period, i.e. December 22, 2012 to January 28, 2019, the period would be six years, one month and six days. Regardless of the exact duration, the court considered Appellant's period of a clean criminal history when it agreed to impose a county sentence within the mitigated range, instead of a state sentence within the standard range. Specifically, the court

stated that it accepted a plea agreement in the mitigated range in part because Appellant's prior record score may over represent his criminal background because of its age. This statement encompassed both Appellant's period without a criminal offense and the age of all of his prior convictions.

Furthermore, Appellant's period of a clean criminal history and his book endeavors did not justify a sentence of time-served, which was a mere 20 days, or electronic monitoring or house arrest. Appellant had already received significant breaks. In exchange for his guilty plea on Count 8, the Commonwealth agreed to drop the remaining charges and it agreed to a county sentence despite the fact the standard guideline range (15-21 months) called for a state sentence. Appellant did not deserve any further reduction in his sentence. Appellant committed a felony drug delivery, which carried a statutory maximum of 15 years' incarceration and a fine of up to $250,000. Although he had not committed a crime in several years, this was not his first contact with the criminal justice system. Appellant was aware that the court could sentence him to a minimum sentence of twelve months less one day, because the court specifically advised him of that possibility at his guilty plea hearing. Furthermore, he knew or should have known that his plea agreement was not for time-served, electronic monitoring or house arrest. The guilty plea colloquy did not mention these terms and they were not mentioned during the guilty plea hearing. Finally, the court would not have imposed the sentence Appellant desired, because to do so would depreciate the seriousness of the crime he committed.

Appellant claims the trial court erred in that the court failed to consider and select one or more of the sentencing alternatives as provided in 42 Pa. C.S. §9721(a). This statement is factually inaccurate. The court selected the alternatives of total confinement and

consecutive probation. Therefore, the court did select and consider one or more of the sentencing alternatives provided in 42 Pa. C.S. §9721(a). If Appellant meant that the court erred in failing to consider and select electronic monitoring or house arrest, the court cannot agree. Neither Appellant nor his counsel requested or advocated for electronic monitoring or house arrest at the time of sentencing. After the court sentenced Appellant, he asked for a time-served sentence or, in the alternative, to withdraw his plea. Electronic monitoring and house arrest were not referenced in any court filings until Appellant filed his post-sentence motion. Since the court questioned the propriety of a mitigated range sentence, it was not about to give Appellant the functional equivalent of a "free pass" in the form of time-served, electronic monitoring or house arrest. Therefore, the court summarily denied Appellant's post sentence motion.

Appellant also asserts the trial court erred in considering the entire contents of the PSI, the general rule of 42 Pa. C.S. §9721(a), and the general standards of 42 Pa. C.S. §9721(b), in particular the rehabilitative needs of Appellant. It is not error to consider these factors. Perhaps Appellant meant to say the trial court erred in failing to consider these factors. However, such an assertion would be inaccurate. The court reviewed the PSI in detail during the sentencing hearing.

Section 9721(a) states:

> In determining the sentence to be imposed the court shall, except as provided in subsection (a.1), consider and select one or more of the following alternatives, and may impose them consecutively or concurrently:
> (1) An order of probation.
> (2) A determination of guilt without further penalty.
> (3) Partial confinement.
> (4) Total confinement.
> (5) A fine.
> (6), (7) Deleted by 2019, Dec. 18, P.L. 776, No. 115, § 4, imd.

effective.

42 Pa. C.S.A. §9721(a).

Rather than impose a period of total confinement in a state correctional facility, the court accepted the plea agreement and imposed a maximum county sentence and consecutive probation. The court did not believe that guilt without further penalty, partial confinement or a fine were appropriate in this case in light of the sentencing guidelines, the gravity of the offense, and the impact of the drug offense on the community and individuals.

Section 9721(b) states in part:

> In selecting from the alternatives set forth in subsection (a), the court shall follow the general principle that the sentence imposed should call for total confinement that is consistent with section 9725 (relating to total confinement) and 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. The court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing and taking effect under section 2155 (relating to publication of guidelines for sentencing, resentencing and parole, risk assessment instrument and recommitment ranges following revocation).

42 Pa.C.S. §9721(b).

As previously noted in this opinion, the court was of the opinion that total confinement of Appellant was necessary because a lesser sentence would depreciate the seriousness of the crime. 42 Pa. C.S.A. §9725(3). Appellant did not just deliver a little bit of marijuana. This also was not a situation where he was trying to eliminate pain and suffering of a dying relative or anything of that nature. He sold to a confidential informant three grams of MDMA, commonly known as Ecstasy or Molly, which is a stimulant and psychedelic drug that distorts sensory and time perception. The adverse effects of MDMA include addiction and paranoia. The impact of addiction on the user and the costs and other impacts

on the community are significant.

While Appellant is writing a book, he has been doing so for approximately four years. He should have considered his aspirations of becoming a published writer before he agreed to deliver unlawful controlled substances, particularly since he has some familiarity with the criminal justice system and the consequences of committing crimes, including incarceration.

The standard guideline range was for a minimum sentence between 15 and 21 months of incarceration. A minimum sentence cannot exceed one-half the maximum sentence. 42 Pa. C.S.A. §9756(b)(1). A standard range sentence would have resulted in a maximum sentence of more than two years, which would be a state sentence. 42 Pa. C.S.A. §9762(b). The mitigated range was 9 to 15 months. The sentence imposed by the court was in the middle of the mitigated range. There was nothing in this case, not even Appellant's book, which would justify a 20-day time-served sentence or a sentence of house arrest or electronic monitoring without any additional period of incarceration. In other words, Appellant was seeking a sentence far below the sentencing guidelines without sufficient reasons for such a sentence.

Contrary to Appellant's assertions, the court considered the PSI, the general rule of section 9721(a), and the standards of section 9721(b), including his rehabilitative needs; it simply did not view or weigh them in the manner that Appellant wanted.

Appellant next asserts that the trial court erred in failing to make a determination as to whether Appellant was an eligible offender for a Recidivism Risk Reduction Incentive (RRRI) as required under 61 Pa. C.S. §4505. Again, the court cannot agree.

Section 4503 describes an eligible person as a defendant or inmate convicted of a criminal offense **who will be committed to the custody of the department** and who meets certain eligibility requirements. 61 Pa. C.S.A. §4503. The "department" is the Department of Corrections of the Commonwealth. 61 Pa. C.S.A. §102. An individual is committed to the custody of the Department of Corrections (DOC) when he receives a maximum sentence of two years or more. See 42 Pa. C.S.A. §9762(b) (regarding place of confinement). The court sentenced Appellant to a maximum sentence of 24 months less one day. Maximum terms of less than two years are committed to a county prison within the jurisdiction of the court. 42 Pa. C.S.A. §9762(b)(3). Since Appellant was committed to the custody of the Lycoming County Prison, and not the DOC, he was not an eligible person for RRRI.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)
Bryan Fitzcharles, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)