NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. FREDERICK WAYNE POPOWICH, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 654 MDA 2013

Appeal from the Judgment of Sentence January 31, 2013
In the Court of Common Pleas of Lycoming County
Criminal Division at No(s): CP-41-CR-0000331-2011

COMMONWEALTH OF PENNSYLVANIA, Appellee v. FREDERICK WAYNE POPOWICH, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 655 MDA 2013

Appeal from the Judgment of Sentence January 31, 2013
In the Court of Common Pleas of Lycoming County
Criminal Division at No(s): CP-41-CR-0000463-2011

BEFORE: BOWES, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.: **FILED APRIL 15, 2014**

Frederick Wayne Popowich appeals from the judgment of sentence of one to five years imprisonment that was imposed after he pled guilty to two

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* Former Justice specially assigned to the Superior Court.

counts of driving under the influence of alcohol ("DUI") at two separate criminal actions. We reject his sentencing challenges and affirm.

At criminal action number 331-2011, Appellant was charged with DUI, general impairment; DUI, highest rate of alcohol, graded as a first-degree misdemeanor; driving with a suspended license, DUI-related; and driving with an expired inspection sticker. The plea colloquy was not transcribed, but the allegations in the affidavit of probable cause indicate the following. On May 23, 2010, Appellant was stopped by Hughesville Police Officer Michael Palmeter for driving his Ford Explorer with an expired inspection sticker. While speaking to Appellant, Officer Palmeter noticed the odor of alcohol on Appellant's breath. After Appellant told the officer that his license was suspended, Officer Palmeter went to his patrol car to check on its status. As he returned to the Explorer, Officer Palmeter overheard Appellant telling someone on his cell phone that he was about to be arrested. When the officer asked Appellant why he thought that he was going to be arrested, Appellant responded, "I have been drinking." Affidavit of Probable Cause, 6/9/10, at 1.

After Appellant was ordered from his car, he failed the ensuing field sobriety tests. He was transported to the hospital, where his blood was drawn within two hours of the initial stop. Appellant's blood alcohol content ("BAC") was .207%, and the criminal complaint indicates that at the time of the May 23, 2010 incident, Appellant had been convicted of four previous

DUI offenses within ten years of May 23, 2010. On October 3, 2011, Appellant pled guilty to all charges.

Appellant was charged at criminal action number 463-2011 with DUI, general impairment; DUI, highest rate of alcohol, graded as a first-degree misdemeanor; driving with a suspended license, DUI-related; possession of an open container of alcohol in a vehicle; and possession of drug paraphernalia. On January 31, 2011, Appellant was stopped by Deputy Sheriff Jason Sparks after Sheriff Sparks observed Appellant leave his lane of travel five times. Inside Appellant's vehicle, Sheriff Sparks observed an open bottle of whiskey and a pipe utilized to smoke marijuana. Appellant exhibited obvious signs of intoxication, failed field sobriety tests, and was transported to the hospital where his blood was drawn within two hours of the traffic stop. On this occasion, Appellant's BAC was .297%. The criminal complaint at action number 463-2011 indicated that Appellant had three, rather than four, prior convictions for DUI.[1] Appellant also pled guilty to all of the offenses at this criminal action number.

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[1] We note that Appellant has never contested, either in the trial court or on appeal, that his DUI conviction involving the May 23, 2010 incident was at least his fourth DUI conviction.

Both cases proceeded to sentencing on January 2, 2013,[2] and Appellant received two concurrent sentences of one to five years county imprisonment followed by one year probation. The court additionally ordered the one-year minimum sentence to be "served on in-home detention electronic monitoring." N.T. Sentencing, 1/2/13, at 10. On January 17, 2013, the Commonwealth filed a *nunc pro tunc* motion for reconsideration of the sentence. It contended that the sentence was illegal since the sentence of house arrest with electronic monitoring violated the mandatory one-year term of imprisonment imposed by 75 Pa.C.S. § 3804(c)(3)(i) (an individual who drives DUI, highest rate of alcohol, "shall be sentenced . . . [f]or a third or subsequent offense, to . . . undergo imprisonment of not less than one year[.]").

On January 31, 2013, the January 2, 2013 sentence was vacated, and Appellant was sentenced to two concurrent terms of incarceration of one to five years imprisonment to be served in a state correctional institution. Appellant thereafter filed a motion for reconsideration of the January 31, 2013 sentence, and this appeal followed denial of that motion.

Appellant presents these issues for our review:

> 1. Whether the Court erred in granting the Commonwealth's untimely Motion for Reconsideration of Sentence?

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[2] Appellant was sentenced prior to January 2, 2013, but that sentence was later vacated, and it is not at issue herein.

> 2. Whether the Court erred in holding that it cannot sentence Appellant to Electronic Monitoring for the offenses charged?
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> 3. Whether the Court abused its discretion in imposing a Sentence of State Incarceration, the minimum of which is one (1) year and the maximum of which is (5) years?
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> 4. Whether by restricting the Court of its discretion to Sentence Appellant to House Arrest, In-Home Confinement, or Electronic Monitoring, the punishments pursuant to 75 Pa.C.S. 3804 constitute Cruel and Unusual Punishment?

Appellant's brief at 6.

Appellant first suggests that the trial court committed error when it granted the Commonwealth's untimely post-sentence motion. We disagree. In ***Commonwealth v. Dreves***, 839 A.2d 1122, 1128 (Pa.Super. 2003), we observed that "under 42 Pa.C.S. § 5505, if no appeal had been taken, within 30 days after the imposition of sentence, the trial court has the discretion to grant a request to file a post-sentence motion *nunc pro tunc*." Section 5505 provides, "Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed." 42 Pa.C.S. § 5505. Thus, if a party files a request to file a post-sentence motion *nunc pro tunc* within thirty days of imposition of the sentence, "the decision to allow the filing of a post-trial motion *nunc pro tunc* is vested in the discretion of the trial court and that we will not reverse unless the trial court abused its discretion." ***Dreves***, ***supra*** at 1128.

In this case, the request to file a post-sentence motion *nunc pro tunc* was filed within thirty days of imposition of sentence, and the court vacated its January 2nd sentence before thirty days had expired. Thus, the trial court had the authority to perform the actions that it did. We also reject Appellant's averment that the court abused its discretion in considering the Commonwealth's late filing. He assails the court's rationale for permitting the *nunc pro tunc* filing, which was that the sentence imposed on January 2, 2013 was illegal. As analyzed in detail *infra*, the sentencing court correctly concluded that it should grant the Commonwealth's request to file a motion to modify *nunc pro tunc* because the sentence that it imposed was illegal. Hence, there was no abuse of discretion herein, and we reject Appellant's first issue.

Appellant's second averment is somewhat difficult to decipher and intelligently address. He claims that the trial court was incorrect when it concluded that it violated the mandatory minimum sentencing requirement of 75 Pa.C.S. § 3804(c)(3)(i) with its January 2, 2013 minimum sentence of one year house arrest with home monitoring. Appellant's argument appears to contain three distinct aspects: 1) despite the existence of the mandatory minimum, a sentence of partial confinement remained available to the sentencing court; 2) his January 2, 2013 sentence of house arrest with home monitoring was proper under the guidelines; and 3) he was eligible for intermediate punishment under the Pennsylvania Code.

We conclude that Appellant's arguments fail because he was subject to the mandatory minimum sentence, he had to serve that sentence in jail, and he was ineligible for intermediate punishment under the provisions of the Sentencing Code. Additionally, nothing contained in the Pennsylvania Code or sentencing guidelines, which were not at issue due to the application of a mandatory sentence, refutes these three conclusions.

Our reasoning is as follows. The Sentencing Code does, as noted by Appellant, accord the trial court various options in terms of sentencing. It provides that:

> **(a) General rule.**—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:
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> (1) An order of probation.
>
> (2) A determination of guilt without further penalty.
>
> (3) Partial confinement.
>
> (4) Total confinement.
>
> (5) A fine.
>
> (6) County intermediate punishment.
>
> (7) State intermediate punishment.

42 Pa.C.S. § 9721(a). The exception contained in (a.1) states: "Unless specifically authorized under section 9763 (relating to a sentence of county intermediate punishment) or 61 Pa.C.S. Ch. 41 (relating to State intermediate punishment), subsection (a) shall not apply where a mandatory

minimum sentence is otherwise provided by law." Thus, contrary to Appellant's contention, the option of partial confinement did not exist in this case since application of a mandatory minimum sentence was otherwise provided by law.

As we have observed, the "Sentencing Code itself dictates that a sentencing court is generally prohibited from imposing a sentence inconsistent with an applicable mandatory minimum sentence." ***Commonwealth v. Mebane***, 58 A.3d 1243, 1249 (Pa.Super. 2012) (emphasis omitted). The Commonwealth has the discretion to invoke a mandatory minimum sentence, and, "[o]nce properly invoked by the prosecution, a mandatory minimum sentence cannot be circumvented as a matter of judicial discretion." ***Id***.;[3] ***Accord Commonwealth v. Mazzetti***, 44 A.3d 58, 64 (Pa. 2012) ("where a mandatory minimum sentence applies, the court is deprived of the discretion to impose any of the specified alternatives" of § 9721(a)). However, it is also true that the sentencing court has the discretion to impose a sentence of county or state intermediate punishment under § 9721(a.1) so long as the defendant is eligible to participate in the program in question. ***Mazzetti***, ***supra*** at 64 ("section 9721(a.1) acknowledges that 42 Pa.C.S. § 9763 authorizes the trial court to

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[3] In light of the fact that a mandatory sentence was applicable herein, we reject Appellant's continual reliance upon the guidelines in his obtuse analysis of the various sentencing options available to the court. ***See*** Appellant's brief at 15, 17, 22-23, 24.

impose a sentence of county intermediate punishment even if there is an applicable mandatory minimum").

In light of this law, we first must ascertain whether the mandatory minimum sentence applied herein, and thus precluded the court from considering the alternative sentencing options of § 9721(a). If so, we then must examine whether Appellant was eligible, as he implies, for county intermediate punishment and was thereby removed from the strictures of the mandatory minimum.

Application of a mandatory minimum sentence relates to the legality of the sentence imposed. ***Commonwealth v. Foster***, 960 A.2d 160 (Pa.Super. 2008). Hence, the following standards apply:

> "The scope and standard of review in determining the legality of a sentence are well established. If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated. In evaluating a trial court's application of a statute, our standard of review is plenary and is limited to determining whether the trial court committed an error of law." ***Commonwealth v. Leverette***, 911 A.2d 998, 1001–1002 (Pa.Super. 2006) (citations omitted).

Commonwealth v. Jurczak, 2014 WL 688194, 2 (Pa.Super. 2014).

Herein, the mandatory minimum is outlined in 75 Pa.C.S. § 3804(c)(3)(i), which provides that an individual who drives DUI, highest rate of alcohol, "shall be sentenced . . . [f]or a third or subsequent offense, to . . . undergo imprisonment of not less than one year[.]" Appellant pled guilty to driving under the influence of alcohol, highest rate of alcohol, at

action number 331-2011, which was at least his fourth offense for DUI.[4] He then pled guilty to the same offense at 463-2011, which was his fifth. Thus, the mandatory minimum applied at both criminal action numbers. Where a mandatory sentence of incarceration is required by statute, a defendant is not permitted to serve that sentence on house arrest with electronic monitoring, and such a sentence must be served in jail. ***Commonwealth v. Kriston***, 588 A.2d 898, 899-900 (Pa. 1991) (defendant was not entitled to credit for time served against a mandatory minimum sentence for period that defendant spent under house arrest with electronic monitoring; "legislature would not have intended that its use of the term 'imprisonment' would be so diluted in effect as to encompass home monitoring programs"); ***Commonwealth v. Griffith***, 950 A.2d 324, 326 (Pa.Super. 2008) (sentencing court lacked authority to sentence defendant to house arrest with monitoring where Commonwealth properly invoked a mandatory term of imprisonment; "participation in an electronic home monitoring program does not constitute 'imprisonment' within the purview of the mandatory minimum sentencing provisions"). Hence, the trial court did not err in concluding that its sentence of one year of house arrest with electronic

[4] As evidenced by the countervailing positions in the two complaints herein, it is unclear whether Appellant had three or four prior DUIs in 2011. Nevertheless, his conviction at 331-2011 was at least his fourth offense.

monitoring failed to satisfy the requirement of § 3804(d) that Appellant be sentenced to one year imprisonment.[5]

Additionally, Appellant was not eligible for county intermediate punishment. That sentence is permitted only for a first, second, or third DUI offense. Section 9804 of title 42, governing county intermediate punishment states, "No person other than the eligible offender shall be sentenced to a county intermediate punishment program." 42 Pa.C.S. § 9804(b)(1)(i). That section continues, "A defendant subject to 75 Pa.C.S. § 3804 (relating to penalties) or 30 Pa.C.S. § 5502(c.1) may only be sentenced to county intermediate punishment **for a first, second or third offense under 75 Pa.C.S. Ch. 38** (relating to driving after imbibing alcohol or utilizing drugs) or 30 Pa.C.S. § 5502." 42 Pa.C.S. § 9804(b)(5) (emphasis added);[6] ***see also*** 42 Pa.C.S. § 9763(c)(1).[7]

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[5] While Appellant continually relies upon his medical condition, which is discussed in the text *infra*, as grounds for avoiding imprisonment, he has provided no authority for the proposition that a defendant's physical infirmities prevent imposition of a mandatory term of imprisonment.

[6] Appellant's suggestion that the Pennsylvania Code permits a sentence of partial confinement in the present case is incorrect. ***See*** Appellant's brief at 15, 16, 17, 20, 22, 23. Nothing in the Pennsylvania Code permits partial confinement when imprisonment is required by a statute, nor does that Code allow an otherwise ineligible offender to participate in county intermediate punishment.

[7] Section 9763 provides:

> Any person receiving a penalty imposed pursuant to 75 Pa.C.S. § 1543(b) (relating to driving while operating privilege is

(Footnote Continued Next Page)

In conclusion, the mandatory minimum of one year imprisonment applied to each of Appellant's DUI offenses. Appellant was not eligible for county intermediate punishment because the DUI offenses in question were at least his fourth and fifth offenses, respectively. House arrest with electronic monitoring is not a permissible sentence when a mandatory minimum sentence of imprisonment is mandated. Hence, the trial court did not err in holding that its January 2, 2013 minimum sentence of one year house arrest with electronic monitoring was contrary to law. Moreover, it did not abuse its discretion in imposing a sentence of one year imprisonment since it lacked the ability to impose any other sentence.

We now examine Appellant's position that he should have been sentenced to county rather than state confinement. Appellant notes that, even though he received a maximum sentence of five years imprisonment, the court had the option of sentencing him to county prison under 75 Pa.C.S. § 3804(d) (emphasis added), which states:

> If a person is sentenced pursuant to this chapter and, after the initial assessment required by section 3814(1), the person is

(Footnote Continued) ———————

> suspended or revoked), former 75 Pa.C.S. § 3731 (relating to driving under influence of alcohol or controlled substance) or 75 Pa.C.S. § 3804 (relating to penalties) **for a first, second or third offense** under 75 Pa.C.S. Ch. 38 (relating to driving after imbibing alcohol or utilizing drugs) may only be sentenced to county intermediate punishment after undergoing an assessment under 75 Pa.C.S. § 3814 (relating to drug and alcohol assessments).

42 Pa.C.S. § 9763(c)(1) (emphasis added).

> determined to be in need of additional treatment pursuant to section 3814(2), the judge shall impose a minimum sentence as provided by law and a maximum sentence equal to the statutorily available maximum. **A sentence to the statutorily available maximum imposed pursuant to this subsection may, in the discretion of the sentencing court, be ordered to be served in a county prison, notwithstanding the provisions of 42 Pa.C.S. § 9762 (relating to sentencing proceeding; place of confinement)**.

Appellant received the statutory maximum of five years for his DUIs, which were graded as first-degree misdemeanors. 18 Pa.C.S. § 1104(1) ("A person who has been convicted of a misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall be not more than . . . [f]ive years in the case of a misdemeanor of the first degree."). Under 42 Pa.C.S. § 9762(b), "Maximum terms of five or more years shall be committed to the Department of Corrections for confinement." Nevertheless, the sentencing court did have the discretion, as provided by § 3804(d), to sentence Appellant to county jail notwithstanding § 9762(b).

In the past, we have ruled that "where the trial court has the discretion to impose a state sentence or a county sentence, the court must articulate its reasons for choosing state time when county time is recommended under the guidelines." ***Commonwealth v. Hartle***, 894 A.2d 800, 808 (Pa.Super. 2006). However, despite Appellant's garbled assertions to the contrary, the guidelines do not apply herein. Thus, there can be no guideline recommendation that Appellant's sentence be served locally. Rather, we have the opposite situation in that § 9762 provides for

Appellant's sentence to be served in state prison in the first instance, and the court is given the option to permit him to serve it in the county jail. We are not inclined to hold that a sentencing court must justify failing to order a county sentence where the sentence ordinarily would be served in state prison, and where the court has the authority to exercise lenity and allow county imprisonment.

Nevertheless, in the present case, the sentencing court adequately supported its decision to sentence Appellant to state incarceration. The transcript of the hearing on Appellant's motion to modify his January 31, 2013 sentence establishes that Appellant has Crohn's disease, suffered two strokes, and was confined to a wheelchair. The sentencing court delineated the following rationale for imposing a state sentence:

> [T]he Court did not believe the county prison would be able to handle Appellant's medical conditions. When the Court originally sentenced Appellant to serve his sentence at the county prison, it incorrectly believed that Appellant could legally serve that sentence on in-home detention with electronic monitoring and that Appellant could continue to receive medical treatment with his private medical providers outside of the prison setting. The Court did not change the sentence to a state correctional institution as a means to cause a hardship or burden on Appellant or his family. Instead, the Court sincerely believed that a state correctional institution would be much better equipped to handle Appellant's medical issues than the county prison.

Trial Court Opinion, 9/9/13, at 9. Hence, we reject Appellant's claim that the court "erred in sentencing him to a State Sentence." Appellant's brief at 17.

Appellant's final position is that, due to his medical conditions, it is cruel and unusual punishment under the Eighth Amendment of the United States Constitution to sentence him to incarceration. While Appellant did not raise this position before the trial court, "this Court has long held that a claim that a sentence violates an individual's right to be free from cruel and unusual punishment is a challenge to the legality of the sentence, rendering the claim unwaivable." ***Commonwealth v. Brown***, 71 A.3d 1009, 1015-16 (Pa.Super. 2013). We first stress that Appellant fails to refer us to a single case that discusses whether confinement to jail by a physically infirm person constitutes cruel and unusual punishment. On the other hand, the Commonwealth correctly observes that we have rejected a position that a jail sentence is automatically cruel and unusual merely due to a person's medical condition. ***Commonwealth v. O'Neil***, 573 A.2d 1112, 1114 (Pa.Super. 1990) ("incarcerating the physically infirm is [not] *per se* cruel and unusual punishment"); ***see also Commonwealth v. Green***, 593 A.2d 899 (Pa.Super. 1991) (even though mandatory minimum sentence might be equivalent to life imprisonment due to the myriad infirmities suffered by the elderly defendant, it did not constitute cruel and unusual punishment); ***Commonwealth v. Carr***, 543 A.2d 1232 (Pa.Super. 1988) (since defendant did not allege or establish that his medical needs could not be met in jail, his sentence of imprisonment was not cruel and unusual punishment merely based on the fact that sentencing court chose to impose

jail term rather probationary sentence that defendant claimed would have accommodated his special medical needs and still protected the community); ***Commonwealth v. Landi***, 421 A.2d 442 (Pa.Super. 1980) (sentence of imprisonment for a paraplegic did not constitute cruel and usual punishment).

Normally, a sentence is cruel and unusual when it offends evolving standards of decency displayed by a maturing society. ***Commonwealth v. Baker***, 78 A.3d 1044 (Pa. 2013). We are aware of no modern trend against imprisoning persons with medical problems.[8] Rather, modern prison systems address the physical needs of their prisoners. Thus, we cannot accept Appellant's proposition that a one-year term of imprisonment constitutes cruel and unusual punishment because he is confined to a wheel chair and suffers from Crohn's disease.

Judgment of sentence affirmed.

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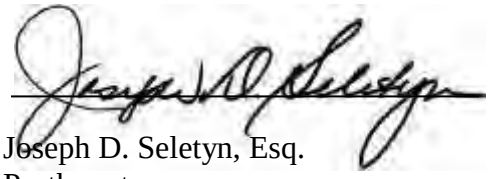
[8] While the sentencing court indicated that it was amenable to holding a hearing to determine whether the jail term would constitute cruel and unusual punishment due to Appellant's infirmities, there is no authority for a finding that any term of incarceration is cruel and unusual simply because a defendant has medical problems. With respect to legality-of-sentence issues, "our standard of review is *de novo* and our scope of review is plenary." ***Commonwealth v. Nero***, 58 A.3d 802, 806 (Pa.Super. 2012) (citation omitted). As the court committed legal error in concluding that Appellant's position warranted relief, we decline to remand for a hearing on this question.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014