

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
GARY LEE ROSE,	:	
	:	
Appellant	:	No. 1335 MDA 2013

Appeal from the PCRA Order entered on July 9, 2013  
in the Court of Common Pleas of Clinton County,  
Criminal Division, No. CP-18-CR-0000062-2011

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
GARY LEE ROSE,	:	
	:	
Appellant	:	No. 1336 MDA 2013

Appeal from the PCRA Order entered on July 9, 2013  
in the Court of Common Pleas of Clinton County,  
Criminal Division, No. CP-18-CR-0000086-2012

BEFORE: PANELLA, OLSON and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

**FILED APRIL 23, 2014**

In these consolidated appeals, Gary Lee Rose ("Rose") appeals from the Order dismissing his first Petition filed pursuant to the Post Conviction

Relief Act ("PCRA").<sup>1</sup> **See** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On December 30, 2010, Rose was arrested for driving under the influence ("DUI"), and was found to have a blood alcohol content of .115% (the "2011 DUI").<sup>2</sup> On September 9, 2011, Rose pled guilty to one count of DUI,<sup>3</sup> which was graded by the trial court as a first-degree misdemeanor. On that same date, the trial court sentenced Rose to nine months in prison followed by intermediate punishment of five years. This Court affirmed Rose's 2011 DUI sentence. **See Commonwealth v. Rose**, 53 A.3d 939 (Pa. Super. 2012) (unpublished memorandum).

On January 21, 2012, while on bail pending appeal of his 2011 DUI sentence, Rose was again arrested for DUI (the "2012 DUI"), and refused to submit to blood testing. On May 7, 2012, Rose pled guilty to one count of DUI,<sup>4</sup> which the trial court graded as a first-degree misdemeanor before sentencing Rose to twelve months to sixty months in prison, to be served

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<sup>1</sup> Rose's claim on appeal involves challenges to two separate convictions, which the PCRA court addressed in a single Order filed in both cases. Therefore, Rose's claim constitutes two appeals, which this Court has consolidated.

<sup>2</sup> The criminal Complaint for Rose's 2011 DUI incorrectly indicated that it was his "second" DUI offense, noting a prior DUI offense in 2009. However, a pre-sentence investigation report ("PSI") revealed that the 2011 DUI was Rose's third DUI offense, as Rose had also been convicted of DUI in 2008. Rose has admitted that he was convicted previously of DUI in 2008 and 2009. **See** N.T., 7/8/13, at 14-15.

<sup>3</sup> **See** 75 Pa.C.S.A. § 3802(b) (high rate of alcohol).

<sup>4</sup> **See** 75 Pa.C.S.A. § 3802(a)(1) (general impairment).

consecutively to his 2011 DUI sentence. Rose did not appeal his 2012 DUI sentence.<sup>5</sup>

On April 22, 2013, Rose filed, *pro se*, a PCRA Petition raising claims related to both his 2011 DUI sentence and his 2012 DUI sentence. Rose was appointed PCRA counsel. On July 8, 2013, following a hearing, the PCRA court dismissed Rose's PCRA Petition. Rose filed a timely Notice of Appeal, and was thereafter directed to file a Pa.R.A.P. 1925(b) concise statement of matters complained of on appeal. Subsequently, Rose filed a Pa.R.A.P. 1925(b) Concise Statement.<sup>6</sup>

On appeal, Rose raises the following issue for our review:

[Whether] the sentenced [*sic*] imposed by the [trial] court on [Rose] was illegal?

Brief for Appellant at 6.

Here, Rose challenges the legality of his 2011 DUI sentence because he claims trial court error based the grading of his offense, **see *Commonwealth v. Coto***, 932 A.2d 933, 935 (Pa. Super. 2007) (stating

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<sup>5</sup> In his Petition, Rose concedes that his 2012 DUI was his fourth DUI offense. PCRA Petition, 4/22/13, at 1.

<sup>6</sup> In his Concise Statement, Rose offers only the following sentence to clarify his claim on appeal: "[t]he Concise Statement of the matters complained of on an appeal of the instant matter is that the sentence is illegal." Concise Statement, 8/15/13. Rose's Concise Statement fails to meet the requirements of Appellate Rule 1925(b)(4)(ii), as it fails to identify any basis for his claim of illegality of sentence. **See** Pa.R.A.P. 1925(b)(4)(ii). Nevertheless, because Rose's claim implicates the legality of his sentence, we will address it.

that a challenge to the grading of an offense implicates the legality of a sentence); and the imposition of a mandatory minimum sentence, **see Commonwealth v. Foster**, 17 A.2d 332, 345 (Pa. 2011) (stating that a challenge to the imposition of a mandatory minimum sentence constitutes a challenge to the legality of the sentence). A challenge to the legality of a sentence is never waived so long as a court has jurisdiction to address the claim. **See Commonwealth v. Berry**, 877 A.2d 479, 482 (Pa. Super. 2005). Issues relating to the legality of a sentence are reviewed *de novo*, and our scope of review is plenary. **Commonwealth v. Infante**, 63 A.3d 358, 363 (Pa. Super. 2013).

Because Rose filed a timely PCRA Petition, we will address his illegality claim. **See Commonwealth v. Voss**, 38 A.2d 795, 800 (Pa. Super. 2003) (stating that, in the PCRA context, jurisdiction is tied to the filing of a timely PCRA petition); **see also Commonwealth v. Haun**, 32 A.3d 697, 698 (Pa. 2011) (noting that the PCRA provides a framework for collateral judicial review of legality-of-sentence claims).

Initially, Rose contends that the trial court should not have graded his 2011 DUI as first-degree misdemeanor and, instead, should have graded it

as an ungraded misdemeanor. Brief for Appellant at 9.<sup>7</sup> On this basis, Rose contends that the sentence imposed for his 2011 DUI is illegal. ***Id.***<sup>8</sup>

Our review of the record discloses that, following his 2011 DUI, Rose pled guilty to a violation of 75 Pa.C.S.A. § 3802(b) (high rate of alcohol). Pursuant to section 3803(b)(3), an individual who violates section 3802(b) *and has more than one prior offense* commits a misdemeanor of the first degree. ***See*** 75 Pa.C.S.A. § 3803(b)(3). In making its calculation, the trial court was permitted to consider each of Rose's prior DUI offenses that occurred within the ten years preceding his 2011 DUI. ***See*** 75 Pa.C.S.A. § 3806(b). Because Rose had two DUI offenses within the ten years

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<sup>7</sup> Rose also argues that that the trial court should have considered his 2011 DUI and his 2012 DUI as his second and third DUI offenses, rather than as his third and fourth DUI offenses. Brief for Appellant at 9. Additionally, Rose contends that, because the criminal Complaint filed pursuant to his 2011 DUI incorrectly described his 2011 DUI as his "second" DUI offense, the trial court should have sentenced him to a thirty-day prison sentence under 75 Pa.C.S.A. § 3804(b)(2) (pertaining to penalties for a second DUI offense) as if his 2011 DUI was, indeed, his second DUI offense. ***Id.*** at 10-11. We find these arguments to be without merit, as Rose has conceded that his 2011 DUI and 2012 DUI constituted his third and fourth DUI offenses. ***See*** N.T., 7/8/13, at 14-15; ***see also*** PCRA Petition, 4/22/13, at 1.

<sup>8</sup> Although Rose similarly contends that the trial court erred by grading his 2012 DUI as first-degree misdemeanor rather than as an ungraded misdemeanor, he concedes that the sentence imposed for his 2012 DUI complies with 75 Pa.C.S.A. § 3804(c)(3). Brief for Appellant at 10. Rose further concedes that he does not know whether the trial court's alleged errors regarding his 2011 DUI sentence had any impact on his 2012 DUI sentence. ***Id.*** at 11. Based on Rose's concession that his 2012 DUI sentence is not illegal, we conclude that Rose is not entitled to relief as to that sentence.

preceding his 2011 DUI, we conclude that the trial court properly graded Rose's 2011 DUI as a first-degree misdemeanor.<sup>9</sup>

Rose also contends that the trial court erred by imposing sentence for his 2011 DUI offense in accordance with the sentencing guidelines rather than in accordance with section 75 Pa.C.S.A. § 3804(b)(3) (specifying the penalties for a high rate of blood alcohol DUI offense constituting the defendant's third DUI offense), which provides for a lesser prison sentence of not less than ninety days. Brief for Appellant at 10. Rose has failed to cite to any authority in support of this argument, in violation of the Pennsylvania Rules of Appellate Procedure. **See** Pa.R.A.P. 2119(a) (stating that the parties' briefs must include a discussion of each question raised on appeal and a "citation of authorities as are deemed pertinent.>").

Although Rose correctly notes that the penalties imposed by the sentencing guidelines for his 2011 DUI offense differ from those imposed by 75 Pa.C.S.A. § 3804(b)(3), Rose ignores the provisions in the guidelines that provide a remedy in the event of a conflict. Pursuant to 204 Pa. Code § 303.9(h), when the sentencing guidelines recommend a sentence that is higher than that required by a mandatory sentencing statute, the court *shall* consider the guideline recommendation. **See** 204 Pa. Code § 303.9(h); **see also Commonwealth v. Fogel**, 741 A.2d 767, 769 (Pa. Super. 1999)

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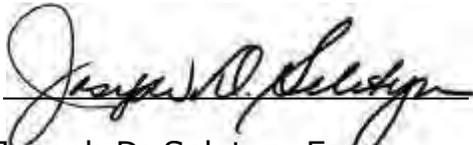
<sup>9</sup> Similarly, pursuant to 75 Pa.C.S.A. § 3803(b)(4), Rose's 2012 DUI was properly graded by the trial court as a first-degree misdemeanor because that offense involved a violation of section 3802(a)(1), and Rose refused to submit to a blood test. **See** 75 Pa.C.S.A. § 3803(b)(4).

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(applying 204 Pa. Code § 303.9(h) to resolve a conflict between the sentencing guidelines and the mandatory sentencing provisions of the Vehicle Code when sentencing a DUI defendant). Because the trial court was required to follow the sentencing guidelines, we conclude that it did not err by following the sentencing guidelines when sentencing Rose for his 2011 DUI offense.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/23/2014