

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : **No. 99-10,268**
:
vs. : **CRIMINAL DIVISION**
:
:
RICHARD A. UTEGG, : **Notice of Intent to**
Defendant : **Dismiss PCRA**

This matter came before the Court on Defendant's Post Conviction Relief Act (PCRA) Petition. The relevant facts are as follows. On August 3, 1999, Defendant pled guilty to driving under the influence of alcohol (DUI); driving under suspension, DUI related; driving an unregistered vehicle, unauthorized transfer of a license plate; and driving without insurance. Since Defendant had approximately 5 previous DUI convictions, the current DUI was treated as a misdemeanor of the first degree, and the Court advised Defendant that he could receive five years in jail, a \$10,000 fine or both for that offense.

On November 23, 1999, the Court sentenced Defendant to imprisonment in a State Correctional Institution for a minimum of nine (9) months and a maximum of two (2) years for the DUI, a consecutive term of 90 days imprisonment and a \$1,000 fine for driving under suspension - DUI related and fines for the remaining summary convictions.

On February 1, 2000, Defendant filed a pro se PCRA petition. On February 29, 2000, Defendant filed a pro se amendment to his PCRA petition. An initial PCRA conference was held with counsel on or about March 13, 2000. After the conference, the Court issued an Order requesting preparation of the transcripts of Defendant's guilty plea and sentencing hearings. The Court also gave defense counsel thirty (30) days from receipt of the transcripts

within which to file any amendment to Defendant's pro se petition.¹ On May 4, 2000, the Court held an additional conference at which counsel for the defense and the Commonwealth argued their respective positions on whether Defendant should be granted an evidentiary hearing on his PCRA petition.

In his PCRA petition and his amendment thereto, Defendant raises five (5) issues. First, Defendant contends that his suspension was not DUI related because his DUI suspension expired in 1997. This Court cannot agree. The driving under suspension statute states that a suspension is DUI related until the individual's operating privileges are restored. 75 Pa.C.S. 1543(b)(2). Defendant pled guilty to driving under suspension, DUI related. N.T., August 3, 1999, at p. 4-5. Therefore, this allegation is without merit.

Defendant next asserts that the DUI should not have been graded higher than a misdemeanor of the second degree. Again, the Court cannot agree. This was Defendant's sixth conviction for DUI. A person convicted of a third or subsequent DUI is guilty of a misdemeanor to the first degree. 75 Pa.C.S. 3731(e)(1). The Court clearly advised Defendant that he was pleading guilty to a misdemeanor of the first degree and informed him of the elements of the offense and the applicable maximum sentence for that offense. Therefore, the DUI offense was not improperly graded and Defendant's plea was not unlawfully induced or unknowingly entered.

Defendant's third assertion is that his DUI conviction should have been treated as a first DUI offense and he should have received no more than 48 hours incarceration. For mandatory minimum purposes, the Court considered the DUI as a first offense since

¹No further amendments to the PCRA petition were filed by Defendant or his counsel.

Defendant's prior DUI convictions occurred more than seven (7) years prior to the instant offense. However, just because the Court could not sentence Defendant to less than 48 hours incarceration does not mean the Court could not impose a higher sentence. The offense gravity score for DUI which is a misdemeanor of the first degree is a three (3). Defendant's prior record score was a five (5). Thus, the standard guideline range for this offense was six (6) to sixteen (16) months. The Court was required to consider this guideline range when determining Defendant's sentence. 204 Pa.Code §303.9(h). The Court imposed a minimum sentence of nine (9) months, which was within the standard guideline range. In order to sentence Defendant outside the standard guideline range, the Court would have to set forth in the record the mitigating factors justifying a lesser sentence. In this case, the Court found no such mitigating factors and found that the standard guideline range was appropriate.

Defendant's next allegation is that the Court erred in considering his prior DUI convictions which occurred more than seven (7) years prior to his current offense. Again, this Court cannot agree. Although these offenses could not be considered in determining the applicable mandatory minimum sentence, they could be utilized to determine Defendant's prior record score to determine an appropriate sentence in this case. Generally, all prior convictions shall be counted in the prior record score. 204 Pa.Code §303.5(a). The only exception applicable to this case would be any prior conviction which contributed to an increase in the grade of a subsequent conviction. 204 Pa.Code §303.8(g). Therefore, Defendant's first two DUI convictions would not count in his prior record score. Defendant's prior record score is a five (5) without these convictions; therefore, the Court did not err in considering Defendant's prior DUI convictions when determining Defendant's sentence in this case.

Defendant's final assertion is that the assistant public defender who appeared at

sentencing was not the one assigned to his case and he was ineffective because he was not prepared. This contention is also meritless. Even if original counsel were present at Defendant's sentencing, the result would have been the same. Since Defendant has not alleged the outcome would have been different, he has not met the prejudice component to obtain relief on an ineffectiveness of counsel claim.

ORDER

AND NOW, this ____ day of October 2000, upon review of the record and pursuant to Pa.Cr.Crim.P. Rule 1507(a), it is the finding of this Court that Defendant's Petition for Post Conviction Relief filed in the above-captioned matter raises no genuine issue of fact and Petitioner is not entitled to post conviction collateral relief. As no purpose would be served by conducting a hearing, none will be scheduled and the parties are hereby notified of this Court's intention to deny the Petition. Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an order dismissing the petition.

By The Court,

Kenneth D. Brown, J.

cc: Kenneth Osokow, Esquire (ADA)
James Protasio, Esquire
Richard Utegg, EC-0572
1000 Follies Road, Dallas PA 18612
Law Clerk
Work file
Gary Weber, Esquire (Lycoming Reporter)