IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	NO. 1422 CR 2016
	:	
LAKODA-LYN ELIZABETH HOFFMAN,	:	
Defendant	:	

Criminal Law - Multiple DUI Offenses – Enhanced Penalty for Second or Subsequent Offense - Recidivist Philosophy – Statutory Definition of Prior Offense - Right to a Jury Trial - Petty Versus Serious Offense - Unconstitutional as Applied

1. Although general "recidivist philosophy" for imposing an enhanced sentence on a second offense requires that conviction and sentencing on a first offense precede commission of the second offense, this is not a constitutional mandate; the legislature is free to reject or replace it when enacting recidivist sentencing legislation.
2. Under the current DUI law, a "prior offense" is defined as any DUI conviction for which a judgment of sentence has been imposed before sentencing on the present DUI violation occurs.
3. Under the current DUI law, a prior offense is defined not by the date on which the offense occurs or the date of conviction, but by the date on which a judgment of sentence is imposed.
4. In accordance with the existing definition of what constitutes a "prior offense," if after the date of commission and conviction of a DUI offense and before sentencing on that offense, the offender commits a new DUI offense for which he is convicted and sentenced, sentencing on the first-in-time offense is treated as a second offense for sentencing purposes.
5. The right to a jury trial under both the federal and state constitutions depends on whether the offense charged is a serious or petty offense. If the maximum authorized term of imprisonment set by the state legislature is greater than six months, the offense is a "serious" offense. If the maximum authorized term of imprisonment set by the state legislature is six months or less, the offense is a "petty" offense.
6. The right to a jury trial is absolute for serious offenses. There is no constitutional right to a jury trial for a petty offense.

7. A statute which on its face is constitutional, may nevertheless be unconstitutional as applied if its application to a particular person under particular circumstances deprives that person of a constitutional right.

8. In the instant proceedings, Defendant was properly tried and convicted in a bench trial as a first-time DUI offender for which the maximum penalties to which she was subject was six months' imprisonment and a fine not to exceed $5,000.00. As a petty offense, Defendant was not entitled to a jury trial. Subsequently, and before Defendant was sentenced on her first-in-time DUI offense, Defendant was convicted and sentenced on a second DUI offense, the effect of which was to transform the first offense to a second offense for sentencing purposes, resulting in a change in the grade of the offense and maximum penalties to which Defendant was subject. As a second time DUI offender, Defendant was subject to a maximum period of imprisonment not to exceed five years and a fine not to exceed $10,000.00, thereby making the offense a serious offense for which Defendant was entitled to a jury trial. As applied to the facts and circumstances of Defendant's prosecution as a first-time DUI offender, treated as a second offense for sentencing purposes, Defendant was unconstitutionally deprived of her right to a jury trial.

9. By depriving Defendant of the right to a jury trial, yet subjecting her to a period of imprisonment in excess of six months, the driving under the influence law as applied to Defendant is unconstitutional. In consequence, Defendant was entitled to be sentenced as a first-time offender.

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Seth E. Miller, Esquire — Counsel for Commonwealth
Assistant District Attorney
Paul J. Levy, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – April 18, 2018

At a bench trial held on September 12, 2017, Lakoda-Lyn Hoffman, the Defendant in these proceedings, was convicted of driving under the influence ("DUI") as a first-time offender. In the interim, between the time of Defendant's conviction and the date of her sentencing on December 12, 2017, Defendant pled guilty to a second DUI offense in Lehigh County and was sentenced thereon on the same date as a first-time offender. Because of Defendant's conviction and sentence in Lehigh County, in accordance with Sections 3804 (c)(2) and 3806 of the Vehicle Code, 75 Pa.C.S.A. §§ 3804 (c)(2) (Penalties) and 3806 (Prior offenses) respectively, Defendant was sentenced by this court as a second-time offender on December 12, 2017. Defendant's Post-Sentence Motion raises two primary challenges to her sentencing as a second time DUI offender: (1) that treating a first-time DUI offense as a second offense for sentencing purposes contravenes time-honored recidivist policy which requires

commission, conviction and sentencing on a prior offense before an enhanced penalty for a second offense is imposed; and (2) that the effect of changing the nature and grade of a DUI offense after conviction from an offense for which no right to a jury trial exists to one where the right is constitutionally guaranteed, without providing the Defendant with an opportunity to exercise such right, renders the statute unconstitutional as applied.

FACTUAL AND PROCEDURAL BACKGROUND

During the early morning hours of July 2, 2016, Defendant was the driver and sole occupant of a motor vehicle involved in a one car motor vehicle accident at 5635 Little Gap Road in Lower Towamensing Township, Carbon County, Pennsylvania. Upon arrival of the state police at the scene of this accident, the police detected an odor of an alcoholic beverage emanating from Defendant's breath; additionally, Defendant admitted to consuming two shots of fireball and smoking marijuana the previous evening. Field sobriety tests confirmed Defendant's impairment and the results of a blood draw revealed the presence of Delta-9 THC and Delta-9 Carboxy THC in Defendant's bloodstream, both ingredients in marijuana.

On August 22, 2016, a criminal complaint was filed against Defendant charging Defendant in Count 1 with Driving Under the Influence of a Controlled Substance, presence of a schedule I controlled substance (marijuana);[1] in Count 2 with Driving Under the

[1] 75 Pa.C.S.A. § 3802(d)(1)(i).

Influence of a Controlled Substance, General Impairment;[2] in Count 3 with Driving on Roadways Laned for Traffic;[3] and in Count 4 with Careless Driving.[4] Upon Defendant's waiver of her right to a preliminary hearing, all charges were bound over to court. The same charges specified in the criminal complaint were carried over to the criminal information, with the two counts of driving under the influence further designated as a first-time offense.

At a bench trial held on September 12, 2017, Defendant was convicted of driving when there was present in her blood a schedule I controlled substance (*i.e.*, 75 Pa.C.S.A. § 3802(d)(1)(i)), and acquitted of all remaining charges. Prior to any evidence being taken, the court confirmed with counsel that the driving under the influence charges were first time offenses, that the maximum period of imprisonment to which Defendant was subject if convicted would not exceed six months, and that Defendant had no right to a jury trial. That Defendant was charged and tried in Carbon County as a first-time DUI offender and was not entitled to a jury trial at the time of her bench trial is not in dispute.

At the same time as Defendant's bench trial in Carbon County, however, there was then pending against her in Lehigh County criminal charges for a second driving under the influence offense, driving with a blood alcohol content of at least 0.10% but less than 0.16%.

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[2] 75 Pa.C.S.A. § 3802(d)(2).
[3] 75 Pa.C.S.A. § 3309(1).
[4] 75 Pa.C.S.A. § 3714(a).

See 75 Pa.C.S.A. § 3802(b) (High rate of alcohol). The offense date for this second DUI offense was October 4, 2016, after the July 2, 2016, date of Defendant's first DUI offense in Carbon County. Following Defendant's conviction of driving under the influence in Carbon County and before she was sentenced on this offense, Defendant pled guilty to driving under the influence, general impairment (75 Pa.C.S.A. § 3802(a)(1)) in Lehigh County and was sentenced on the same date, September 29, 2017, to six months' probation. At the time of this plea and sentencing, Defendant was represented by the same counsel who was representing her in the Carbon County proceedings.

In accordance with the foregoing sequence of events and because Defendant had previously been sentenced as a first time DUI offender in Lehigh County, at the time of Defendant's sentencing in Carbon County on December 12, 2017, she was treated as a second time DUI offender. As such, the DUI offense for which she was convicted in Carbon County required that she be imprisoned for no less than ninety days nor more than five years and be fined no less than $1,500.00 nor more than $10,000.00. 75 Pa.C.S.A. §§ 3804(c)(2), 3804 (e)(2)(ii).[5] Nevertheless, because of what the court perceived as an infringement on her right to a jury trial, the sentence Defendant actually received in Carbon County was a thirty day period of imprisonment, followed by sixty days of restricted intermediate

[5] Further, the offense is graded as a misdemeanor of the first degree and requires an eighteen month suspension of operating privileges. 75 Pa.C.S.A. §§ 3803(b)(4), 3804 (e)(2)(ii).

punishment (home confinement), followed by three months' probation (*i.e.*, an aggregate sentence of six months), a $1,500.00 fine, and an eighteen month suspension of her operating privileges. Defendant contends the court erred in sentencing her as a second time DUI offender.

DISCUSSION

The dates of commission, conviction and sentencing for the driving under the influence offenses at issue in these proceedings may be summarized as follows:

July 2, 2016	-	commission of first offense (Carbon County)
October 4, 2016	-	commission of second offense (Lehigh County)
September 12, 2017	-	conviction on first offense (Carbon County)
September 29, 2017	-	conviction and sentencing on second offense (Lehigh County)
December 12, 2017	-	sentencing on first offense (Carbon County).

Under the driving under the influence law in effect at the time Defendant committed these offenses, the term "prior offense" was defined as

> [a]ny conviction for which judgment of sentence has been imposed. . . before the sentencing on the present violation for. . . (1) an offense under Section 3802 (relating to driving under influence of alcohol or controlled substance). . . .

75 Pa.C.S.A. § 3806(a)(1).[6] The statute further provides that

> [f]or purposes of Section[ ]. . . 3804 (relating to penalties). . . the prior offense must have occurred:
>
> (i) within 10 years prior to the date of the offense for which the defendant is being sentenced; or
> (ii) on or after the date of the offense for which the defendant is being sentenced.

75 Pa.C.S.A. § 3806(b)(1). Finally, the statute requires that "[t]he court shall calculate the number of prior offenses, if any, at the time of sentencing." 75 Pa.C.S.A. § 3806(b)(2).

The above-quoted subsections of Section 3806 are clear and unambiguous. For a DUI offense to be counted as a "prior offense" at the time of sentencing, the defendant must have been both convicted and sentenced on the prior offense before the date of sentencing on the instant DUI offense for which a sentence is being imposed and sentencing on the prior offense must have occurred either within ten years prior to the date of the offense for which the defendant is being sentenced or on or after the date of such offense. Under this language, the date on which the prior offense was committed or conviction occurred in relation to the corresponding dates of the instant offense for which the defendant is presently being sentenced is immaterial so long as at the time of the sentencing on the instant offense the defendant has previously been sentenced on the prior offense within the time periods specified in the statute. In

[6] The amendment to Section 3806 in effect when these offenses occurred, and still in effect today, is that appearing in the Act of May 25, 2016, P.L. 236, No. 33, § 5, effective immediately.

addition, the determination of whether a prior offense exists is made at the time of sentencing.

While perhaps counterintuitive, a prior offense is defined not by the date of the offense or the date of conviction, but by the date on which a judgment of sentence has been imposed. As applies to the sequence of events in this case, even though the dates of Defendant's DUI offense and conviction in Carbon County were prior in time to the respective dates of the Lehigh County offense and conviction, because the judgment of sentence in Lehigh County was entered prior to sentencing in Carbon County, under the clear language of Section 3806 the Lehigh County offense was a "prior offense" and the Carbon County offense was a subsequent or second offense. See also 1 Pa.C.S.A. § 1221(b) of the Statutory Construction Act, which provides that "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." Pursuant to Section 3806 (b)(2), Defendant was made aware of this determination at the time of sentencing.

The Legislature in its enactment of the current version of Section 3806 clearly intended to avoid having two separate DUI offenses both treated as a first offense for sentencing purposes simply because of the happenstance of the date of occurrence, conviction or sentencing of each offense in relation to the other. While general "recidivist philosophy" for imposing an enhanced sentence on a second offense requires that conviction and sentencing

on a first offense precede commission of the second offense, as stated by the Pennsylvania Supreme Court in Commonwealth v. Williams, 652 A.2d 283 (Pa. 1994),

> [t]he "**recidivist** philosophy," however, is not a constitutional principal or mandate, and the legislature is therefore free to reject or replace it when enacting **recidivist sentencing** legislation. If the legislature enacts a **statute** which clearly expresses a different application, the "**recidivist** philosophy" possesses no authority which would override clearly contrary statutory language.

Id. at 285; *see also* Commonwealth v. Plass, 636 A.2d 637 (Pa.Super. 1994)) (holding that the clear language of 18 Pa.C.S.A. § 7508(a)(3)(i) required imposition of an enhanced mandatory minimum where defendant was convicted of a prior drug trafficking offense before sentencing, but after commission of the principal offense), *affirmed*, 652 A.2d 283 (Pa. 1994).

To the extent Defendant argues that at the time she committed the DUI offense in Carbon County and was tried as a first-time offender, she did not have notice that an enhanced sentence would result if she were convicted and sentenced in Lehigh County before being sentenced in Carbon County, such argument is without legal merit. Section 3806 went into effect on May 25, 2016, before either the Carbon County or Lehigh County offenses occurred. Consequently, at the time of Defendant's bench trial in Carbon County, not only did she know of the criminal charges pending against her for driving under the influence in both Carbon and Lehigh County, she was also on notice as of the date of each offense that her actions were

proscribed by law and of the existence of the sentencing statute. *See* Commonwealth v. Marks, 704 A.2d 1095, 1102 (Pa.Super. 1997) (holding that defendant's subsequent convictions for two homicides committed after commission of the principal underlying third degree murder offense which was the subject of defendant's sentencing appeal were properly considered and counted in sentencing defendant to a mandatory term of life imprisonment pursuant to 42 Pa.C.S.A. § 9715 which required a sentence of life imprisonment for any person convicted of murder of the third degree and who was previously convicted at *any time* of murder or voluntary manslaughter), *appeal denied*, 722 A.2d 1056 (Pa. 1998). Moreover, Defendant's argument that because she was tried as a first-time offender in Carbon County she must be sentenced as a first-time offender, ignores the realities of what actually occurred: while Defendant's trial on September 12, 2017, was for her first in time DUI offense, she legally was sentenced for her second DUI conviction. *Id*. Finally, it's important to note that Defendant had the benefit of counsel at all times and was in fact represented by the same legal counsel in both matters.

Section 3806 is not unconstitutional on its face. Nor is it inherently unconstitutional simply because the grade and severity of the sentencing penalty to which a criminal defendant is subject is increased after commission of a criminal offense, not because of a change in the law but because of the application of the law to changed circumstances of which the defendant was on notice prior to

the commission of the offense. Commonwealth v. Marks, 704 A.2d at 1102. This, however, does not answer the second part of Defendant's challenge: that at the time of her sentencing in Carbon County as a second time DUI offender she was subject to a maximum period of imprisonment in excess of six months (*i.e.*, five years), yet she was never provided with the opportunity for a jury trial on this offense.

In approaching this issue we begin with certain underlying premises. First, at the time of Defendant's September 12, 2017, bench trial in Carbon County, she was not entitled to a jury trial: this was Defendant's first-in-time DUI offense, there existed no pre-existing judgment of sentence in a DUI case, and Defendant was presumed innocent of the pending DUI charge in Lehigh County. Second, absent some trial error of which we are unaware, the verdict entered against Defendant in Carbon County is valid and unassailable, and we know of no legal basis on which it can be validly set aside. Third, Defendant's plea and sentencing in Lehigh County as a first-time DUI offender was proper. Accepting these premises as true, under the clear language of Section 3806 the Lehigh County offense was a "prior offense" at the time of Defendant's sentencing in Carbon County, Defendant's DUI offense in Carbon County was a second offense for sentencing purposes, and Section 3804 (c)(2) required that Defendant be sentenced to a term of imprisonment of no less than ninety days nor more than five years. By setting this as the maximum authorized term of imprisonment, the Legislature has

made a legislative finding that this is a serious offense to which the courts must defer. Blanton v. North Las Vegas, 489 U.S. 538, 541-543, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989).

The right to a jury trial under both our federal and state constitutions depends on whether the offense charged is a serious or petty offense. The dividing line between a petty and serious offense is an objective one: is the maximum authorized term of imprisonment set by the state Legislature greater than, or equal to or less than six months.

> The test is clear. The decisions of the Supreme Court of the United States 'have established a fixed dividing line between petty and serious offenses: those crimes carrying [a sentence of] more than six months [ ] are serious [crimes] and those carrying [a sentence of six months or] less are petty crimes.' " Commonwealth v. Mayberry, 459 Pa. 91, 98, 327 A.2d 86, 89 (1974) (quoting Codispoti v. Pennsylvania, 418 U.S. 506, 512, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974)). It is well-settled that a legislature's determination that an offense carries a maximum prison term of six months or less indicates its view that an offense is "petty." Blanton v. North Las Vegas, 489 U.S. 538, 543, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989).

Commonwealth v. Kerry, 906 A.2d 1237, 1239 (Pa.Super. 2006) (holding that in the context of recidivist DUI legislation, the fact that conviction on a subsequent offense is characterized as a serious offense (*i.e.*, one carrying a potential period of imprisonment in excess of six months) does not transform a prior offense for which the maximum possible term of imprisonment is six months or less into a serious offense for purposes of a defendant's jury trial rights).

If the offense is a serious offense in the constitutional sense, the right to a jury trial is absolute. Commonwealth v. Mayberry, 327 A.2d 86, 89 n.9 (Pa. 1974).

As applied to the facts and sequence of events in this case, Sections 3804 and 3806 of the Vehicle Code, 75 Pa.C.S.A. §§ 3804 and 3806 respectively, allow the Defendant to be sentenced to a maximum period of imprisonment not to exceed five years with never having been given the opportunity for a jury trial on the underlying DUI offense which occurred in Carbon County. By depriving Defendant of this right to a jury trial, yet subjecting her to a period of imprisonment in excess of six months, the driving under the influence law as applied to Defendant is unconstitutional. *See* Commonwealth v. Brown, 26 A.3d 485, 493 (Pa.Super. 2011) (discussing the distinction between a statute which is unconstitutional on its face and as applied).[7] Nor is the statute severable to avoid this result, Section 3806's definition of "prior offense" being embedded into the fabric of the law. *Cf.* Commonwealth v. Valentine, 101 A.3d 801, 811 (Pa.Super. 2014) (holding the provisions of mandatory minimum

[7] In Commonwealth v. Brown, the Superior Court noted that a defendant may contest the constitutionality of a statute on its face or as applied, stating:

> A facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case. An as-applied attack, in contrast, does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right. A criminal defendant may seek to vacate his conviction by demonstrating a law's facial or as-applied unconstitutionality.

26 A.3d 485, 493 (Pa.Super. 2011) (quoting United States v. Marcavage, 609 F.3d 264, 273 (3d Cir.2010).

sentencing statutes assigning fact-finding responsibilities to the trial court to be determined by a preponderance of the evidence were constitutionally infirm and unseverable from the statutes as a whole, and that any correction implemented by the court would involve an impermissible judicial infringement of the legislative function), *appeal denied*, 124 A.3d 309 (Pa. 2015).

CONCLUSION

In implementing an enhanced penalty for multiple DUI offenses, neither logic nor law requires the Legislature to adopt the traditional policy underlying recidivist legislation: that a previous conviction exist before a defendant is subject to enhanced punishment on a second offense. "[T]he recidivist philosophy, while a valid policy, is not the only valid sentencing policy, nor is it a constitutional principle or mandate, and the legislature is free to enact a statute which clearly expresses a different application." Commonwealth v. Shawver, 18 A.3d 1190, 1197 (Pa.Super. 2011). Provided such legislation is rationally related to its underlying policies, constitutional challenges premised on double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection and privileges and immunities have, in general, not been sustained. *Id.*

Under the current driving under the influence law, if at the time of sentencing the defendant has previously been sentenced on another DUI offense, it is immaterial when the previous offense was

committed or a conviction obtained, the look-back period is computed at the time of sentencing on the offense at issue, the principal offense. Therefore, even though the instant DUI offense in Carbon County was first in time, because Defendant was convicted and sentenced on another DUI offense before being sentencing in Carbon County, pursuant to Section 3806 of the Vehicle Code the Carbon County offense was properly treated as a second offense for sentencing purposes.

At the same time, by creating a scenario, as here, where sentencing on a separate or subsequent in time DUI offense transforms an existing first offense DUI conviction into a second offense for sentencing purposes and, in the process, denies the Defendant a right to a jury trial, the statute cannot be constitutionally enforced as applied and must yield to an unenhanced sentence on the existing conviction. We hold, therefore, that Section 3806 of the Vehicle Code is invalid and unenforceable against Defendant under the circumstances of this case and that Defendant shall be re-sentenced as a first-time offender.

BY THE COURT:

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P.J.