IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BRUCE K. STEWART, Defendant Below-Appellant,	)	
v.	)	Case I.D. - 0103005513
STATE OF DELAWARE, Plaintiff Below-Appellee.	)	

Submitted: July 30, 2002
Decided: September 25, 2002

ON APPEAL FROM THE COURT OF COMMON PLEAS
OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY
AFFIRMED.

ORDER

Nicole M. Walker, Esquire, Assistant Public Defender, Attorney for Defendant Below-Appellant.

Joelle M. Wright, Esquire, Deputy Attorney General, Attorney for Plaintiff Below-Appellee.

ABLEMAN, JUDGE

Bruce K. Stewart ("Appellant") was charged in the Court of Common Pleas with Reckless Driving in violation of 21 *Del. C.* § 4175 and Disregarding a Police Officer's Signal in violation of 21 *Del. C.* § 4103. At his trial on January 23, 2002, Appellant plead guilty to both charges. Appellant was sentenced as a "subsequent offender" under 21 *Del. C.* § 4103(b).

On February 6, 2002, the Appellant filed a notice of appeal from the sentence imposed on the offense of Disregarding a Police Officer's Signal pursuant to 21 *Del. C.* § 4103. This is the Court's decision on appeal.

FACTS

On March 7, 2001, members of the FBI Fugitive Task Force (FTF) were conducting a surveillance of Hamilton Drive in New Castle, Delaware in an effort to locate the Appellant. The FBI had received information that the Appellant was residing at this address. The Appellant was being sought in connection with two warrants issued against him for Attempted Murder and Aggravated Menacing offenses.

The FTF observed the Appellant leaving the residence and entering a rental car. After the FTF made a positive identification of the Appellant, the FTF radioed to another car to follow him. A marked New Castle County police car pulled behind the Appellant as he traveled along Route 273 and activated its emergency

equipment in an attempt to stop the Appellant's vehicle.[1] At trial, Appellant refuted any knowledge or awareness that he was being followed by a marked police car.[2] Appellant contended that he was being pursued by unmarked vehicles and was unaware that law enforcement officers were in the vehicles. Further, Appellant stated that he feared for his life and thought that "they [law enforcement officers] were trying to assassinate him."[3] The Appellant failed to comply or respond to the marked police car's emergency lights. Instead, Appellant made an illegal U-turn on Route 273, causing his vehicle to jump over a traffic island traveling at a speed upwards of 100 miles per hour.[4] As the Appellant sped westbound along Route 273, the marked police car continued in pursuit with its emergency lights activated. The Appellant failed to observe and comply with the police officer's signals.

As Appellant traveled along Route 273, Detective Sullivan, one of the pursuing police officers, attempted to cut off Appellant's vehicle. The Appellant did not heed Detective Sullivan's efforts nor did he stop his vehicle. Instead, Appellant traveled over a curb, entered upon Airport Road, and continued driving at excessive speeds on the wrong side of the road while swerving and dodging oncoming traffic.[5] In a further attempt to evade the police, the Appellant exited Airport Road and entered the parking lot of a Wawa convenience store at an

[1] Transcript of Court Proceedings, dated January 23, 2002, at 15 (hereinafter "Tr. Ct. Proc. at ___.").
[2] Tr. Ct. Proc. at 20.
[3] *Id*.
[4] *Id*. at 15.

excessive speed, potentially injuring some children located within the parking lot area. Appellant finally made his way to the Interstate 95 southbound access ramp, whereupon the police called off the pursuit due to the speed of the Appellant's vehicle and the potential endangerment of civilians traveling along Interstate 95.

Appellant denied that he was traveling at speeds of upwards of 100 miles per hour and that he ran any person off the road. Appellant claimed that his rental car was not able to exceed 85 miles per hour due to a governing device that sets the highest speed capable of being obtained at 85 miles per hour. Appellant stated that, "[I] knew that I was being pursued, but it wasn't until like ten, fifteen minutes into the chase that I knew that they was officers …"[6] The Appellant further admitted that he continued driving even after he recognized his pursuers to be police officers.[7]

At trial, Appellant entered a plea of guilty to both charges. The State moved to have the Appellant sentenced as a second offender under 21 *Del. C*. § 4103 of the Delaware Motor Vehicle Code for having committed a "subsequent like offense" within the intended statutory meaning. The State based this motion on evidence that the Appellant had been convicted of the same statutory offense in 1993, approximately eight years earlier. If convicted of committing a "subsequent like offense," Appellant would be subject to a more severe punishment, i.e., fined

[5] *Id*. at 16.
[6] *Id*. at 22.

not less than $1,150 nor more than $3,450 and imprisoned not less than 60 days nor more than 18 months.[8]

In contrast, Appellant's counsel requested that the trial Court, in its discretion, should consider this a first offense for the Appellant under this statute and a mitigating factor in sentencing. Appellant's counsel argued that 21 *Del. C.* § 4103 does not define a "subsequent like offense" nor does it even set forth a statutory time period for the first offense to run before a defendant can be sentenced as a second offender. Therefore, Appellant submits that his first offense from eight years earlier should not be considered within the statutory constructs of 21 *Del. C.* § 4103 and Appellant should receive the sentence associated with a first offense, i.e., not less than $575 nor more than $2,000, or imprisoned for not less than 60 days nor more than 6 months or both.[9]

After defense counsel raised an objection to second offender status, the Court indicated that it would permit briefing on the issue. However, the Appellant instructed his counsel to request that the Court of Common Pleas proceed with the sentencing phase of the trial without briefing. The Appellant was subsequently sentenced as follows: for Reckless Driving, thirty days (30) days at Level V plus a fine in the amount of $200.00 and 18% to the Victim's Compensation Fund; and

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[7] *Id*.
[8] 21 *Del. C.* § 4103(b).
[9] *Id*.

for Disregarding a Police Officer's Signal, twelve (12) months at Level V plus a fine in the amount of $1,150.00.

DISCUSSION

The imposition of a sentence on a defendant is within the judicial discretion of a sentencing court.[10] It is well established that appellate review by this Court of a lower court's sentencing determination is extremely limited; the Court may only determine whether the sentencing court abused its discretion.[11] Further, the scope of discretion of a sentencing court can be extensive without exceeding the parameters of permissible judicial discretion. "A judge has broad discretion in making a sentencing determination and may consider 'information pertaining to a defendant's personal history and behavior which is not confined exclusively to conduct for which the defendant was convicted.'"[12] This Court's review of a lower court's sentencing determination 'generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature.'[13]

The Appellant contends that the trial Court erred as a matter of law by presuming to exercise unbridled discretion in imputing an infinite time period in

[10] *See Logan v. State*, Del. Supr., Cr.A. No. N94-07-0587, 1995 WL 108977, Carpenter, J. (Feb. 14, 1995) (ORDER); *also see Henry v. State*, Del. Supr., No. 14-1990, 1991 WL 12094, Christie, C.J. (Jan. 15, 1991) (ORDER); *Bailey v. State*, 459 A.2d 531, 535 (Del. Super. Ct. 1983).
[11] *Henry v. State*, Del. Supr., No. 14-1990, 1991 WL 12094, Christie, C.J. (Jan. 15, 1991) (ORDER).

connection with determination of a "subsequent like offense" within the statutory language of 21 *Del. C.* § 4103.[14] As a result, the trial Court considered an eight-year-old conviction for the same offense to increase the Appellant's sentence from one that would have been maximized at six (6) months to a twelve (12) month sentence under an expanded maximum of eighteen (18) months.[15] Appellant requests that his sentence should be remanded because 21 *Del. C.* § 4103 is void for vagueness. To the extent it is not vague, he should be sentenced as a first offender imputing up to a five (5) year statutory time frame. In opposition, the State argues that the trial Court did not err as a matter of law because the statute is not vague and Appellant is, and should be, sentenced as a second offender.[16]

In *Logan v. State*, this Court addressed the same issues of purported statutory vagueness and absence of a statutory definition of "subsequent like offense" within the context of the State of Delaware's Motor Vehicle Code.[17] The defendant in *Logan* appealed from a decision of the Court of Common Pleas that found the defendant guilty of driving a vehicle while his license was suspended pursuant to 21 *Del. C.* § 2756(a). In his appeal, Mr. Logan argued that he should

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[12] *Id*. at *5 (quoting *Lake v. State*, Del. Supr., No. 67, 1984, Horsey, J. (Oct. 29, 1984), Order at 2).
[13] *Logan*, 1995 WL 108977, at *1 (quoting *Ward v. State*, 567 A.2d 1296, 1297 (Del. Super. Ct. 1989)).
[14] Appellant's Opening Brief, dated July 1, 2002, at 6 (hereinafter "Appellant's Opening Br. at ___.").
[15] Appellant's Opening Br. at 6.
[16] State's Answering Brief, dated July 22, 2002, at 4 (hereinafter "State's Answering Br. at ___.").
[17] *Logan v. State*, Del. Supr., Cr.A. No. N94-07-0587, 1995 WL 108977, Carpenter, J. (Feb. 14, 1995).

have been sentenced as a first offender for driving while his license was suspended because his first offense for the same act was "too remote in time."[18]

As in the instant case, the prevailing Motor Vehicle Code statute in *Logan* was silent as to a finite time period within which a prior offense must have occurred in order for a later conviction under the same statute to constitute a subsequent offense.[19] Additionally, Mr. Logan cited various other statutes within the Motor Vehicle Code that contain definite time limitations within which a later offense for the same crime is considered a "subsequent like offense" in support of the proposition that the Delaware legislature failed to provide any statutory guidelines as to a specific applicable time period, thereby rendering the statute invalid for vagueness. Similarly, the Appellant also cites to various Motor Vehicle Code recidivist statutes that clearly indicate the time period to be used in measuring whether a second offense is to be considered a "subsequent like offense."[20] As the Court in *Logan* stated, "[d]efendant's citation of various other provisions of the motor vehicle code containing time limitations merely emphasizes the fact that the legislature could have included a time limitation in § *2756(a)* [driving a vehicle with a suspended or revoked license], but did not do so."[21]

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[18] *Id*. at *1.
[19] *Id*.
[20] Appellant's Opening Br. at 7.
[21] *Logan*, 1995 WL 108977, at *1.

Similarly, the legislature could have included a time limitation in 21 *Del. C.* § 4103(b), but did not do so. Notwithstanding, 21 *Del. C.* § 2756(a) was later amended by the legislature to define a "subsequent offense" as one occurring within three years of a former offense. This legislative modification further supports this Court's belief that had the legislature determined that there should be a time limitation for a subsequent offense within 21 *Del. C.* § 4103(b) it would have included it in the plain language of the statute or amended it to incorporate such a limitation. Absence of a defined time limitation does not serve to invalidate 21 *Del. C.* § 4103(b).

Appellant's first contention that 21 *Del. C.* § 4103(b) is vague and therefore, rendered void and in violation of Appellant's right to due process under the Fifth Amendment, is without merit. The doctrine of unconstitutional vagueness is applicable to statutes that proscribe criminal activities.[22] But, "[a] statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated behavior is forbidden by the statute, or if it encourages arbitrary or erratic enforcement."[23] The language of 21 *Del. C.* § 4103(b) clearly states the terms and conditions of contemplated behavior, which if disobeyed, constitutes a violation of the statute. Even if a criminal statute may appear vague on its face, the Delaware Supreme Court has recognized that, "[a]ny statute may be drafted in

[22] *Sanders* v. *State*, 585 A.2d 117, 127 (Del. 1990).

vague language, but inartful drafting does not give rise to a constitutional claim. Rather, it forces the courts that apply the ambiguous statute to construe its language."[24] Exercising its discretionary privilege and considering the totality of the circumstances, the trial Court interpreted 21 *Del. C.* § 4103(b) correctly, notwithstanding any alleged color or hint of vagueness for lack of a definitive explanation of "subsequent like offense."

The United States Supreme Court in *Connally v. General Construction Co.* has specified a test [Connally test] by which the language of a criminal statute may be analyzed to determine if it is void for vagueness:

> [t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties …; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[25]

In *State v. Robinson*, the Delaware Supreme Court approved the Connally test.[26] The Connally test emphasizes two elements: actual notice to a person and ensuring

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[23] *State v. Baker*, 720 A.2d 1139, 1147 (Del. 1998); *see also Sanders v. State*, 585 A.2d 117, 127 (Del. 1990) (discussing the "void for vagueness doctrine").
[24] *Sanders*, 585 A.2d at 127.
[25] *Connally v. General Construction Co.*, 269 U.S. 385 (1926).
[26] *State v. Robinson*, 251 A.2d 552 (Del. 1969); *also see Baker*, 720 A.2d at 1148; *State v. J.K.*, 383 A.2d 283, 291 (Del. 1977).

against arbitrary government or state enforcement. More recently, the United States Supreme Court has placed a stronger emphasis on the latter stressing the necessity that "a legislature establish minimum guidelines to govern law enforcement."[27] Applying the test to this case, Appellant was placed on sufficient notice after his initial conviction under 21 *Del. C.* § 4103(b) that another offense under the same statute occurring later in time would constitute a "subsequent like offense." A reasonable person of "ordinary intelligence" would infer nothing less. Webster's Dictionary defines "subsequent" as "coming after in time, order or place."[28] A "subsequent like offense" can mean nothing other than an offense which comes after the first offense without any reference to time limitations. Second, the trial Court used proper judicial discretion in enforcing the statutory sentence to be imposed.

The Appellant's second contention that the Court should have stepped in and imputed a time period limitation in conformance with other similar Motor Vehicle Code statutes is misplaced. It is the duty of the legislature, not the Court, to incorporate a time limitation for a "subsequent like offense" within the text of the statute. Nor is it within this Court's discretion to presume or hypothesize on the legislative intent behind the drafting of 21 *Del. C.* § 4103(b). It is the Court's

[27] *Baker*, 720 A.2d at 1148.
[28] WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1155 (1988).

responsibility to interpret the plain meaning of the statutory language and ensure that it was interpreted correctly as a matter of law.

Applying the foregoing standards, the Court finds that the Court of Common Pleas did not abuse its judicial discretion in interpreting 21 *Del. C.* § 4103(b) and sentencing the Appellant accordingly. "A sentence which is based on materially false information or impermissible factors, or which results from a 'closed mind' on the part of the judge, is improper if the defendant can demonstrate that the sentence arose from the impropriety."[29] The sentencing Court considered the totality of the circumstances in arriving at a proper sentencing disposition based upon: Appellant's evasive conduct, the speed of the chase, the Appellant's statements and admissions, and the Appellant's disregard for the safety of the citizens of Delaware.[30] *Section* 4103(b) does not state a time limitation for "subsequent like offenses," and, therefore, the Appellant was properly sentenced as a subsequent offender.

Therefore, this Court concludes that the sentence imposed by the Court of Common Pleas falls within the statutory limitations of 21 *Del. C.* § 4103(b) as drafted by the Delaware Legislature and that the Court used proper discretion in determining the sentence and committed no error of law.

[29] *Henry*, 1991 WL 12094, at *5.
[30] Tr. Ct. Proc. at 24.

CONCLUSION

For the foregoing reasons, the decision of the Court of Common Pleas is hereby **AFFIRMED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Nicole M. Walker, Esquire
Joelle M. Wright, Esquire
Prothonotary
Presentence