

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

MICHAEL D. TAYLOR

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 806 MDA 2012

Appeal from the Judgment of Sentence March 6, 2012
In the Court of Common Pleas of Snyder County
Criminal Division at No(s): CP-55-CR-0000152-2011

BEFORE: SHOGAN, J., LAZARUS, J., and OTT, J.

MEMORANDUM BY OTT, J.:

Filed: March 12, 2013

Michael D. Taylor appeals from the judgment of sentence imposed on March 6, 2012, in the Court of Common Pleas of Snyder County. Pursuant to a plea agreement, Taylor pleaded guilty to driving under the influence ("Highest rate of alcohol," Blood Alcohol Content (BAC) +.16%), first offense,¹ in exchange for the Commonwealth's agreement to *nolle pros* the remaining charges, which included, *inter alia*, flight to avoid apprehension, trial or punishment,² and several summary violations of the Vehicle Code.³

¹ 75 Pa.C.S. § 3802(c). The mandatory minimum sentence for this offense is 72 hours. **See** 75 Pa.C.S. § 3804(c)(1). The charges arose out of a one-car accident.

² 18 Pa.C.S. § 5126(a).

³ 75 Pa.C.S. §§ 3361 ("Driving vehicle at safe speed"), 3741(a)(1) ("Immediate notice of accident to police department"/Injury or death), and
(Footnote Continued Next Page)

The trial court sentenced Taylor to serve a term of imprisonment of 15 days to six months. In this challenge to the discretionary aspects of sentence, Taylor claims (1) that the trial court abused its discretion by enhancing his sentence due to charges *nolle prossed* pursuant to the plea agreement, and (2) that the trial court lacked a sufficient evidentiary basis for enhancing his sentence. Based upon the following, we vacate and remand.

The trial court summarized the background of this appeal as follows:

On May 6, 2011, the Commonwealth filed a 7-Count Information against [Taylor] alleging driving under the influence of alcohol or a controlled substance an ungraded misdemeanor. In addition, [Taylor] was charged with flight to avoid apprehension, trial or punishment, driving vehicle at a safe speed and immediate notice of accident to police department (2 Counts). On January 10, 2012, [Taylor] plead guilty to Count 3 driving under the influence an ungraded misdemeanor punishable by up to 6 months incarceration. In the Guilty Plea Colloquy the Plea Agreement indicated that the Commonwealth had no objection to the Court imposing the mandatory minimum sentence [72 hours] and that the remaining charges would be dismissed. There were no other terms of the Plea Agreement.

The Guideline form indicated a standard range of 72 hours and an aggravated range of [+]³ months. On March 6, 2012, [Taylor] was sentenced to an aggravated range sentence of 15 days to 6 months incarceration in the Snyder County Jail.

(Footnote Continued) _____

3741(a)(2) ("Immediate notice of accident to police department"/Damage to vehicle).

Trial Court Opinion, 4/26/2012, at 1–2. Taylor thereafter filed a motion for modification of sentence, which was denied, and he then filed this appeal.⁴

Preliminarily, we note that Taylor has properly preserved his challenge to the discretionary aspects of sentence by filing a motion to modify sentence, and by including a statement pursuant to Pa.R.A.P. 2119(f) in his brief, averring that there exists a substantial question as to whether the sentence imposed in this case is inconsistent with the Sentencing Code or violates the fundamental norms underlying the sentencing process. **See Commonwealth v. Moury**, 992 A.2d 162, 170 (Pa. Super. 2010). Therefore, we first examine the exercise of the trial judge’s discretion in sentencing Taylor in the light of Taylor’s claim that the trial court considered “impermissible”⁵ factors in fashioning the aggravated range sentence.

Our standard and scope of review in determining whether a trial court has erred in fashioning a sentence is well-settled:

“Sentencing is a matter vested in the discretion of the sentencing judge and a sentence will not be disturbed on appeal absent a manifest abuse of discretion.” In this context an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court erred or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias, or ill-will, or arrived at a manifestly unreasonable decision.

⁴ Taylor timely complied with the order of the trial court to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

⁵ Taylor’s Brief at 11 (Rule 2119(f) statement).

Commonwealth v. Coulverson, 34 A.3d 135, 143 (Pa. Super. 2011) (citations omitted). Where a sentence is within the guideline range, we review to determine whether the trial court's sentence is "clearly unreasonable." 42 Pa.C.S. § 9781(c)(2).

Taylor claims that, in choosing a sentence, the trial court improperly considered conduct related to charges that had been *nolle proessed* as part of the plea agreement. In support, Taylor cites ***Commonwealth v. Stewart***, 867 A.2d 589, 592–93 (Pa. Super. 2005).

In ***Stewart***, the trial court increased the defendant's sentence and stated on the record: "This sentence is in the aggravated range because two counts of IDSI [Involuntary Deviate Sexual Intercourse], which each [carries] a mandatory minimum of five years, have been *nolle proessed* as well as another count of statutory sexual assault." ***Id.*** at 593. Upon review, this Court stated that the allegation that trial court's reliance on *nolle proessed* charges was an improper factor in fashioning a sentence in the aggravated range raised a substantial question. ***Id.*** at 592. The ***Stewart*** Court, *per* the Honorable Maureen Lally-Green, concluded: "[A] manifest abuse of discretion exists when a sentence is enhanced due to charges that

have been *nolle prossed* as part of a plea agreement, because notions of fundamental fairness are violated. *Id.* at 593.⁶

After review, we conclude that **Stewart** controls the outcome of the present case. Here, Taylor had a prior record score of 0, and the DUI charge to which he pleaded guilty had an offense gravity score of 1. Although the standard range was Restorative Sanctions, a mandatory minimum sentence of 72 hours applied, and the aggravated range was +3 months.

At sentencing, trial counsel stated that “because of the other incident involved that [Taylor] is not being charged with, he was precluded from [Accelerated Rehabilitative Disposition].” N.T., 3/6/2012, at 2. Trial counsel also informed the trial court that Taylor had suffered a broken ankle and concussion in the accident and had mental health problems.⁷ *Id.* at 3. Trial counsel pointed out that if Taylor had pleaded guilty to the charge of flight to avoid apprehension, trial or punishment, based on his prior record score of 0, and the offense gravity score of 2, the standard range sentence for that offense would have been Restorative Sanctions. *Id.* Trial counsel requested the court to impose the mandatory minimum sentence, i.e., 72 hours, for

⁶ It bears emphasis that the sentencing guidelines also preclude a sentencing court from considering charges that have been *nolle prossed*. **See** 204 Pa. Code § 303.8(g)(2) (excluding from the Prior Record Score “[a] charge which is nolle prossed, dismissed, or on which a demurrer is sustained.”).

⁷ Taylor was 22 years of age at the time of the sentencing hearing.

the DUI offense. *Id.* Trial counsel pointed out that Taylor's blood alcohol content, which was .165%, "was at the bottom of tier 3 [75 Pa.C.S. § 3802(c) (BAC +.16%)]." *Id.* at 4. Taylor also addressed the court and stated that he took responsibility for his actions, and apologized for his actions. *Id.* at 3.

Thereafter, the court, in imposing sentence, referenced facts set forth in the affidavit of probable cause, which was attached to the presentence investigation report, stating:

In a driving under the influence [case] where someone leaves the scene, it would get the mandatory minimum and preclude an individual from receiving the ARD program. **In this particular case, [Taylor] went above and beyond just fleeing the scene. He was told to stop by law enforcement and disregarded the instructions. Then he began running with a broken ankle, failed to stop multiple times, and the officer had to essentially take him down. That takes us past the mandatory minimum.**

Id. at 4. As stated above, the trial court imposed a sentence of 15 days to 6 months' imprisonment.⁸

While the court did not explicitly mention the charge of flight from apprehension, trial or punishment that had been *nolle prosequi*, the above excerpt reflects that the trial court considered such charge in fashioning the

⁸ The recommendation of the Adult Probation Office of Snyder County, as stated in the Pre-sentence Investigation Report, was "for a period of incarceration slightly longer than the mandatory minimum[.]" However, the court did not discuss this recommendation at the sentencing hearing.

sentence upon Taylor's DUI offense. Accordingly, based on ***Stewart***, we are constrained to vacate the judgment of sentence and remand for resentencing.⁹

Judgment of sentence vacated. Case remanded for resentencing.
Jurisdiction relinquished.

⁹ Based on our disposition, we do not reach Taylor's remaining claim that "the trial court's enhancement of Taylor's sentence based upon unsubstantiated hearsay was inappropriate and resulted in an invalid sentence." Taylor's Brief at 12.