

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
DANIEL DUDLEY,	:	
	:	
Appellant	:	No. 381 EDA 2013

Appeal from the Judgment of Sentence January 15, 2013
 In the Court of Common Pleas of Delaware County
 Criminal Division No(s).: CP-23-CR-0000878-2008
 CP-23-CR-0000880-2008
 CP-23-CR-0001760-2008
 CP-23-CR-0004554-2008

BEFORE: ALLEN, MUNDY and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED DECEMBER 03, 2013**

Pro se Appellant, Daniel Dudley, appeals from the judgment of sentence entered in the Delaware County Court of Common Pleas after the court concluded he violated his probation. This matter returns to this Court after remand for a **Grazier**¹ hearing. He contends, *inter alia*, that the trial court erred in revoking his probation and that his constitutional due process rights were violated. We affirm.

* Former Justice specially assigned to the Superior Court.

¹ **Commonwealth v. Grazier**, 713 A.2d 81 (Pa. 1998).

We adopt the facts and procedural history set forth in the trial court's opinion. **See** Trial Ct. Op., 5/15/13, at 1-4. Appellant, then represented by counsel, timely appealed on January 29, 2013. On March 1, 2013, the court served an order on Appellant—but did not serve his then-counsel—instructing him to comply with Pa.R.A.P. 1925(b) within twenty-one days. Appellant, however, did not file a Rule 1925(b) statement within twenty-one days.

On May 2, 2013, Appellant filed a *pro se* petition with this Court asking this Court to permit his counsel to withdraw. On May 14, 2013, Appellant's counsel filed with this Court a petition to withdraw. This Court, on May 24, 2013, remanded to the trial court to conduct a **Grazier** hearing.

On June 12, 2013, the trial court docketed Appellant's *pro se* Rule 1925(b) statement, which was putatively untimely.

The trial court held a **Grazier** hearing on June 27, 2013. At the hearing, the trial court permitted counsel to withdraw and Appellant to proceed *pro se*. The court also held that it would accept Appellant's *pro se* Rule 1925(b) statement *nunc pro tunc*.² N.T. **Grazier** H'rg, 6/27/13, at 13. The case now returns to this Court, and Appellant has filed a *pro se* brief.

Appellant raises the following issues:

The trial court erred in revoking [his] parole and probation and re-sentencing him to his full back-time of 471 days, and concurrent 2 to 4 years, in violation of [his]

² We therefore consider Appellant's Rule 1925(b) statement timely filed.

constitutional right to due process, and his right to a speedy revocation hearing pursuant to [Pa.R.Crim.P.] 708.

The trial court erred in revoking [his] probation, and resentencing him without first providing him written notice of the alleged violation.

The trial court erred in revoking [his] probation, and resentencing him without providing him with a preliminary probable cause hearing **Gagnon I.** [sic]

Ineffective assistance of counsel.

Appellant's Brief at 1.

For his first issue, Appellant claims the Commonwealth should not have been able to vacate his probation because his probation had expired prior to his revocation hearing. He suggests his due process rights were violated because the Commonwealth failed to hold a prompt revocation hearing. Appellant claims that he was prejudiced by the delay because he would have been paroled but for the delay. We hold Appellant is not entitled to relief.

The standard of review is an error of law. **Commonwealth v. Heilman**, 876 A.2d 1021, 1026 (Pa. Super. 2005). Pennsylvania Rule of Criminal Procedure 708(B) addresses when a probation revocation hearing should be held:

(B) Whenever a defendant has been sentenced to probation or intermediate punishment, or placed on parole, the judge shall not revoke such probation, intermediate punishment, or parole as allowed by law unless there has been:

(1) a hearing held as speedily as possible at which the defendant is present and represented by counsel; and

(2) a finding of record that the defendant violated a condition of probation, intermediate punishment, or parole.

Pa.R.Crim.P. 708(B)(1)-(2).

The language “speedily as possible” has been interpreted to require a hearing within a reasonable time. Rule 708 does not establish a presumptive period in which the Commonwealth must revoke probation; but instead, the question is whether the delay was reasonable under the circumstances of the specific case and whether the appellant was prejudiced by the delay. The relevant period of delay is calculated from the date of conviction or entry of guilty plea to the date of the violation hearing.

In evaluating the reasonableness of a delay, the court examines three factors: the length of the delay; the reasons for the delay; and the prejudice resulting to the defendant from the delay. The court must analyze the circumstances surrounding the delay to determine if the Commonwealth acted with diligence in scheduling the revocation hearing. Prejudice in this context compromises the loss of essential witnesses or evidence, the absence of which would obfuscate the determination of whether probation was violated, or unnecessary restraint of personal liberty.

Commonwealth v. Clark, 847 A.2d 122, 123-24 (Pa. Super. 2004) (citations omitted). “If a defendant is already incarcerated on the charges that triggered the probation revocation, he cannot claim the delay in holding his revocation hearing caused him any loss of personal liberty.”

Commonwealth v. Christmas, 995 A.2d 1259, 1263 (Pa. Super. 2010) (citations omitted).

In this case, Appellant was arrested on March 20, March 22, March 25, and March 26, 2011, for multiple charges triggering the instant probation revocation and has remained in custody on those charges. Appellant's **Gagnon II** Report, 11/20/12, at 2. As the **Christmas** Court observed, Appellant cannot claim any prejudice from the delay because he was incarcerated. **See Christmas**, 995 A.2d at 1263. Because Appellant cannot establish prejudice, he has not demonstrated the delay before holding his revocation hearing was unreasonable. **See Clark**, 847 A.2d at 123-24.

We summarize Appellant's arguments for his second and third claims. Appellant contends his due process rights were violated when he did not receive written notice of the alleged violations of his probation. Similarly, he contends the trial court erred by not holding a **Gagnon I** hearing. We hold Appellant is not entitled to relief.

In **Commonwealth v. Ferguson**, 761 A.2d 613 (Pa. Super. 2000), this Court summarized the probation revocation process as follows:

When a parolee or probationer is detained pending a revocation hearing, due process requires a determination at a **pre-revocation** hearing, a **Gagnon I** hearing, that probable cause exists to believe that a violation has been committed. Where a finding of probable cause is made, a second, more comprehensive hearing, a **Gagnon II** hearing, is required before a final revocation decision can be made.

* * *

At the preliminary [**Gagnon I**] hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to

present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. Thus, the **Gagnon I** hearing is similar to the preliminary hearing afforded all offenders before a Common Pleas Court trial: the Commonwealth must show probable cause that the violation was committed.

The **Gagnon II** hearing entails, or may entail, two decisions: first, a consideration of whether the facts determined warrant revocation. The first step in a **Gagnon II** revocation decision . . . involves a wholly retrospective factual question: whether the parolee [or probationer] has in fact acted in violation of one or more conditions of his parole [or probation]. It is this fact that must be demonstrated by evidence containing probative value. Only if it is determined that the parolee [or probationer] did violate the conditions does the second question arise: should the parolee [or probationer] be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? Thus, the **Gagnon II** hearing is more complete than the **Gagnon I** hearing in affording the probationer additional due process safeguards, specifically:

(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by *618 the factfinders as to the evidence relied on and reasons for revoking [probation or] parole.

Id. at 617-18 (quotation marks and citations omitted).

A **Gagnon I** hearing is not required when the defendant has had a preliminary hearing on the crimes that led to a request to have the

defendant's parole or probation revoked. **See generally Commonwealth v. Davis**, 336 A.2d 616, 622 (Pa. Super. 1975). A **Gagnon I** hearing is also not required if, prior to the probation revocation hearing, the probationer has been arrested, tried, and convicted. **See id.** at 622 (holding, "The purpose of that hearing—to show probable cause whether probation has been violated—will have been served by the trial."). If a defendant agreed to waive the preliminary hearing, then the defendant is generally barred from challenging "the sufficiency of the Commonwealth's *prima facie* case." Pa.R.Crim.P. 541(A)(1).

Instantly, Appellant's **Gagnon II** hearing was held on January 15, 2013. Prior to the hearing, Appellant pleaded guilty on November 7, 2011, April 16, 2012, and May 15, 2012 to multiple crimes—prior to Appellant's **Gagnon II** hearing. Appellant's **Gagnon II** Report at 2 (referencing cases: CP-15-CR-4838-2011; CP-15-CR-2280-2011; CP-46-CR-8331-2011; CP-46-CR-8325-2011; CP-46-CR-7631-2011). Appellant also waived his preliminary hearing for the following Delaware County cases: CP-23-CR-1827-2012, CP-23-CR-1832-2012, and CP-23-CR-1890-2012. Appellant's Pet. to Appoint Counsel, 12/31/12, at ¶ 6. Because Appellant waived his preliminary hearing for those Delaware County cases, he cannot challenge the "sufficiency of the Commonwealth's *prima facie* case." **See** Pa.R.Crim.P. 541(A)(1); **Ferguson**, 761 A.2d at 617-18. Similarly, because Appellant pleaded guilty to the remaining crimes at issue that led to the instant

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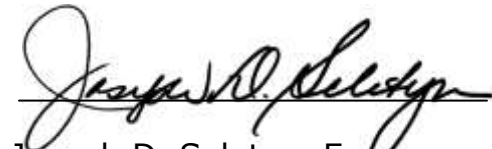
probation violations, he cannot suggest that his right to a **Gagnon I** hearing was violated. **Cf. Davis**, 336 A.2d at 622. Accordingly, because Appellant either pleaded guilty to or waived his preliminary hearing for the crimes constituting the instant probation violations, he cannot contend error.

Finally, with respect to Appellant's claims of ineffective assistance of counsel, it is well-settled that such claims will generally not be entertained on direct appeal. **See Commonwealth v. Holmes**, ___ A.3d ___, 2013 WL 5827027, at *1 (Pa. 2013).

Accordingly, having discerned no error of law, we affirm the judgment of sentence. **See Heilman**, 876 A.2d at 1026.

Judgment of sentence 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: 12/3/2013

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

COMMONWEALTH OF PENNSYLVANIA

NO. 4554-08
1760-08
0878-08
0880-08

v.

DANIEL DUDLEY

OPINION

Mallon, J.

Filed: 5-15-13

I. FACTUAL AND PROCEDURAL HISTORY

Daniel Dudley appeals from the imposition of this court's sentence following a Gagnon II hearing. By way of procedural history, Appellant Daniel Dudley appeared before the undersigned on August 25, 2009, and entered an open guilty plea on docket numbers 0880-08, 0878-08, 1760-08 and 4554-08. On docket number 0880-09, the Appellant entered an open guilty plea to the following charges:

- Information B: theft by unlawful taking,
- Information D: false identification to law enforcement, and
- Information E resisting arrest.

Appellant was sentenced to 9 months to 23 months on Information B and was made good time eligible.¹ Appellant was not given credit for time served. On Information D, Appellant was sentenced to two years of probation, to run consecutive to Information B. On Information E, Appellant was sentenced to one year of probation, to run consecutive to the probation period imposed on Information D.

¹ Good time allows a defendant to have 6 days credited against his sentence for each month that he receives no write-ups, or violations, in prison.

(52)

On the same day, Appellant entered an open guilty plea on docket number 0878-08 to the following charges:

- Information B: forgery and
- Information C: access device fraud.

On Information B, eleven (11) counts of forgery that were consolidated into one count, Appellant was sentenced to 9 months to 23 months and given made good time eligible. Appellant was not given credit for time served. On Information C, Appellant was sentenced to three (3) years of concurrent probation. The sentence for this case was ordered to run concurrent to Appellant's sentence on docket number 0880-08, which is set forth in the preceding paragraph. Appellant was also ordered to pay restitution to the victims in this case, totaling \$1935.00.

Appellant also entered an open guilty plea to the following charges on docket number 1760-08:

- Information A: forgery,
- Information B: criminal conspiracy, and
- Information D: access device fraud.

On Information A, eleven (11) counts of forgery consolidated into one, Appellant was sentenced to 9 months to 23 month and was made good time eligible. Appellant was not given credit for time served. On Information B, Appellant was sentenced to three (3) years of probation to run concurrent to Information A and concurrent to the sentence imposed on docket number 0880-08. On Information D, Appellant was sentenced to three (3) years of probation, to run concurrent to the probation imposed on Information B and concurrent to the sentence imposed on docket number 0880-08. Appellant was also ordered to pay restitution to the victim in this case in the amount of \$233.98.

Lastly, Appellant entered an open guilty plea on one count of theft by receiving stolen property on docket number 4554-08 and was sentenced to three (3) years of county probation, which was also to run concurrent to the sentence imposed on docket number 0880-08.

On November 20, 2012, a Gagnon II Hearing Report was issued by the Delaware County Office of Adult Probation and Parole, alleging that the Appellant violated Rule #3, which requires the individual to comply with municipal, county, state and federal laws. The report alleged that the Appellant was arrested on new cases in Montgomery, Chester, and Delaware counties while on parole on the aforementioned cases. The report also alleged that the Appellant had violated Rule #10A, which requires the individual to pay all imposed fines, costs, and restitution. The report alleged that the Appellant owed \$744 on docket number 0880-08, \$5,849.98 on docket number 1760-08, and \$3,086 on docket number 0878-08. On January 15, 2013, the Appellant appeared before this Court for a Gagnon II hearing. Lisa Coladonato, of the Delaware County Office of Adult Probation and Parole, testified at the hearing and recommended as follows:

“On Indictment number 880 of '08, Information B., the Defendant is to be found in violation of his parole. His parole is to be revoked, and he is to receive his full back time of 471 days, with release on his max date. On Information E and Information D., the Defendant is to be found in violation of his probation. On Information E., the Defendant's probation is to be revoked, and he is to receive a new sentence of one year to two years, concurrent to Information B. And I'll make that - - change that to make it effective today. The original hearing date was November 29th. On Information D., the Defendant's probation is to be revoked, and he is to receive a new sentence of six months to 12 months concurrent to Information E., also effective today. On Indictment number 4554 of 2008, Information E., the Defendant is to be found in violation of his probation. His probation is to be revoked, and he is to receive a new sentence of two years to four years, also effective today. On Indictment number 1760 of 2008, Information A., the Defendant is to be found in violation of his parole. His parole is to be revoked, and he is to receive his full back time of 471 days, with release on his max date. On Information D. and Information B., the Defendant is to be found in violation of his probation. On Information D., his probation is to be revoked, and he is to receive a new sentence of two years to four years concurrent to

Information A, effective today. On Information B., his probation is to be revoked, and he is to receive a new sentence of two years to four years concurrent to Information D., also effective today. On Indictment number 878 of 2008, Information B., the Defendant is to be found in violation of his parole. His parole is to be revoked, and he is to receive his full back time of 471 days, with release on his max date. On Information C., the Defendant is to be found in violation of his probation. His probation is to be revoked, and he is to receive a new sentence of two years to four years concurrent to Information B., also effective today. Indictment numbers 880 of '08, 4554 of '08, 1760 of '08, and 878 of '08, are to run concurrent to each other. And they are to run consecutive to the Defendant's state sentence on Chester County ACP-14 CR-2280 of 2011. The Bench Warrants are to be rescinded."

N.T., 1/15/2013, pp. 4-6.

This court adopted the recommendations of Ms. Coladonato and sentenced the Appellant in accordance with the terms set forth above. Thereafter, Appellant filed a notice of appeal. On March 1, 2013 this court entered an Order requesting a concise statement from the Appellant. Appellant failed to comply with said Order.

II. DISCUSSION

An Appellant whose revocation of probation sentence has been imposed has 30 days to appeal, regardless of whether or not he files a post-sentence motion. *Commonwealth v. Parlante*, 823 A.2d 927, 929 (Pa. Super. 2003) (citing Pa.R.Crim.P. 708(D)). The imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal. *Commonwealth v. Sierra*, 752 A.2d 910, 913 (Pa. Super. 2000). **42 Pa.C.S.A. § 9771 Modification or revocation of probation**, sets forth the following:

(a) General rule.--The court may at any time terminate continued supervision or lessen or increase the conditions upon which an order of probation has been imposed.

(b) Revocation.--The court may revoke an order of probation upon proof of the violation of specified conditions of the probation. Upon revocation the sentencing alternatives available to the court shall be the same as were available at the time of the initial sentencing, due consideration being given to the time spent serving the order of probation.

(c) Limitation on sentence of total confinement.--The court shall not impose a sentence of total confinement upon revocation unless it finds that:

- (1) the defendant has been convicted of another crime; or
- (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or
- (3) such a sentence is essential to vindicate the authority of the court.

(d) Hearing required.--There shall be no revocation or increase of conditions of sentence under this section except after a hearing at which the court shall consider the record of the sentencing proceeding together with evidence of the conduct of the defendant while on probation. Probation may be eliminated or the term decreased without a hearing.

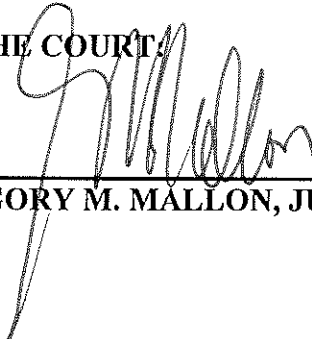
The court finds that the Appellant's appeal was timely filed. The court also respectfully submits that it imposed a proper and legal sentence. It was evident at the hearing on January 15, 2013 that the Appellant had violated the conditions of his probation and parole after he was convicted of similar crimes in neighboring counties. The rules above set forth that the court may impose a sentence of total confinement if a defendant has been convicted of another crime. 42 Pa.C.S.A. § 9771(c)(1). In Appellant's case, he was convicted of at least new five crimes at the time of the hearing, and it was clear that he could not be rehabilitated through the use of probation. The sentence imposed by the court were within the statutory maximums set forth in 18 Pa.C.S.A. § 1104 *et. seq.*

In the alternative, this court respectfully submits that any issue that Appellant may have with his sentence is waived. It is well established in Pennsylvania that "in order to preserve their claims for appellate review, [a]ppellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P.1925. Any issues not raised in a Pa.R.A.P.1925(b) statement will be deemed waived." *Commonwealth v. Castillo*, 585 Pa. 395, 403, 888 A.2d 775, 780 (2005) (citing *Commonwealth v. Lord*, 553, Pa. 415, 719 A.2d 306 (1998)).

IV. CONCLUSION

For the reasons outlined above, it is respectfully submitted that the Judgments of Sentences imposed in this matter should be affirmed on appeal.

BY THE COURT:



GREGORY M. MALLON, JUDGE

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