NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. EDWARD JOSEPH WHITE Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1039 MDA 2012

Appeal from the Judgment of Sentence May 4, 2012
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0003397-2010

BEFORE: BOWES, J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.: Filed: February 5, 2013

Appellant, Edward Joseph White, appeals from the judgment of sentence entered in the Lancaster County Court of Common Pleas, following revocation of his probation. We affirm.

The relevant facts and procedural history of this appeal are as follows. On March 28, 2011, Appellant pled guilty to two (2) counts of possession of child pornography and one (1) count of criminal use of a communication facility.[1] On September 19, 2011, the court sentenced Appellant to an aggregate term of ten (10) years' probation. The court also ordered Appellant to comply with the registration requirements of Megan's Law, as well as certain probation conditions for sex offenders. Additionally, the court

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[1] 18 Pa.C.S.A. §§ 6312(d)(1), 7512, respectively.

prohibited Appellant from volunteering with the Cub Scouts or working as a Sunday school teacher at his local church.

Appellant subsequently violated the terms of his probation by possessing pornographic materials, including a pornography catalog, completed order forms for additional pornographic materials, personal journals describing sexual conduct with children, naked photos of an adult female, and a sex toy. The court conducted a probation violation hearing on January 3, 2012. At the conclusion of the hearing, the court revoked Appellant's probationary sentences, ordered a pre-sentence investigation ("PSI") report, and scheduled the matter for re-sentencing. On May 4, 2012, the court re-sentenced Appellant to an aggregate term of three (3) to six (6) years' imprisonment, followed by a consecutive term of fifteen (15) years' probation.

On May 14, 2012, Appellant filed post-sentence motions. Appellant alleged he suffers from various cognitive impairments, including organic brain syndrome, which prevented him from fully understanding the terms and conditions of his probation. Appellant also claimed he acquired the prohibited items prior to the imposition of the probationary sentence, and he believed that many of the items did not constitute pornographic materials that could trigger a violation. Moreover, Appellant did not exhibit any behavior indicating he was likely to reoffend. Under these circumstances, Appellant concluded the court had imposed an excessive sentence.

Appellant filed a notice of appeal on June 1, 2012.[2] The court did not order Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

Appellant raises one issue for our review:

> WAS THE TRIAL COURT'S SENTENCE OF THREE TO SIX YEARS' INCARCERATION FOLLOWED BY FIFTEEN YEARS' PROBATION FOR TECHNICAL VIOLATIONS OF PROBATION, BASED ON ITEMS WHICH WERE IN [APPELLANT'S] POSSESSION BEFORE PROBATION BEGAN, MANIFESTLY EXCESSIVE AND AN ABUSE OF DISCRETION?

(Appellant's Brief at 4).

Appellant complains the court found technical violations of the terms of his probation, because he failed to discard the prohibited pornographic materials. Appellant contends he owned the prohibited items prior to the imposition of the probationary sentences, and he simply did not have enough time to comply with the terms of his probation before the officer's search of his residence. Appellant insists his failure to dispose of the sexually explicit items right away did not necessarily mean he was likely to re-offend. Appellant concludes the court imposed an excessive sentence of total confinement in light of the underlying technical violations. Appellant's claim challenges the discretionary aspects of his sentence. ***See Commonwealth v. Lutes***, 793 A.2d 949 (Pa.Super. 2002) (stating claim

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[2] Appellant's post-sentence motions did not toll the appeal period. ***See*** Pa.R.Crim.P. 708(D).

that sentence is manifestly excessive challenges discretionary aspects of sentencing).

When reviewing the outcome of a revocation hearing, this Court is limited to determining the validity of the proceeding and the legality of the judgment of sentence imposed. ***Commonwealth v. Heilman***, 876 A.2d 1021 (Pa.Super. 2005). Notwithstanding the stated scope of review suggesting only the legality of a sentence is reviewable, an appellant may also challenge the discretionary aspects of a sentence imposed following revocation. ***Commonwealth v. Sierra***, 752 A.2d 910 (Pa.Super. 2000). ***See also Commonwealth v. Cappellini***, 690 A.2d 1220 (Pa.Super. 1997) (addressing discretionary aspects of sentence imposed following revocation of probation).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Sierra, supra*** at 912. Prior to reaching the merits of a discretionary sentencing issue:

> [W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to **exceptional** cases." ***Commonwealth v. Williams***, 562 A.2d 1385, 1387 (Pa.Super. 1989) (*en banc*) (emphasis in original) (internal quotation marks omitted).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830 A.2d 1013 (Pa.Super. 2003). A substantial question exists "only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Sierra, supra*** at 912-13.

A claim that a sentence is manifestly excessive might raise a substantial question if the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence imposed violates a specific

provision of the Sentencing Code or the norms underlying the sentencing process. ***Mouzon, supra*** at 435, 812 A.2d at 627. Moreover, "a claim that a particular probation revocation sentence is excessive in light of its underlying technical violations can present a question that we should review." ***Commonwealth v. Malovich***, 903 A.2d 1247, 1253 (Pa.Super. 2006).

In the instant case, Appellant's post-sentence motion and Rule 2119(f) statement properly preserved his claim regarding the excessiveness of his sentence. Appellant's challenge to his probation revocation sentence as excessive, in light of the underlying technical violations, appears to raise a substantial question as to the discretionary aspects of his sentence. ***See id.***

"In general, 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. Hoover***, 909 A.2d 321, 322 (Pa.Super. 2006). A sentence should not be disturbed where it is evident the court was aware of the appropriate sentencing considerations and weighed them in a meaningful fashion. ***Commonwealth v. Fish***, 752 A.2d 921, 923 (Pa.Super. 2000).

The Sentencing Guidelines do not apply to sentences imposed following a revocation of probation. ***Commonwealth v. Ferguson***, 893 A.2d 735, 739 (Pa.Super. 2006), *appeal denied*, 588 Pa. 788, 906 A.2d 1196 (2006). "[U]pon sentencing following a revocation of probation, the trial

court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence." ***Commonwealth v. Coolbaugh***, 770 A.2d 788, 792 (Pa.Super. 2001). A court can sentence a defendant to total confinement after revoking probation if the defendant was convicted of another crime, the defendant's conduct indicates that it is likely that he will commit another crime if he is not imprisoned, or such a sentence is essential to vindicate the court's authority. ***Commonwealth v. Crump***, 995 A.2d 1280 (Pa.Super. 2010), *appeal denied*, 608 Pa. 661, 13 A.3d 475 (2010).

Instantly, Appellant's revocation hearing commenced with a stipulation that he had violated the terms of his probation. Thereafter, the probation officer testified that he interviewed Appellant on September 26, 2011. During the interview, the probation officer emphasized "Rule Number 13" of the conditions governing probation, which prohibited Appellant from possessing pornographic materials. (***See*** N.T. Violation Hearing, 1/3/12, at 2.) On September 30, 2011, the probation officer conducted a home visit and discovered pornographic materials. The probation officer also discovered a journal detailing Appellant's sexual fantasies involving children, biographical information of the children in Appellant's Sunday school classes, and girls' panties that were soiled with Appellant's dry semen. Further, the probation officer found Lancaster City Police Department apparel and badges, as well as handcuffs and a stun gun. Although possession of the

law enforcement paraphernalia did not constitute a probation violation, the probation officer opined, "[T]hose items would only be used for one purpose and that would be to lure a potential victim." (***Id.*** at 4). At the conclusion of the hearing, the court found Appellant had violated the conditions of his probation. Nevertheless, the court did not immediately re-sentence Appellant. Instead, the court ordered a PSI report and deferred sentencing.

With the benefit of the PSI report, the court re-sentenced Appellant on May 4, 2012. Throughout the hearing, the court received argument from Appellant and counsel regarding why Appellant had possessed the prohibited items. At the conclusion of the hearing, the court explained its sentencing decision as follows:

> You have been diagnosed by your psychologist…as a pedophile. You are, in fact, on everything I have seen a pedophile.
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> I was so emotionally drained reading your journals, that frankly I didn't know how I could regain a sense of balance and reason in order to come up with a fair sentence; however, I have.
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> * * *
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> Your collection of interests, shall we say, all seem to center around some degree of eroticism. That is unhealthy for a pedophile.
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> These items that were found were not, as I recall from the [violation] hearing, found as a result of some kind of search. It was a regular home visit, which is not an uncommon practice for not only the Sex Offender Unit but for other units of Probation and Parole.

As I recall, there was even an instance of testimony where the quantity and volume of items out and about were such that people couldn't even sit down. So it's not like it's some surprise to you that there's pornography all over the place.

* * *

I know that your attorney went over the sex offender conditions with you. I know that at a minimum, even if he only did it once, [the probation officer] did. And the simplest of those and easiest to remember is not having any pornography around, which should have sent you straight home to order a rollaway dumpster to start shoveling this stuff out, because it seems to have filled your apartment.

All of the printed material is upsetting and disturbing. That's a violation.

* * *

And then I look at [the second reason for revocation listed in the petition to issue *capias*] and I am faced with someone who seems to think it is not a problem to amass girls' and infants' panties as a masturbation aid.

Coupled with the printed materials, I see what I consider to be an escalation of conduct, additional proof of the strength and depth of the deviant sexual interest. That starts to scare me, and it scares me a lot.

Frankly, I put aside for violation purposes all of the law enforcement ephemera, whatever you wanted to call it, souvenirs. I put that aside for finding the violation. I can, however, consider it now in the context of your otherwise strong, focused interest, the writings in which you discuss attempts to groom children into positions of vulnerability to your sexual gratification.

* * *

You would not be the first person to groom a child. You probably would not be the last. But when the explicitness

> of the writings are coupled with the actions, the other things, the uniforms, the badges, the handcuffs, the stun gun, they don't lead me to the sentence but they confirm for me that I believe the sentence that I have worked out is, in fact, the appropriate one.

(***See*** N.T. Sentencing, 5/4/12, at 46-50.)

Here, the court noted how counsel and the probation officer had warned Appellant that he could not possess pornography, and Appellant had the opportunity to comply with this probationary condition. Moreover, the items found in Appellant's residence demonstrated "an escalation of conduct" justifying a term of incarceration. The testimony from the probation officer concerning Appellant's violations supported the court's conclusions. Further, the record indicates the court was aware of the relevant sentencing considerations and weighed them in a meaningful fashion. ***See Fish, supra***.

Based upon the foregoing, we conclude Appellant's sentence should remain undisturbed. ***See Hoover, supra***. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.