

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JOSHUA B. FETTEROLF,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 12 MDA 2013

Appeal from the Order Entered November 27, 2012
In the Court of Common Pleas of Union County
Criminal Division at No(s): CP-60-CR-0000045-1999

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JOSHUA B. FETTEROLF,

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IN THE SUPERIOR COURT OF
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No. 13 MDA 2013

Appeal from the Order Entered November 27, 2012
In the Court of Common Pleas of Union County
Criminal Division at No(s): CP-60-CR-0000046-1999

BEFORE: BENDER, J., DONOHUE, J., and STRASSBURGER, J.*

MEMORANDUM BY BENDER, J.:

FILED SEPTEMBER 11, 2013

* Retired Senior Judge assigned to the Superior Court.

Appellant, Joshua B. Fetterolf, appeals from the trial court's November 27, 2012 order in which the court imposed conditions on Appellant's term of probation in two separate cases.¹ We affirm.

In October of 1999, Appellant entered guilty pleas to one count of unlawful restraint in two separate cases. For each of those counts, the court sentenced Appellant to a five-year term of probation, and imposed those terms to run consecutively.² Before Appellant began serving his sentence of probation, the Commonwealth filed a petition to impose probation conditions pursuant to 42 Pa.C.S. § 9771.³ After conducting a hearing, the court issued

¹ Because Appellant's appeals in both cases involve the same sentencing claim, this Court issued an order on January 25, 2013, consolidating his appeals.

² The court also imposed the terms of probation to run consecutively to a sentence of 54 to 108 months' imprisonment that the court imposed in an unrelated case.

³ That statute states, in relevant part:

(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.

...

(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.

42 Pa.C.S. § 9771(a), (d).

an order on November 27, 2012, granting the Commonwealth's petition and accepting each of its requested conditions. Appellant did not petition for reconsideration. Instead, he filed a timely notice of appeal from that order, as well as a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Herein, he presents one issue for our review: "Did the [t]rial [c]ourt commit error in imposing special, optional, supplemental and additional conditions for Appellant's supervision?" Appellant's Brief at 4.

Initially, we must ascertain whether Appellant has preserved this issue for our review. The Commonwealth maintains that Appellant is challenging the discretionary aspects of his sentence and, consequently, he was required to file a post-sentence motion for reconsideration in order to preserve his issue for our review. Because the record establishes that Appellant failed to do so, the Commonwealth argues that his claim is waived. For his part, Appellant seems confused as to whether his issue implicates a non-waivable challenge to the legality of his sentence, or whether it constitutes a discretionary aspects of sentencing claim. For instance, Appellant begins his argument by stating that, "[w]hen one disputes a [c]ourt's ability to impose probation conditions, it implies a question as to the legality of a sentence." Appellant's Brief at 8 (citing ***Commonwealth v. Wilson***, 11 A.3d 519, 535 (Pa. Super. 2010), *vacated and remanded on other grounds*, 67 A.3d 736 (Pa. 2013)). However, he then sets forth the applicable standard of review for issues relating to the discretionary aspects of a sentence. Appellant also

includes in his brief a "Statement of Reasons for Allowance of Appeal," as required by Pa.R.A.P. 2119(f) when challenging the discretionary aspects of a sentence.

After reviewing Appellant's argument, we agree with the Commonwealth that his issue concerns the discretionary aspects of his sentence. In *Wilson*, the appellant argued that a probation condition "imposed by the trial court [was] without legal authority" and specified the statutory provision the condition allegedly violated. *Id.* at 523. Because the appellant contended "that the trial court ordered a condition of his probation and parole for which it had no statutory authority," this Court concluded that the claim presented a challenge to the legality of the sentence.

Here, however, Appellant does not argue that the at-issue conditions were contrary to the law or beyond the power of the court to impose. Instead, he maintains that the court's imposing the additional conditions was improper where the witness on whose testimony the court relied "had no direct contact with [Appellant] and was only vaguely familiar with the case," "improperly characterized the underlying crimes as sex offenses when they were not," and "confirmed that at least one of the provisions would never be enforced." Appellant's Brief at 8. Additionally, Appellant complains that "the proposed supervision restrictions would lead to some very questionable results." *Id.* at 9. For instance, he "would not be able to have a Bible in [his] home," he would be subject to "contradictory instructions about when [he could] begin personal relationships," and he would be prohibited from

“post[ing] advertisements to sell household items.” **Id.** Appellant does not elaborate on which condition(s) would result in these “questionable results.” Instead, he simply concludes that “it cannot be said that [his] supervision is consistent with the [S]entencing [C]ode or in line with the fundamental norms of the sentencing process.” **Id.** While Appellant clearly believes that the conditions imposed by the court were not warranted, he presents no discussion as to how or why they were illegal. Therefore, his issue implicates the discretionary aspects of his sentence.

It is well-settled that challenges to the discretionary aspects of a sentence must be raised in a post-sentence motion for reconsideration or orally at the time of sentencing. **Commonwealth v. Bromley**, 862 A.2d 598 (Pa. Super. 2004) (“It is well settled that an [a]ppellant’s challenge to the discretionary aspects of his sentence is waived if the [a]ppellant has not filed a post-sentence motion challenging the discretionary aspects with the sentencing court.”).⁴ Appellant did not file a motion for reconsideration of the court’s November 27, 2012 order. He also does not point to any place in

⁴ This mandate stems from the general rule that “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a). The rationale underlying these mandates is that “[t]he swift and orderly administration of criminal justice requires that lower courts be given the opportunity to rectify their errors before they are considered on appeal.” **Commonwealth v. Reid**, 326 A.2d 267, 267-268 (Pa. 1974). While the present circumstances are somewhat atypical because Appellant is challenging conditions of his probation imposed by a court order and not at the time of his sentencing in 1999, the rationale underlying the requirement that the issue first be presented to the trial court is still applicable.

the record where he preserved the arguments he raises herein. Therefore, we consider his sentencing challenge as waived for our review.

Nevertheless, we mention that even had Appellant properly preserved his claim, we would conclude that it is meritless. This Court has stated:

In imposing an order of probation, a court may require a defendant “[t]o satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience.” 42 Pa.C.S.A. § 9754(c)(13).

A probation order is unique and individualized. It is constructed as an alternative to imprisonment and is designed to rehabilitate a criminal defendant while still preserving the rights of law-abiding citizens to be secure in their persons and property. When conditions are placed on probation orders they are formulated to insure or assist a defendant in leading a law-abiding life.

Commonwealth v. Koren, 435 Pa.Super. 499, 646 A.2d 1205, 1208–1209 (1994) (citations omitted). Moreover, as long as conditions placed on probation are reasonable, it is within a trial court's discretion to order them. ***Id.***

Commonwealth v. Hartman, 908 A.2d 316, 320-321 (Pa. Super. 2006).

Here, at the November 27, 2012 hearing, the court emphasized that the offenses to which Appellant pled guilty in 1999 all were “sexual in nature” and involved violence or threats of violence. N.T. Hearing, 11/27/12, at 30. While acknowledging that the conditions the Commonwealth requested would “restrict [Appellant’s] freedom to a large extent,” the court nevertheless reasoned that those conditions were “designed to minimize [Appellant’s] opportunity to act out on desires that he may have which will inevitably, hopefully, lead to his leading a law-abiding

life.” **Id.** at 30-31. The court further found that the conditions were “reasonable and appropriate” to ensure that Appellant did not reoffend, and were also “reasonable and appropriate for the protection of the public.” **Id.** at 31.

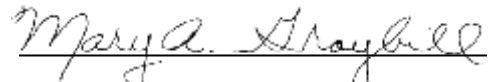
We ascertain no abuse of the court’s discretion in imposing the additional conditions of Appellant’s probation. This is especially true in light of the deficient nature of Appellant’s argument on appeal. For instance, in his one and one-half page argument, Appellant does not state which specific condition(s) of his probation were improper. While his “Statement of the Questions Involved” indicates that he is challenging the “special, optional, supplemental and additional conditions” of his probation,⁵ the trial court imposed 20 “special” and “supplement special” conditions, as well as 18 “rules” relating to Appellant’s behavior, his possession of contraband, his ability to travel, and his treatment as a sex offender. **See** “Commonwealth’s Petition to Impose Probation Conditions Pursuant to 42 Pa.C.S.A. [§] 9771(d),” 8/13/12, at 5-12 (unnumbered pages). We decline to guess at which of the 38 conditions and/or rules imposed by the trial court that Appellant considers as an abuse of the court’s discretion. Additionally, Appellant cites no legal authority to support his general assertions that the court’s conditions were inappropriate. Thus, even had Appellant preserved

⁵ Appellant’s Brief at 4.

his sentencing challenge, we would conclude that the additional conditions of his probation were reasonable in light of the court's above-stated rationale and the inadequacy of Appellant's argument to the contrary.

Order affirmed.

Judgment Entered.


Deputy Prothonotary

Date: 9/11/2013