

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

CAYLIA MARIE SHANK

Appellant

No. 1210 WDA 2012

Appeal from the Judgment of Sentence July 5, 2012  
In the Court of Common Pleas of Jefferson County  
Criminal Division at No(s): CP-33-CR-0000186-2011

BEFORE: DONOHUE, J., MUNDY, J., and PLATT, J.\*

MEMORANDUM BY MUNDY, J.:

Filed: March 8, 2013

Appellant, Caylia Marie Shank, appeals from the July 5, 2012 judgment of sentence of two and one-half to five years' imprisonment imposed following the revocation of her probation. After careful review, we affirm the judgment of sentence.<sup>1</sup>

The relevant facts and procedural history, as gleaned from the certified record, are as follows. On April 4, 2011, Appellant was arrested for selling marijuana to an undercover officer and charged with delivery of a controlled

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> We note the Commonwealth has not filed a brief in this matter.

substance (marijuana)<sup>2</sup> and related offenses. Thereafter, on July 20, 2011, Appellant pled guilty to one count of delivery of a controlled substance, and was subsequently sentenced by the Jefferson County Court of Common Pleas to two years' probation. While on probation, Appellant was arrested following a traffic stop in Allegheny County, and charged with possession of a controlled substance (heroin).<sup>3</sup> Following a conviction for said charge, the Allegheny Court of Common Pleas sentenced Appellant to eighteen months' probation on April 23, 2012. On July 5, 2012, as a result of Appellant's Allegheny County conviction, the Jefferson County Court of Common Pleas revoked Appellant's remaining probation term and resented her to two and one-half to five years' imprisonment. Appellant did not file post-sentence motions. On August 3, 2012, Appellant filed a timely notice of appeal.<sup>4</sup>

On appeal, Appellant raises the following issue for our review.

- (1) Whether the trial court abused its discretion when it revoked Appellant's county-level probation and re-sentenced her to serve a sentence of incarceration in the State Correctional Institution for a minimum of two and one-half (2 ½) years to a maximum of five (5) years with credit for time served in the County Jail as well as credit for time served in

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<sup>2</sup> 35 P.S. § 780-113(a)(30).

<sup>3</sup> 35 P.S. § 780-113(a)(16).

<sup>4</sup> Appellant and the trial court have complied with Pa.R.A.P. 1925.

the State Correctional Institution for  
[A]ppellant's violation of probation.

Appellant's Brief at 3.

Our standard of review in assessing whether a trial court has erred in fashioning a sentence following the revocation of probation is well settled. The "[r]evocation of a probation sentence is a matter committed to the sound discretion of the trial court and that court's decision will not be disturbed on appeal in the absence of an error of law or an abuse of discretion." ***Commonwealth v. Williams***, 997 A.2d 1205, 1208 (Pa. Super. 2010) (citation omitted). "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused." ***Commonwealth v. Burns***, 988 A.2d 684, 689 (Pa. Super. 2009) (*en banc*) (citation omitted), *appeal denied*, 8 A.3d 341 (Pa. 2010). "Our review is limited to determining the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing alternatives that it had at the time of the initial sentencing." ***Commonwealth v. MacGregor***, 912 A.2d 315, 317 (Pa. Super. 2006) (citations omitted). We also observe that, "whether an offender is serving a sentence of probation or intermediate punishment, if he violates the assigned conditions, the order of probation or intermediate punishment (as the case may be) may be revoked and a new sentence

imposed.” ***Commonwealth v. Wegley***, 829 A.2d 1148, 1153 (Pa. 2003) (citations omitted).

Where an appellant challenges the discretionary aspects of his probation-revocation sentence, there is no automatic right to appeal, and an appellant’s appeal should be considered a petition for allowance of appeal. ***Commonwealth v. W.H.M., Jr.***, 932 A.2d 155, 163 (Pa. Super. 2007); **see also *Commonwealth v. Ferguson***, 893 A.2d 735, 737 (Pa. Super. 2006) (stating, “it is now accepted that it is within our scope of review to consider challenges to the discretionary aspects of an appellant’s sentence in an appeal following a revocation of probation[.]”), ***appeal denied***, 906 A.2d 1196 (Pa. 2006). We will grant an appeal challenging the discretion of the sentencing court only where the appellant has advanced a colorable argument that the sentence is inconsistent with the Sentencing Code or contrary to the fundamental norms that underlie the sentencing process. ***Commonwealth v. Hyland***, 875 A.2d 1175, 1183 (Pa. Super. 2005), ***appeal denied***, 890 A.2d 1057 (Pa. 2005).

Prior to reaching the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine the following.

- (1) [W]hether appellant has filed a timely notice of appeal;
- (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence;
- (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.

***Commonwealth v. Prisk***, 13 A.3d 526, 532 (Pa. Super. 2011) (some citations omitted).

Herein, our review of the record indicates that although Appellant has filed a timely notice of appeal, Appellant failed to file a timely motion to reconsider or modify her sentence. In accordance with Pennsylvania Rule of Criminal Procedure 708, Appellant was required to do the following.

(D) Motion to Modify Sentence. A motion to modify a sentence imposed after a revocation shall be filed within 10 days of the date of imposition. The filing of a motion to modify sentence will not toll the 30-day appeal period.

Pa.R.Crim.P. 708(D). Accordingly, because Appellant failed to file a motion to reconsider or modify her sentence within 10 days of the date of sentencing, or by July 15, 2012, Appellant has failed to preserve her sentencing claim for review. Therefore, Appellant's sole issue on appeal is waived.

Nevertheless, even if we were to reach the merits of Appellant's claim, Appellant fails to raise a substantial question.<sup>5</sup> "A substantial question will be found where the defendant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the [sentencing] code or is contrary to the fundamental norms which underlie

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<sup>5</sup> We note Appellant did include a statement in accordance with Pa.R.C.P. 2119(f), thereby satisfying the third prong of the test set forth in ***Prisk***, ***supra*** at 532.

the sentencing process." ***Commonwealth v. Booze***, 953 A.2d 1263, 1278 (Pa. Super. 2008) (citation omitted), *appeal denied*, 13 A.3d 474 (Pa. 2010); ***see also*** 42 Pa.C.S.A. § 9781(b). "We determine whether a particular case raises a substantial question on a case-by-case basis." ***Commonwealth v. Corley***, 31 A.3d 293, 297 (Pa. Super. 2011) (citation omitted).

Herein, Appellant avers that although she expected a sentence of incarceration, the sentence she received was unreasonably excessive considering it was her first violation and the new charge was an ungraded misdemeanor. Appellant's Brief at 7. This Court has long recognized that "an allegation that a sentencing court failed to consider or did not adequately consider certain factors does not raise a substantial question that the sentence was inappropriate." ***Commonwealth v. Johnson***, 961 A.2d 877, 880 (Pa. Super. 2008), *appeal denied*, 968 A.2d 1280 (Pa. 2009); ***see also Commonwealth v. Bullock***, 868 A.2d 516, 529 (Pa. Super. 2005) (stating "a claim of inadequate consideration of mitigating factors does not raise a substantial question for our review"). This is so because the weight to be afforded the various sentencing factors is a discretionary matter for the sentencing court and the action of the sentencing court will not be disturbed simply because the defendant would have preferred that different weight be given to any particular factor. ***Commonwealth v. Marts***, 889 A.2d 608, 615 (Pa. Super. 2005).

In its Rule 1925(a) opinion, the trial court set forth the following reasoning in support of its determination.

Although this was [Appellant]'s first violation, the [sentencing c]ourt could not take lightly that it was a new conviction for another drug offense – the type of offense for which she was already on supervision. Nor could the [sentencing c]ourt ignore the fact that she had committed it *after* she had already spent time in county jail on account of the offense and *after* she had already completed drug and alcohol counseling. What that told the [sentencing c]ourt was that neither measure had deterred her from engaging in drug-related criminal conduct in the past, and she gave it no reason to believe that similar treatment would produce different results a second time. Additionally, the nature of the violation indicated that [Appellant] did indeed have a drug problem that she could not or would not overcome utilizing only the drug and alcohol counseling resources available at the county level. It was thus the [sentencing c]ourt's conclusion that the most effective sentence alternative was a maximum term of total incarceration at a state facility.

Trial Court Opinion, 9/11/12, at 1 (emphasis in original). Therefore, as the trial court was aware of all relevant mitigating factors, weighed the information, and fashioned Appellant's sentence within the standard range of the sentencing guidelines, Appellant's claim would fail.

Based on the foregoing, we conclude Appellant has failed to preserve her sentencing claim for review, and therefore, her claim is waived. Accordingly we affirm the July 5, 2012 judgment of sentence.

Judgment of sentence affirmed.