NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ROBERT MICHAEL LATTARULO, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1216 EDA 2012

Appeal from the Judgment of Sentence March 21, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No(s):
1216 EDA 2012
CP-23-CR-0007653-2007

BEFORE: FORD ELLIOTT, P.J.E., BENDER, J., and SHOGAN, J.

MEMORANDUM BY BENDER, J. Filed: January 28, 2013

Robert Michael Lattarulo (Appellant) appeals from his judgment of sentence of 18 – 36 months' incarceration following revocation of his sentence of probation. In this appeal, Appellant challenges the discretionary aspects of his sentence. After careful review, we affirm.

On January 18, 2008, Appellant pled guilty to one count each of possession with intent to deliver marijuana (PWID), 35 P.S. § 780-113 (a)(30), and criminal conspiracy to commit PWID, 18 Pa.C.S. 903 (a)(1). These convictions arose out of Appellant's attempted sale of approximately ten pounds of marijuana to an undercover officer. The trial court originally sentenced Appellant to a term of 15 – 36 months' incarceration and a consecutive term of 5 years' state-supervised probation. Appellant served

his term of incarceration, and then completed his remaining term of parole on October 17, 2010. On January 12, 2012, Appellant was detained for technical violations of the terms of his probation.

A ***Gagnon II*** hearing[1] was held on March 21, 2012.[2] The trial court revoked Appellant's probation and sentenced him to a term of 18 – 36 months' incarceration and a consecutive term of 2 years' probation. Appellant filed a timely motion for reconsideration of sentence on March 30, 2012. The trial court denied the motion on April 4, 2012. Appellant now challenges the discretionary aspects of his sentence.

The revocation of Appellant's probationary sentence arose out of the following circumstances:

> Defendant began serving his probation on October 17, 2010. According to Officer Richard Kwiatkowski of the Commonwealth Board of Probation and Parole, defendant's adjustment was poor. Defendant was elusive and had no phone. He missed appointments. On December 13, 2011, his urine tested positive for marijuana and he admitted to using the drug to relieve stress. He was given a verbal warning. In August 2011, defendant moved to an apartment on Frankford Avenue in

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[1] ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973). "In ***Gagnon***, the United States Supreme Court held that due process requires that a probationer, like a parolee, be given a preliminary (***Gagnon I***) and a final (***Gagnon II***) hearing prior to revoking probation." ***Commonwealth v. Parker***, 611 A.2d 199, 201 n.2 (Pa. 1992).

[2] The trial court informs us that "[d]espite an order and several inquiries, the transcript of this hearing has yet to be produced." Trial Court Opinion (TCO), 8/24/12, at 2. However, no party complains that the lack of a transcript for the ***Gagnon II*** hearing is an impediment to our resolution of the instant appeal.

> Philadelphia. Officer Kwiatkowski attempted to make night visits, but defendant claimed that he worked nights. In January 2012, defendant moved to a new address in Philadelphia. He reported that he had income from sporadic work with a home remodeling company and public assistance. On January 11, 2012, he again tested positive for marijuana and was detained. Agents of the Commonwealth of Pennsylvania Board of Probation and Parole searched defendant's residence and discovered income that he failed to disclose to the staff. Defendant kept a journal of gambling winnings and had a casino lock box containing $6,000. The agents found evidence of unauthorized trips out of the district, including room keys to casino hotel rooms and a train ticket. Defendant admitted taking these trips and knowing that they constituted a violation of his probation. He also admitted that he knowingly hid his earnings from his probation officer. Officer Kwiatkowski charged defendant with the following technical probation violations:
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> > (1) Leaving the district to visit casinos in Atlantic City and Bensalem on a regular basis without permission in knowing violation of his probation.
> >
> > (2) Use of Controlled Substances, *i.e.* marijuana, in knowing violation of his probation.
> >
> > (3) Failing to pay fines, costs and restitution(s), despite having the ability to pay them by virtue of his poker winnings, which he failed to disclose. (He made his last payment on November 7, 2008 and had complained to supervision staff of financial distress).
> >
> > (4) Failing to pay monthly supervision fees, despite being in possession of a substantial sum of money which he failed to disclose.

TCO, at 1 – 2.

Appellant claims that his term of incarceration "was so excessive as to constitute an abuse of discretion under" both 42 Pa.C.S. § 9771 and 42 Pa.C.S. § 9721. To support his argument, Appellant highlights the fact that the court revoked his probation for "mere" technical violations (and, correspondingly, that he did not reoffend during his parole and probationary

periods), that he does not have a significant criminal history and has never committed a crime of violence, and because he accepted responsibility for his actions. Appellant's Brief, 13 – 14. Given these factors, Appellant argues that vindication of the trial court's authority did not require Appellant's incarceration. He also argues that these facts fail to establish his lack of amenability to rehabilitation, his likelihood of re-offense, or that he presents a public threat.

> A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute. First, the petitioner must set forth in its brief a concise statement of the reasons relied upon for allowance of appeal. Pa.R.A.P. 2119(f).[3] Second, the petitioner must demonstrate that a substantial question exists as to whether the sentence imposed is inappropriate under the Sentencing Code. 42 Pa.C.S.A. § 9781(b); ***Commonwealth v. Tuladziecki***, 513 Pa. 508, 522 A.2d 17, 20 (1987). This Court has found that a substantial question exists 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.

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[3] The Rules of Appellate Procedure require that:

> An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

Pa.R.A.P. 2119(f).

Commonwealth v. Hoch, 936 A.2d 515, 518 (Pa. Super. 2007) (some internal citations and quotations marks omitted).

Appellant failed to include a concise statement of the reasons relied upon for allowance of appeal in his brief pursuant to Pa.R.A.P. 2119(f). Appellant also failed to specifically argue whether a substantial question is presented by his discretionary aspects of sentencing claim. However, the Commonwealth failed to raise an objection to this procedural defect. In such circumstances,

> when the appellant has not included a Rule 2119(f) statement and the appellee has not objected, this Court may ignore the omission and determine if there is a substantial question that the sentence imposed was not appropriate, or enforce the requirements of Pa.R.A.P. 2119(f) *sua sponte*, *i.e.*, deny allowance of appeal.

Commonwealth v. Kiesel, 854 A.2d 530, 533 (Pa. Super. 2004).

In this instance, we decline to enforce the requirement of Pa.R.A.P. 2119(f) *sua sponte*, and therefore we will not deny allowance of appeal for this procedural defect, particularly because Appellant clearly presents a substantial question for our review. ***See Commonwealth v. Robertson***, 874 A.2d 1200, 1211 (Pa. Super. 2005) ("Although this Court is permitted to overlook a party's failure to provide a 2119(f) statement, it should only do so in situations where the substantial question presented is evident from the appellant's brief.").

> A substantial question requires a demonstration that "the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process."

> ***Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa. Super. 2005). This Court's inquiry "must focus on the reasons for which the appeal is sought, in contrast to the facts underlying the appeal, which are necessary only to decide the appeal on the merits." ***Id***. Whether a substantial question has been raised is determined on a case-by-case basis; the fact that a sentence is within the statutory limits does not mean a substantial question cannot be raised. ***Commonwealth v. Titus***, 816 A.2d 251, 255 (Pa. Super. 2003). However, a bald assertion that a sentence is excessive does not by itself raise a substantial question justifying this Court's review of the merits of the underlying claim. ***Id***.

Commonwealth v. Fisher, 47 A.3d 155, 159 (Pa. Super. 2012).

Appellant contends that his sentence is inconsistent with two specific provisions of the sentencing code, 42 Pa.C.S. § 9771 and 42 Pa.C.S. § 9721, and makes specific arguments to support his claim. Hence, Appellant raises a substantial question for our review. ***See Hoch***, ***supra***.

> Sentencing is a matter vested in the sound 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 ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

> ***Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa. Super. 1999) (*en banc*) (quotations marks and citations omitted). ***See also Commonwealth v. Walls***, 592 Pa. 557, 926 A.2d 957, 961 (2007) (citation omitted) ("An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice bias or ill-will, or such a lack of support as to be clearly erroneous.").

> The rationale behind such broad discretion and the concomitantly deferential standard of appellate review is that the sentencing court is "in the best position to determine the proper penalty for a particular offense based

> upon an evaluation of the individual circumstances before it." ***Commonwealth v. Ward***, 524 Pa. 48, 568 A.2d 1242, 1243 (1990); ***see also Commonwealth v. Jones***, 418 Pa.Super. 93, 613 A.2d 587, 591 (1992) (*en banc*) (offering that the sentencing court is in a superior position to "view the defendant's character, displays of remorse, defiance or indifference and the overall effect and nature of the crime."). Simply stated, the sentencing court sentences flesh-and-blood defendants and the nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review.
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> ***Id***. Nevertheless, the trial court's discretion is not unfettered. "When imposing a sentence, the sentencing court must consider the factors set out in 42 Pa.C.S. § 9721(b), that is, the protection of the public, gravity of offense in relation to impact on victim and community, and rehabilitative needs of the defendant.... [A]nd, of course, the court must consider the sentencing guidelines." ***Fullin***, 892 A.2d at 847–48.

Commonwealth v. Coulverson, 34 A.3d 135, 143-44 (Pa. Super. 2011).

Conformity to 42 Pa.C.S. § 9771

Modification or revocation of an order of probation is governed by 42 Pa.C.S. § 9771, which provides, in pertinent part, as follows:

> **(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 initial sentencing, due consideration being given to the time spent serving the order of probation.
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> **(c) Limitation on sentence of total confinement.--**The court shall not impose a sentence of total confinement upon revocation unless it finds that:
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> (1) the defendant has been convicted of another crime; or
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> (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.

42 Pa.C.S. § 9771.

Summarizing, when a court revokes probation, all of the sentencing alternatives that were available when the original sentence of probation was imposed are again available to the court. 42 Pa.C.S. § 9771(b). However, imposition of a sentence of total incarceration is prohibited unless at least one of the three conditions set forth in § 9771(c) is present. Here, the trial court imposed a sentence of total incarceration and therefore the sentence must be considered in light of § 9771(c). The trial court invoked both § 9771(c)(2) and § 9771(c)(3) to justify the imposition of a sentence of total incarceration in this case.

Pursuant to § 9771(c)(2), the trial court indicated the necessity of a sentence of total incarceration because Appellant's drug use and resistance to rehabilitation and supervision demonstrate "that unless incarcerated, he will in all likelihood commit another crime." TCO, at 3. The trial court also invoked § 9771(c)(3), finding that "[d]uring his short period of probation, [Appellant] managed to so repeatedly violate its terms as to demonstrate a disdain for the law, the authority of the Board of Probation and Parole and this Court." ***Id***.

Appellant contends that the trial court grossly exaggerated his likelihood of re-offense and that his actions did not requir a sentence of incarceration to vindicate the authority of the court. Appellant suggests the

following factors support that proposition: 1) Appellant only has a limited and non-violent criminal history, and has not reoffended while serving both his terms of parole and probation; 2) Appellant only failed two urine screens, admitted to his use of marijuana, and averred that he only used the substance to alleviate stress; 3) Appellant's rehabilitative needs would be better served with drug rehabilitation and/or therapy to help him deal with stress rather than by simply incarcerating him.

Beginning with § 9771(c)(3), we conclude sufficient evidence supported the trial court's ruling that a sentence of total incarceration was necessary to "vindicate the authority of the court." Appellant repeatedly flaunted the authority of the trial court by failing two drug tests, failing to make scheduled appointments with his probation officer, failing to make payments on fines and costs while concealing a significant amount of money he won at a casino, and by failing to seek the permission of his probation officer to repeatedly leave the probation district to gamble in Atlantic City. Given that either § 9771(c)(2) or § 9771(c)(3) can independently provide statutory authorization for the imposition of sentence of total incarceration in this case, and given that we have concluded that application of § 9771(c)(3) justified a sentence of total incarceration, we need not reach the question of the applicability of § 9771(c)(2).

Conformity to 42 Pa.C.S. § 9721

Having established that a sentence of total incarceration is justified under of § 9771(c)(3), we now consider Appellant's contention that the term

imposed was excessive. He cites the trial court's failure to adequately consider factors set forth in 42 Pa.C.S. § 9721, and argues further that our holding in ***Commonwealth v. Parlante***, 823 A.2d 927, 930 (Pa. Super. 2003), supports his claim that his sentence was manifestly excessive in consideration of the factors set forth in § 9721. We disagree.

> [A] sentence may … be unreasonable if the appellate court finds that the sentence was imposed without express or implicit consideration by the sentencing court of the general standards applicable to sentencing found in Section 9721, *i.e.*, the protection of the public; the gravity of the offense in relation to the impact on the victim and the community; and the rehabilitative needs of the defendant.

Walls, 926 A.2d at 964.

In ***Parlante***, the trial court convicted Parlante of three counts of forgery and sentenced her to "one year of probation in the Intermediate Punishment Program (IPP), house arrest and mandatory drug treatment." ***Parlante***, 823 A.2d at 928. Prior to the expiration of her term of probation, she was arrested for numerous technical violations and for possession of a controlled substance and related offenses. ***Id***. With respect to her forgery probation, the trial court permitted her to remain on IPP with the additional condition of electronic monitoring. ***Id***. However, this pattern of nonconformity to the terms of her probation continued:

> Parlante committed more technical violations of her probation. On May 25, 2000 a hearing was held in which Parlante pled guilty to possession of a controlled substance, possession of drug paraphernalia and criminal conspiracy. As a result, Judge Cappellini revoked Parlante's probationary sentence for the three forgeries and sentenced her to three years in the IPP program,

> drug treatment, and ninety days of home confinement. However, between August 2000 and February 2001, Parlante committed numerous technical violations of her probation and was arrested once again, this time for underage drinking. Judge Cappellini revoked Parlante's probation in the IPP and mandated that Parlante be reevaluated for drug treatment. During this time, Parlante once again failed to report to her probation officer. On October 19, 2001, after this sixth violation of her probation, Judge Olszewski, Jr. sentenced Parlante to 4 to 8 years in a state correctional facility for the three forgery charges and drug possession.

Id.

Parlante appealed, challenging the discretionary aspects of her sentence of 4 – 8 years' incarceration. While we found, as we have in this case, that total incarceration was warranted under § 9771(c), we vacated Parlante's sentence, concluding that the trial court had abused its discretion in crafting the sentence. We explained:

> The record indicates that the trial court failed to consider Parlante's age, family history, rehabilitative needs, the pre-sentence report or the fact that all of her offenses were non-violent in nature and that her last two probation violations were purely technical. The trial court based Parlante's sentence solely on the fact that her prior record indicated that it was likely that she would violate her probation in the future but failed to consider other important factors. Judge Olszewski, Jr. repeatedly remarked that Parlante had six chances to clean up her act but that she would not have a seventh chance.

Id. at 930. Concerning Parlante's prior record, we remarked, "Parlante's short criminal record includes convictions for forgery, misdemeanor drug possession and underage drinking, the latter of which occurred two days before her twenty-first birthday." ***Id***. at 931.

The facts of the instant case are readily distinguishable from the facts of ***Parlante***. Appellant was originally convicted for the attempted sale of a large quantity of marijuana, which, while non-violent in character, is a far more severe offense than forgery and mere possession. Despite her numerous violations, Parlante was very young, and one of her offenses, underage drinking, occurred only two days before her twenty-first birthday, whereas the record in this case indicates that Appellant is now forty years' old.

Appellant also attempts to compare his candor with the court favorably to the facts of ***Parlante***. We conclude, however, as did the trial court, that Appellant's candor with the court was largely self-serving, only manifesting itself after his violations were exposed by authorities. Finally, Appellant's aggregate sentence of 18 – 36 months' incarceration for the underlying PWID simply doesn't compare to Parlante's term of 4 – 8 years' incarceration for forgery and simple possession offenses, particularly considering their relative ages. Put simply, ***Parlante*** does not require, nor does it even strongly suggest, that the trial court committed an abuse of discretion in crafting Appellant's sentence in this case.

While we agree with Appellant that his probation violations and criminal record are all of a non-violent character, Appellant's underlying crime is more serious than the crimes we encountered in ***Parlante***. Furthermore, although Appellant's rehabilitative needs may suggest the appropriateness of drug treatment or other forms of therapy, his inability to

conform to the most basic requirements of his probation militate against that factor that weighs strongly in his favor. Thus, while Appellant's sentence may be harsh,[4] it is not manifestly excessive. Accordingly, we conclude that the trial court did not abuse its discretion in sentencing Appellant.

Judgment of sentence affirmed.

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[4] As we noted above, "[a]n abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." ***Walls***, 926 A.2d at 961 (quoting ***Grady v. Frito-Lay, Inc.***, 839 A.2d 1038, 1046 (Pa. 2003)).