NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOHN ERIC SECOR, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1828 MDA 2012

Appeal from the Judgment of Sentence of May 17, 2012,
in the Court of Common Pleas of Bradford County,
Criminal Division at No. CP-08-CR-0000019-2009

BEFORE: PANELLA, ALLEN and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: **FILED MAY 30, 2013**

This case is a direct appeal from the judgment of sentence imposed on Appellant after he pled guilty to driving under the influence of alcohol ("DUI"). He contends that he completed the Accelerated Rehabilitative Disposition ("ARD") program, that the lower court thereafter wrongly purported to revoke his participation in ARD and that his subsequent sentence, imposed following his aforesaid guilty plea, was illegal as it violated his federal and state rights against double jeopardy. We affirm the judgment of sentence.

Charged with DUI counts, Appellant entered the ARD program on March 16, 2009. To complete the program, Appellant was required to

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* Retired Senior Judge assigned to the Superior Court.

undergo nine months of probationary supervision, perform community service, surrender his driver's license for a period of suspension, attend safe-driving school, participate in a victim-impact panel, meet various requirements associated with drug-and-alcohol evaluation, counseling and treatment, pay court costs and restitution, and not violate any federal or state law. The ARD order provided that, if Appellant violated any of the foregoing conditions, the criminal charges against him would be re-presented to the court for prosecution. Alternatively, upon his completion of ARD, the DUI charges against Appellant would be dismissed.

In January 2010, the Commonwealth moved to revoke Appellant's ARD status.[1] The docket reflects the filing of the revocation motion but we do not know the content thereof because the motion is not in the record.[2] The court scheduled a hearing on the Commonwealth's motion and then postponed the hearing multiple times, the last scheduled date for the

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[1] While the initial nine-month period of supervision had originally been set to expire on or about December 16, 2009, Appellant does not dispute that he had not yet completed the ARD program as of January 2010.

[2] The lower court's opinion asserts that the Commonwealth's motion alleged Appellant failed to comply with numerous conditions of the ARD program, including the failure to report for drug-and-alcohol testing. This Court is not permitted to rely on facts asserted in lower court opinions or in briefs where those facts are not otherwise contained in the record. ***Commonwealth v. Wrecks***, 931 A.2d 717, 722 (Pa. Super. 2007). We do see that payment documents in the record appear to reflect Appellant had not, at the time of the Commonwealth's motion, met his payment obligations under the ARD program. Whether the Commonwealth specifically alleged payment delinquencies in its revocation motion of January 2010 we do not know.

hearing being June 2, 2011. The docket indicates that, on June 3, 2011, the court entered an order denying the Commonwealth's motion to revoke Appellant's ARD status. The order is not in the record.

The docket also reveals that, on June 7, 2011, the Bradford County Probation Department ("Probation Department") filed a notice of termination of court supervision. The notice is not in the record.

The docket contains an entry of June 8, 2011, indicating the court ordered Appellant to pay his delinquent costs and restitution. The order itself is not in the record. Appellant takes no issue with his continued duty to make ARD payments at that time.

On June 21, 2011, the Commonwealth moved to revoke Appellant's participation in the ARD program. Appellant and the lower court assert that the Commonwealth filed its motion because, on June 3, 2011, local police filed a criminal complaint against Appellant alleging he had committed an offense or offenses on December 14, 2009. However, the motion itself is not in the record.

On November 3, 2011, the court revoked Appellant's ARD status. The court's order is in the record. It indicates the court removed Appellant from

the ARD program because Appellant had pled guilty to another crime, thereby violating his ARD terms.[3]

Also on November 3, 2011, Appellant pled guilty to DUI in the present case. Before sentencing, he moved to withdraw his plea on the grounds that he had completed the ARD program, that his plea counsel had been unaware of that fact, and that completion of the ARD program constituted a double-jeopardy bar to his instant DUI conviction. The court denied his motion.

On May 17, 2012, the court sentenced Appellant. He filed a timely post-sentence motion, claiming that double-jeopardy considerations arising from his alleged completion of ARD precluded his conviction and sentencing for DUI. The court denied the motion. Appellant filed this timely appeal.

Herein, Appellant argues that, as of November 3, 2011, the date on which his ARD participation was revoked and on which he pled guilty in this case, he had completed the ARD program except for meeting his payment obligations. He concludes that double-jeopardy principles render his current sentence illegal. For the reasons that follow, he has not persuaded us of his position.

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[3] Appellant claims he pled *nolo contendere* to conspiracy. Whether he pled guilty or *nolo contendere*, Appellant does not disagree that he was convicted of a new criminal offense.

As part of an ARD program, a court may require the defendant to satisfy various conditions such as a period of supervision by a probation office and the payment of costs and restitution. ***Commonwealth v. Lebo***, 713 A.2d 1158, 1161-62 (Pa. Super. 1998); Pa.R.Crim.P. 316. If an ARD participant violates one or more ARD conditions, the Commonwealth may seek to remove that participant from the ARD program by filing a motion with the ARD court. Pa.R.Crim.P. 318(A). A motion alleging an ARD violation must be filed during the period of the ARD program or, if filed thereafter, must be filed within a reasonable time after the alleged violation was committed. Pa.R.Crim.P. 318(B).

The decision to grant or deny a revocation motion is left to the discretion of the ARD court. ***Lebo***, 713 A.2d at 1161. An ARD court's decision on such a motion will not be disturbed on appeal unless the court abused its discretion. ***Id.*** An abuse of discretion is not a mere error in judgment but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law. ***Commonwealth v. Riley***, 19 A.3d 1146, 1149 (Pa. Super. 2011).

If an ARD court does, in fact, remove a person from the ARD program, the Commonwealth may then prosecute the underlying criminal charges. ***Commonwealth v. Szebin***, 785 A.2d 103, 105 (Pa. Super. 2001); Pa.R.Crim.P. 318(C).

Generally, double-jeopardy principles protect individuals from successive punishments for the same criminal offense. ***Szebin***, 785 A.2d at 104.[4] Prosecuting and sentencing an individual after revocation of the individual's ARD participation due to a violation of ARD conditions does not constitute a double-jeopardy violation. ***Szebin***, 785 A.2d at 105.

A double-jeopardy claim presents a question of law. ***Commonwealth v. Kuykendall***, 2 A.3d 559, 563 (Pa. Super. 2010). Our standard of review is *de novo*. ***Id.*** It is an appellant's burden to persuade us the lower court erred and relief is due. ***Wrecks,*** 931 A.2d at 722.

Earlier in this memo, we pointed out the absence of some documents from the record. A few words on that issue are in order. Although we do not know the full content of the missing documents, we are permitted to recognize the filing of those documents (*e.g.*, a motion to revoke ARD, an order directing the payment of costs and restitution) based on the information contained on the docket itself. ***Id.*** Given the information reflected on the instant docket and given the information from the numerous documents that are, in fact, contained in the record, we have before us sufficient facts to evaluate the arguments Appellant has presented to us. Therefore, we will do so.[5] Important to our resolution of this case are the

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[4] Federal and state double-jeopardy protections are coextensive. ***Commonwealth v. Bowers***, 25 A.3d 349, 355 n.5 (Pa. Super. 2011).

[5] As a general rule, we note also that, to whatever extent there are arguable deficits in a factual record presented to this Court, such deficits militate in favor of affirmance and against an appellant because it is an appellant's duty

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portions of the record revealing that Appellant had not met all of his ARD payment obligations as of November 3, 2011. Indeed, as we have noted, Appellant's argument concedes he had not met his financial obligations as of that date.

To complete the ARD program, Appellant needed to satisfy the various ARD conditions we summarized *supra*. Among those conditions was the payment of costs and restitution. He had not made all his required payments as of November 3, 2011. As such, he had not completed his ARD obligations. He was still in the ARD program at that time.

The fact that the Probation Department had apparently stopped supervising Appellant on June 7, 2011, does not mean he had completed and had been successfully released from the ARD program. By analogy to non-ARD situations, this Court is quite aware that trial courts sometimes impose unsupervised probation as a penalty. ***See Commonwealth v. Heidler***, 741 A.2d 213, 215 (Pa. Super. 1999); ***Commonwealth v. Decker***, 664 A.2d 1028, 1028 (Pa. Super. 1995). Along these lines, we also note that 42 Pa.C.S.A. § 9754 indicates courts **may** require probationers to **report** to a probation officer. 42 Pa.C.S.A. § 9754(c)(10). Given that unsupervised and/or non-reporting probation is a tenable penalty in non-

(Footnote Continued) ———————————

to ensure that the record includes all facts necessary to resolve the appellant's claims. ***Commonwealth v. Rush***, 959 A.2d 945, 949 (Pa. Super. 2008).

ARD cases, we fail to see how the termination of supervision during ARD participation necessarily signifies successful completion of the ARD program.

Here, Appellant was originally required to undergo nine months of supervision as one of numerous conditions of his ARD program. The Probation Department seemingly supervised him throughout those nine months and for some time thereafter, for a total period of supervision spanning March 16, 2009, to June 7, 2011. When the Probation Department stopped actively supervising Appellant, he had not yet met all of his other ARD conditions. Indeed, the very day after the termination of supervision, the court ordered Appellant to finish making his ARD payments. He has not disputed his obligation to make those payments. Also, he has offered us no persuasive legal authority for the proposition that the end of supervision translated into successful completion of the ARD program, particularly when one or more ARD conditions remained unfulfilled.

In sum, Appellant has not convinced us he successfully completed the ARD program at the time his participation therein was revoked on November 3, 2011. Moreover, he does not dispute that, on November 3, 2011, he was convicted of a new criminal offense. Additionally, he does not dispute that he committed the new offense during the period of his ARD program. Commission of, and conviction for, a new offense was a violation of Appellant's ARD conditions. Accordingly, Appellant has not persuaded us the lower court engaged in any bias, ill will, manifest unreasonableness, misapplication of law, partiality, or prejudice in revoking his ARD status.

We note also that the Commonwealth's motion to remove Appellant from the ARD program was filed while he was still in the program, consistent with Rule 318(B). His brief argues the Commonwealth filed its motion after Appellant completed the ARD program and not within a reasonable time after his violation of ARD (*i.e.*, his criminal offense on the unrelated case) as is required by Pa.R.Crim.P. 318(B). This argument is misguided. The motion was not filed after the period of the ARD program ended. Appellant has not shown the court acted abusively in granting the timely filed motion.

In closing, Appellant was in the ARD program when the court revoked his participation therein. He has shown no abuse of discretion by the court in revoking his ARD status. He has likewise not shown us that double-jeopardy principles render his sentence illegal. Therefore, he is not entitled to relief.

Based on our foregoing discussion, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

Mary A. Hrabell

Deputy Prothonotary

Date: 5/30/2013