NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JOHN JOSEPH DIETRICH Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1889 WDA 2012

Appeal from the Judgment of Sentence April 20, 2011
In the Court of Common Pleas of Jefferson County
Criminal Division at No(s): CP-33-CR-0000213-2005

BEFORE: SHOGAN, J., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY LAZARUS, J. **FILED SEPTEMBER 03, 2013**

John Dietrich appeals, *nunc pro tunc*, from his judgment of sentence imposed after his probation was revoked. Upon review, we affirm.

On June 2, 2006, Dietrich pled guilty to charges of possession with intent to deliver and involuntary manslaughter and was immediately sentenced to two concurrent terms of one year less one day to two years less one day of incarceration. The court also sentenced Dietrich to a consecutive ten-year probationary term on the manslaughter conviction.

In 2010, following an investigation during which a confidential informant purchased hydrocodone and buprenorphine from Dietrich on two separate occasions, Dietrich was charged with possession and delivery of a

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* Retired Senior Judge assigned to the Superior Court.

controlled substance. As a result of the new charges, Dietrich was detained pending a violation of probation ("VOP") hearing to determine whether he had violated conditions four and eight of his probation.[1]

At a hearing on April 11, 2011, Dietrich, who was represented by counsel, testified on his own behalf and presented the testimony of other witnesses. At the conclusion of that hearing, the VOP court found Dietrich to be in violation of his probation. A further hearing was held on April 20, 2011, at which time the court formally revoked Dietrich's probation and sentenced him to five to ten years' incarceration, plus five consecutive years of probation. Thereafter, the VOP court denied Dietrich's motion for reconsideration of sentence. Dietrich filed an appeal of his revocation sentence, which this Court dismissed by order dated October 18, 2011 for failure to file a brief. Dietrich was subsequently granted relief under the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 ("PCRA"), resulting in the reinstatement of his appellate rights, *nunc pro tunc*. This timely appeal followed, in which Dietrich raises the following issues for our review:[2]

> (1) Was Dietrich's sentence manifestly excessive given the "victimless" nature of his crimes and the court's failure to address his rehabilitative needs?

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[1] Condition #4 of Dietrich's probation required him to comply with the laws of Pennsylvania. Condition #8 required him to refrain from the possession and/or sale of controlled substances.

[2] We have restated, combined and/or renumbered certain of Dietrich's claims for ease of disposition.

(2) Did the VOP court err in failing to make the required finding or findings under 42 Pa.C.S.A. § 9771(c) prior to sentencing Dietrich to a period of total confinement upon revocation of probation?

(3) Did the VOP court abuse its discretion, and enter a manifestly excessive sentence, by failing to consider the general standards of sentencing contained in 42 Pa.C.S.A. § 9721(b) prior to sentencing Dietrich to a probation revocation sentence of five to ten years' incarceration followed by a five year probationary term?

(4) Was the Gagnon II probation revocation proceeding invalid where there is no record of Dietrich receiving, prior to the Gagnon II hearing, a written notice of the charges and the conditions of probation he was alleged to have violated?

(5) Whether the VOP court erred in finding Dietrich to be in violation of his probation because the violations had not been proven by sufficient evidence?

Appellant's brief at 5.

Dietrich's first three appellate issues implicate the discretionary aspects of his sentence. Where the discretionary aspects of a sentence are challenged, an appellant is not guaranteed an appeal as of right. Rather, two requirements must be met before we will review such a claim on its merits:

> First, an appellant must 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. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. In order to establish a substantial question, the appellant must show actions by the trial court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.

***Commonwealth v. Ferguson*,** 893 A.2d 735, 737 (Pa. Super. 2006) (citation omitted).

Here, Dietrich has included in his brief a statement of reasons pursuant to Pa.R.A.P. 2119(f), in which he asserts:[3] (1) his sentence was manifestly excessive given the "victimless" nature of his crimes and the court's failure to address his rehabilitative needs and (2) the imposition of a sentence of total confinement was erroneous under 42 Pa.C.S.A. § 9771(c).[4]

Dietrich's first claim, that the VOP court failed to take into consideration his rehabilitative needs, does not raise a substantial question meriting our review. ***See Commonwealth v. Griffin***, 65 A.3d 932 (Pa. Super. 2013) (allegation that sentence failed to take into account defendant's rehabilitative needs under 42 Pa.C.S.A. § 9721(b) and is thus

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[3] We have reworded and/or combined certain of Dietrich's Rule 2119(f) claims for ease of disposition. Specifically, Dietrich's second and third claims, as originally presented, both involve the same issue and have, thus, been combined into a single claim.

[4] We note that the issues raised in Dietrich's Rule 2119(f) statement do not track the discretionary-aspects-of-sentencing claims included in the statement of questions involved portion of his brief. In particular, Dietrich's claim involving section 9721(b) of the Sentencing Code does not appear in his Rule 2119(f) statement. Generally, failure to include an issue in a Rule 2119(f) statement results in the waiver of that claim where the Commonwealth objects. ***Commonwealth v. Karns***, 50 A.3d 158 (Pa. Super. 2012). Here, however, the Commonwealth declined to file a brief and, as such, has not objected to our addressing the merits of the claim. Accordingly, we decline to find waiver and will review Dietrich's section 9721(b) claim.

manifestly excessive garners no relief); ***see also Commonwealth v. Coolbaugh***, 770 A.2d 788 (Pa. Super. 2001), citing ***Commonwealth v. Mobley***, 581 A.2d 949 (Pa. Super. 1990) (claim that sentence imposed failed to take into consideration defendant's rehabilitative needs and was manifestly excessive did not raise a substantial question where sentence was within statutory limits and within sentencing guidelines). Here, the maximum penalty for a violation of 35 P.S. § 780-113(a)(3) (possession with intent to deliver) is fifteen years;[5] Dietrich's VOP sentence of five to ten years is well within the statutory range. As such, we will not address the merits of this claim.[6]

Dietrich next asserts that the VOP court failed to comply with 42 Pa.C.S.A. § 9771(c) in imposing a sentence of total confinement. Section 9771(c) provides that a court may only impose a sentence of total confinement upon revocation if it finds that:

(1) the defendant has been convicted of another crime;

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[5] ***See*** 35 P.S. § 780-113(f)(1) (fifteen year maximum penalty where conviction involves intent to distribute schedule II narcotic drug).

[6] Even if we were to consider the merits of this claim, it would garner Dietrich no relief. At resentencing, the VOP court had access to a presentence investigation report, which it considered in imposing sentence. "[W]here, as here, the sentencing court had the benefit of a pre-sentence investigation report, we can assume the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." ***Commonwealth v. Rhoades***, 8 A.3d 912, 919 (Pa. Super. 2010).

> (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or
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> (3) such a sentence is essential to vindicate the authority of the court.

42 Pa.C.S.A. § 9771(c).

Here, Dietrich alleges that the VOP court failed to make a finding that one of the three factors enumerated in section 9117(c) was present. Because such a finding is a mandatory prerequisite to the imposition of a sentence of total confinement, we conclude that this claim raises a substantial question and will, accordingly, address its merits.[7] However, for the following reasons, the claim garners Dietrich no relief.

At Dietrich's resentencing hearing on April 20, 2011, the VOP court took note of Dietrich's prior criminal history. In addition to the involuntary manslaughter and possession with intent to deliver convictions on which he was being resentenced, the court noted previous convictions for grand larceny and possession of more than twenty grams of marijuana in the state of Florida, as well as for cocaine trafficking in Massachusetts. The court further cited additional charges in Florida and Texas that were either dismissed or unreported. The court concluded that Dietrich "show[ed] a

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[7] We note that this court has previously held that a VOP court's failure to comply with section 9771 does not implicate the legality of a revocation sentence. ***See Commonwealth v. Schutzues***, 54 A.3d 86 (Pa. Super. 2012) (declining to conclude that trial court's apparent failure to consider section 9771(c) results in illegal sentence).

history back into the '80s of felony convictions. So I think with committing that new offense and with your record and all other things we considered, I do think the recommendation of [the] probation [department] is probably the least restrictive incarceration that should be done." N.T. VOP Resentencing, 4/20/11, at 6-7.

In addition to its statements on the record at resentencing, the VOP court stated as follows in its Rule 1925(a) opinion filed on July 26, 2011:

> As for other rehabilitative measures, the [c]ourt explained the reasons it believed that nothing less than total confinement was appropriate, including [Dietrich's] overall drug history; the nature of the offense that led to [Dietrich's] original sentence – a death resulting from the delivery of a controlled substance – and the fact that the new offense with which he was charged was also related to the delivery of a controlled substance. That history notwithstanding, and despite the fact that the [c]ourt had given him a mitigated, probationary sentence in the first place, [Dietrich] again participated in the delivery of a controlled substance. Clearly he was unimpressed by either the [c]ourt's leniency or the fact that his last drug delivery had led to the death of another human being. The [c]ourt could only conclude from that and the other facts before it that alternative sentencing was ineffective to keep [Dietrich] from committing additional drug-related crimes and thereby putting society at risk.

Trial Court Opinion, 7/26/11, at 4 (citation to record omitted).

In its statements from the bench and in its opinion, the VOP court made clear that its sentence of total confinement was based upon a finding that Dietrich's conduct "indicates that it is likely that he will commit another crime if he is not imprisoned[.]" 42 Pa.C.S.A. § 9771(c). We note that a court "is not required to parrot the words of the sentencing code,"

Commonwealth v. Kalichak, 943 A.2d 285, 290 (Pa. Super. 2008) (referring to 42 Pa.C.S.A. § 9721(b)), and are satisfied that the VOP court made the requisite finding prescribed under section 9771(c). Accordingly, Dietrich's second and third claims are without merit.

Next Dietrich asserts that the VOP court abused its discretion, and imposed a manifestly excessive sentence, by failing to consider the general standards of sentencing contained in 42 Pa.C.S.A. § 9721(b). This claim also raises a substantial question for our review. ***See Commonwealth v. Fullin***, 892 A.2d 843, 848 (Pa. Super. 2006) (failure to consider section 9721(b) factors raises substantial question).

Section 9721(b) requires, in relevant part, that in imposing sentence:

> [T]he court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.

42 Pa.C.S. § 9721(b).

Here, prior to sentencing Dietrich, the VOP court had access to a presentence investigation and was also aware of Dietrich's new charges, his recent probation violation for a failed drug test, and his prior record. A sentencing court is deemed to have properly considered and weighed all relevant factors where he has been informed by a presentencing report. ***Commonwealth v. Boyer***, 856 A.2d 149, 154 (Pa. Super. 2004).

Accordingly, we may presume the VOP court considered the section 9721 factors in fashioning its sentence. This claim, therefore, is meritless.

Dietrich next claims that his ***Gagnon II*** revocation proceedings were invalid because there is no record of his receiving written notice of the charges and conditions of probation he was alleged to have violated. Dietrich asserts that, on the date on which the court had scheduled a ***Gagnon I*** hearing, a ***Gagnon II*** hearing was actually held. Thus, he claims, the revocation process was invalid. ***See Commonwealth v. Infante***, 888 A.2d 783 (Pa. 2005) (scope of review in appeal of revocation sentence limited to validity of revocation proceedings and legality of sentence imposed).

A defendant is generally entitled to two separate hearings prior to revoking probation. ***Commonwealth v. Cappellini***, 690 A.2d 1220, 1227 n.4 (Pa. Super. 1996), citing ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973). The purpose of the first (***Gagnon I***) hearing is to "ensure against detention on allegations of violation that have no foundation of probable cause." ***Id.***, citing ***Commonwealth v. Perry***, 385 A.2d 518, 520 (Pa. Super. 1978). The purpose of the second (***Gagnon II***) hearing is to determine whether facts exist to justify revocation of parole or probation. ***Id.*** However, we have previously held that, where a probationer fails to complain of the lack of a ***Gagnon I*** hearing before his probation is revoked, the claim is waived.

> The purpose of the non-waivable requirement of written notice of alleged violations is to ensure that the parolee or probationer can sufficiently prepare his case, both against the allegations of

> violations, and against the argument that the violations, if proved, demonstrate that parole or probation is no longer an effective rehabilitative tool and should be revoked. In other words, the requirement bears directly on the ability to contest revocation. Accordingly, we have declined to apply the rule of waiver to a requirement that is central to the substance of the revocation proceedings. The purpose of the requirement of a ***Gagnon I*** hearing is different: it is to ensure against detention on allegations of violations that have no foundation of probable cause. If before his parole or probation is revoked a parolee or probationer has not complained of the lack of a ***Gagnon I*** hearing, he has already suffered the harm that the omission allegedly caused; since the substance of the revocation proceeding is not affected by the omission, the parolee or probationer will not be heard to complain later.
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> This is analogous to the rule that objections to defects in a preliminary hearing (e.g., lack of counsel) or to the denial of a preliminary hearing must be raised by a motion to quash the indictment; otherwise, all such procedural and "non-jurisdictional" defects are waived.

Commonwealth v. Perry, 385 A.2d 518, 519 (Pa. Super. 1978) (citation omitted).

Here, Dietrich has failed to allege any prejudice resulting from his alleged failure to receive notice of either the ***Gagnon I*** or ***Gagnon II*** hearing. In fact, Dietrich not only appeared at the April 11, 2011 hearing with counsel, but he presented his own testimony, as well as that of two other witnesses. Counsel was fully prepared to, and in fact did, vigorously cross-examine the Commonwealth's witnesses. Significantly, neither Dietrich nor his counsel objected at the time of hearing on the basis that he had not received notice, and the failure to do so waives the issue for purposes of appeal. ***Commonwealth v. King***, 430 A.2d 990 (Pa. Super. 1981), citing ***Commonwealth v. Collins***, 424 A.2d 1254 (Pa. 1981).

Moreover, the VOP court annexed to its January 3, 2013, Rule 1925(a) opinion a copy of a "Notice of Charges and Hearing Rights & Written Request For Revocation," dated March 28, 2011, indicating the conditions of probation Dietrich was alleged to have violated and informing him of his rights. In light of all the foregoing, we are unable to conclude that Dietrich's ***Gagnon II*** hearing was invalid. As such, this claim is meritless.

Finally, Dietrich challenges the sufficiency of the evidence to prove that he violated his probation. Specifically, Dietrich claims that the facts presented at the revocation hearing were "neither probative nor reliable given the discrepancy in [the witnesses'] testimony regarding such basic facts as whose vehicle was taken to [Dietrich's] residence" and that "[Dietrich's] presence at the scene, without more, is insufficient to prove any criminal intent." Brief of Appellant, at 36, 37. This claim is meritless.

Dietrich misconstrues the nature of a sufficiency challenge in the context of a probation revocation proceeding.

> [T]he reason for revocation of probation need not necessarily be the commission of or conviction for subsequent criminal conduct. Rather, this Court has repeatedly acknowledged the very broad standard that sentencing courts must use in determining whether probation has been violated:
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> > A probation violation is established whenever it is shown that the conduct of the probationer indicates the probation has proven to have been an ineffective vehicle to accomplish rehabilitation and not sufficient to deter against future antisocial conduct.

Commonwealth v. Ortega, 995 A.2d 879, 886 (Pa. Super. 2010), quoting ***Commonwealth v. Infante***, 888 A.2d 783, 791 (Pa. 2005) (internal

citations omitted). The Commonwealth need only make this showing by a preponderance of the evidence. ***Id.*** (citation omitted).

Thus, the question before us is not whether the evidence admitted at the VOP hearing would, if admitted at trial, suffice to convict Dietrich beyond a reasonable doubt of possession and delivery of a controlled substance, but whether it showed by a preponderance of the evidence that probation had proven ineffective at rehabilitating Dietrich and deterring him from antisocial behavior. ***Commonwealth v. Ortega***, 995 A.2d 879, 886 (Pa. Super. 2010).

At Dietrich's VOP hearing, the court heard testimony from Pennsylvania State Trooper Michael Boltz that he arranged two controlled buys from Dietrich through a confidential informant (CI) on two separate occasions. Trooper Boltz testified that the CI went in Dietrich's house for three minutes and four minutes, respectively, and returned to the vehicle with seven hydrocodone pills and two buprenorphine pills, and ten hydrocodone pills, respectively. On one occasion, Trooper Boltz witnessed Dietrich leave the house with his girlfriend immediately after the controlled buy. The CI, whose testimony the VOP court found to be credible, also testified to purchasing drugs from Dietrich on those two occasions. After the controlled buys, forensic scientists analyzed the drugs and identified them as Schedule III controlled substances. Finally, Dietrich had recently tested

positive for use of the Schedule III controlled substance buprenorphine for which he was sentenced to 30 days' incarceration on a prior violation.

It is well established that the imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which we will not disturb absent an abuse of that discretion. ***Commonwealth v. Sierra***, 752 A.2d 910, 913 (Pa. Super. 2000). Based upon the evidence presented at Dietrich's VOP hearing, the court did not abuse its discretion in concluding that probation had proven ineffective at rehabilitating Dietrich and imposing sentence accordingly. ***See Ortega***, ***supra***.

Judgment of sentence affirmed.

SHOGAN, J., Concurs in the result.

Judgment Entered.

Nicholas V. Cusatti

Deputy Prothonotary

Date: 9/3/2013