

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
MARTIN J. LUCK,		
Appellant		No. 100 WDA 2014

Appeal from the Judgment of Sentence April 5, 2012
in the Court of Common Pleas of Lawrence County
Criminal Division at No.: CP-37-CR-0000594-2007

BEFORE: BENDER, P.J.E., WECHT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.:

FILED July 1, 2014

Appellant, Martin J. Luck, appeals from the judgment of sentence imposed on April 5, 2012, following the second revocation of his probation. He claims his sentence was excessive, and the sentencing court failed to provide adequate reasoning for its actions. We affirm.

This case returns to us after remand. (***See Commonwealth v. Luck***, No. 440 WDA 2013, unpublished memorandum at 1, 3 (Pa. Super. filed November 14, 2013)). On August 12, 2009, Appellant entered an open plea of guilty to the charge of endangering the welfare of children, 18 Pa.C.S.A. § 4304(a), in exchange for the Commonwealth's recommendation of a

* Retired Senior Judge assigned to the Superior Court.

sentence of time served to twelve months' incarceration.¹ (**See** N.T. Guilty Plea Colloquy, 8/12/09, at 9). On December 3, 2009, the court sentenced him to a term of not less than four days to no more than twelve months' incarceration, followed by one year of probation. (**See** N.T. Sentence, 12/03/09, at 13-14). With credit for time served, he was immediately paroled. As part of the plea agreement, the remaining companion charge of simple assault, 18 Pa.C.S.A. § 2701(a)(1), was *nolle prossed*.

The court first revoked Appellant's probation on August 13, 2010, and re-sentenced him to the original sentence with credit for [by then] forty-four days served, apparently after DUI charges were resolved in his favor. (**See** Order, 8/13/10, at 1; **see also** N.T. Revocation, 4/05/12, at 43-44). Appellant was (again) immediately paroled. (**See id.**). However, on April 5, 2012, the court revoked his probation a second time for technical violations including changing residences without permission, failing to report as instructed, and failure to abide by court-ordered electronic monitoring. (**See** N.T. Revocation Hearing, 4/05/12, at 36).

¹ The Commonwealth also requested that Appellant participate in group counseling for batterers, and have no contact with the victim. (**See** N.T. Guilty Plea Colloquy, 8/12/09, at 3). Appellant was arrested after beating the nine-year old autistic son of his then-girlfriend (and mother of his daughter), who were both living with him at the time. (**See id.** at 7; N.T. Sentence, 12/03/09, at 4-6).

Notably, the sentencing court expressly disclaimed any consideration of Appellant's then pending charges for unrelated drug offenses in Mercer County. (**See id.** at 35) ("It's upon that basis [failure to report or maintain contact with probation officer, no electronic monitoring] **not about pending charges** – pending charges are pending charges. . . . As citizens of this great country of ours, that's all they are, all right.") (emphasis added).

After this second revocation, the court sentenced Appellant to a term of incarceration of not less than one nor more than three years' imprisonment in a state correctional institution, with credit for two hundred thirty-six days served. (**See id.** at 50; Order, 4/05/12, at 1-2). Counsel filed a motion for reconsideration, claiming the sentence was excessive. (**See** Motion for Reconsideration, dated 4/18/12, filed 4/24/12). The Commonwealth opposed. (**See** Statement of the District Attorney, dated 4/18/12, filed 4/24/12). The court denied the motion without a hearing. (**See** Order, 4/24/12).

On April 30, 2012, Appellant filed a *pro se* petition seeking relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541–9546. The court appointed current counsel, who filed an amended petition on August 20, 2012. After a hearing on November 1, 2012, the court reinstated Appellant's direct appeal rights *nunc pro tunc*, but denied PCRA relief on his claim of ineffective assistance of counsel. Appellant appealed.

On November 14, 2013, a panel of this Court vacated the order of the PCRA court, and remanded for the PCRA court to "enter an order which

solely grants Appellant his direct appeal rights *nunc pro tunc*.” (**Luck**, **supra** at 3). The panel explained that because the PCRA court granted Appellant PCRA relief in the form of a reinstatement of his direct appeal rights *nunc pro tunc*, it was without authority to reach the merits of Appellant’s remaining PCRA claim, citing **Commonwealth v. Donaghy**, 33 A.3d 12, 14 n.5 (Pa. Super. 2011), *appeal denied*, 40 A.3d 120 (Pa. 2012). (**See id.** at 2).

After remand, the PCRA court reinstated Appellant’s direct appeal rights *nunc pro tunc*, as directed. (**See** Order, dated 12/02/13, and filed 12/03/13, at 2). Appellant timely appealed, on December 19, 2013.²

Appellant presents the following hybrid question for our review:

The questions involved in this APPEAL [sic] relate to whether error was committed in the aforementioned Court Order(s) and accompanying Opinion(s) in deciding that this claim does not meet the prerequisites for granting relief for an excessive sentence; specifically whether:

(A) The Lawrence County PA Court of Common Pleas erred in granting the (second) Petition(s) [sic] to Revoke Parole since it failed to provide adequate reasoning on the record explaining why it refused to await disposition of then-pending charge(s) in Mercer County PA Common Pleas Court (at Case No. CR 737-2011) that were the subject of the (second) Petition(s) to Revoke Parole;

² Appellant filed a concise statement of errors, on January 10, 2014. **See** Pa.R.A.P. 1925(b). The trial court filed a Rule 1925(a) opinion on February 19, 2014, referencing its prior opinion dated February 13, 2013 [filed February 14, 2013]. **See** Pa.R.A.P. 1925(a).

thereby failing to give effect to the concurrent sentencing provision(s) in the parole revocation order(s)[?]

(Appellant's Brief, at 10).³

Appellant asserts that his sentence on revocation was excessive, claiming that the Lawrence County Court should have waited until the disposition of unrelated charges in Mercer County, and then sentenced him on the charges here concurrently to any sentence imposed there. (***See id.*** at 16-18). He claims the sentencing court erred when it failed to give adequate reasons for not doing so. (***See id.*** at 16). We disagree.

Appellant's claim of excessiveness challenges the discretionary aspects of his sentence.

In general, the imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal. ***Commonwealth v. Sierra***, 752 A.2d 910, 913 (Pa. Super. 2000). Our standard of 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. 42 Pa.C.S.A. § 9771(b); ***Commonwealth v. Gheen***, 455 Pa. Super. 499, 501, 688 A.2d 1206, 1207-08 (1997) (the scope of review in an appeal following a sentence imposed after probation revocation is limited to the validity of the revocation proceedings and the legality of the judgment of sentence). Once probation has been revoked, a sentence of

³ We note that Appellant's 117 word question fails to comply with Pennsylvania Rule of Appellate Procedure 2116, which provides in pertinent part that: "The statement of the questions involved must state **concisely** the issues to be resolved, expressed in the terms and circumstances of the case but without unnecessary detail." Pa.R.A.P. 2116 (emphasis added). We also note that the Commonwealth did not file a brief in this matter.

total confinement may be imposed if any of the following conditions exist: (1) the defendant has been convicted of another crime; or (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 court. 42 Pa.C.S.A. § 9771(c); **Commonwealth v. Coolbaugh**, 770 A.2d 788, 792 (Pa. Super. 2001). **Commonwealth v. Hoover**, 909 A.2d 321, 322–323 (Pa. Super. 2006).

Commonwealth v. Edwards, 71 A.3d 323, 327 (Pa. Super. 2013), *appeal denied*, 81 A.3d 75 (Pa. 2013). Additionally, this Court has decided that “review of a discretionary sentencing matter after revocation proceedings is encompassed by the scope of this Court’s review.” **Commonwealth v. Cartrette**, 83 A.3d 1030, 1042 (Pa. Super. 2013) (*en banc*).

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.

The right to appellate review of the discretionary aspects of a sentence is not absolute, and must be considered a petition for permission to appeal. An appellant must satisfy a four-part test to invoke this Court’s jurisdiction when challenging the discretionary aspects of a sentence.

[W]e conduct a four-part analysis to determine: (1) whether 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; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

* * *

Whether a particular challenge to a sentence amounts to a substantial question is determined on a case-by-case basis. A substantial question exists only 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.

Commonwealth v. Buterbaugh, 2014 WL 1898968, at *16-*17 (Pa. Super. filed May 13, 2014) (citations, internal quotation marks and other punctuation omitted).

Discretionary aspects of sentence. 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).

Preliminarily, here, we note that Appellant's question incorporates a factually fallacious premise, belied by the record. The pending charges in Mercer County were patently **not** the "subject" of the second petition to revoke. To the contrary, as already noted, the court expressly declined reliance or consideration of them, an implicit invocation of Appellant's presumption of innocence. (**See** N.T. Revocation Hearing, 4/05/12, at 35). Accordingly, the then-pending charges in Mercer County were not material or relevant to the sentence at issue in this appeal. Appellant's claim that the sentencing court failed to provide adequate reasoning on the record for its

“refusal” to await the Mercer County disposition lacks any basis in law or fact, and is accordingly, frivolous.

Next, we review whether Appellant has properly raised and preserved any other challenges to his sentence. Appellant fulfilled the first two elements required for a challenge to the discretionary aspects of sentence by filing a timely notice of appeal, and by preserving his claim in a motion for modification of sentence. **See *Buterbaugh, supra*** at *17. Appellant also met the third element because his brief contains a concise statement of the reasons relied upon for appeal. (**See** Appellant’s Brief, at 15).

Therefore, we must determine if Appellant’s challenge to the discretionary aspects of his sentence raises a substantial question. We conclude it does not.

A substantial question exists only 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.

Buterbaugh, supra at *17 (citations and internal quotation marks omitted).

Here, Appellant offers neither. In fact, he offers no pertinent argument at all. Instead, he posits, incorrectly, that the sentencing court provided that the sentence at issue must run concurrently with any sentence imposed on the unrelated charges in Mercer County. (**See** Appellant’s Brief, at 15). To the contrary, the pertinent provision of the sentencing order on

appeal provided only that “This sentence shall be served on a concurrent basis with any sentence that [Appellant] is **now serving or issued prior** to the date of this sentence.” (Order, 4/05/12, at 1; **see also** Appellant’s Brief, at Appendix B) (emphasis added).

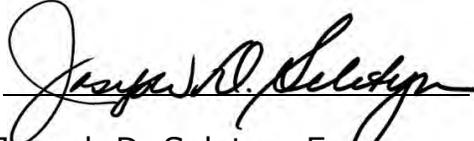
Appellant concededly was not sentenced in the Mercer County matter until September 25, 2012. (**See** Appellant’s Brief, at Appendix C, Mercer County Sentencing Order, 737 Criminal 2011, 9/25/12 [filed 9/26/12], at 1). Moreover, by its own terms the Mercer County sentence is “consecutive to any existing sentence.” (**Id.**).

Finally, here, the sentencing court (*i.e.*, the Lawrence County Court of Common Pleas) expressly stated, “Now, this sentencing today does not take into account anything that’s in the future, and what I’m specifically saying, I don’t know the outcome of any pending charges.” (N.T. Revocation, 4/05/12, at 52). Appellant’s claim lacks any basis in law or fact, and is, accordingly, frivolous. The mere happenstance that his sentence in Mercer County turned out to be shorter than his sentence in Lawrence County does not make the Lawrence County sentence excessive, or create any other reviewable issue. Appellant fails to raise a substantial question. His claims would merit no relief.⁴

⁴ To the extent that Appellant purports to raise other issues beyond his sentence after revocation, (**see** Appellant’s Brief, at 7), such issues are beyond the scope of this appeal. Issues not related to the issue on remand (*Footnote Continued Next Page*)

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/1/2014

(Footnote Continued) _____

are not reviewable by this Court. **See *Commonwealth v. Lawson***, 789 A.2d 252, 254 (Pa. Super. 2001) (waiving issues not raised previously in trial court and unrelated to issue on remand).